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

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

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This is a Key-Numbered Volume

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

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

JUDGES

OF THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE DISTRICT COURTS

FIRST CIRCUIT

Hon. OLIVER WENDELL HOLMES, Circuit Justice.....Washington, D. C.
Hon. FREDERIC DODGE, Circuit Judge[1].....Boston, Mass.
Hon. GEO. H. BINGHAM, Circuit Judge.....Manchester, N. H.
Hon. CHAS. F. JOHNSON, Circuit Judge.....Portland, Me.
Hon. CLARENCE HALE, District Judge, Maine.....Portland, Me.
Hon. JAS. M. MORTON, Jr., District Judge, Massachusetts.....Boston, Mass.
Hon. EDGAR ALDRICH, District Judge, New Hampshire.....Littleton, N. H.
Hon. ARTHUR L. BROWN, District Judge, Rhode Island.....Providence, R. I.

SECOND CIRCUIT

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

THIRD CIRCUIT

Hon. MAHLON PITNEY, Circuit Justice.....Washington, D. C.
Hon. JOSEPH BUFFINGTON, Circuit Judge.....Pittsburgh, Pa.
Hon. JOHN B. McPHERSON, Circuit Judge.....Philadelphia, Pa.
Hon. VICTOR B. WOOLLEY, Circuit Judge.....Wilmington, Del.
Hon. EDWARD G. BRADFORD, District Judge, Delaware[2].....Wilmington, Del.
Hon. JOHN RELLSTAB, District Judge, New Jersey.....Trenton, N. J.
Hon. THOS. G. HAIGHT, District Judge, New Jersey.....Jersey City, N. J.
Hon. J. WARREN DAVIS, District Judge, New Jersey.....Trenton, N. J.
Hon. J. WHITAKER THOMPSON, District Judge, E. D. Pennsylvania...Philadelphia, Pa.
Hon. OLIVER B. DICKINSON, District Judge, E. D. Pennsylvania.....Philadelphia, Pa.
Hon. CHAS. B. WITMER, District Judge, M. D. Pennsylvania.....Sunbury, Pa.
Hon. CHARLES P. ORR, District Judge, W. D. Pennsylvania.....Pittsburgh, Pa.
Hon. W. H. SEWARD THOMSON, District Judge, W. D. Pennsylvania.....Pittsburgh, Pa.

[1] Resigned July 1, 1918.

[2] Resigned May 20, 1918.

FOURTH CIRCUIT

Hon. EDWARD D. WHITE, Circuit Justice.....Washington, D. C.
Hon. JETER C. PRITCHARD, Circuit Judge.....Asheville, N. C.
Hon. MARTIN A. KNAPP, Circuit Judge.....Washington, D. C.
Hon. CHAS. A. WOODS, Circuit Judge.....Marion, S. C.
Hon. JOHN C. ROSE, District Judge, Maryland.....Baltimore, Md.
Hon. HENRY G. CONNOR, District Judge, E. D. North Carolina.....Wilson, N. C.
Hon. JAMES E. BOYD, District Judge, W. D. North Carolina.....Greensboro, N. C.
Hon. HENRY A. MIDDLETON SMITH, District Judge, E. D. S. C.....Charleston, S. C.
Hon. JOSEPH T. JOHNSON, District Judge, W. D. S. C. .....Greenville, S. C.
Hon. EDMUND WADDILL, Jr., District Judge, E. D. Virginia.....Richmond, Va.
Hon. HENRY CLAY McDOWELL, District Judge, W. D. Virginia.....Lynchburg, Va.
Hon. ALSTON G. DAYTON, District Judge, N. D. West Virginia.....Philippi, W. Va.
Hon. BENJAMIN F. KELLER, District Judge, S. D. West Virginia....Charleston, W. Va.

FIFTH CIRCUIT

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

SIXTH CIRCUIT

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

SEVENTH CIRCUIT

Hon. JOHN H. CLARKE, Circuit Justice ....Washington, D. C.
Hon. FRANCIS E. BAKER, Circuit Judge.....Goshen, Ind.
Hon. CHRISTIAN C. KOHLSAAT, Circuit Judge[3].....Chicago, Ill.
Hon. JULIAN W. MACK, Circuit Judge.....Chicago, Ill.

[3] Died May 11, 1918.

Hon. SAMUEL ALSCHULER, Circuit Judge ..... Chicago, Ill.
Hon. EVAN A. EVANS, Circuit Judge ..... Baraboo, Wis.
Hon. KENESAW M. LANDIS, District Judge, N. D. Illinois..... Chicago, Ill.
Hon. GEORGE A. CARPENTER, District Judge, N. D. Illinois..... Chicago, Ill.
Hon. J. OTIS HUMPHREY, District Judge, S. D. Illinois[4]..... Springfield, Ill.
Hon. LOUIS FITZ HENRY, District Judge, S. D. Illinois[5]..... Bloomington, Ill.
Hon. GEO. W. ENGLISH, District Judge, E. D. Illinois[6] ..... Danville, Ill.
Hon. ALBERT B. ANDERSON, District Judge, Indiana..... Indianapolis, Ind.
Hon. FERDINAND A. GEIGER, District Judge, E. D. Wisconsin..... Milwaukee, Wis.
Hon. ARTHUR L. SANBORN, District Judge, W. D. Wisconsin..... Madison, Wis.

EIGHTH CIRCUIT

Hon. WILLIS VAN DEVANTER, Circuit Justice..... Washington, D. C.
Hon. WALTER H. SANBORN, Circuit Judge..... St. Paul, Minn.
Hon. WILLIAM C. HOOK, Circuit Judge..... Leavenworth, Kan.
Hon. WALTER I. SMITH, Circuit Judge..... Council Bluffs, Iowa.
Hon. JOHN E. CARLAND, Circuit Judge..... Washington, D. C.
Hon. KIMBROUGH STONE, Circuit Judge ..... Kansas City, Mo.
Hon. JACOB TRIEBER, District Judge, E. D. Arkansas..... Little Rock, Ark.
Hon. F. A. YOUMANS, District Judge, W. D. Arkansas..... Ft. Smith, Ark.
Hon. ROBERT E. LEWIS, District Judge, Colorado..... Denver, Colo.
Hon. HENRY T. REED, District Judge, N. D. Iowa..... Cresco, Iowa.
Hon. MARTIN J. WADE, District Judge, S. D. Iowa..... Iowa City, Iowa.
Hon. JOHN C. POLLOCK, District Judge, Kansas..... Kansas City, Kan.
Hon. PAGE MORRIS, District Judge, Minnesota..... Duluth, Minn.
Hon. WILBUR F. BOOTH, District Judge, Minnesota..... Minneapolis, Minn.
Hon. DAVID P. DYER, District Judge, E. D. Missouri..... St. Louis, Mo.
Hon. ARBA S. VAN VALKENBURGH, District Judge, W. D. Missouri... Kansas City, Mo.
Hon. THOMAS C. MUNGER, District Judge, Nebraska..... Lincoln, Neb.
Hon. JOSEPH W. WOODROUGH, District Judge, Nebraska ..... Omaha, Neb.
Hon. COLIN NEBLETT, District Judge, New Mexico ..... Santa Fé, N. M.
Hon. CHARLES F. AMIDON, District Judge, North Dakota..... Fargo, N. D.
Hon. RALPH E. CAMPBELL, District Judge, E. D. Oklahoma[7]..... Muskogee, Okl.
Hon. JOHN H. COTTERAL, District Judge, W. D. Oklahoma..... Guthrie, Okl.
Hon. JAMES D. ELLIOTT, District Judge, South Dakota..... Sioux Falls, S. D.
Hon. TILLMAN D. JOHNSON, District Judge, Utah ..... Ogden, Utah.
Hon. JOHN A. RINER, District Judge, Wyoming..... Cheyenne, Wyo.

NINTH CIRCUIT

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

[4] Died June 14, 1918.
[5] Appointed July 6, 1918, to succeed J. Otis Humphrey.
[6] Appointed May 3, 1918.
[7] Resigned August 31, 1918.

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CASES REPORTED

CASES ON REHEARING

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

EIGHTH CIRCUIT.

Altheimer & Rawlings Inv. Co. v. Allen, 248 F. 688. Rehearing denied July 8, 1918.

Anderson v. Hultberg, 247 F. 273. Rehearing denied Sept. 2, 1918.

Hart v. Crane, 247 F. 260. Rehearing denied July 24, 1918.

CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE DISTRICT COURTS

ALEXANDER et al. v. FIDELITY TRUST CO. (three cases).

FIDELITY TRUST CO. v. ALEXANDER et al.

(Circuit Court of Appeals, Third Circuit. November 24, 1917. On Rehearing, March 27, 1918.)

Nos. 2277–2280.

1. TRUSTS ⟸305—ACCOUNTING—LACHES.

Where complainants' father, who held in trust for their benefit the proceeds of land devised in trust for them by their maternal grandfather, and was, under the terms of the will, entitled to withhold distribution during his life, complainants' failure to demand an accounting during the lifetime of their father, the latter having recognized the existence of the trust up to the time of his death, did not amount to laches precluding the enforcement of their rights against the executor of the father's estate.

2. TRUSTS ⟸305—ACCOUNTING—LACHES.

Two years after the death of their father, in 1895, complainants made demand on defendant, executor of the estate of the father, for settlement of a trust created for complainants' benefit by their maternal grandfather and recognized by the father at the time of his death. Meanwhile one of the complainants had filed a caveat against the probate of the will, and, though defeated in the lower court, appealed to the Supreme Court, wherein the will was upheld by a decision rendered in 1903. In 1899 complainants secured the appointment of a substituted trustee under the will of their grandfather, which trustee that year sued defendant for an accounting. Defendant then filed a bill for vacation of the appointment of such trustee, and the suit for accounting was not disposed of pending determination of the proceeding for vacation of appointment of the substituted trustee. *Held*, that where complainants, a few months after the vacation of the appointment of the substituted trustee, filed a bill for an accounting, they were not guilty of laches precluding recovery, though 18 years elapsed between the death of their father, the original trustee, and the filing of such bill, complainants' demands on defendant executor and institution of suit by the substituted trustee having fully advised it of complainants' claim, so that defendant, which required a refunding bond as a condition to distribution, was not injured by the delay.

3. TRUSTS ⟸291—PAYMENT—SETTLEMENT.

A father, who was trustee for his children under a trust created by their maternal grandfather, cannot, by making bequests to them by will in lieu of accounting for the trust property which he commingled with his own, discharge his liability as trustee, the children not being bound to accept the proposed bequests any more than they would have been

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bound in the lifetime of the father to have accepted a sum of money in satisfaction of their rights as beneficiaries.

4. ABATEMENT AND REVIVAL ⟸14—PENDENCY OF OTHER SUIT—EFFECT.
Complainants' father, a citizen of Pennsylvania, was by the will of their maternal grandfather made trustee of a trust for complainants' benefit. After the death of the father a Delaware corporation was appointed as substituted trustee under the will of complainants' maternal grandfather, and such trustee instituted an action in the federal court against defendant, a Pennsylvania corporation, and executor of complainants' father. On petition of defendant, the order appointing the substituted trustee was revoked; whereupon complainants, nonresidents of Pennsylvania, filed a bill in their own names against defendant for an accounting. *Held* that, if defendant was injured by the pendency of the suit by the substituted trustee, it should move for a dismissal thereof, and was not entitled to a dismissal of the bill by complainants.

5. EXECUTORS AND ADMINISTRATORS ⟸47—ASSETS—DISTRIBUTIVE SHARE.
The shares of deceased beneficiaries under a trust are distributable to their administrators, and, in a suit by a surviving beneficiary, the question whether the shares of such deceased beneficiaries descended to the survivors need not be determined.

6. TRUSTS ⟸305—ACCOUNTING—RIGHT TO—COMMINGLING OF ESTATES.
Where a trustee, without the consent or knowledge of the beneficiaries, commingled trust funds with his own, but up to the time of his death recognized the validity of the trust and his liability to account, his executor cannot defeat a suit by the beneficiaries to compel an accounting, no rights of any third persons having intervened; for the trustee, by commingling the trust funds with his own, rendered his whole estate liable to the beneficiaries.

7. EVIDENCE ⟸60—PRESUMPTIONS—INNOCENCE.
Where the act of a party may refer indifferently to one of two motives, the law prefers to refer it to that which is honest rather than to that which is dishonest.

8. TRUSTS ⟸305—COMMINGLING OF TRUST FUNDS—PRESUMPTION.
Where a trustee commingled trust funds with his own and entered credits to the cestui que trust on his books, the presumption is that the trustee intended the joint fund to be chargeable with the trust, and casts on the trustee or his representative the burden to show clearly what part of the property belongs to his own estate.

9. JUDGMENT ⟸590(1)—DETERMINATION—RULE OF DECISION.
In a suit to compel the executor of a deceased trustee to account, a decision, in a previous suit to compel the executor to account for property held by the deceased under a different trust, that the beneficiaries having allowed the administration to proceed and the trust res to be disposed of and distributed before they instituted suit, they were not entitled to invoke equitable aid to recover the value of the property or the accumulations, having an adequate remedy at law, does not amount to a rule of decision precluding a decree directing an accounting by the executor, where the testator in the latter case had commingled the trust funds with his own, and the beneficiaries had at all times since his death been asserting their rights to an accounting.

10. TRUSTS ⟸305—ACCOUNTING—ACCEPTANCE OF BENEFITS—EFFECT.
That a testator, who was trustee of a trust created by his son's maternal grandfather, in which the son was a beneficiary, made bequests to his son, which his will stated were to be accepted in lieu of any right of accounting, will not preclude the son from enforcing an accounting by testator's executor, where the son attacked the validity of the will and refused to accept any benefit thereunder.

11. COURTS ⟸505—STATE AND FEDERAL COURTS—EXECUTION.
In a suit in the federal court against defendant, a corporate executor, to compel it to account for trust property which its testator as trustee commingled with his own funds, there was a decree for complainants directing an accounting. The testator's estate was at the time of the rendition of the decree still in progress of settlement in the state court. *Held*, that notwithstanding the usual rule that in suits against an executor the law presumes that he has a sufficiency of assets in his hands belonging to his testator with which to pay the judgment or decree against him, unless he pleads complete administration or that he has only assets to a limited extent, etc., execution should in the first instance be denied, so as to allow presentation of the decree to the state court.

12. WILLS ⟸787—ELECTION—EFFECT.
Where a beneficiary under the will of one who was a trustee elected to take a bequest which the will stated should be in full payment of any demands for which the testator was liable as trustee, such election is binding on the beneficiary, and she cannot compel the testator's executor to account for trust property in his hands.

13. EVIDENCE ⟸271(18)—EX PARTE DECLARATIONS—ADMISSIBILITY.
An ex parte statement by a trustee in his own book that he had paid one of the beneficiaries is not admissible in an action by the beneficiary to compel his executor to account.

14. TRUSTS ⟸305—ACTIONS—PAYMENT OF BENEFICIARY.
In a suit against the executor of a trustee to compel an accounting for trust property which the trustee commingled with his own property, where there was nothing to show that one particular beneficiary had been paid, it appearing that the trustee recognized the existence of the trust up to the time of his death, the claim of such beneficiary must prevail.

On Petition for Reargument.

15. APPEAL AND ERROR ⟸828—REARGUMENT—GRANTING OF PETITION.
Where petitioner would be affected by the decree appealed from, though he was not named therein, and, had he then asked, he would have been heard when the appeals were originally argued, his petition for reargument will be granted, to avoid a possible injustice; it appearing that he had no record notice of the appeals.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania; J. Whitaker Thompson, Judge.

Bill by Archibald A. Alexander, Mary C. Alexander, and John S. Alexander against the Fidelity Trust Company, executor of the estate of John Alexander, to compel an accounting. From a decree in favor of Archibald A. Alexander, but denying relief to the other complainants, the trustee and Mary C. Alexander and John S. Alexander severally appeal, while Archibald A. Alexander appeals from an order supplemental to the decree, staying execution thereon. Affirmed as to the appeals of all parties save John S. Alexander, and as to him reversed and bill reinstated with directions.

See, also, 243 Fed. 162, — C. C. A. —.

M. Hampton Todd, of Philadelphia, Pa., for appellants.

H. Gordon McCouch and Harold B. Beitler, both of Philadelphia, Pa., for appellee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. Federal jurisdiction of this action depends upon diversity of citizenship. The bill was brought by Archibald A. Alexander, Mary C. Alexander, and John S. Alexander against the Fidelity Trust Company as executor of their father, John Alexander, to compel an account of a certain trust. The fundamental averments of the bill are that John Alexander had been a trustee for the plaintiffs, that he had not accounted for the fund, but had left it as an indistinguishable part of his estate, and that his executor was in possession of assets sufficient to respond to the plaintiffs' demand. In full detail the facts appear in the following unreported opinion of Judge Thompson, delivered August 26, 1915:

"The plaintiffs filed a bill for an accounting by the Fidelity Trust Company, as executor and trustee under the will of John Alexander, deceased, of moneys received by the decedent, John Alexander, as trustee for the plaintiffs under the will of George Jones, deceased. The Fidelity Trust Company alone filed an answer and put in a defense.

"George Jones, a resident of Wilmington, Del., died in August, 1867. John Alexander married George Jones' daughter, Mary Jane, who died prior to the time of George Jones' death, leaving five children, Mary C., John S., Archibald A., still living, and James G. and Annie G. Alexander, both deceased.

"The second item of George Jones' will is as follows:

" 'To my Son in Law John Alexander and his heirs and assigns I give and devise all my farm land in Kent County in this State, in Trust for the Equal use, benefit and behoof of his children by my daughter Mary Jane (now deceased) with authority to retain and manage it for their respective Equal benefit, or at his option at any time to convey and assign the same to them and their heirs as Tenants in Common free and discharged of any trust or, with the assent to be expressed in writing, of such of the said children as may at the time of the Exercise of such option, have attained twenty-one years of age, to sell and dispose of the said lands and tenements, at public or private sale for the best price to be obtained therefor, and thereupon to make a good and sufficient deed or deeds in fee simple therefor to the purchaser or purchasers thereof, free from all Trust and any liability of the purchaser or purchasers to see to or account for the proper application of the purchase money by the said John Alexander or his heirs; the said purchase money thereupon to be still held in Trust by him or them for my said Grandchildren, or at his discretion, to be paid over to them respectively discharged of any Trust, at such times and manner as he shall deem most beneficial to them respectively.'

"Letters of administration were granted to John S. Alexander upon the estate of James G. Alexander, December 22, 1868, and upon the estate of Annie G. Alexander, November 4, 1899.

"After the death of George Jones, the decedent, John Alexander, remarried and had one son, Lucien H. On March 27, 1868, John Alexander, together with Mary C., John S., and Annie G., all of whom had then reached the age of twenty-one years, sold the real estate in Kent county, known as Linden Farm, to Henrietta Ord Underwood, for the sum of $13,000. The purchase price was paid to John Alexander as follows: $10,000 by the assignment to him of a bond and mortgage of John P. McLear and wife to Henrietta Ord Underwood to secure the payment of the sum of $10,000 and the remaining $3,000 by a purchase-money mortgage upon Linden Farm in the sum of $3,000. John Alexander sold the McLear mortgage March 18, 1872, for $10,000, together with the interest due thereon, the proceeds in all exceeding $12,000. The decedent, on March 28, 1873, charged himself as trustee, and credited the accounts of Archibald and Mary, respectively, with the sum of $4,026.91 each. It is conceded that settlement in the sum of $4,026.91 in full for his share of the proceeds of the McLear mortgage under the George Jones trust was made at that time by the decedent with his son John S. Alexander. The Underwood mortgage for $3,000 was sued out in proceedings brought in 1884,

and the land was purchased at the sheriff's sale by John Alexander in his own right for the sum of $6,500 and a deed made to him by the sheriff. The title to the property remained in John Alexander at the time of his death. John Alexander continued to recognize the George Jones trust and his liability to account under it down to the time of his death. This is shown by entries in his book and by declarations in wills made in 1891 and 1893. In a will executed June 26, 1891, by item 4 he directed his executors (in case he did not do the same thing in his lifetime) to transfer to the Fidelity Insurance Trust & Safe Deposit Company, in trust for his daughter Mary, certain securities, and, in case he did not do the same thing in his lifetime, to transfer to his son Archibald certain securities and the proceeds of a certain life insurance policy, with the following clause applying to both bequests: 'Which transfers include payment in full to my daughter Mary C. and my son Archibald A. of their interest in bequest of their Grandfather.'

"In an entry in his ledger under the date of January 13, 1887, he had enumerated the same securities referred to in the will of 1891, and directed that his executors transfer them to Mary and Archibald, respectively, at his death in case he had not done so in his lifetime.

"The testator further directed that reference be made to the memoranda accounts of his children to ascertain whether the transfers referred to had been made in his lifetime. It is apparent that his intention in item 4 of the will of 1891 was to designate the funds held by him in trust, and, as far as Mary and Archibald were concerned, to carry out the directions of George Jones under the last clause of item second of his will, viz.: 'The said purchase money thereupon to be still held in trust by him (John Alexander) or them for my said grandchildren, or, at his discretion, to be paid over to them respectively discharged of any trust, at such times and manner as he shall deem most beneficial to them respectively.'

"In a subsequent will dated March 15, 1893, which was duly probated, in the fourth paragraph he again recognized his liability to account for the George Jones trust by directing his executors, in case he had not done the same thing in his lifetime, to pay over to the Fidelity Insurance Trust & Safe Deposit Company for his daughter Mary C. the sum of $15,000, to be held in trust with power of appointment in her by will; and further directed his executors, in case he had not done the same thing in his lifetime, to transfer to his son Archibald certain stock, certain interest in joint indebtedness declared against his sons Archibald and John S., and the proceeds of a certain life insurance policy, and declared 'these payments and transfers include payment in full to my daughter Mary C. and my son Archibald A. of their interest in bequest of their grandfather Jones.'

"He further provided in item 4: 'As my devoted son John S. has years ago received from me his share of his grandfather Jones' estate, and has also been released from certain large cash liabilities to me, I bequeath in this item of my will only to my children Mary C., Archibald A., and Lucien H., and I have, according to my best judgment, done the strictest equity to all.'

"The existence of the George Jones trust at the time of John Alexander's death, and his recognition of his liability to account to Mary and Archibald, is therefore clearly established by the testator's declaration.

"During the lifetime of John Alexander, he had advanced and loaned large sums of money to his sons, which appear charged against them on his books. In the will of 1893, item 8, he states that the advances to his two sons John S. and Archibald A. amount to $115,100, 'a portion of which indebtedness to the extent of ($6,000) Six thousand dollars thereof I have by Section Four of my Will bequeathed to my son Archibald A., which leaves at this date as forming part of my residuary estate a net balance of indebtedness due by my said two sons of One hundred and nine thousand one hundred dollars ($109,100), whereby my said two sons have jointly received possibly more than their just share of my residuary estate.' The amount of the indebtedness was by a codicil declared to be $121,800.

"The accounts with Mary upon her father's books do not indicate any intention on his part to charge against her share in the George Jones trust any individual advances made to her. The individual accounts of Archibald

upon his father's books, as far as appears, show loans and advances made by his father in his individual capacity, and do not indicate any intention to charge them against the fund held as trustee. The declarations in the wills of 1891 and 1893 indicate that up to that time no settlement of the Jones trust estate had been made, but that John Alexander intended by his bequest, in item 4, to charge against the shares of Mary and Archibald under the Jones trust in settlement thereof the money and securities therein enumerated.

"It is evident from the books of the decedent and conceded by all parties in interest that there was a commingling of the trust funds with his individual funds, but there is no evidence that at the time advances were made in his lifetime it was intended by the parties that they should be considered as advances out of the trust funds.

"Upon the death of John Alexander on February 7, 1895, the will of March 15, 1893, with codicils thereto, was offered for probate. A caveat and petition for an issue filed by Archibald A. Alexander were, after hearing before the register of wills of Philadelphia county, dismissed, and the will and codicils admitted to probate. In October, 1898, John S. Archibald and Mary appealed to the orphans' court from the decision of the register of wills, and, after lengthy hearing, the appeal was dismissed and an issue d. b. n. refused. From the action of the orphans' court an appeal was taken to the Supreme Court of Pennsylvania, whereupon, on May 11, 1903, the decree of the orphans' court was affirmed. See Alexander's Estate, 206 Pa. 47, 55 Atl. 797. Meanwhile, on June 15, 1899, upon petition of Mary C. Alexander and John S. Alexander, the Court of Chancery of Delaware appointed the Security Trust & Safe Deposit Company of Delaware substituted trustee under the last will and testament of George Jones. The substituted trustee on December 12, 1899, filed in the United States Circuit Court for this district to No. 29 of October sessions, 1899, a bill in equity against the executors of John Alexander's will, alleging subsfantially the same facts, so far as the right to an accounting is concerned, as are set forth in the present bill, and praying for the same relief as in the present bill. After the suit was at issue, a motion made to dismiss for want of jurisdiction was held under advisement by Judge McPherson pending a suggestion that the construction of the will should be primarily determined by the Delaware Court of Chancery, and the question of the propriety of the complainant's appointment raised in that court. On April 13, 1905, a bill was filed in the Delaware Court of Chancery by the Fidelity Trust Company, as executor and trustee under the will of John Alexander, praying that the appointment of the substituted trustee be vacated. A decree was finally entered on October 10, 1912, revoking the order appointing the Security Trust & Safe Deposit Company as substituted trustee as having been inadvertently entered.

"On January 7, 1913, the present bill was filed.

"It appears by the answer that repeated demands were made by the plaintiffs upon the defendant for the sums in controversy and for an accounting more than sixteen years prior to the filing of the bill herein, and a denial of all liability for the payment of any such sums or of any obligation to account therefor was then made by the defendant.

"The first account of the executors was audited in the orphans' court April 17, 1896, and confirmed nisi, and adjudication filed April 30, 1896. It appears by the adjudication and schedule of distribution that $15,000 was awarded to the Fidelity Insurance, Trust & Safe Deposit Company as trustee for Mary C. Alexander under the trust declared in the fourth item of the testator's will. It further appears that payments of $1,107.50 of income had been made by the accountants to the Fidelity Trust Company, which are referred to in the schedule as 'payments on account interest to May 16, 1896, on Mary C. Alexander bequest of $15,000, in accordance with fourth item of will as per account filed.'

"It also appears that at that time there was contained in the schedule of distribution an award to Archibald A. Alexander of 100 shares of stock of the Texas National Bank, and of an assignment of $6,000 of the testator's interest in the joint indebtedness due to the estate by his two sons, Archibald and John S. As the account then being audited was that of the executors

under the will, and not of the Fidelity Trust Company as trustee for Mary C. Alexander, it is apparent that the payments of income charged in the account consisted of income paid by the accountants as executors to the Fidelity Trust Company as trustee. There is no evidence of any payment directly to Mary C. Alexander, or acceptance by her, of any income out of the $15,000 bequest, and there is no evidence of any acceptance by Archibald A. Alexander of the bequest to him in settlement of his interest in the George Jones trust.

[1] "The defense mainly relied upon is laches, in that the trust determined on the death of John Alexander and the beneficiaries thereunder were then entitled to sue therefor; that sixteen years prior to the filing of the bill repeated demands were made by the plaintiffs for an accounting and a denial of all liability made by the defendant, and that, in view of the laches of the plaintiffs, forty-two years having elapsed since the alleged tortious conversion of the trust fund and failure to pay income to those entitled, and eighteen years having elapsed since the death of the testator and the filing of the bill, they have lost their right to an account and the bill should be dismissed.

"Under the facts developed, laches cannot be imputed to the plaintiffs based upon their failure to claim an accounting during the lifetime of their father. There was no disavowal by him of the trust, and up to the date of the will of 1893, and therefore to the time of his death, he never disavowed his liability to an account, but, by his own declarations in his books of account and in the wills of 1891 and 1893, declared the continued existence of the trust and his liability to an accounting.

[2] "Neither can laches be charged against the defendant by reason of the fact that the bill was not filed until January, 1913, or eighteen years after the death of the testator. That is an unusually long period to elapse before the assertion of one's right, and, if nothing had been done during that interval, the defense of laches would doubtless avail even in favor of a fiduciary. It is admitted, however, that demand was made by the plaintiffs for an accounting in 1897. Meanwhile a caveat against the probate of the will under which the defendant claimed as executor had been filed, and in 1898 an appeal taken to the orphans' court. In 1899 a substituted trustee was, upon the application of two of the plaintiffs, appointed by the Delaware Court of Chancery for the purpose of asserting the same rights as are now asserted by this suit. In 1899 the substituted trustee brought suit in the Circuit Court in this district, based upon the same grounds as the present suit. By reason of litigation in Delaware concerning the appointment of the substituted trustee, the proceedings in the prior suit in this court were not carried to a conclusion, but, upon the vacation of the appointment of the trustee in 1912, the present bill was promptly filed. If the Fidelity Trust Company had had no notice of the trust, delay for a much shorter period would defeat the plaintiffs' rights upon the ground of laches, but the testator, by the terms of the very will under which the defendant derives its authority, declared the existence of the trust. The disavowal by the Trust Company upon demand two years later was followed by the proceedings brought in 1899, four years after the decedent's death. The Trust Company was not at that time in a position to assert that the beneficiaries under the George Jones trust were sleeping upon their rights, and surely it could not so claim during the pendency of that suit. If, during the time before the bringing of the present suit, the defendant has parted with the evidences of the condition of the trust, its position is not due to want of notice of the claims of the plaintiffs through their laches. It was not because of neglect to assert the plaintiffs' rights that the books of account in which the decedent kept the record of his dealings with the beneficiaries under his will had been allowed to go out of its possession and were brought into court in the custody of Lucien H. Alexander, who appeared and produced them under a subpœna duces tecum. At the audit of the second account of the executors, May 9, 1904, it was requested by counsel for the defendant that the sums awarded be retained by the accountant to await the result of the suit pending in the Circuit Court for this district brought by the Security Trust Company of Delaware, trustee, under the will of George Jones, against the executors. This request was denied because of uncertainty as to the length of time which would probably ensue before the final determi-

nation of the suit, but, in order to protect the accountant, distribution was made conditionally upon a refunding bond being entered into by the distributees, and it appears that the executor still has in its custody about $43,000 undistributed. Surely in 1904, when its counsel called the court's attention to the pending suit, the defendant had notice and would not have deprived itself of the means of defending that suit. So far as appears, the suit is still pending, but cannot be prosecuted, because the plaintiff's appointment as trustee under the George Jones will was, at the instance of the defendant, vacated in 1912, but the present suit was immediately brought after the order vacating the appointment was made. In the absence of the running of a statute of limitations, the doctrine of laches is invoked to prevent injury to an innocent party. It is doubtful if it should be applied as strictly in favor of a corporation engaged under its charter in the business of acting as executor and trustee as in favor of an individual. That the defendant has not, during the last eighteen years, been permitted by the plaintiffs to lose sight of the fact that they claimed as beneficiaries under the George Jones trust for sufficient intervals of time to bar them by laches is clearly apparent upon the present record, and no evidence has been presented to show that the defendant as a stakeholder will suffer by reason of being required to account.

[3] "The next defense set up is payment through advances to the plaintiffs, through their support by their father and through settlement made under his will. The capacity in which the decedent held the funds of the Jones trust was entirely separate and distinct from the capacity in which he dealt with his children in supporting them and in making advances to them. After a careful examination of the voluminous statements of account which were offered in evidence, I have been unable to find anything which indicates that, prior to the will of 1891, John Alexander intended that the liability of his sons and daughter to him individually should have any relation to his liability to them as trustee under George Jones' will. It is contrary to the ordinary conception of a trust that a trustee may offset his individual claim against his cestui que trust against the latter's claim upon the trust fund. It is apparent, however, that, under the wills of 1891 and 1893, the testator attempted to make a settlement under the trust with his son Archibald and daughter Mary. John Alexander could dispose of his individual estate as he desired, but he could not make a settlement with his children of the trusteeship as provided for in the wills without the consent of the cestuis que trustent evidenced by acceptance or in some other manner indicating their consent, express or implied. There is no evidence that Archibald ever consented to such arrangement, nor that he has accepted the provisions made for him under his father's will, and he is therefore free to dispute the effect of the bequest as a settlement with him. If there were evidence of the acceptance by Mary of income from the fund bequeathed to her under the fourth item of her father's will as such, she no doubt would be estopped from demanding an accounting in this suit. It has not been shown, however, that the payment to the Fidelity Trust Company as her trustee was followed by payment to her, and there is no evidence in the case, therefore, that she has accepted the benefits of the $15,000 bequest, as alleged in the answer, and the allegation, being deemed denied under the 31st equity rule, falls for want of proof.

"The claim of John S. Alexander was withdrawn by his counsel at the trial.

[4] "The question of jurisdiction raised by the defendant was determined by Judge Sater, sitting by designation in this court, when a motion to dismiss the bill upon that ground was denied. If the defendant is injured by the pendency of the suit of the Security Trust Company, it should, as suggested by Judge Sater, move for a dismissal of that bill.

[5] "A further question is raised by the pleadings as to whether the interests of James G. and Annie G. Alexander vested in their father, the decedent, or in their brothers and sister, the plaintiffs. The decision of that question is not necessary in the present suit, as in either case their shares would be distributable to their administrator.

"A decree may be entered in accordance with the prayers of the bill in favor of the plaintiffs Mary C. and Archibald A. Alexander, and dismissing the bill as to John S. Alexander."

After filing this opinion Judge Thompson heard additional testimony, which led him to conclude that Mary was not entitled to relief, and in March, 1916, he therefore ordered an account in favor of Archibald alone, dismissing the bill as to Mary and John S.:

"The additional evidence offered by the defendant the Fidelity Trust Company upon rehearing is sufficient to establish an acceptance by Mary C. Alexander of the bequests under her father's will, subject to the terms of the will providing that the 'transfers include payment in full to my daughter Mary C. and my son Archibald A. of their interest in bequest of their grandfather.'

"The additional evidence does not support the same conclusion as to Archibald A. Alexander, and no sufficient cause is shown for disturbing as to him the findings in the opinion filed August 16, 1915.

"As to the interest of John S. Alexander in the Jones trust, there is no evidence of any demand made by him upon his father for an accounting during his lifetime, nor is there any evidence to establish such a recognition by his father of accountability to him as appears by his declarations in regard to Archibald A. and Mary C."

Accordingly an account was stated by a special master (Hon. Wm. W. Porter), who in a clear and convincing report sustained the material positions of Archibald, and recommended a decree in his favor, the amount not being in dispute on this appeal. Exceptions to the report were dismissed in the following opinion (also unreported), and a final decree was entered:

[6] "As stated in the brief of counsel for the defendant:

" 'These exceptions all depend on the same underlying principle of law, which may be thus briefly stated:

" 'The Jones trust terminated on the death of John Alexander. No property belonging to the trust came into the hands of his executors, from which it follows that at no time since the death of John Alexander would a bill in equity lie against his executors for an accounting in reference to said trust, the only right of action being one at law against the executors for the tortious conversion by their testator of the trust funds in question. The status, therefore, of the beneficiaries after the death of John Alexander, was changed to that of ordinary creditors of his estate, from which it follows, as a corollary, that the executors have the right to set off against such claim any debts due by the beneficiaries to the estate, and the statute of limitations runs against this, as against any other action at law, from the date of the death of John Alexander.'

"Assuming that the trust terminated at the death of John Alexander, it does not follow that the cestui que trust's right to an accounting was then changed into a debt at common law.

"The fallacy in the argument for the defendant is that some controlling facts are left out of consideration.

"First. The trustee commingled the funds of the trust estate with his own, without the consent or knowledge of the fiduciary.

"Second. The decedent recognized the validity and existence of the trust and his liability to account therefor up to the time of his death.

"Third. The estate came into the hands of the defendant as John Alexander's executor in the same condition as it was in when he recognized his liability to an accounting.

"Fourth. There are no rights of creditors or purchasers for value or innocent third parties intervening.

"The master found against the defendant's contention that the entries in the books of John Alexander concerning the trust funds constituted a distribution to the beneficiaries, and found that such a disposition of the trust funds constitutes in law a conversion by him of the trust funds. Counsel for the defendant argues that therefore it must be concluded that there was no trust fund in existence when John Alexander died, and con-

sequently the beneficiary was merely a creditor of the deceased trustee's estate.

"Counsel has industriously collected authorities in support of the doctrine of failure of right to pursue trust funds commingled with other property. In every case so cited an equity superior to that of the cestui que trust was established, but in none of those cases is it held that a trustee who, without knowledge or consent of the cestui que trust, has commingled the trust funds with his own, can set up his own tortious conversion, and thereby establish a claim to the whole of the commingled property.

"In the following cases relied upon by the defendant the cestui que trust claimed a preference over the trustee's general creditors: Thompson's Appeal, 22 Pa. 16; People's Bank, 93 Pa. 107, 39 Am. Rep. 728; Freiberg v. Stoddard, 161 Pa. 259, 28 Atl. 1111; Lebanon Trust & S. D. Banks Assigned Estate, 166 Pa. 622, 31 Atl. 334; Comm. v. Tradesman's Tr. Co., 250 Pa. 372, 95 Atl. 574; Columbia Bank's Estate, 147 Pa. 422, 23 Atl. 625, 626, 628; Rado's Estate, 30 Pittsb. Leg. J. (Pa.) 410.

"And in Milligan's Appeal, 82 Pa. 389, the question was whether the trustee should be ordered to transfer to the cestui que trust certain valuable stock, purchased by the trustee out of commingled assets, instead of money. There was no evidence that the stock was purchased with her money; moreover, sufficient to satisfy the trust remained in the trustee's hands uninvested, and it was held that she was rightly awarded the money rather than the stock.

"It may be assumed that the industry of counsel would have produced authorities in support of his contention that the accountability of a trustee as against the cestui que trust ends when he commingles the trust funds with his own if there were such cases upon the books. The rule as to following trust funds, even where other equities are asserted, is thus stated by Mr. Justice Bradley in Frelinghuysen v. Nugent et al. (C. C.) 36 Fed. 229, and approved by Mr. Justice Fuller speaking for the Supreme Court in Peters v. Bain, 133 U. S. at page 693, 10 Sup. Ct. at page 361, 33 L. Ed. 696:

" 'Formerly the equitable right of following misapplied money or other property into the hands of the parties receiving it depended upon the ability of identifying it, the equity attaching only to the very property misapplied. This right was first extended to the proceeds of the property, namely, to that which was procured in place of it by exchange, purchase, or sale. But if it became confused with other property of the same kind, so as not to be distinguishable, without any fault on the part of the possessor, the equity was lost. Finally, however, it has been held as the better doctrine that confusion does not destroy the equity entirely, but converts it into a charge upon the entire mass, giving to the party injured by the unlawful diversion a priority of right over the other creditors of the possessor.'

"The court's attention has not been called to any authority holding that, as against the cestui que trust, the trustee can set up his own failure to set apart trust funds, and say: 'I converted your money to my own use long ago by mixing it with my own. True, I have ample to pay you, which is the product of the commingled funds, but I do not know which is yours and which is mine. You did not consent that I should do so, nor did you know that I did so, but by converting it to my own use I made you a mere creditor and the statute of limitations has run against your claim.'

"As found by the master, the intent of the decedent to commingle the trust funds with his own was not one which the donor contemplated, nor the law sanctions, and cannot bind the cestui que trust without his consent or knowledge.

"What John Alexander did cannot be set up to the advantage of his estate to defeat the trust.

" 'All that he did must be taken as in furtherance of the trust. To this he was bound by the duties of his office.' Paull v. Oliphant, 14 Pa. 350.

"In the case at bar it is shown that, while the trustee mingled the moneys of the trust estate with his own, it was done in recognition of the trust.

[7] "The finding by the master of the trustee's intention to postpone distribution under the discretion vested in him by George Jones' will until the time of his death is supported by the evidence, and is in accordance with

the maxim that, where the act of a party may be referred indifferently to one of two motives, the law prefers to refer it to that which is honest rather than that which is dishonest. Boone County Bank v. Latimer (C. C.) 67 Fed. 27.

[8] "The presumption is that in commingling the trust funds with his own, and crediting the cestui que trust on his books, John Alexander intended the joint fund to be chargeable with the trust funds, there being ample funds in the hands of his executor to meet the charge. So that where the two funds are thus blended, and the claim of the cestui que trust is not subject to any superior equities, the burden is put upon the trustee or his representative to show clearly what part of the property belongs to his estate. Perry on Trusts and Trustees, § 128; Boone County Bank v. Latimer, supra; Bank v. King, 57 Pa. 202, 98 Am. Dec. 215.

"It would be strange, indeed, if, with the presumption of a rightful intention on the part of the trustee to finally distribute the sums credited on his books to his son, and with the joint product of the commingled funds coming into the hands of the executor, the holder of the estate, thus enriched by the trust funds, should be allowed to defeat the trust by pleading a dishonest intent on the part of its decedent.

"What the plaintiff is claiming here is the right to follow his property or its value and the accrued profits into the product arising from the commingling of the trust funds with the mass of the decedent's estate.

"It was his right to elect to pursue this remedy, and an election to proceed as a mere creditor cannot be made for him by the defendant so as to invoke the statute of limitations and convert the trustee's individual dealings with him into a set-off and thus defeat the trust.

"I am of the opinion that there is no merit in the exceptions, and they will be dismissed, and the report confirmed.

"A decree may be entered accordingly."

Four appeals are before us, each presenting a separate question.

Fidelity Trust Company's Appeal.

[9] We see no need to supplement the careful and satisfactory opinions of the District Judge except by discussing briefly the Trust Company's contention that our decision dismissing the bill, that was considered in Fidelity Trust Co. v. Alexander, 243 Fed. 162, —— C. C. A. ——, requires us to dismiss the present bill also. We think this position is not well taken. In the former case, which grew out of a family arrangement or trust in favor of the same beneficiaries, the fund then in question consisted of 60 shares of bank stock that had not been ear-marked, but formed a part of 319 shares that passed into the hands of the same executor. The beneficiaries had brought no action of any kind for about 20 years after they might have sued, and the only question before us was whether, under the circumstances there disclosed, they had lost whatever remedy in equity they might once have possessed. For a long time before the testator's death the stock had lost its identity, and the testator had apparently treated the trust fund as his own. In this respect the two cases are alike, but in the earlier case the trustee's will did not recognize the existence of the trust or propose a method of settlement. Before an account could be successfully demanded, the beneficiaries were obliged to prove the existence and survival of the trust, whereas in the present case the testator clearly recognizes the trust as existing, and empowers his executor to settle it, and the executor has accepted the authority, and has acted under it in part, as appears by the company's accounts in the orphans' court of Philadelphia county. It is a mistake to suppose that in 243 Fed. 162,

—— C. C. A. ——, we decided that the plaintiffs had never had a right to a remedy in equity. On the contrary, we assumed that they had not been confined to an action at law or to the proceeding in the orphans' court, "but could have proceeded in any other court having jurisdiction of the parties and the subject-matter"; but we laid weight upon the fact that they had taken no action of any kind until after the stock had been turned into money or had passed into other hands under the decree of the orphans' court. The point decided was that under such circumstances the claim against the estate had become a mere claim for the value of the stock and no longer needed a remedy in equity. No accounting was required, a mere calculation being sufficient. Since, therefore, the equitable remedy had not been invoked for so long a time, and had meanwhile become unnecessary, we held that the right to resort thereto had disappeared, and we restricted the plaintiffs to such other remedies as might remain, either at law or in the orphans' court.

In several particulars many of the cases now cited differ materially from the situation before us on this appeal, and therefore do not furnish the rule for decision. No conflicting rights of creditors or of purchasers for value are now involved; there is no dispute that the trust continued to the date of the testator's death, or that his estate became liable in some form of action; the assets of the trust certainly went into the executor's hands, although no one could point them out in specie, and the estate is amply solvent. In the fourth paragraph of his will the testator distinctly recognizes the trust and his liability, and in effect offers to settle with Mary and Archibald on specified terms. He had not settled with them himself, and he practically said to his executor: "I am bound to settle with Mary and Archibald for their shares of the Jones trust. The fund is somewhere in my estate; I do not know where, and I do not know how much I should pay them, but I propose to make a certain provision for each of them in full settlement of my obligation, and if they accept I leave it to you to carry the proposal into effect." No doubt he intended also to impose the settlement upon his children, but this was beyond his power. In substance, the proposal of the will had the same effect as if it had been made in his lifetime, and neither then nor after his death could he compel its acceptance. Under the trust he had exercised his right to postpone settlement until his death, but this left the task for his executor, unless the beneficiaries should see fit to accept the proposals in the will. Under such circumstances, we think a bill for an account was an appropriate, although perhaps not an exclusive, remedy, and we agree with the District Court that the present record shows no obstacle thereto.

[10] The Trust Company contends, however, that a serious obstacle is found in certain acts of Archibald after his father's death, these amounting, so it is said, to an election to take under the will. Upon this point Judge Thompson heard the evidence, and found as a result that:

"The additional evidence does not support the same conclusion (of acceptance) as to Archibald A. Alexander, and no sufficient cause is shown for disturbing as to him the findings in the opinion filed August 16, 1915."

With this we agree. Archibald has always opposed his father's will. For years he contested it in the courts, he never willingly accepted its provisions or profited by it in any degree, and in our opinion none of the acts referred to is inconsistent with this attitude of antagonism, and none requires us to hold that he made his election in favor of the will. Of course, now that the Supreme Court of Pennsylvania has adjudged the will to be valid, he is confronted with a different situation; but we do not see how this affects the conclusion that the testator, being a trustee under obligation to account, could not by his own act, without his son's consent, take away the son's right to have that obligation fulfilled in some appropriate forum. No act of Archibald was proved that amounts to an election, and, as the other objections of the Trust Company have been sufficiently answered by the district court, we need not discuss the subject further.

On the Trust Company's appeal the decree is affirmed.

Appeal of Archibald Alexander.

[11] After the decree had been entered and the Trust Company had perfected its appeal by filing assignments of error and entering the bond for costs required by the District Court, Archibald notified the Trust Company that he would issue an execution, whereupon the company asked, and the District Court granted, an order staying the writ. From this order, which is a supplement to the decree, the present appeal is taken, and the argument is made that the stay was improperly granted because the appeal is not in form a supersedeas. The appellant's counsel contends that the well-settled practice in suits against an executor requires him to—

"plead either (1) that he never was such an executor, (2) that he has fully administered the estate, or (3) that he had only assets to a certain extent in his possession belonging to the decedent's estate. If he should fail to file any of said pleas, then, on a judgment or a decree against him, the law presumes he has a sufficiency of assets in his hands belonging to the testator with which to pay the judgment or decree against him."

Cases are cited in support of this contention, and in disputes where the limited jurisdiction of the federal courts is not an element the practice may be as argued. But in the present situation we do not think these cases are decisive. The testator's estate is still in process of settlement before the orphans' court of Philadelphia county, and we must take care to do nothing that may interfere with the distribution that belongs peculiarly to that tribunal. It may be true that the executor has abundant assets to pay the decree and all other claims that may be urged against the estate; but this we cannot certainly know, and, in order to avoid the possibility of mistake, we think we should confine the appellant, at least for the present, to the advantage he has gained by recovering the decree. He has now established his right to an account and has liquidated his claim. As it seems to us, the next step is to present the decree to the orphans' court, and if it shall there appear that the company has sufficient assets to pay the decree in full, and if the company should thereafter refuse to pay, we have no doubt the district court would permit the execution to issue. But until this shall be

done we think the order restraining execution should stand. See Yonley v. Lavender, 21 Wall. 276, 22 L. Ed. 536; Byers v. McAuley, 149 U. S. 608, 13 Sup. Ct. 906, 37 L. Ed. 867; Burd's Ex'r v. McGregor's Adm'r, 2 Grant, Cas. (Pa.) 365.

On the appeal of Archibald Alexander the decree is affirmed.

Appeal of Mary Alexander.

[12] Only a few words are needed in disposing of this appeal. In the fourth paragraph of his will the testator bequeathed the sum of $15,000 for the use of his daughter Mary, declaring that this was to be in full of her interest in her grandfather's estate. In August, 1896, this sum was set apart by the orphans' court, and she accepted and has ever since enjoyed the benefit of the income therefrom. And under the eighth paragraph of the will a much larger fund has also been set apart for her use, of which she has enjoyed, and is still enjoying, the income. At the time of her father's death she was mentally competent and of full age, and her interests have been cared for by distinguished counsel. Her contention now is that, although this bill was not filed until more than 20 years after her father's death, she continues to have the right to elect whether she will take the fund of $15,000 or will insist on her right to an account for her share in the Jones estate. The answer seems plain; with knowledge of the facts or with the means of knowledge, she distinctly made her election many years ago and accepted her father's will, and she must abide by the choice she then made.

On her appeal the decree is affirmed.

Appeal of John Alexander.

[13, 14] The appellant has not accepted his father's will, or received any benefit thereunder, but he concedes that his father paid him all that was due on the $10,000 mortgage, and confines his present claim to his share of the Underwood mortgage. Concerning this we need only say that we find no competent evidence in the record to answer the claim. We are not satisfied with the reasons given by the District Court for rejecting it. The testator could not be compelled to settle with his children in his lifetime, but, when he died without having settled voluntarily, prima facie they were all entitled to an account, and to be paid whatever should appear to be due. So far as Mary and Archibald are concerned, this presumption was strengthened by the testator's declarations (these being competent, because against his interest) that they had not been paid; but the fact that no such declaration was made with regard to John would not seriously affect the presumption that he also had not been paid. We find nothing in the record against his claim except the testator's declaration, made in the will of 1891 and repeated in the will of 1893, that "my devoted son John has years ago received from me his share of (the bequest from) his grandfather Jones's estate." Now, if this were competent evidence, we should accept it as decisive, at least in the absence of opposing evidence, but we feel bound to reject it under the well-known rule of evidence as an ex parte declaration in favor of the testator's interest,

and, there being nothing else to show that John has been paid his share of the Underwood mortgage, we must sustain the claim to an account therefor. Upon his appeal, therefore, the decree is reversed and the bill is reinstated, with directions to the District Court to take an account of his share in the $3,000 mortgage referred to.

We may add that we neither express nor intimate an opinion concerning the effect that a recovery by John and Archibald in this proceeding may have upon their claim (if any should hereafter be made) to share in a future distribution under their father's will.

On Petition of Lucien H. Alexander for Reargument.

Lucien H. Alexander, in pro. per.

PER CURIAM. [15] If we should apply the strict rules of legal procedure to this petition for a reargument, the decision would not be difficult. But the situation is peculiar; the petitioner would be affected by the decree appealed from, although he is not named therein, and, if he had asked to be heard when the appeals were originally argued in this court, we would undoubtedly have allowed him to take part. We assume that he had no actual notice (he had no record notice of the appeals), and therefore, in order to avoid a possible injustice and to afford him the opportunity to have a hearing, we have decided to grant his motion.

We direct that on or before February 5, 1918, he serve upon opposing counsel his printed brief, and such other printed matter as he may desire to present to this court; any reply thereto to be served on him on or before February 16, 1918; and the reargument to take place on February 21, 1918.

On Rehearing.

PER CURIAM. The rehearing granted in three of these appeals has now been had, and we have carefully considered again the arguments that were presented last November, as well as the arguments that have recently been presented for the first time; but we have not been brought to see that the opinion previously filed should be modified in any respect.

It is perhaps superfluous to say that much of the prolonged litigation that has vexed John Alexander's estate is directly due to his own well-meant and kindly, but nevertheless masterful, attitude toward his children's rights under their grandfather's will. But the statement is true, and, although it will probably have little, if any, effect, it may stand as one more contribution to the mass of testimony that favors established legal rules and methods rather than individual caprice and irregularity. And so, too, in reference to rules of evidence. Having learned what kind of a man the testator was, we do not find it easy to shut our minds to the declaration in his will that he had already settled fully with John; but, if the general rule is to prevail, this declaration is not competent, and there is then no evidence concerning a settlement, except John's own admission, and this only affects the $10,000 mortgage. We feel bound to stand by the rule, and to disregard our own belief concerning the value of the testator's statement.

No change will be made in the opinion filed November 24, 1917.

PORTO RICO RY., LIGHT & POWER CO. v. UNITED STATES.

(Circuit Court of Appeals, First Circuit. March 26, 1917.)

No. 1292.

1. LANDLORD AND TENANT ⟸103(1)—CONDITIONS—BREACH OF.
The breach of a condition or covenant, with a right of re-entry, does not ipso facto work a forfeiture of the lease, but merely subjects the grantee or lessee to a liability to have a forfeiture declared at the lessor's option.

2. PUBLIC LANDS ⟸209—LEASE OF PORTO RICO LANDS—FORFEITURE—DECLARATION.
Though the United States, on cession of Porto Rico, acquired the reversion of lands held under a royal lease by Spain, and was authorized under Rev. St. and Codes Porto Rico, § 4578, to declare forfeiture of the lease, which made no provision for re-entry on account of the lessee's failure to pay rent, such forfeiture to be effective, must be declared by Congress by some legislative action.

3. STIPULATIONS ⟸14(1)—CONSTRUCTION.
Where a royal lease of Porto Rico lands, the reversion of which the United States acquired on cession by Spain, contemplated a reasonable increase in the rental, and the increase made by the United States was unreasonable, a stipulation that defendants refused to pay the rent demanded or recognize the right of the United States to demand such increase, should not be construed as a denial of the right to increase the rent and a refusal on the part of defendants to pay any increased rental whatsoever.

In Error to the District Court of the United States for the District of Porto Rico; Hamilton, Judge.

Ejectment by the United States against the Porto Rico Railway, Light & Power Company. There was a judgment for plaintiff, and defendant brings error. Reversed and remanded, with directions.

Carroll G. Walter, of New York City (J. Henri Brown, of San Juan, Porto Rico, and Edward J. Patterson, of New York City, on the brief), for plaintiff in error.

Thomas J. Boynton, U. S. Atty., and James A. Hatton, Asst. U. S. Atty., both of Boston, Mass. (George W. Anderson, U. S. Atty., of Boston, Mass., on the brief), for the United States.

Before DODGE, BINGHAM, and JOHNSON, Circuit Judges.

BINGHAM, Circuit Judge. This is an action of ejectment brought July 1, 1914, in the name of the United States, by the District Attorney for the District of Porto Rico, acting under the direction of the Solicitor of the Treasury, against the Porto Rico Railway, Light & Power Company, a Porto Rico corporation, to recover possession of a tract of land of 1248.24 square meters known as "La Carbonera," situated in the municipality of San Juan, Porto Rico, and leased by the Spanish government to Pablo Ubarri, pursuant to a royal order of January 21, 1881, who duly assigned and transferred his rights therein to the defendant.

A trial by jury having been waived, the case was heard before the District Judge, who made certain findings of fact and rulings of law, and entered a judgment in favor of the plaintiff. From this judgment the defendant sued out a writ of error, and in its assignment of errors complains, among other things, that the court erred in holding (1) that an action of ejectment could be maintained; (2) that the plaintiff was not estopped to increase the rental after the lapse of fifteen years from the happening of the contingency provided for in the lease on which an increase of rental might be had; (3) that it was the defendant's duty to determine the correct amount of the increased rent and tender the same under penalty of a forfeiture of the lease; (4) that the action could be maintained without a prior forfeiture of the grant or lease by legislative or judicial proceedings; (5) in the admission of certain testimony; and (6) in rendering judgment for the plaintiff upon the agreed facts and the facts found.

From the facts agreed and found, it appears that the United States is the owner in fee simple of the land in question, having acquired title by cession from Spain under the Treaty of Paris; that the military easements affecting the enjoyment and occupation of the land ceased in 1897; that the government officials of the United States in 1912 decided to increase the annual rental to $4,980, and, prior to June 30, 1912, duly notified the defendant that the rent would be increased to such sum from and after July 1, 1912; that the defendant refused to pay the rent as increased, or to recognize the right of the United States to demand such increase; that the yearly rental previously established by the Spanish government was 156.78 pesos, which sum Ubarri and the defendant paid yearly to the proper governmental authorities down to June 30, 1912, and thereafter annually tendered that sum.

[1, 2] In the view we take of the case, if it be assumed that ejectment is the proper remedy, that the plaintiff had the right to increase the rent, that the sum to which it was increased was reasonable, and that, under the civil law, a right to forfeit a lease for breach of a covenant to pay rent may exist, although no proviso or condition giving a right of re-entry is reserved in the lease or otherwise provided for, this suit cannot be maintained unless Congress, in whom alone the power resides, has exercised the right of election vested in the government to declare a forfeiture.

The lease did not contain a proviso permitting re-entry upon the failure of the lessee to pay the rent which it impliedly covenanted to pay (Beal v. Bass, 86 Me. 325, 29 Atl. 1088; Hodgkins v. Price, 137 Mass. 13, 17; People v. Gilbert, 64 Ill. App. 203; Spear v. Fuller, 8 N. H. 174, 28 Am. Dec. 391; 1 Washburn on Real Property, §§ 655, 656, 657; 24 Cyc. pp. 1348, 1349), or provide that payment of the rent should be a condition to the continuance of the lessee's rights under the lease, as required by the common law to entitle a lessor to enforce a forfeiture (Jackson v. Allen, 3 Cow. (N. Y.) 220, 227; Atlantic & Pacific Railroad v. Mingus, 165 U. S. 413, 428, 17 Sup. Ct. 348, 41 L. Ed. 770). But the Revised Statutes and Codes of Porto Rico provide:

"(4578) Sec. 1472. The lessor may judicially dispossess the lessee for any of the following causes: * * *

"2. Default in payment of the price agreed upon."

And, if this means that, under the civil law a breach of covenant to pay rent may be availed of to enforce a forfeiture without reserving a right of re-entry or making the payment of the rent a condition to the continuance of the lease, it would seem that the government, notwithstanding the absence of the foregoing provisions in the lease, might avail itself of a right to enforce a forfeiture provided it took the proper steps to do so.

The breach of a condition or of a covenant with a right of re-entry does not ipso facto work a forfeiture of a lease; it merely subjects the grantee or lessee to a liability to have a forfeiture declared. It is at the election of the lessor to say whether he will avail himself of the breach and declare a forfeiture or not, and, where the lessor is an individual, he is the party to make the election, and, where the lessor is the United States, it devolves upon Congress to exercise the power. In the latter case, the power to declare a forfeiture residing solely in Congress, its election so to do must be manifested in a legislative act. While there may be some doubt from the expressions used in the decided cases as to what action on the part of Congress may be sufficient to manifest an intention to declare a forfeiture, there can be no doubt that some legislative action is necessary for this purpose. United States v. De Repentigny, 5 Wall. 211, 268, 18 L. Ed. 627; Schulenberg v. Harriman, 21 Wall. 44, 63, 22 L. Ed. 551; St. Louis, Iron Mountain, etc., Ry. Co. v. McGee, 115 U. S. 469, 6 Sup. Ct. 123, 29 L. Ed. 446; New York Indians v. United States, 170 U. S. 1, 24, 18 Sup. Ct. 531, 42 L. Ed. 927; Spokane, etc., Ry. v. Washington & Great Northern Ry. Co., 219 U. S. 166, 173, 31 Sup. Ct. 182, 55 L. Ed. 159. See, also, United States v. Washington Improvement Co. (C. C.) 189 Fed. 674. In this case it does not appear that any legislative action looking to the declaration of a forfeiture has been taken by Congress, and, such being the situation, the present action cannot be maintained.

[3] It should perhaps also be stated that we are of the opinion that there is another insuperable objection to the maintenance of the action. The right reserved in the lease to increase the rent upon the cessation of the military easements contemplated a reasonable increase in the rental due to the increased value of the occupation and enjoyment of the land on the cessation of those easements. The District Court found that the reasonable value of the land after the removal of the military easements did not exceed $30 or $40 per square meter, and that a reasonable rental would be 5 per cent. of the valuation thus determined. The reasonable rental based on these figures for the 1,248.24 square meters of land here in controversy would be $2,496.48, or practically one half the rental demanded. The court below construed the stipulation of the parties in the case that the defendant "refused to pay said rent or to recognize the right of the United States to demand such increase," as a denial of the right of the government to increase the rent and a refusal on the part of the defendant to pay any increased

rental whatsoever, and that such being the case it was in default whether the increase was reasonable or otherwise. We, however, think that the stipulation does not warrant such a construction; that it means rather that the defendant did not question the right of the government to increase the rental, but that the amount to which it had increased it was unreasonable and in excess of its right; and, this being so, the refusal to pay the sum demanded would not put the defendant in default and entitle the plaintiff to assert a forfeiture.

The judgment of the District Court is reversed, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

PANAMA ELECTRIC RY. CO. v. MOYERS.

(Circuit Court of Appeals, Fifth Circuit. March 18, 1918.)

No. 3124.

1. VENUE ⊂=8—TRANSITORY ACTIONS.
   An action for damages for injuries to an automobile from collision with an electric car is transitory, and, though it arose in Panama, the district court of the Canal Zone has jurisdiction, regardless of the citizenship of the parties, where service might be had on the defendant within the Zone.
2. STATUTES ⊂=281—PLEADING—FOREIGN LAWS—WHAT LAW GOVERNS.
   The lex fori is decisive as to the necessity and manner of pleading foreign laws on which a transitory action is based.
3. EVIDENCE ⊂=37—FOREIGN LAWS—PROOF.
   Foreign laws are facts, and must, like other facts, be proven.
4. EVIDENCE ⊂=81—PRESUMPTIONS—FOREIGN LAWS.
   While a court of a common-law country may presume that the laws of a foreign country which are of common-law origin are the same as those of the forum, there is no such presumption with respect to the laws of a country having their origin in the civil, instead of the common, law.
5. EVIDENCE ⊂=37—FAMILIARITY OF COURT WITH FOREIGN LAW.
   In action in the district court for the Canal Zone for damages from collision occurring in Panama, plaintiff's failure to introduce evidence of the law of Panama could not be excused because of familiarity of the trial judge with Panama law, for familiarity of the trial judge with the facts of the case being tried before him does not render unnecessary the introduction of evidence.
6. STATUTES ⊂=290—EVIDENCE—ADMISSIBILITY.
   In such action, the exclusion of evidence as to the laws of Panama and facts which were pleaded by defendant as being a defense under those laws is improper.

In Error to the District Court of the Canal Zone; Wm. H. Jackson, Judge.

Action by H. G. Moyers against the Panama Electric Railway Company. There was a judgment for plaintiff, and defendant brings error. Reversed and remanded.

Theodore C. Hinckley and Stevens Ganson, both of Panama, Republic of Panama, for plaintiff in error.

Wm. C. MacIntyre and E. M. Robinson, both of Cristobal, Canal Zone, for defendant in error.

Before PARDEE, WALKER, and BATTS, Circuit Judges.

BATTS, Circuit Judge. Plaintiff (H. G. Moyers, defendant in error) instituted suit against defendant (the Panama Electric Company, plaintiff in error) in the United States District Court of the Canal Zone, for damages in the amount of $1,500 for injuries to an automobile, occasioned by a collision in Panama with a car of defendant. It is alleged that plaintiff was a resident of the city of Panama, republic of Panama, and that the defendant company is a common carrier of passengers between Balboa, Canal Zone, and the city of Panama, and that it was doing business in the Canal Zone, and had property within the jurisdiction of the court. There is no allegation as to the citizenship of the plaintiff or defendant. The defendant entered a plea to the jurisdiction, alleging that the court had no jurisdiction over the defendant in personam, nor of the subject-matter of the action.

[1] There are many excellent reasons why the courts of the Canal Zone should not take jurisdiction of cases arising in Panama, especially where it is not shown that either party is a citizen of the United States. The courts of Panama are easily accessible, and, it must be assumed, better qualified to determine and apply the laws of that country than are the courts of the United States. While this is true, the authorities seem to establish that the courts of the Canal Zone are not without jurisdiction of cases of the kind here involved. The action is one known as transitory, and the rule appears to be that courts anywhere will entertain jurisdiction if service may be had upon the defendant. It is true that, in most of the cases in which such jurisdiction has been exercised, one or both of the parties have been citizens of the country in which the suit is brought; but the law as stated in the cases would not seem to regard the matter of citizenship as controlling. Dennick v. Railroad Co., 103 U. S. 11, 26 L. Ed. 439; Railroad Co. v. Crosby, 222 U. S. 473, 32 Sup. Ct. 132, 56 L. Ed. 274, 38 L. R. A. (N. S.) 40; Evey v. Mexican Central Ry. Co., 81 Fed. 294, 26 C. C. A. 407, 38 L. R. A. 387; Slater v. Mexican Nat. Ry. Co., 194 U. S. 120, 24 Sup. Ct. 581, 48 L. Ed. 900; s. c., 115 Fed. 593, 53 C. C. A. 239; Stewart v. B. & O. R. R. Co., 168 U. S. 448, 18 Sup. Ct. 105, 42 L. Ed. 537.

[2] The complaint of plaintiff does not set up the law of Panama applicable to the alleged facts, nor was any evidence introduced by him with reference to the law of that country. At the conclusion of the introduction of evidence by the plaintiff, the defendant made a motion to dismiss on the ground:

> That "the plaintiff had failed to prove a prima facie case; plaintiff had failed to establish by evidence the law of the republic of Panama, which was the lex loci delicti; that it was not proved that the evidence as introduced by the plaintiff under the laws entitled him to recover against the defendant."

In Liverpool Steam Co. v. Phœnix Ins. Co., 129 U. S. 445, 9 Sup. Ct. 469, 32 L. Ed. 788, it is held:

> "The rule that the courts of one country cannot take cognizance of the law of another without plea and proof has been constantly maintained, at law and in equity, in England and America."

Authorities are cited.

The rule as thus laid down is subject, in so far as pleading is concerned, to the general rules of pleading of the forum. When the lex

fori does not require other facts under like circumstances to be pleaded, the foreign law need not be pleaded as a fact.

[3, 4] As to proof of foreign laws, the general rule as stated is maintained. Like other facts, foreign laws must be proved. Certain presumptions, however, are sometimes indulged, and some limitations and modifications have been recognized. Where, for instance, the foreign country whose law is being applied is of common-law origin, the common-law country exercising jurisdiction may assume the foreign law to be the same as its own, in the absence of something indicating the contrary. Further limitations are suggested and the general law stated in Cuba R. R. Co. v. Crosby, 222 U. S. 477, 32 Sup. Ct. 132, 56 L. Ed. 274, 38 L. R. A. (N. S.) 40. In this case damages were sought for the loss of a hand through defect in machinery, the accident occurring in Cuba. No evidence was given as to the Cuban law, the trial judge holding that, if the law was different from the lex fori, it was for the defendant to allege and prove it. The Supreme Court says:

"It may be that, in dealing with rudimentary contracts or torts made or committed abroad, * * * courts would assume a liability to exist if nothing to the contrary appeared. * * * Such matters are likely to impose an obligation in all civilized countries. * * * With very rare exceptions, the liabilities of parties to each other are fixed by the law of the territorial jurisdiction within which the wrong is done and the parties are at the time of doing it. * * * The only justification for allowing a party to recover when the cause of action arose in another civilized jurisdiction is a well-founded belief that it was a cause of action in that place. The right to recover stands upon that as its necessary foundation. It is a part of the plaintiff's case, and if there is reason for doubt he must allege and prove it. * * * In the case at bar the court was dealing with the law of Cuba, a country inheriting the law of Spain and, we may presume, continuing it with such modifications as later years may have brought. There is no general presumption that the law is the same as the common law. We properly may say that we all know the fact to be otherwise. * * * Whatever presumption there is is purely one of fact, that may be corrected by proof. Therefore the presumption should be limited to cases in which it reasonably may be believed to express the fact."

The action in the instant case of the trial judge in his rulings with reference to the proof of the laws of Panama is defended upon the ground that the Canal Zone had been a part of the republic of Panama, and that—

"the laws of Panama, because they are the laws of that country, are the laws of the Canal Zone, and the courts of the Canal Zone have been construing those laws in the Canal Zone, and following the principles of Columbian and Panamanian jurisprudence since 1904."

It is true that the laws applicable to the territory now constituting the Canal Zone, and to the territory constituting the republic of Panama, were the same. It is not, however, true that the laws are now the same. Since 1904 changes have been made, both in the laws of Panama and the laws of the Canal Zone. If, as stated by counsel, courts of the Canal Zone have been construing the laws of Panama since 1904, it is to be assumed that they have construed them only when the laws have been properly before them as evidence.

[5] It is sought to excuse introduction of evidence of the law of Panama on the ground of familiarity of the trial judge with the juris-

prudence of that country. Familiarity of the trial judge with the facts of the case being tried before him does not render unnecessary the introduction of evidence. It is quite possible that the trial judge could have qualified as an expert in the laws of Panama; his testimony with reference thereto would, in that event, have been admissible, but he was not called upon to testify.

It appears from the answer of the defendant that part of the applicable law was contained in certain provisions of the Code of Panama and some articles of the Police Code of that country. Indeed, the trial judge stated in his charge that the plaintiff's cause of action was based upon a provision of the Panama Code which he cited. It is apparent from the statement of the trial judge, and the pleadings of the defendant and evidence offered by it, that the cause of action and the defense to it were to be governed by written provisions of the laws of Panama, and the construction given to these laws in that country.

[6] The defendant offered as a witness a practicing lawyer in the republic of Panama, who had for seven years been a justice of the Supreme Court of that republic. He was asked a question with reference to a decree, which apparently had the force of law, regulating the running of electric cars and vehicles crossing the tramway. The question was objected to, the ground of objection not being stated. The objection was sustained. The trial judge, in his charge to the jury, states that the plaintiff was not precluded from a recovery on account of the ordinance referred to, and says:

"And for this reason I prohibited Judge De la Guardia from giving his opinion as to whether or not that would preclude the plaintiff in a civil action in the republic of Panama from recovering, because that must depend upon the circumstances."

The question was doubtless objectionable in form. After this objection had been sustained, counsel for the defendant made the following tender:

"May it please the court: This is a case involving the construction and interpretation of the law of the republic of Panama. The proper construction of that law is a charge upon this court. This is a transitory action; lex loci delicti governs; the collision occurred in the republic of Panama; both parties, plaintiff and defendant, are residents of Panama and do business there; we now propose to show as a fact that by the law of Panama, and the construction of that law by the courts of last resort of that republic, one who violates the provisions of Executive Decree 163 of December, 1904, is precluded from recovery against a defendant in an action of this nature for damages. We now tender evidence to show that this plaintiff, under the law of Panama, and the construction of that law by the courts of Panama, under the facts as testified to in this case, would be precluded from recovery; and we further tender evidence of Judge Guardia to show that there is no right of action against a corporation for damages for negligence under the laws of Panama, and the construction thereof by the courts of Panama, when the employés who caused the damage were carefully instructed in their duties, and the corporation exercised due care and diligence in their employment."

The court refused to hear the evidence, stating:

"To permit the introduction of such evidence would be to delegate to this witness the right to pass upon the issues involved in this case. The plaintiff's objection is therefore sustained."

In addition to pleading the decree referred to, defendant set up as matters of defense:

"That the defendant, at all times, has exercised due care and diligence in the selection of its employés, and that all employés of said defendant company are competent and faithful servants of the defendant company, and that they had at all times used due care and diligence in the performance of the duties intrusted to them."

The tender of evidence by the defendant was responsive to its pleading, and it was entitled to at least some of the evidence tendered. Slater v. Mexican National Ry. Co., 194 U. S. 120, 24 Sup. Ct. 581, 48 L. Ed. 900.

The conclusion reached with reference to the rejection of this evidence renders it unnecessary to consider the other assignments of error. The judgment is reversed, and the cause remanded.

Reversed and remanded.

SCATTERGOOD et al. v. AMERICAN PIPE & CONSTRUCTION CO.

Appeal of HITCHCOCK.

(Circuit Court of Appeals, Third Circuit. March 29, 1918. Rehearing Denied April 22, 1918.)

No. 2336.

1. COURTS ⟸276—UNITED STATES COURTS—DISTRICT FOR BRINGING SUIT—WAIVER OF OBJECTIONS BY APPEARANCE.
   Where a petition for the appointment of a receiver of a foreign corporation was filed in the federal District Court for the state wherein it was doing its principal business, the corporation's voluntary appearance and filing of an answer cured any objections on the ground of want of jurisdiction of its person.
2. CORPORATIONS ⟸557(½)—RECEIVER—APPOINTMENT—DISMISSAL OF BILL.
   A bill seeking the appointment of a corporate receiver should be dismissed by the court on its own motion, when it appears that the court is without jurisdiction, regardless of how knowledge of that fact may be acquired.
3. COURTS ⟸262(3)—UNITED STATES COURTS—RECEIVER—APPOINTMENT—JURISDICTION.
   A New Jersey corporation, which controlled many subsidiary public service corporations, continuously carried on its principal business in Pennsylvania. Its most important subsidiaries were chartered by that state, and their plants located therein. The New Jersey company became embarrassed and on petition by stockholders a receiver was appointed by the district federal court for Pennsylvania, the appointment being consented to by a majority of the stockholders and creditors. Nearly all of the creditors were residents of Pennsylvania. *Held*, in view of the power exercised by the Pennsylvania state courts, the district court had jurisdiction to appoint a temporary receiver for the purpose of protecting the corporation, its subsidiaries and the public.
4. COURTS ⟸263—UNITED STATES COURTS—RECEIVER—ORDER OF APPOINTMENT—JURISDICTION.
   Where the federal District Court had jurisdiction of the subject-matter, warranting the appointment of a receiver of an embarrassed corporation, it had authority to decide all questions arising therein and its rulings could be questioned only by those properly parties.

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5. CORPORATIONS ⇐556—RECEIVER—INTERVENTION—APPOINTMENT.
Where the court appointing a receiver of a financially embarrassed corporation had jurisdiction of the subject-matter and the corporation, a stockholder cannot, merely by virtue of his interest as such, intervene and attack the appointment.

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

Bill by Alfred G. Scattergood and others against the American Pipe & Construction Company, in which a receiver was appointed. Thereafter Charles A. Hitchcock filed a petition in intervention, which was denied, and he appeals. Affirmed.

Horace L. Cheyney and Runyon & Autenrieth, all of New York City, for appellant.

Francis B. Bracken and Walter George Smith, both of Philadelphia, Pa., for appellees.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. The following facts—we state them in outline merely—were before the District Judge in December, 1917, when he refused the intervener's petition to dismiss the bill, or to vacate the receiver's appointment:

In September, 1917, the American Pipe & Construction Company, a New Jersey corporation, with an issued capital of $5,000,000, controlled and managed 17 subsidiary companies, and was affiliated with 6 others, all of the 23 being public utility corporations, mainly for the purpose of supplying water to municipalities in several states. It owned all the stock of the subsidiaries, and a substantial amount in each of those affiliated, as well as about $4,000,000 of bonds issued by one or another of these two classes. The management of the subsidiaries had obliged it to assume liabilities, and to make advances, both in large sums. Part of the company's business is to do construction work by contract, and when the bill was filed several contracts were in hand unfinished. Its direct liabilities also were large, and defaults on these and on its contingent liabilities—such as guaranteed bonds—were sure to occur before long. Under conditions then existing in the money market, it could not borrow money or sell its own securities, but if the contracts could be finished considerable profit was likely, and this would help the company to meet its obligations and would benefit its security holders and other creditors. The bill set out these facts and averred that as all the allied companies were public utility corporations, they should be maintained as going concerns so that the public should not lose their services, and, moreover, that to allow creditors to resort to legal process would immediately break up the company's business and sacrifice its assets. Insolvency was not charged, but the plaintiffs, who were two of the stockholders, asked the court to interpose, so that creditors and stockholders might be saved from severe or total loss, and the public might be saved from the loss of service that the company through its subsidiaries was then

furnishing. The directors took action, and this resulted in a voluntary appearance, with an answer admitting the averments of the bill and praying for such a decree as might be just and equitable.

On September 22, 1917, the District Court appointed the company's president as temporary receiver, and a month later (with the approval of a considerable majority of the stockholders, and of a large number of creditors, nearly all the latter being residents of Pennsylvania) made the appointment permanent, authorizing the receiver to take possession of the company's property, to continue the business substantially as before, and to complete the existing contracts of construction with power to borrow money for this purpose. The decree enjoined the company and its officers from interfering with the receiver in carrying out its provisions. On October 31 Charles A. Hitchcock, the appellant, filed a petition averring that he was a stockholder, and had filed a bill in the United States court for the district of New Jersey, wherein he was asking for a receiver under the laws of that state on the ground of the company's insolvency; and he asserted further that as the company's charter was granted by New Jersey the District Court in Pennsylvania had no power to appoint a general receiver. He therefore sought to intervene as a defendant, in order to move for the vacation of the appointment and the dismissal of the bill. To this petition the plaintiffs and the company made answer, denying the court's lack of power to appoint, and averring facts to justify a suit in the Pennsylvania district, namely, the continuous maintenance in Philadelphia of the company's principal business, the chartering by Pennsylvania of its most important subsidiaries and the location of their plants in that state, the residence in Pennsylvania of nearly all the company's creditors, and the request or approval of a majority of its stockholders and creditors that the court below should make the order complained of. The District Court sustained the jurisdiction and refused Hitchcock's petition.

[1-3] That the court below had jurisdiction of the company's person is apparent; whatever objection on that ground may have existed was waived by the voluntary appearance and the answer. Central Trust Co. v. McGeorge, 151 U. S. 129, 14 Sup. Ct. 286, 38 L. Ed. 98. Indeed, the appellant concedes the correctness of this position, and bases his attack mainly on a denial of the court's power over the subject-matter of the bill, namely, the appointment of a receiver for a foreign corporation. We shall assume that the appellant has sufficient standing to urge this objection; and in any event, if in truth there is no jurisdiction of the subject-matter, either the District Court or this court would be bound to take note of that fact (however the knowledge might be acquired), and to dismiss the bill of its own motion. Upon this question we think the silence of the Supreme Court in Trust Co. v. McGeorge may fairly be allowed a good deal of weight. The facts there resemble closely the facts now before us. A New Jersey corporation was sued by a New York plaintiff in the United States court for the Western district of Virginia. The corporation carried on business in Virginia, owned property there, and was the main and substantial defendant, altho two other companies were involved in the litigation. It had voluntarily appeared and con-

sented to the appointment of a receiver, and the effect of the appearance and answer was the question decided; but the jurisdiction of the court over the subject-matter—the appointment of a receiver for a foreign corporation under the circumstances described—was so plainly presented on the surface of the cause that we can scarcely believe it could have been overlooked. Apparently, although the right of the lower court to appoint, where the corporation was properly before it and where the principal business and much of the property were also within the district, was not discussed by the Supreme Court, no one questioned the right either in the court below, or on the appeal. See, also, Lewis v. American Naval Stores Co. (C. C.) 119 Fed. 391.

But, without relying on the inference from these cases, let us consider the question on its merits. Under facts like the foregoing, does a District Court in Pennsylvania have power to appoint a receiver for a foreign corporation? In our opinion the answer should be yes; the reason being that the law of the state as interpreted by its highest tribunal has given that power to the local courts, and therefore according to the established rule a similar power may be exercised by the federal courts within the state. Clark v. Smith, 13 Pet. 195, 10 L. Ed. 123; and citations in 3 Rose's Notes (Rev. Ed.) 399. Among the Pennsylvania cases may be mentioned Bank v. Construction Co., 242 Pa. 269, 89 Atl. 76, where the state courts exercised jurisdiction over a New Jersey corporation "with a principal office in Philadelphia, engaged largely in building railroads and in public contracts," settled its affairs, and wound up its business; and Blum Bros. v. Girard Bank, 248 Pa. 148, 93 Atl. 940, Ann. Cas. 1916D, 609, where the common pleas court appointed receivers for a New Jersey corporation doing a mercantile business in Philadelphia, although the bill averred that the corporation was solvent, being in possession of assets far in excess of its liabilities, but was temporarily embarrassed by reason of a stringent money market and other circumstances. In the latter case the Supreme Court maintains the right to appoint receivers in the case of embarrassed corporations (making no distinction between domestic and foreign), and says:

"The right to appoint receivers has belonged to courts of chancery from a very early time (Power v. Grogan, 232 Pa. 387–394 [81 Atl. 416]). With us it has been uniformly exercised in cases of embarrassed corporations, and this course has had statutory authority, at least, since the Act of June 16, 1836, P. L. 789 (section 13, paragraph V), which confers on the courts of common pleas the supervision and control over corporations. * * * Many of our decisions recognize the right of a court of equity, in a proper case, to appoint receivers for a financially embarrassed trading corporation, and, if it proves insolvent, to distribute the assets for the benefit of creditors and to others ultimately entitled thereto."

[4, 5] We think these references are enough to show that a Pennsylvania court (and therefore a federal court sitting within the state) may entertain a bill to appoint receivers for a corporation financially embarrassed; and, if this be true, the District Court had jurisdiction of the subject-matter of the present bill as well as of the defendant's person. Having thus complete jurisdiction over the cause, it had authority to decide all questions arising therein, and its rulings can be questioned only by those properly parties to the dispute. Among

such parties we do not think the appellant is to be reckoned. The sole ground for his effort to interfere is that he is a stockholder; but, as the company has voluntarily submitted its person and the subject-matter of the suit to a tribunal having jurisdiction in both respects, we do not see by what right a single stockholder relying merely on that character can attack such valid and voluntary action, and can successfully undertake to conduct the proceeding as if he and not the company were the real defendant. For example, much of his argument objects to the bill as if it had been before the court on demurrer.

We do not think our conclusion is in real conflict with Maguire v. Mortgage Co., 203 Fed. 858, 122 C. C. A. 83, where the Court of Appeals for the Second Circuit recognizes that if state statutes "provide for the liquidation of the affairs of corporations through receivers * * * the courts within the appropriate jurisdictions may enforce them." But no such statute was there presented, and this we think sufficiently distinguishes the case now before us.

The order of the District Court is affirmed.

CAMP BIRD, Limited, v. HOWBERT, Collector of Internal Revenue.

(Circuit Court of Appeals, Eighth Circuit. February 1, 1918.)

No. 4939.

1. INTERNAL REVENUE ⟸38—CORPORATION TAXES—ADDITIONAL ASSESSMENT —RECOVERY.

   In view of the fact that it was enacted as part of the legislation imposing a general system of internal revenue to meet the financial burdens of the Civil War, Rev. St. § 3225 (Comp. St. 1916, § 5948), declaring that, when a second assessment is made, in case of any list, statement, or return which in the opinion of the collector was false or fraudulent, or contained any understatement or undervaluation, no taxes collected under such assessment shall be recovered, unless the list, statement, or return was not false or fraudulent, and did not contain any understatement or undervaluation, in its application to taxes collected under Corporation Tax Act Aug. 5, 1909, c. 6, 36 Stat. 112, does not authorize the recovery of sums paid on a second assessment, where the return was false, but not fraudulent.

2. INTERNAL REVENUE ⟸2—EXCISE TAXES—AUTHORITY OF CONGRESS—UNIFORM.

   The only limitation on the power of Congress in the imposition of excise taxes, such as those imposed on corporations, is that they be uniform throughout the United States, and by that is meant a geographical uniformity.

3. INTERNAL REVENUE ⟸2—VALIDITY OF STATUTE—CONFISCATION.

   Rev. St. § 3225 (Comp. St. 1916, § 5948), relating to internal revenue, and forbidding recovery of amounts paid on a second assessment, where the return was false or fraudulent, is not invalid in its applicability to the Corporation Tax Act, for it does not destroy uniformity of taxation, applying to all portions of the country alike.

4. INTERNAL REVENUE ⟸38—EXCISE TAXES—CORPORATION TAXES.

   As the Corporation Tax Act imposes an excise tax, and declares that all laws relating to the collection, remission, and refund of internal revenue taxes so far as applicable shall apply, Rev. St. § 3225 (Comp.

St. 1916, § 5948), which is part of the law relating to the refund of internal revenue taxes, and forbids the return of taxes collected on a second assessment, where the return was false or fraudulent, applies.

5. INTERNAL REVENUE ⟸4—AMENDMENT—RETROACTIVE EFFECT.
The amendment to Rev. St. § 3225 (Comp. St. 1916, § 5948), declaring that the section shall apply to statements or returns made in good faith regarding the annual depreciation of oil and gas wells and mines, is not retroactive, and does not authorize recovery of corporation taxes previously collected from a mining company on a second assessment, where the first return was false.

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

Action by the Camp Bird, Limited, a corporation, against Frank W. Howbert, as Collector of Internal Revenue. There was a judgment for defendant, and plaintiff brings error. Affirmed.

George L. Nye, of Denver, Colo., and William Story, Jr., of Ouray, Colo. (W. V. Hodges, of Denver, Colo., on the brief), for plaintiff in error.

John A. Gordon, Asst. U. S. Atty., of Denver, Colo. (Harry B. Tedrow, U. S. Atty., of Denver, Colo., on the brief), for defendant in error.

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

MUNGER, District Judge. This action was brought by plaintiff in error, hereafter called plaintiff, against defendant in error, as collector of internal revenue of the United States for the district of Colorado, hereafter called defendant. The object of the action was to recover sums of money that plaintiff had paid to defendant as an internal revenue tax. A jury was waived, and the trial court entered judgment upon special findings of facts, dismissing plaintiff's action.

Briefly stated, the court found that the plaintiff was the owner of valuable and productive mining property in Colorado, after the year 1902, and that it made a return for each of the years 1909, 1910, and 1911 to the collector of internal revenue, purporting to set forth its income for each of those years, under the provisions of the act of Congress approved August 5, 1909 (36 Stat. 112, c. 6), relating to an excise tax on corporations. In these returns the plaintiff stated the items of charge and credit and the net annual income which it considered subject to the tax. The Commissioner of Internal Revenue found that deductions claimed in each of these returns had been overstated, and that the amount subject to the tax had been understated, and made additional assessments against the plaintiff and notified it of his action. The plaintiff, under protest, paid the additional taxes levied. An application to the Commissioner of Internal Revenue for an abatement of the additional tax was denied by the Commissioner, and this action was then begun. While the court found that the plaintiff had understated its net income upon which it was required to pay the excise tax, it was further found that the understatement was not made

fraudulently, knowingly, willfully, nor for the purpose of defrauding the United States, but was made in good faith and with the belief that the figures presented stated the facts. The only question in the case is whether the judgment is supported by these findings.

[1] Section 3225 of the Revised Statutes (Comp. St. 1916, § 5948), as it existed at the time these taxes were levied and collected, was as follows:

"When a second assessment is made in case of any list, statement, or return, which in the opinion of the collector or deputy collector was false or fraudulent, or contained any understatement or undervaluation, no taxes 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."

It is contended that this section was meant to be applied only to those who intentionally made false statements or undervaluations, because when this act was passed an accurate statement of the facts required in returns by taxpayers could be made, whereas returns under the corporation tax law necessarily must be estimates.

By the acts of Congress approved June 30, 1864 (13 Stat. 223, c. 173), as amended and supplemented by the acts of Congress of March 3, 1865 (13 Stat. 469, c. 78), of July 13, 1866 (14 Stat. 98, c 184), and March 2, 1867 (14 Stat. 471, c. 169), a general system of internal revenue was provided to meet the financial burdens imposed by the Civil War. Taxes were imposed generally upon property, occupations, industries, and incomes. Many classes of persons subject to taxation were required to make sworn lists or returns of property subject to the tax. The values of property were to be reported and amounts of net income, and the accurate statement of many of the items required were quite as difficult as the ascertainment of the required items under the present corporation tax. Section 14 gave the assessor power to summon a declarant and to examine him and his books, if in his opinion the return was either false or fraudulent, or contained any understatement or undervaluation. If the return was false or fraudulent, the assessor was required to increase the tax by 100 per cent. An unexcused neglect or refusal to make or to verify a list was penalized by the addition of 50 per cent. to the tax. By section 20 the assessor was empowered to fix the amount of additional tax to be paid, when there had been an omission, understatement, undervaluation, or false or fraudulent statement. Section 44 authorized the Commissioner of Internal Revenue to refund excessive taxes collected, and to repay to collectors amounts recovered in court against them for taxes collected by them, but provided that no taxes should be recovered, refunded, or paid back, where a second assessment had been made because the first list had been, in the opinion of the assessor, either false, fraudulent, or contained any understatement or undervaluation, unless it was proved that the return was not false or fraudulent, or did not contain any understatement or undervaluation.

The substance of these enactments has continued in force ever since. See Rev. St. §§ 3173, 3176, 3182, 3220, 3225; U. S. Comp. Stats. Ann. §§ 5896, 5899, 5904, 5944, 5948. They evince a discriminating use of

terms as between false and fraudulent returns and those that contain only an understatement or valuation, and provide remedies and penalties apportioned to the several delinquencies. The mere undervaluation or understatement in a return is made a basis for summoning the delinquent to appear and be examined, and a basis also for imposing an additional assessment, and prevents the Commissioner of Internal Revenue from making a refund or remission of taxes. The further provision found in section 3225 of the Revised Statutes, denying recovery by suit of any tax imposed under a second assessment, because in the opinion of the collector or his deputy the former return was false or fraudulent, or contained an understatement or undervaluation, unless it is proved that the prior list was not false nor fraudulent, nor contained any understatement or undervaluation is in harmony with these provisions, and manifests the intention of Congress that no recovery may be had although the undervaluation or understatement was made unintentionally. See Bergdoll v. Pollock, 95 U. S. 337, 24 L. Ed. 512.

[2, 3] The proposition is advanced that this construction of section 3225 renders it violative of the Constitution, as it would result in the confiscation of plaintiff's property. It is well settled that this corporation tax act imposed an excise tax, and the only limitation on the power of Congress in the imposition of excise taxes is that they shall be uniform throughout the United States. United States v. Singer, 15 Wall. 111, 121, 21 L. Ed. 49; Pacific Insurance Co. v. Soule, 7 Wall. 433, 446, 19 L. Ed. 95. By this a geographical uniformity is meant. Flint v. Stone Tracy Co., 220 U. S. 107, 31 Sup. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312. The provisions laying an additional tax proportionate to the property omitted from the list, on all who make any understatement or undervaluation, operates uniformly on all of that class of persons wherever found, and hence was within the power of Congress. The refusal of a right of action to recover such taxes, unless proof is made that there was no understatement or undervaluation, is likewise within the scope of the legislative power.

[4] It is claimed that section 3225, Rev. St., does not apply to the suit for the recovery of taxes collected under the corporation tax of 1909. This section applies to internal revenue taxes generally and the corporation tax is one embraced in that class. In addition the corporation tax law contained a clause as follows (page 951, Supp. to U. S. Comp. Stats. 1911):

"All laws relating to the collection, remission, and refund of internal revenue taxes, so far as applicable to and not inconsistent with the provisions of this section, are hereby extended and made applicable to the tax imposed by this section."

We think that section 3225, Rev. Stats., is a part of the laws relating to the refund of internal revenue taxes, as section 3220, Rev. St., provides that the Commissioner of Internal Revenue is authorized to refund to the collector any amount that may be recovered against him in any court for any internal taxes collected by him.

[5] Plaintiff also contends that the judgment is erroneous because, after final judgment was entered in this case, Congress enacted an

amendment to section 3225, Rev. St., which reads (page 6984, 6 U. S. Comp. Stats. Ann.):

"* * * But this section shall not apply to statements or returns made or to be made in good faith under the laws of the United States regarding annual depreciation of oil or gas wells and mines."

This statute does not purport to be retroactive in its operation, and hence cannot affect the judgment in this case. This disposes of all questions that require consideration.

The judgment will be affirmed.

CROCKER v. INGERSOLL ENGINEERING & CONSTRUCTING CO.

(Circuit Court of Appeals, Sixth Circuit. February 11, 1918.)

No. 3062.

1. DEEDS ⟸173—RESTRICTIONS—ENFORCEMENT.
Where a grantor subdivided his lands and disposed of them to numerous grantees, and the several deeds all contained a restrictive covenant in the nature of a condition subsequent, allowing the grantor to re-enter in event of breach, the restriction must be deemed for the benefit of the several grantees, and can be enforced by them, though the grantor had lost his right of re-entry.

2. INJUNCTION ⟸62(1)—RESTRICTIVE COVENANTS.
Injunction is an appropriate remedy to enforce a restrictive covenant imposed on lands by the common grantor for the benefit of his several grantees.

3. DEEDS ⟸176—RESTRICTIONS—ENFORCEMENT.
The running of limitations against the right of a grantor to enforce a restrictive covenant in the nature of a condition subsequent does not show that the grantee had freed his property from the incumbrance of the restriction, where it was enforceable by other grantees of the same grantor, whose number exceeded 100, for limitations available against the grantor might well not be available against all the grantees or their successors.

4. VENDOR AND PURCHASER ⟸138—TITLE—KNOWLEDGE BY PURCHASER.
Though the purchaser relied on its own title examination when it contracted, and there was no fraud or misleading by the vendor, yet an action for damages on account of the vendor's inability to convey title as agreed cannot be defeated, unless the purchaser knew of the particular defect when it contracted.

5. VENDOR AND PURCHASER ⟸351(10)—DAMAGES—INTEREST AND RENTAL.
Where a vendor's title proved defective, the purchaser, who had been admitted into possession, should not be allowed to recover interest on purchase-money payments, without being charged with the rental value of the premises while it had possession.

6. APPEAL AND ERROR ⟸269, 719(9)—REVIEW—ASSIGNMENT OF ERROR.
Where, in an action by a purchaser for damages on account of the vendor's inability to convey title as agreed, there was an error in favor of the purchaser in the assessment of damage, such error, not having been assigned, will not be considered, under rule 11 (198 Fed. xxii, 115 C. C. A. xxii); it appearing that it was more than counterbalanced by reason of the vendor's forfeiture of improvements placed on the premises by the purchaser.

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7. ACTION ⊂=53(2)—SPLITTING CAUSE OF ACTION.
Where a purchaser, after being admitted into possession, defaulted, and the vendor forfeited the contract, such purchaser, having recovered damages on account of the vendor's inability to convey the title as agreed, cannot thereafter recover on account of improvements which it placed on the premises, for a cause of action cannot be split.

8. EQUITY ⊂=65(2)—EQUITABLE RELIEF—RIGHT TO.
Where a purchaser of land, having been admitted into possession, defaulted in payment and allowed the vendor to forfeit the contract, without informing him as to the trouble with the title, such purchaser is not entitled to equitable aid on account of improvements placed on the premises, which by reason of the forfeiture became the property of the vendor.

In Error to the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge.

Action by the Ingersoll Engineering & Constructing Company against Martin Crocker. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Martin Crocker, of Mt. Clemens, Mich. (F. D. Eaman, of Detroit, Mich., of counsel), for plaintiff in error.

Gifford K. Wright, of Pittsburgh, Pa., and Fritz L. Radford, of Detroit, Mich. (McKee, Mitchell & Alter, of Pittsburgh, Pa., of counsel), for defendant in error.

Before KNAPPEN, MACK, and DENISON, Circuit Judges.

PER CURIAM. A general statement of the facts here involved will be found in our opinion in Ingersoll Co. v. Crocker, 228 Fed. 844, 143 C. C. A. 242, and need not be here repeated. After that opinion was filed, the suit at law therein referred to proceeded to trial in the court below, resulting in a judgment which awarded to the Ingersoll Company the purchase money it had paid Crocker, and interest, and from that judgment the present writ of error is prosecuted.

[1, 2] 1. A re-examination of the chief and underlying meritorious question has not convinced us that it was mistakenly decided upon the former hearing. It is true that the restrictive provision was not, in form, a covenant, but was distinctly a condition subsequent; and it may well be that the right to forfeiture or re-entry for breach of that condition has been lost by the grantor and his heirs. However, this deed cannot be considered by itself; there were about 120 of them, made at about the same time, in identical form and covering practically all the property in the vicinity; and we have no doubt that they constituted, in substance and effect, and at least in equity, an agreement between the grantor and each grantee, and for the benefit of all other similar grantees, that the restrictions should be maintained in that vicinity; nor that this parcel, and each of the others, was burdened with what was, in effect, a negative easement for the benefit of adjacent parcels; nor that, at the least, the owners of other parcels out of the same tract might have injunctive relief against a breach of the restriction; nor that this was a burden which, while it existed, made the title unmarketable. Lowrie, J., in Clark v. Martin, 49 Pa.

289, 297; Bigelow, J., in Whitney v. Union Co., 11 Gray (Mass.) 359, 363, 71 Am. Dec. 715; Cooley, J., in Watrous v. Allen, 57 Mich. 362, 367, 24 N. W. 104, 58 Am. Rep. 363.

2. Upon the former hearing, it was not apparent to us how it could be sufficiently shown by way of defense to the suit at law that there had been such an adverse user as to destroy the effect of the condition, in view of the fact that the grantees, or their heirs and assigns, of all the other parcels beneficially affected were not parties to that suit; but there are cases where title by adverse possession may be so clearly established, even in a suit to which possible claimants are not parties, that the marketability of the title is thereby established (Barnard v. Brown, 112 Mich. 452, 70 N. W. 1038, 67 Am. St. Rep. 432; Pratt v. Eby, 67 Pa. 396); and we therefore left this question for trial in the suit at law, to be dealt with as the proofs there might justify.

[3] 3. The use of this parcel for a considerable number of years for a planing mill was clearly proved; but even if we assume that this use was, as matter of law, a breach of the condition, and that the proofs in this case show that it continued for 15 years, that would not have justified a verdict for Crocker. There were more than 100 parties who were entitled to dispute these claims of fact, and disprove them if possible, and there is a high probability, if not certainty, that among so many parties there will be some against whom the statute of limitations or the equivalent rules of laches or abandonment could not be running because such parties were not sui juris or not within the country. It must be evident that there is not a mere possibility, but a real and substantial probability, that the validity of the title depends upon the verdict of a future jury upon a disputed question of fact. Simis v. McElroy, 160 N. Y. 156, 163, 54 N. E. 674, 73 Am. St. Rep. 673; Carolan v. Yoran, 104 App. Div. 488, 93 N. Y. Supp. 935, 937; cases cited in 32 Cyc. 1462.

4. There was only one way to clear the title—by bill in equity against all parties in interest. Alpha Co. v. Shirk (C. C. A. 7) 227 Fed. 966, 972, 142 C. C. A. 424. If Crocker had promptly moved for this remedy as soon as he knew the situation, possibly a way might have been found to hold matters in statu quo until he could get that relief; but several years have elapsed, and it is now too late to consider any such course.

[4] 5. The facts, clearly proved, that there was no fraud or misleading by Crocker, and that the vendee relied on its own title examination when it made the contract, cannot avail to defeat the action. This is not a suit for rescission, it is for the damages flowing from Crocker's inability to convey the title he promised. Only if the vendee knew of this very defect when it made the contract could we justify the conclusion of waiver.

[5-8] 6. It is claimed that the Ingersoll Company recovered interest upon its purchase-money payments and was not charged with the rental value of the premises while it had possession. This would seem to be error. Warvelle on Vendors (2d Ed.) p. 229. However, if the point was fairly brought to the attention of the trial court, which we doubt, it was not properly saved by exception and assignment

of error; and we are not inclined to notice it under rule 11 (198 Fed. xxii, 115 C. C. A. xxii) because any prejudice therefrom is at least counterbalanced by the situation which has resulted regarding the improvements which were placed upon the land by the Ingersoll Company and which, by the forfeiture of the title, have become Crocker's property. The Ingersoll Company can have no remaining right to recover therefor, either at law or in equity, because their value was a part of its damages which it had the right to recover, if anywhere, in this action, and a cause of action cannot be split by pleading only a part of it, whether the imperfect pleading be purposeful or inadvertent; and, more specifically, the Ingersoll Company cannot recover therefor in the equity suit, both because that is limited by the effect of our previous mandate and because the conduct of the Ingersoll Company, in leading Crocker to forfeit the contract without letting him know what the trouble with the title was, forbids a court of equity to give it any help.

7. The other assignments do not present any matters sufficiently controlling to justify discussion.

The judgment is affirmed.

HENDRIKSON et al. v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. January 3, 1918.)

No. 1546.

CRIMINAL LAW ⊂=631(4)—TRIAL—SERVICE OF LIST OF JURORS—RULES OF COURT.

It is within the powers of a District Court to make and enforce a rule prohibiting the disclosure of names of jurymen drawn for a term to any party prior to two days before the beginning of the term, and such rule may be enforced in criminal cases, where the offense is less than capital.

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

Criminal prosecution by the United States against F. L. Hendrikson and C. H. Hendrikson. Judgment of conviction, and defendants bring error. Affirmed.

W. Turner Logan, of Charleston, S. C., for plaintiffs in error.

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

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

KNAPP, Circuit Judge. Plaintiffs in error, hereinafter called defendants, were convicted in the District Court for the Eastern District of South Carolina of stealing a quantity of zinc blocks, copper wire, and other articles, the property of the United States. The first

and principal question raised by the assignments of error is this: Some five days before the opening of the term at which defendants were to be tried, their counsel applied to the clerk for a list of the jurors who had been drawn and summoned. This request was refused by the clerk in obedience to a rule of the District Court which forbids disclosure of the names of jurymen "to any party whomsoever (save to the marshal of the court to be summoned) prior to two entire days before the first day on which any term or postponed term is to be holden whereat such jurors should serve." When the case was called for trial, counsel moved for a continuance, because the jury list had been refused, and the motion was denied.

We put aside as unimportant in this case the government's contention that the denial of a continuance was discretionary, and therefore not subject to review, and that defendants are not shown to have been prejudiced in any way by failure to get the jury list when requested. It is enough to say that the motion was not addressed primarily to the discretion of the court, but involved rather the assertion that defendants had been denied a right to which they were entitled, and the opinion of the learned District Judge shows that it was so regarded and decided. Moreover, if defendants had the right to be furnished with the list of jurors at the time application was made therefor, the presumption would be indulged that they were prejudiced by its refusal.

The controlling question, as we conceive, is the question of the power of the court to make and enforce the rule. Does it take away or abridge any substantial right, constitutional or otherwise, secured to defendants and those in like situation? There is no federal statute of direct application. Section 1033 of the Revised Statutes (Comp. St. 1916, § 1699) provides in substance that a copy of the indictment and a list of the jury shall be furnished, at least three entire days before his trial, to a person indicted for treason, and at least two entire days before his trial to a person indicted for any other capital offense. As this is the only provision on the subject, it would seem to follow, on the principle that inclusion of one is exclusion of another, that if the indictment be for a crime of lesser degree the jury list cannot be required and need not be furnished in advance of the trial. In United States v. Van Duzee, 140 U. S. 169, page 173, 11 Sup. Ct. 758, page 760 [35 L. Ed. 399], this was apparently assumed to be the settled rule of law, as it is incidentally remarked in the opinion:

"Nor is he entitled to a list of witnesses and jurors."

In the Shelp Case, 81 Fed. 694, 697, 26 C. C. A. 570, 573, it is said:

"If the indictment is not for a capital offense, the defendant is not entitled, as a matter of right, to a list of witnesses or jurors."

The general doctrine is stated in Pointer v. United States, 151 U. S. 396, 407, 14 Sup. Ct. 410, 414 (38 L. Ed. 208), as follows:

"In respect to the qualifications and exemptions of jurors to serve in the courts of the United States, the state laws are controlling. But Congress has not made the laws and usages relating to the designation and impaneling of jurors in the respective state courts applicable to the courts of the United States, except as the latter shall by general standing rule or by special order in a particular case adopt the state practice in that regard.

* * * In the absence of such a rule or order, * * * the mode of designating and impaneling jurors for the trial of cases in the courts of the United States is within the control of those courts, subject only to the restrictions Congress has prescribed, and also to such limitations as are recognized by the settled principles of criminal law to be essential in securing impartial juries for the trial of offenses."

This declaration covers the instant case and leaves practically nothing to be said. The necessary implication is that the rule under review was within the power of the District Court and that, so far from taking away any right possessed by defendants, it served rather to grant a privilege which otherwise they could not assert. It is needful only to add that nothing appears in the record before us to suggest that this power has been unwisely or improperly exercised.

The remaining assignments of error are based upon certain instructions to the jury, including those that were refused in the form requested by defendants. We have carefully examined these contentions without finding any of them of sufficient merit to require extended discussion. Complaint is made that defendants were prejudiced by the statement that "the charge in this case against them is intensified by the fact that both are employés of the government," with some amplifying comment. But the fact had repeatedly appeared in testimony and was wholly undisputed. It was alluded to by the trial judge as an aggravating circumstance, if defendants were guilty; but he took care to explain that it did not enter into the consideration of whether or not they were guilty, and made this plain by saying:

"They are to be judged by the same rules of testimony which would apply to any one; that is to say, that the testimony sufficient to establish their guilt must be as strong as in analogous cases would be the case for the charge against another."

In short, we are not persuaded that the instruction here referred to was misleading or otherwise harmful.

The explanation of what was meant by "reasonable doubt" is alleged to involve an erroneous statement of the law; but the argument is quite unconvincing. Indeed, the definition of this term by the learned district judge is practically identical with the definition approved by the Supreme Court in Hopt v. Utah, 120 U. S. 430, 7 Sup. Ct. 614, 30 L. Ed. 708, in which the subject of reasonable doubt is discussed at some length.

Of the remaining instructions to which exception was taken we deem it sufficient to say that they were warranted by the facts developed at the trial or were proper illustrations of the applicable principles of law. We are satisfied that defendants have had a fair and impartial trial, and the judgment of conviction should be affirmed.

BANK OF COMMERCE v. BROWN.

(Circuit Court of Appeals, Fourth Circuit. January 3, 1918.)

No. 1562.

1. BANKRUPTCY ⟸303(3)—VOIDABLE PREFERENCE—EVIDENCE.
Evidence considered, and *held* insufficient to support a finding that a bank, at the time it discounted the note of a bankrupt secured by collateral, from the proceeds of which note the bankrupt paid a prior unsecured note for a smaller amount, receiving the remainder in cash, had reasonable cause to believe that the bankrupt was insolvent, so as to render the transaction voidable as a preference.

2. BANKRUPTCY ⟸166(4)—VOIDABLE PREFERENCE—REASONABLE CAUSE TO BELIEVE DEBTOR INSOLVENT.
The burden is upon a trustee to prove that a creditor had reasonable cause to believe, at the time of taking security from the bankrupt, that he was insolvent, and that the security would effect a preference; and it is not sufficient, under Bankruptcy Act July 1, 1898, c. 541, § 60, cls. "b," "c," 30 Stat. 562 (Comp. St. 1916, § 9644), that the creditor may have had a suspicion as to the debtor's solvency, but he must have had knowledge of facts calculated to produce a belief of his insolvency in the mind of an ordinarily intelligent man.

Appeal from the District Court of the United States for the Western District of South Carolina, at Greenville, in Bankruptcy; Joseph T. Johnson, Judge.

In the matter of A. J. Dillard, bankrupt. From an order sustaining the objection of J. Hertz Brown, trustee, to the claim of the Bank of Commerce to certain security, the latter appeals. Reversed.

John Gary Evans, of Spartanburg, S. C. (I. A. Phifer, of Spartanburg, S. C., on the brief), for appellant.

J. C. Otts, of Spartanburg, S. C., for appellee.

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

KNAPP, Circuit Judge. [1] The controlling question in this case lies within narrow limits. On December 2, 1915, the Bank of Commerce, appellant herein, held notes to the amount of about $1,500, signed or indorsed by A. J. Dillard, who was adjudicated bankrupt within four months thereafter. On the date named, the bank discounted Dillard's note for $2,500, placing to his credit the proceeds, less what was due on the old notes, which were surrendered. To secure the payment of this note, Dillard gave the bank a note of the same amount, made by his son, S. B. Dillard, and one Bomar, which note was secured by mortgage on certain real estate and is the note in controversy. The trustee in bankruptcy having disputed the bank's claim to this security, on the ground that it was a voidable preference, the issue was tried in the court below, and a decree entered to the effect that the bank could hold the collateral as security for the additional money loaned when the $2,500 note was discounted, but not for the pre-existing debt, and that the balance of the collateral, after payment

of the amount advanced when it was pledged, must be turned over to the trustee. The bank appeals.

The sole basis of this decision, as the decree discloses, was the testimony of a Mr. Cantrell, who was a member of the loan committee of the bank at the time of the transaction. His entire statement, so far as material, appears in the record as follows:

"Q. Your idea in making this additional loan was to secure what he already owed you? A. That note was due, and he said it didn't suit him to take it up, and he gave us a $2,500 note he held against Mr. Bomar, and took up the $1,500 note, and I think we gave him $1,000 in money. Q. You considered the note perfectly good? A. Sure did. Q. How did you consider the notes you already had? A. Well, we didn't see any chance of collecting them. Q. You took this additional note for what you thought you were in danger of losing? A. That's my idea. Q. From what you have heard, you thought you were in pretty grave danger of losing? A. Well, we were uneasy."

It will be observed that no fact or circumstance is mentioned by Cantrell, and no reason given by him for any opinion or belief he may have had respecting the financial condition of Dillard; nor was this belief or opinion, if his state of mind may be so described, communicated to any officer or director of the bank. In point of fact, there was no meeting of the loan committee to pass upon the discount of Dillard's note; but each member was separately consulted and gave his assent. Moreover, the president of the bank, its cashier, and another member of the loan committee, all testified in substance that they had no reason to suppose that Dillard was insolvent; and the learned District Judge says he was satisfied that their testimony was true. There was also testimony to the same effect by the president of another bank.

[2] Even if it be assumed, as stated in the decree, that "Cantrell's knowledge and purpose is the knowledge and purpose of the bank," and giving due weight to his testimony as above quoted, we think it quite insufficient to sustain the conclusion that the bank had reasonable cause to believe that Dillard was insolvent and that the taking of the security in question would give it a preference over other creditors. And so the courts have held in analogous cases. In Grant v. National Bank, 97 U. S. 80, 24 L. Ed. 971, where, as seems to us, the proof respecting "reasonable cause to believe" was decidedly less favorable to the security holder than in the case at bar, the Supreme Court, reversing the court below, said:

"It is not enough that a creditor has some cause to suspect the insolvency of his debtor; but he must have such a knowledge of facts as to induce a reasonable belief of his debtor's insolvency, in order to invalidate a security taken for his debt. * * * A man may have many grounds of suspicion that his debtor is in failing circumstances, and yet have no cause for a well-grounded belief of the fact. He may be unwilling to trust him further; he may feel anxious about his claim, and have a strong desire to secure it; and yet such a belief as the act requires may be wanting. Obtaining additional security, or receiving payment of a debt, under such circumstances, is not prohibited by law. * * * Hence the act, very wisely, as we think, instead of making a payment or a security void for a mere suspicion of the debtor's insolvency, requires, for that purpose, that his creditor should have some reasonable cause to believe him insolvent. He must have a knowledge of some fact or facts calculated to produce such a belief in the mind of an ordinarily intelligent man."

It turned out that Dillard was in fact badly insolvent, and he may have been aware when the transaction took place that his financial condition was hopeless; but the right of the bank to retain the security it got is to be tested, not by the knowledge or intent of Dillard, but by the belief then held by the bank's officers as to his ability to meet his obligations. The burden is upon the trustee to prove that the creditor had reasonable cause to believe at the time of taking the security that the debtor was insolvent and that the transfer would effect a preference. Barbour v. Priest, 103 U. S. 293, 296, 26 L. Ed. 478; Stucky v. Savings Bank, 108 U. S. 74, 2 Sup. Ct. 219, 27 L. Ed. 640. See, also, the later cases of In re Eggert, 102 Fed. 735, 43 C. C. A. 1, and Sharpe v. Allenler, 170 Fed. 589, 96 C. C. A. 104, in which the subject is further discussed.

In the light of these authorities, which appear directly in point, we are of opinion that appellant is entitled to hold the collateral note, or the proceeds thereof, as security for its entire claim against the bankrupt, and that the court below was in error in deciding otherwise. The decree must therefore be reversed, and the cause remanded for further proceedings in accordance with the views herein expressed.

Reversed.

CITY OF GOLDFIELD, COLO., v. ROGER.

ROGER v. CITY OF GOLDFIELD, COLO.

(Circuit Court of Appeals, Eighth Circuit. February 23, 1918.)

Nos. 4831, 4832.

1. APPEAL AND ERROR ⟸759—BRIEFS—ASSIGNMENTS OF ERROR.
   Assignments of error, not set out in plaintiff in error's brief, as required by rule 24 (150 Fed. xxxiii, 79 C. C. A. xxxiii), cannot be considered.

2. APPEAL AND ERROR ⟸846(5)—REVIEW—MATTERS REVIEWABLE.
   In the national courts, where a cause is tried to the court without a jury, and no special findings are made, and none requested, there is nothing for review by an appellate court.

3. TRIAL ⟸393(1)—FINDINGS—SPECIAL FINDINGS.
   Where, in an action tried to the court, an opinion stating certain facts was filed, the facts recited cannot be treated as special findings.

4. APPEAL AND ERROR ⟸110—REVIEW—NEW TRIAL.
   Where, after entry, plaintiff filed motion to reconsider and enlarge the judgment, and such motion was denied, and exceptions taken, the motion, being practically a motion for new trial, cannot be reviewed on writ of error.

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

Action by John Roger against the City of Goldfield, Colo. There was a judgment for plaintiff for part only of the relief sought, and plaintiff brings error, and defendant likewise brings error. Affirmed.

W. M. Alter, of Victor, Colo. (Edward J. Boughton, of Victor, Colo., on the brief), for plaintiff in error in No. 4831 and for defendant in error in No. 4832.

C. A. Ballreich, of Pueblo, Colo. (W. L. Hartman, of Pueblo, Colo., on the brief), for defendant in error in No. 4831 and for plaintiff in error in No. 4832.

Before SANBORN and SMITH, Circuit Judges, and TRIEBER, District Judge.

TRIEBER, District Judge. These are writs of error to review a judgment at law tried to the court without a jury, both parties prosecuting writs of error.

[1] The brief filed by counsel on behalf of the plaintiff in error in No. 4831 fails to set out the assignments of error upon which they rely, as required by rule 24 (150 Fed. xxxiii, 79 C. C. A. xxxiii) of this court. In City of Lincoln v. Sun Vapor Street Light Co., 59 Fed. 756, 8 C. C. A. 253, this court announced that the provisions of this rule, particularly in respect to assignments and specifications of error in briefs will be strictly enforced by the court. The opinion in that case was filed January 29, 1894, and has been enforced ever since. The judgment against the city must therefore be affirmed.

[2] In No. 4832 the same result is reached. As hereinbefore stated, the case was tried to the court without a jury. No special findings were made by the court, nor did either of the parties request the court to make them. The rule of law is well settled in the national courts that in a cause tried to the court without a jury, where no special findings are made, and none requested, there is nothing to be reviewed by the appellate court.

[3] The court filed an opinion in which it states certain facts, but facts recited in the opinion of the court cannot be treated as special findings in the cause. National Bank of Commerce v. First National Bank, 61 Fed. 809, 10 C. C. A. 87; Hinkley v. City of Arkansas City, 69 Fed. 768, 16 C. C. A. 395; Insurance Co. v. International Trust Co., 71 Fed. 88, 17 C. C. A. 616; National Masonic, etc., Ass'n v. Sparks, 83 Fed. 225, 28 C. C. A. 399; Townsend v. Beatrice Cemetery Ass'n, 138 Fed. 381, 70 C. C. A. 521; Mason v. United States, 219 Fed. 547, 135 C. C. A. 315.

[4] Aside from this, no exceptions were taken by the plaintiff at the trial to the judgment of the court. The only exception taken by the plaintiff was:

"To the findings of the court as to the amount due the plaintiff and to the order of judgment entered herein, so far as the amount in the judgment is concerned, and to the order of court overruling plaintiff's motion to enlarge the judgment, which order was entered of record on the 13th of April, 1916, and to the several rulings by the court pertaining to the evidence, all as aforesaid, the plaintiff by his counsel duly excepts."

The judgment was entered on March 6, 1916; the motion of plaintiff to enlarge the judgment was filed on March 20, 1916; the order denying the motion of plaintiff for reconsideration of the judgment was entered April 15, 1916, 40 days after the judgment had been entered

and the exceptions were taken to the overruling of the motion. The motion for reconsidering and enlarging the judgment was practically a motion for a new trial, and that cannot be reviewed by this court.

The judgment is in all things affirmed.

HARRIS v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. February 16, 1918.)

No. 4982.

1. CRIMINAL LAW ⟸1130(2)—APPEAL—BRIEFS—ASSIGNMENTS OF ERROR.
   Assignments of error, not set out in plaintiff in error's brief as required by rule 24 (150 Fed. xxxiii, 79 C. C. A. xxxiii), cannot be considered.
2. INDIANS ⟸35—INDIAN COUNTRY—WHAT IS.
   Kelliher, in the county of Beltrami, state of Minnesota, which is within the exterior boundaries of the territory ceded to the United States by the Chippewa Treaty of February 22, 1855 (10 Stat. 1165), is Indian territory.
3. CRIMINAL LAW ⟸742(1)—APPEAL—PROVINCE OF JURY.
   The jury is the sole judge of the credibility of witnesses.
4. INDIANS ⟸38(1)—INDIAN TERRITORY—INTRODUCTION OF INTOXICATING LIQUOR.
   In a prosecution for introducing or causing to be introduced, into Indian territory intoxicating liquors, in violation of Rev. St. § 2139, as amended by Act Feb. 27, 1877, c. 69, 19 Stat. 244, and by Act July 23, 1892, c. 234, 27 Stat. 260 (Comp. St. 1916, § 4136a), where the alleged offense was committed after the passage of Act May 18, 1916, c. 125, 39 Stat. 124 (Comp. St. 1916, § 4144a), making the possession of intoxicating liquors in country where the introduction is prohibited by treaty or federal statute prima facie evidence upon unlawful introduction, the question of defendant's guilt *held*, under the evidence, properly submitted to the jury.

   Sanborn, C. J., dissenting.

In Error to the District Court of the United States for the District of Minnesota; Page Morris, Judge.

James O. Harris was convicted of wrongfully, unlawfully, and feloniously introducing and causing to be introduced into Indian territory intoxicating liquors in violation of Rev. St. § 2139, as amended by Act Feb. 27, 1877, and Act July 23, 1892, and he brings error. Affirmed.

A. A. Andrews, of Bemidji, Minn., for plaintiff in error.

Alfred Jaques, U. S. Atty., of Duluth, Minn., for the United States.

Before SANBORN, Circuit Judge, and TRIEBER and YOUMANS, District Judges.

TRIEBER, District Judge. This is a writ of error to reverse a judgment entered upon a verdict of guilty rendered by a jury. The defendant was indicted in two counts for having violated section 2139, Rev. St., as amended by Act Feb. 27, 1877, c. 69, 19 Stat. 244, and Act July 23, 1892, c. 234, 27 Stat. 260 (Comp. St. 1916, § 4136a).

The first count charges that the defendant on the 30th day of May,

1916, at Kelliher in the county of Beltrami, in the state and district of Minnesota, had wrongfully, unlawfully, and feloniously introduced and caused to be introduced into Indian country, to wit, into the said county of Beltrami, at Kelliher aforesaid, intoxicating liquors, to wit, 3½ gallons of whisky, which said Kelliher is within the exterior boundaries of the territory ceded to the United States by the Chippewa Treaty of February 22, 1855 (10 Stat. 1165). The second count charges a like offense, committed on the 29th day of July, 1916.

There was a trial to a jury and a verdict of not guilty on the first count, and a verdict of guilty on the second count, upon which the court sentenced him to a fine and imprisonment. We are only concerned with the verdict on the second count.

[1] The brief of the plaintiff in error failed to set out any assignment of errors as required by rule 24 of this court (150 Fed. xxxiii, 79 C. C. A. xxxiii). In City of Goldfield v. John Roger, 249 Fed. 39, — C. C. A. —, decided at this term, we have held upon the authority of City of Lincoln v Sun Vapor Street Light Co., 59 Fed. 756, 8 C. C. A. 253, that the failure to comply with that rule, particularly in respect to assignments and specifications of error in briefs, will prevent a consideration of the assignments of error by this court. But, in view of the fact that in this case the liberty of the defendant is at stake, we shall dispose of the case on its merits.

[2] The assignments of error bring only one question before this court: Did the court err in refusing to direct a verdict of not guilty at the close of the evidence, although other errors have been argued by counsel? In view of the decision of the Supreme Court in Johnson v. Gearlds, 234 U. S. 422, 34 Sup. Ct. 794, 58 L. Ed. 1383, the contention that the place where the liquor was found in the possession of the defendant is not Indian country cannot be sustained.

[3, 4] As the offense was committed after the enactment of Act May 18, 1916, c. 125, 39 Stat. 124 (Comp. St. 1916, § 4144a), amending sections 2140 and 2141, Rev St, possession of intoxicating liquor in the country where the introduction is prohibited by treaty or federal statute, is made prima facie evidence of unlawful introduction. Three witnesses introduced by the government testified positively that on July 29, 1916, the date upon which the introduction of the liquor is charged in the second count to have been committed, they found a quart of whisky in defendant's barroom in Kelliher, under the bar, and that the defendant was present at the time, and also Stone, his barkeeper, the latter behind the bar.

The defendant testified that he was not in the barroom at the time the witnesses for the government came there, but he came in while they were there, and they had about ten bottles of malt set up on the bar; that he bought the stuff for malt, and not for beer; that there was no liquor there that he knew of, but only this beer or malt. Another witness introduced by the defendant was Pete McGinty, who testified that he was selling whisky unlawfully, and that he sold whisky to defendant, at Kelliher, having brought it there; that he would sell him about two quarts of whisky every week or two, after bringing it there.

William Johnson, who was recalled by the government, testified in rebuttal that the witness McGinty told him that he came to Minnesota from North Dakota the fall after this liquor had been found in the possession of the defendant. He was then tending bar for a man by the name of Bagley.

As no exceptions were taken to the charge of the court, which submitted the question of facts to the jury, the finding of the jury is conclusive, if there is substantial evidence to sustain it. If the jury believed the witnesses introduced on the part of the government, then under the act of May 18, 1916, the government made out a prima facie case, subject to rebuttal by the defendant. The jury were the sole judges of the credibility of the witnesses. If they believed the testimony of the defendant and the witness McGinty then the prima facie presumption was rebutted, but on the other hand if they discredited the testimony of these witnesses, which they did, the verdict of guilty was justified. The witness McGinty was impeached by Mr. Johnson, and in fact by himself, when he testified that he was engaged in introducing intoxicating liquors in the prohibited territory, in violation of the laws of the United States. It was for the jury to determine what weight to give to his testimony and that of the defendant, taking into consideration the interest the defendant had in the result of the trial. The court committed no error in submitting the question to the jury.

The judgment is affirmed.

SANBORN, Circuit Judge, dissents.

PHELAN v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. April 1, 1918. Rehearing Denied May 13, 1918.)

No. 3086.

1. CRIMINAL LAW ⟸430, 441—DRAFT—REGISTRATION—EVIDENCE.
In a prosecution for failing to register in accordance with Selective Draft Act May 18, 1917, c. 15, 40 Stat. 76, baptismal records and copies of applications for a pension and for homestead, executed by defendant's mother, wherein she set out his age, are admissible in evidence.

2. ARMY AND NAVY ⟸40—DRAFT—REGISTRATION—EVIDENCE.
In a prosecution for failing to register under Selective Draft Act May 18, 1917, c. 15, where the baptismal record of defendant, made by a Roman Catholic priest, was introduced in evidence, it was competent for the priest to testify as to the tenets of his faith concerning the baptism of infants.

3. CRIMINAL LAW ⟸430—EVIDENCE—CERTIFIED COPIES.
Under Rev. St. § 882 (Comp. St. 1916, § 1494), providing for the admission of copies of records of executive departments, certified copies of pension applications, which are part of the records of the Pension Bureau, are admissible in evidence.

4. CRIMINAL LAW ⟸730(1)—TRIAL—IMPROPER ARGUMENT.
Improper argument of the prosecutor is no ground for reversal, where the jury were explicitly directed to disregard it.

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

Edward H. Phelan was convicted of failing to register in accordance with Selective Draft Act May 18, 1917, c. 15, and he brings error. Affirmed.

Isidore B. Dockweiler and Dockweiler & Mott, all of Los Angeles, Cal. (G. C. O'Connell, of Los Angeles, Cal., of counsel), for plaintiff in error.

Robert O'Connor, U. S. Atty., and Gordon Lawson, Asst. U. S. Atty., both of Los Angeles, Cal.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. We see no merit in any of the contentions on behalf of the plaintiff in error. The indictment against him charged, among other things, that on the 5th day of June, 1917, he was over 21 years of age and had not then attained the age of 31 years, and that notwithstanding the fact that the said 5th day of June was the day appointed by proclamation of the President for the purpose, and that the said plaintiff in error did not come within any of the exceptions contained in the act of Congress in pursuance of which the said proclamation was issued, to wit, the act approved May 18, 1917, entitled "An act to authorize the President to increase temporarily the military establishment of the United States," the said plaintiff in error willfully failed and refused to present himself for and submit to registration thereunder.

The record shows that the sole defense interposed by the plaintiff in error in the court below was based upon the contention that he was born March 13, 1886, and was therefore more than 31 years old on the 5th day of June, 1917. The proof on the part of the government, given on the trial, tended to show that he was in fact born July 13, 1886, and was therefore not 31 years old June 5, 1917. The jury found that issue in favor of the government, and accordingly returned a verdict of guilty, upon which verdict judgment was duly entered.

[1-3] The testimony of the plaintiff in error, as well as that of his mother, given on the trial, was to the effect that he was born March 13, 1886; but even in that testimony both of them admitted that up to within about four years of the time of the trial the plaintiff in error was under the "impression" that his birthday was July 13, 1886. The government offered, and there was admitted in evidence over the objections of the defendant, copies, duly certified by the Commissioner of Pensions, of certain applications, filed years before the giving of her testimony in the present case by the mother of the plaintiff in error, for a pension as the widow of the father of the plaintiff in error, who was a soldier in the Civil War, in which applications she expressly declared the plaintiff in error was born July 13, 1886; and the government also offered, and there was admitted in evidence, also over the objections of the defendant, a petition for a homestead, filed by the mother of the plaintiff in error February 9, 1892, in the superi-

or court of Los Angeles county, in the matter of the estate of her deceased husband, in which petition she stated, among other things, at the time of the death of her husband, which occurred June 1, 1889, that the plaintiff in error was born July 13, 1886; and there was other testimony given on behalf of the government of the same tendency—among which was that of Monsignor Harnett, of the Catholic Church, who testified in substance that as priest he was called upon to and did baptize the plaintiff in error at the residence of his parents; that by the requirements of his church the priest is obliged to record the date of the baptism of infants, and did so in the instant case; the witness saying:

"I have the baptismal record of the year 1886 with me, and there is recorded in that book the baptismal record of the defendant, Edward Henry Phelan. I baptized the child, and after referring to the record can state the date of the baptism"—giving it as August 8, 1886.

The witness was further permitted to testify, over the objection and exception of the defendant, as follows:

"The teaching of the Catholic Church with regard to the death or with regard to the salvation of infants who die without baptism is that no one, no child who is unbaptised and dies before it obtains the use of reason, can enter into the kingdom of Heaven."

We think that all of the testimony referred to, to which objection was taken, tended to sustain the contention of the government that the true date of the birth of the plaintiff in error was July 13, 1886, and accordingly that the objections were properly overruled.

The objections to the introduction in evidence of the certified copies of the records of the Pension Bureau are sufficiently answered by the provisions of the statutes of the United States. Act Aug. 24, 1912, c. 370, 37 Stat. part. 1, pp. 497, 498 (Comp. St. 1916, §§ 675–680).

[4] Conceding the impropriety of the remarks of the United States attorney complained of, the error, if any, was, we think, sufficiently cured by the instructions of the court to the effect that the jury should "not consider the remarks of the United States attorney, coming to a conclusion from this evidence. The jury have no right to consider any evidence that was excluded."

The judgment is affirmed.

THE DIXIE.

(Circuit Court of Appeals, Fifth Circuit. March 4, 1918. Rehearing Denied April 10, 1918.)

No. 3081.

MARITIME LIENS ⊂⊃64—SUIT TO ENFORCE—SUFFICIENCY OF LIBEL.

A libel alleged that libelant hired or chartered a barge to a contracting company which owned the dredge Dixie, that the Dixie was engaged in dredging a bar in the Mississippi river and depositing the material at a designated place on the shore, that during a part of the time the barge was used to support the pipe which conveyed the dredged material from the Dixie to the shore, and that while being so used the barge was sunk. *Held*, that no facts were alleged which gave libelant a maritime lien on the Dixie for the loss.

Appeal from the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

Suit in admiralty by the River Sand & Gravel Company against the steam dredge Dixie; the Board of Commissioners of the Port of New Orleans and others claimants. Decree for respondents (236 Fed. 607), and libelant appeals. Affirmed.

John D. Grace, of New Orleans, La. (M. D. Grace, on the brief), for appellant.

James Wilkinson and P. M. Milner, both of New Orleans, La., for appellees.

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

WALKER, Circuit Judge. This is an appeal from a judgment or decree dismissing a libel in admiralty against the dredge Dixie on an exception thereto by the claimant, based upon the stated ground that:

"Said libel on its face discloses that there is no maritime lien asserted in said libel against the dredge Dixie, which alone could give this court jurisdiction."

The libel discloses the following facts: The Dixie is a steam dredge, owned by the Louisiana Contracting Company, which company was engaged in performing a contract it had entered into with the board of commissioners of the port of New Orleans. Included in the work called for by that contract was the dredging of a bar or shoal in the channel of the Mississippi river opposite a designated site on the New Orleans river front and the placing of the dredged material on that site. The Dixie was used in doing the dredging called for and depositing the dredged material at the place mentioned. The contracting company hired or chartered from the libelant another dredge, called the Katherine, and a barge, called the Texas, and used those vessels in doing part of the work called for by the contract; some of that work, as stated, apparently a different part of it, being done by the Dixie. During part of the time while the Texas was so used, it being

in a position between the Dixie and the river bank, the part of the Dixie's dredging machinery which reached to the place where the dredged material was being deposited rested on or was supported by the Texas. While the Texas was hired or chartered as above stated, it was sunk. All that the libel alleges in this connection is the following:

"While said barge was so employed with the Dixie and by her officers and crew, they permitted said vessel to sink; and, although they have promised to make due efforts to recover said barge and make due return thereof, they have neglected to do so."

The libel does not set out the contracts or charters under which the Katherine and the Texas were hired, nor state the substance of the terms or provisions thereof. It does undertake to show what those contracts imported or the legal effect of them. What the libel contains in that regard amounts to statements of legal opinions or conclusions of the pleader, and as such need not be considered. The libel does not allege facts showing that the Katherine or the Texas was hired in behalf, for the use or on the credit of the Dixie, nor that either of them or the use of either of them was furnished to the Dixie. The libel does not show that the sinking of the Texas was due in any degree to a fault or negligence attributable to the Dixie, or to any breach of duty by any of her officers or crew while acting as such.

The contrary not appearing, it may be presumed that the Katherine and the Texas were hired on the credit of the hirer alone, and that the Dixie was not looked to by the libelant as incurring any responsibility to it as a result of the chartering or hiring. We are not of opinion that the libel shows the existence of any liability which is enforceable against the Dixie. It does not show the furnishing of repairs, supplies, or other necessaries to the Dixie in such sort as to give a maritime lien on the vessel under the Act of June 23, 1910, c. 373, § 1, 36 Stat. 604 (7 U. S. Comp. Stat. Ann. § 7783). It does not show the furnishing of anything to the Dixie or on its credit or responsibility. It does not show the commission of a maritime tort for which the Dixie is subject to be libeled. It does not show that the Dixie was made liable in any way as a result of the transactions alleged.

The conclusion is that the libel was properly dismissed. The decree to that effect is affirmed.

WARTEN v. BROWN et al.

(Circuit Court of Appeals, Fifth Circuit. March 7, 1918.)

No. 3068.

GAMING ⟸2—RECOVERY OF MONEY—WHAT LAW GOVERNS.

Code Ala. 1907, § 3353, declaring that money paid on futures may be recovered, has no application to transactions occurring without the borders of the state, and furnishes no right of recovery, even though the action on the transaction was brought in the federal District Court for Alabama.

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

Action by F. G. Brown, John Douglass, and Herman Blum, heretofore copartners doing business under the firm name of Brown, Douglass & Blum, for the use of Herman Blum, transferee, against L. M. Warten, as surviving partner of the firm of H. & L. M. Warten, who pleaded a set-off. There was a judgment for plaintiffs, and defendant brings error. Affirmed.

W. R. Walker, of Athens, Ala., for plaintiff in error.

S. L. Sinnott and J. T. Stokely, both of Birmingham, Ala., for defendants in error.

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

WALKER, Circuit Judge. Brown, Douglass & Blum, a firm engaged in business in New Orleans, La., at the request of H. & L. M. Warten, made payments to third persons having demands against H. & L. M. Warten, which the latter desired to satisfy. This suit was brought against the surviving partner of H. & L. M. Warten to recover the amounts for which that firm so became indebted. By way of set-off and cross-demand the defendant set up that Brown, Douglass & Blum were liable to him as surviving partner for an amount greater than that sued for, which was lost in alleged gambling cotton futures transactions of H. & L. M. Warten with Brown, Douglass & Blum in New Orleans. The law relied on to support this cross-demand is the following Alabama statute:

"*Money Paid on 'Futures' may be Recovered.*—Any money or thing paid or delivered to any person, whether as principal, agent, or broker, in furtherance or settlement of any contract made in violation of this article, may be recovered in any action brought by the person paying the same, his wife or child." Code of Alabama 1907, § 3353.

This statute does not purport to govern, or to determine the legal consequences of, transactions occurring outside of the state of Alabama. As above stated, the alleged gambling transactions relied on occurred in the state of Louisiana. The legal consequences of those transactions are to be determined by the law of that state. It is not

contended that the law of Louisiana gives a right of action to recover money lost in gambling in "futures." What is asserted by way of cross-demand amounts to a claim that under an Alabama statute a right of action arose out of transactions in Louisiana, though under the law of the latter state those transactions did not have that effect. A claim that a transaction gave rise to a right of action cannot be sustained, if the law of the place where the transaction occurred did not give to it the effect of bringing into existence the liability asserted. A right of action which is the creature of an Alabama statute does not arise out of an occurrence happening in the state of Louisiana. Unless by the law of the place where an act is done it gives rise to an asserted civil liability, that liability does not exist there or elsewhere. Slater v. Mexican National R. R. Co., 194 U. S. 120, 24 Sup. Ct. 581, 48 L. Ed. 900; Alabama Great Southern R. Co. v. Carroll, 97 Ala. 126, 134, 11 South. 803, 18 L. R. A. 433, 38 Am. St. Rep. 163; Pendar v. H. & B. American Machine Co., 35 R. I. 321, 87 Atl. 1, L. R. A. 1916A, 428; 12 Corpus Juris, 452, 453. It is not material that the liability would have been imposed by the law of the state in which redress is sought, if the transaction on which the claim is based had happened there.

The conclusion is that the court was not in error in ruling against the above-mentioned cross-demand.

The judgment is affirmed.

GILL v. WHITE.

(Circuit Court of Appeals, Ninth Circuit. April 1, 1918.)

No. 2999.

BANKRUPTCY ⊂=407(3)—DISCHARGE—GROUNDS FOR DENIAL.

That the bankrupt fraudulently transferred property more than four months prior to the filing of the petition is no ground for opposing his 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 Fillmore White. The specifications of objections to the discharge filed by Eva May Gill were overruled, and the discharge granted, and the objector appeals. Affirmed.

Robert H. Countryman, of San Francisco, Cal., for appellant.

Reuben G. Hunt, of San Francisco, Cal., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. The appellee, who was a bankrupt, petitioned for his discharge. The appellant filed specifications of objection to the discharge. The objections were overruled, and the bankrupt was granted a discharge. The appellant assigns error to the refusal of the referee to permit the appellant to call the bankrupt's wife as a witness on the hearing of the specifications of objection. The referee's ruling was based on the amendment of June 29, 1906 (34 Stat. 618, c. 3608), to section 858 of the Revised Statutes (Comp. St. 1916, § 1464), as construed in In re Kessler (D. C.) 225 Fed. 394, and upon subdivision 1 of section 1881 of the Code of Civil Procedure of California, which provides, with certain exceptions, that a husband cannot be examined for or against his wife without her consent, nor a wife for or against her husband, without his consent. The District Court affirmed the ruling of the referee on the ground that the alleged fraudulent transfer of property, concerning which the appellant wished to elicit the testimony of the bankrupt's wife, occurred more than four months prior to the filing of the petition in bankruptcy, and therefore was not ground for opposing the discharge of the bankrupt.

Agreeing to that conclusion, we affirm the order of the court below.

SANTOWSKY v. McKEY.

(Circuit Court of Appeals, Seventh Circuit. January 25, 1918.)

No. 2496.

JUDGMENT ⊂=564(2)—MATTERS CONCLUDED—TEMPORARY RESTRAINING ORDER. A temporary restraining order, made on application for a temporary injunction in any suit pending, is not a final determination, which renders the issues involved res judicata.

Petition to Review and Revise an Order of the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Petition by Louis Santowsky against Frank M. McKey, trustee in bankruptcy, to revise a decree confirming an order of the referee, denying petitioner's title to property. Reversed.

Bernard J. Brown, of Chicago, Ill., for petitioner.

S. Sidney Stein and Julius Moses, both of Chicago, Ill., for respondent.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

EVAN A. EVANS, Circuit Judge. If the order of July 5, 1916, here under consideration, was determinative merely of bankrupt's petition bearing date May 6, 1916, to dissolve a temporary injunction entered May 5, 1916, we are convinced that the trustee's position is untenable. A temporary restraining order made on application for a temporary injunction in any suit pending is not a final determination of the issues involved. Such an order is not res judicata of the issues temporarily disposed of thereby. Black on Judgments (2d Ed.) § 695.

Upon a careful consideration of all the orders made and proceedings had in this bankruptcy matter, we are convinced that the District Court, by its order of July 5, 1916, disposed of no matter other than the bankrupt's petition of May 6, 1916, which sought dissolution of the temporary injunction, and the order of July 6, 1916, is therefore not res judicata as to the title to the property here in controversy.

The decree of the District Court, confirming the order of the referee bearing date July 28, 1916, is reversed, with directions to proceed to determine the title to the property in controversy.

AUTOMATIC PENCIL SHARPENER CO. v. STEWART MFG. CO. et al.

(Circuit Court of Appeals, Seventh Circuit. January 2, 1918.)

No. 2493.

1. PATENTS ⟸328—VALIDITY—INVENTION.
   Webster patent, No. 640,846, for a pencil sharpener containing a cutter with spiral blades, *held* valid.
2. PATENTS ⟸81—INVALIDITY—SUBSEQUENT PATENT.
   A patent is not open to attack because the invention was disclosed in a patent subsequently issued, where there was no clear showing of prior use of the device last patented.
3. PATENTS ⟸328—INFRINGEMENT—WHAT CONSTITUTES.
   Webster patent, No. 640,846, for a pencil sharpener containing a cutter provided with spiral blades, *held* infringed by defendant's device.
4. PATENTS ⟸328—INFRINGEMENT—WHAT CONSTITUTES.
   The Webster patent, No. 810,104, for a pencil sharpener provided with bearings at opposite ends of the frame, *held* not infringed by defendant's device.
5. PATENTS ⟸328—INFRINGEMENT—WHAT CONSTITUTES.
   The Baines patent, No. 839,806, for a pencil sharpener having an adjustable stop in the frame, *held* not infringed by defendant's device.
6. TRADE-MARKS AND TRADE-NAMES ⟸59(1)—INFRINGEMENT—"JUNIOR."
   Though complainant registered a trade-mark "Junior" for a pencil sharpener, it was no infringement of the same for defendant, who previously sold pencil sharpeners under the name "Stewart," to offer to the trade smaller pencil sharpeners under the name of "Stewart Junior," for the word "Junior," with respect to merchandise, signifies a more recent product, or a smaller type or model.

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

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

Bill by the Automatic Pencil Sharpener Company against the Stewart Manufacturing Company, a corporation, and another. From a decree dismissing the bill, complainant appeals. Reversed, with directions.

From a decree dismissing appellant's bill to enjoin future infringement of Webster patents, No. 640,846 and No. 819,104, and Baines patent, No. 839,806, for pencil sharpeners, and for damages arising out of past infringements, and also for an injunction against alleged unfair trade competition with relation to appellant's registered trade-mark "Junior" for pencil sharpeners, this appeal is taken. Claims 4 and 5 of the Webster patent No. 640,846, dated January 9, 1900, read as follows:

"4. In a pencil sharpener, a cutter provided with spiral blades, said cutter being mounted upon an axle upon the opposite end of which is a pinion, an internal gear secured to the stationary casing, and with which said pinion meshes, said axle being mounted in a bearing which is mounted upon a second axle, a crank secured to said second axle, and a block secured upon said second axle adjacent to said cutter, and provided with a conical groove adapted to receive a pencil and direct and hold the same against the said cutter, substantially as and for the purpose set forth.

"5. In a pencil sharpener, a shaft or axle *13*, internal gear *21*, block *16* and hub *17* mounted on said axle, an axle *19* mounted in said hub and carrying pinion *20*, cutter *23* mounted on axle *19*, said block *16* being provided with the conical groove *25*, substantially as and for the purpose set forth."

Claims 1 and 3 of the Webster patent, No. 819,104, issued May 1, 1906, read as follows:

"1. In a pencil sharpener, the combination of the frame comprising the disks *9* and *10* with the block *11* connecting the same, bearings at opposite ends of the frame, a crank for rotating the same, bearings *19* and *20* in the said disks at an angle to the disks, the shaft *18* fitted to the said bearings, the sharpening cylinder *16* carried by the said shaft and gearing arranged and operated to rotate the sharpening cylinder when the frame is turned by the crank."

"3. In a pencil sharpener, the combination of the frame comprising the disks *9* and *10* with the block *11* connecting the same, a casing provided with bearings for the opposite ends of the frame and having a box *48* to receive the shavings, a crank for rotating the frame in the casing, bearings *19* and *20* in the said disks at an angle to the axis of the disks, the shaft *18* fitted to the said bearings, the sharpening cylinder *16* carried by said shaft and gearing arranged and operated to rotate the sharpening cylinder when the frame is turned by the hand crank."

Claims 8 and 10 of the Baines patent, No. 839,806, issued January 1, 1907, read as follows:

"8. In a pencil-sharpening machine a cutter cylindrical in form and having helically arranged cutting edges, a frame mounted to rotate in a stand or casing and carrying the cutter at an angle with the axis about which said frame rotates, a guide for the pencil in the axis of said frame, an adjustable stop in the frame to limit the longitudinal movement of the pencil, and means to rotate the said cutter and give it a planetary motion."

"10. In a pencil-sharpening machine the combination of a rotary device provided with helically arranged cutting edges, means for imparting both a rotary and planetary motion thereto, and of an adjustable stop carried by the frame to limit the longitudinal movement of the pencil."

The foregoing are the only claims involved in this suit. Defenses are noninfringement and invalidity.

Henry M. Huxley, of Chicago, Ill., for appellant.

Chas. S. Burton, of Chicago, Ill., for appellees.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

EVAN A. EVANS, Circuit Judge (after stating the fact as above). [1] *Webster First Patent, No. 640,846.*—Of the nine elements which comprise the sharpener defined in claim 4, quoted above, the element described as "a cutter provided with spiral blades" is claimed to be unique, and when used in the combination set forth in this claim constitutes the basis for one of the contributions which Webster made to this art. The patentee emphasized this element in his specifications by saying:

"On the free end of the shaft I mount a cutter which in shape is a frustum of a cone and is provided with a plurality of spiral blades and the block (*16*) is provided on the side adjacent to the cutter with a conical shaped groove, which is adapted to receive the end of a pencil and sustain and direct the same against the cutter, as will be readily understood by an inspection of the drawings. * * * It will be observed that the blades on the cutter are made spiral and so disposed that as the cutter is rotated the cutting will be from the point of the pencil backward, thereby giving a fine, long point, without breaking the lead."

The block and the mechanism for rotating the cutter and the block about the pencil supply the means for utilizing the spiral bladed cutter. The advantages of providing a cutter so that each sharpening spiral blade performs a progressive shaving action, beginning at the

point of the lead and moving backward, over a cutter that scrapes like a file, is so obvious that, in the absence of any disclosure in the prior art, invention is apparent. Appellant produced a pencil sharpener which for the first time sharpened the pencil from the point back. This machine, by means of the spiral blades, cut thin shavings along the wood and avoided the difficulties that were met in case a file were used.

Appellees, however, contend that the prior art, represented by two patents, one to Rice, No. 230,338, granted July 28, 1880, and one to Hoffman, No. 291,597, granted January 7, 1884, anticipated appellant's invention. The Hoffman patent is but an improvement of the Rice patent. Hoffman, in his specifications, says:

"My improvement has been designed with special reference to the needs of the pencil sharpener described in letters patent No. 230,338, * * * and it is in this connection that I have illustrated it in the accompanying drawings, * * * and parts thus far described are substantially the same in construction and operation as those described in letters patent No. 230,338, above referred to, and require no further description here."

The contribution to the art made by Rice and Hoffman was chiefly in the use of a rotary file, which both patentees used to point the lead in the pencil. Neither patent provided for the use of its rotary file to cut the wood. Had such a file been provided, it would have soon become clogged with grains of wood and would not have performed its work. Appellant's sharpener is distinguished from both the Rice and Hoffman devices in two important respects. It cut the lead and the wood at the same time, avoiding the consequences that would result in case a file were applied to the wood. A sharpener was also provided wherein the sharpening began at the point of the pencil and worked back. The new features of appellant's sharpener were not disclosed by either the Hoffman or the Rice patents.

[2] Appellant contends that the Eager patent, No. 648,900, May 1, 1900, described an invention having a cutter of the milling tool type and so mounted with respect to the pencil seat as to rotate in the proper direction to cut back from the point of the pencil in the same manner as the cutter of the Webster patent. This patent, however, was issued subsequent to the date of the patent under consideration, and the evidence as to any prior use of such machine is too meager and unsatisfactory to justify us in upsetting appellant's patent on that ground. While the Eager machine is distinguishable from the machine described in Webster's first patent in other respects, it is not necessary, in view of the dates of issuance of the two patents, to point out the distinguishing features.

We conclude claims 4 and 5 of the Webster first patent are valid. The latter claim is sustained, in view of this discussion, without further elaboration.

[3] *Noninfringement.*—Appellees urge that no infringement of this patent is disclosed, because in its cutter the third element in this claim, No. 4, a pinion, must be located upon the opposite end of the "axle," which is the second element of the claim. It does not seem to us that the location of the pinion is a necessary or an essential part of this

third element. In the particular drawing to which reference was made, it is true the pinion was located at the opposite end of the axle; but the location of the pinion was not the essence of the element so described. The claim, fairly construed in the light of the drawings and specifications, does not warrant the limitation or restriction which appellees attempt to place upon the location of the pinion.

[4] *Webster Second Patent, No. 819,104—Noninfringement.*—In both claims 1 and 3 of this patent there appears an element described in claim 1 as "bearings at opposite ends of the frame" and in claim 3 as "a case provided with bearings for the opposite ends of the frame," and it is contended that appellees' sharpener is not provided with such "bearings at the opposite ends of the frame." We have examined the appellees' sharpener in vain for the two bearings at the opposite ends. It is clear that appellees' sharpener carries the rotor on its journal bearing at one end of the journal only. True, at the other end there is provided a sleeve occasionally used for a smaller sized pencil, and when so used it serves somewhat as a bearing. We are convinced, however, that appellees' sharpener does not infringe either claim for want of this element above referred to.

[5] *Baines Patent—Noninfringement.*—Appellees further contend that their sharpener does not infringe the Baines patent, No. 839,806, because it does not possess that element found in claims 8 and 10 described as "an adjustable stop in the frame to limit the longitudinal movement of the pencil." Appellees' sharpener is provided with a stop, but it is not an adjustable stop. Its stop is attached to the frame and firmly secured thereto by means of two screws. Appellant's contention is that this stop is adjustable, because it can be removed, and, when turned over, it will occupy a somewhat different position, and thereby becomes adjustable. In other words, it is possible that this stop may be put into two positions, in one of which the pencil is sharpened to a finer point than in the other. Ignoring the fact that it is impracticable to remove the stop and change ends, we do not believe that, if such change is made, adjustability is thereby secured. The word "adjustable" in this claim must be construed in the light of the mechanism to which it is applied. An adjustable stop in a pencil sharpener is a stop that may be so adjusted as to permit the pencil to be sharpened to various degrees of pointedness. Appellant's stop is more in the nature of a fixed stop. It is firmly secured to the frame. We conclude no infringement of this patent appears.

[6] *Trade-Mark "Junior."*—It is further contended that the court erred in refusing an injunction to restrain appellees from using the words "Stewart Junior," because of appellant's trade-mark of the word "Junior." Appellees have at least two pencil sharpeners upon the market. One is known as the "Stewart Junior." The word "Stewart," as written, is a fac simile of the signature of Mr. Stewart, and the word "Junior" appears in smaller type in Roman letters, and immediately beneath the word "Stewart." Appellees deny appellant's right to a trade-mark on the word "Junior," when applied to a manufactured article such as here under consideration. There is much force in their argument. The word "Junior," especially as applied to a man-

ufactured article, has a well-known meaning. It indicates the later or more recent product, or a smaller type or model of a machine that has been on the market. In the present case, it appears from the exhibits that appellee's "Junior" is a later and a smaller type of sharpener than was previously manufactured by it.

We conclude appellees were within their rights in so using the word "Junior" in connection with the word "Stewart," and in view of the fact that a similar and larger model of this same sharpener, bearing the name "Stewart" written in the same manner, was in use when the later and smaller model by the same company was placed upon the market. While Webster's patent No. 640,846 has now expired, this suit was instituted some time prior to the expiration of the patent. We therefore conclude that appellant is entitled to an accounting for infringement of this patent prior to its expiration.

The decree is reversed with costs, with directions to enter a decree in favor of appellant for an accounting for infringements of patent No. 640,846.

F. B. ZIEG MFG. CO. v. RUSSELL GRADER MFG. CO.

(Circuit Court of Appeals, Sixth Circuit. February 13, 1918.)

No. 3048.

PATENTS ⇐328—VALIDITY AND INFRINGEMENT—ROAD-GRADING MACHINE.

The Clemons patent, No. 924,966, for a road-grading machine, claims 2 and 17, *held* valid, but, as limited by the prior art, not infringed by a machine in which the wheels must always automatically move with the drawbar and parallel with the line of draft.

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

Suit in equity, by the Russell Grader Manufacturing Company against the F. B. Zieg Manufacturing Company. Decree for complainant, and defendant appeals. Reversed.

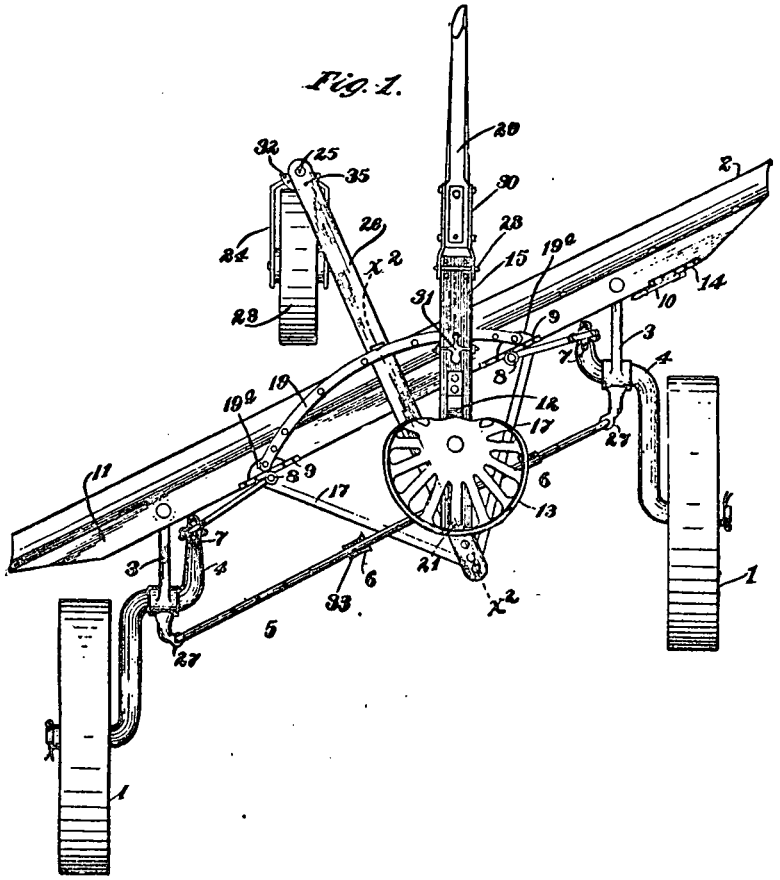
Staley & Bowman, of Springfield, Ohio (Border Bowman and Paul A. Staley, both of Springfield, Ohio, of counsel), for appellant.

A. C. Paul, of Minneapolis, Minn., and A. M. Allen, of Cincinnati, Ohio, for appellee.

Before WARRINGTON, KNAPPEN, and MACK, Circuit Judges.

KNAPPEN, Circuit Judge. This is an appeal by defendant in a patent infringement suit, and involves only claims 2 and 17 of the Clemons patent, No. 924,966, issued June 15, 1909. The District Court held both claims valid and infringed.

The patent is for a road-grading machine, whose mechanism may be described by reference to a reduced reproduction of Fig. 1 of the patent drawings.



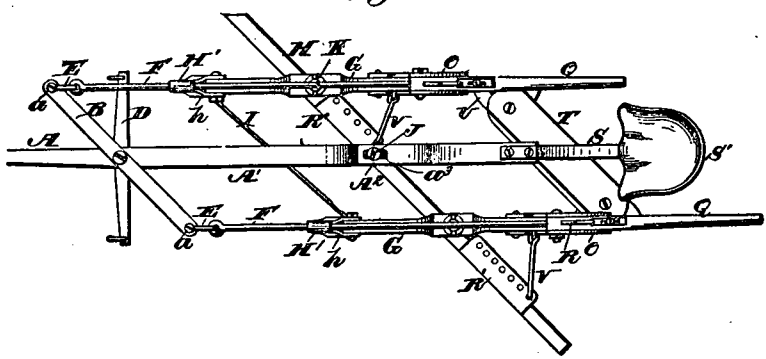
The scraper blade *2* is carried on a frame supported by rear wheels *1* and a forward wheel *23*, which is pivotally connected to the front end of a beam *26*, which beam is connected between its ends to the reinforcing flange *11* on the upper edge of the scraper blade, its rear end being pivotally connected at *21* to the draw bar *15*. The latter is held in desired position by a latch *31*, engaging one of the perforations in the curved bar *19*. A release of the latch by the driver's foot enables the shifting of the line of draft. As the beam *26* is always at right angles with the scraper blade, and as the draw bar always remains in the line of draft, its adjustment with respect to the latch bar changes the angle of the scraper blade with reference to the line of draft, and so sets the blade at right angles with that line or obliquely thereto, thus enabling the scraping of the road from either side to the center or on a level. The wheels *1* are journaled on crank axles *4*, which in turn are journaled on swinging brackets *3* pivoted at their forward ends to flanges on the scraper blade and at their rear ends to an alignment bar *5*; links *7* on the crank axle connect with the lower arms *8* of operating levers (not shown in the drawing), by which the scraper

blade may be raised or lowered throughout its length or either of the opposite ends of the blade may be raised. The specification calls for mechanism (not shown in the drawing above and not involved in the claims in issue) for putting the swinging brackets into different angular positions, whereby the wheels may be set, at the will of the operator, in either perpendicular or oblique positions. In the regular operation of the machine the drawbar is locked to the latch bar by the latch *31*, and the alignment bar *5* is locked to the beam *26* by stop collars *6* on the alignment bar, one on either side of the beam. The machine may be adjusted to any desired operative position by releasing the latch *31* and stop collars *6*. The claims in suit are printed in the margin.[1]

Whether defendant infringes depends upon the validity and scope of these claims.

Clemons was not a pioneer in the road grader art; nearly every important feature of his device was old when he entered the field. Mendenhall (to go no further) had disclosed a machine by which (as shown in reduced Fig. 2 of the patent drawings—a plan view)—.

Fig. 2.



the scraper blade *H* is pivotally hung beneath longitudinal side beams *G*, carried by side rods *F*, the blade being retained in the desired position by rods *V* attached at one end to the side beams and at the other end to perforated metal plates R^1, secured to the top of the scraper blade, the drawbar *A* being also pivotally attached by a bracket to the rear side of the scraper blade. The wheels are carried on brackets depending from the side beams, to which the upper ends are rigidly attached,

[1] "2. In a road-grading machine the combination with a pair of wheels connected to a pair of swinging oscillating brackets pivotally attached to a blade with means for holding said swinging brackets where set substantially as described."

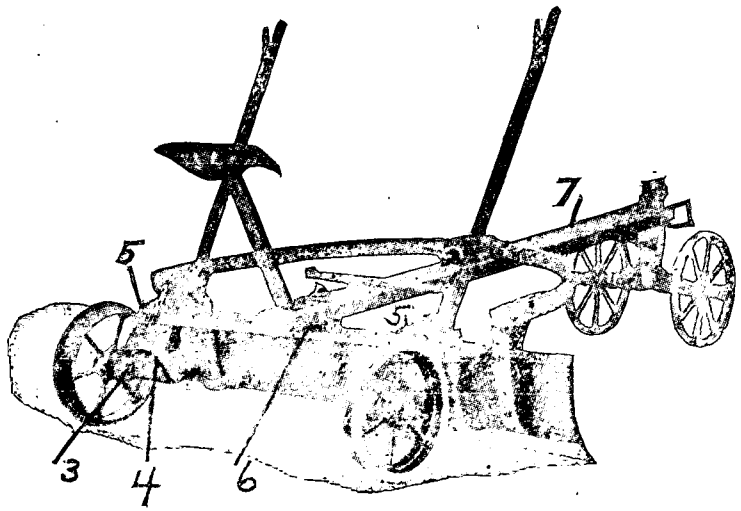
"17. In a road-grading machine, the combination with a scraper blade, of supporting wheels at the front and rear of said blade, crank axles connected to said blade with freedom for both lateral and vertical swinging movements, and to the rear portions of which crank axles, the said rear wheels are journaled, independent devices for vertically adjusting said crank axles and means holding the said crank axles for parallel lateral swinging movements, substantially as described."

their lower ends being pivoted upon brackets attached to the rear end of the scraper blade, which is raised or lowered by means of levers connected with the wheel brackets.

The differences between Clemons and Mendenhall, so far as here important, are these: The connection between Mendenhall's wheels, side beams and drawbar is such that the wheels must always move with the side beams, and thus with the drawbar; the turning of the drawbar automatically turns the wheels, which must thus always maintain practical parallelism with the drawbar. In Clemons, however, the arrangement is such that the wheel brackets move independently of both beam and bar, and the wheels need not thus be constantly held parallel with the line of draft; they are capable of being held in the desired position with respect to beam and drawbar through the alignment bar and the stop collars thereon. We agree with the Circuit Court of Appeals for the Eighth Circuit, that the Clemons patent shows invention over Mendenhall (Stockland v. Russell Co., 222 Fed. 906, 138 C. C. A. 386), but this invention we think resides only, so far as the claims here in issue are concerned, in the positive means for holding, where set, the independently moving and adjustable rear wheel brackets.

We are not impressed with plaintiff's contention that Mendenhall's disclosure is shown to be impracticable, nor by the suggestion that he had in mind only a road scraper, as distinguished from a road grader. His device was reasonably adapted for the latter purpose, though not as well adapted as that of Clemons. While Mendenhall showed no front wheel, there was nothing new in providing one.

Defendant's structure, as illustrated by the subjoined cut, may be thus compared with the device of the patent.



The scraper blade, as in the Clemons patent, is carried on a frame supported by rear and forward wheels; there is, however, no beam as distinguished from the drawbar; the unitary bar which takes the

place of plaintiff's drawbar and beam is pivotally connected near its rear end to the upper edge of the scraper blade; in front of this blade there is (as in Clemons) a circular latch bar adjustable on the drawbar, with perforations for connection therewith, and swinging brackets pivotally connected with the rear side of the scraper blade, to which brackets the levers which raise and lower the blade are pivotally connected, the short arms of the levers being rigidly connected with the axles of the rear wheels. These axles are unlike the crank axles of the patent, for they permit no lateral and independent movement with respect to the drawbar; *the wheels must always automatically move with the drawbar and parallel with the line of draft.* In the rear of the scraper blade an alignment bar, whose ends are pivotally connected with the respective wheel-supporting brackets, is permanently pivoted at the center upon the extreme rear end of the drawbar, which obviously is not at all times at right angles with the scraper blade. Unless in its pivoting upon the drawbar, *the alignment bar has nothing corresponding to the stop collars of the patent.*

We think it clear that the alignment bar *5*, the stop collars *6* and the locking pins *33* are the "means" specified in the claims in suit respectively for "holding said swinging brackets where set" and for "holding the said crank axles for parallel lateral swinging movements." The alignment bar alone is not the means. Defendant has not this holding element, unless, as plaintiff contends, the term "means" should be construed broadly enough to include the pivoting of the alignment bar directly upon the drawbar. But this we think not permissible, for the alignment bar *I* of Mendenhall was, in effect, so pivoted through its connection with the cross bar *B*, which was itself directly pivoted upon the drawbar, thus establishing a permanent connection between wheel brackets and drawbar. Indeed, in defendant's structure there is wholly lacking the idea of a mechanically adjustable connection between wheel brackets and drawbar, to meet changes of draft angle. *The adjustment is automatic, as in Mendenhall.* This difference is, we think, controlling.

The fact that the machine of the patent can be operated without the use of the stop collars on the alignment bar, so long as the angle of draft is unchanged, and is thus capable of a limited automatic movement, is not highly important; it has at all times the adjustable feature and positive holding means referred to, and such adjustment and holding means are necessarily used whenever the angle of draft is changed, and these holding means constitute an essential element of the claims in issue. Nor is it controlling, as respects the question of infringement of the claims in suit, that when the drawbar of the device of the patent is locked to its latch bar, the stop collars loose on the alignment bar and the scraper blade raised clear of the ground, a forward movement of the machine will cause the wheels to line up parallel with the drawbar. It is also immaterial, as respects the question of infringement, that in plaintiff's commercial machine, apparently manufactured as to some features under another patent than the one involved on this appeal, the stop collars are omitted and the alignment bar pivoted directly upon the drawbar.

We conclude that defendant does not infringe the claims in suit.

We find nothing in Stockland v. Russell Co., supra, opposed to this conclusion. The device there held to infringe had an alignment bar so constructed that in turning the machine one of the wheel brackets swings outwardly, independently of the drawbar.

The decree of the District Court is reversed, and the cause remanded, with directions to enter decree dismissing the bill.

GENERAL ELECTRIC CO. v. COOPER HEWITT ELECTRIC CO.

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

No. 3036.

1. PATENTS ⟸109—VALIDITY—AMENDMENT OF APPLICATION.
The rule is that insertions by way of amendment in the description or drawing, or both, of a patent application, do not invalidate the patent, if they are only in amplification and explanation of what was already reasonably indicated to be within the invention, and this rule applies with special force where the insertion was required by the Patent Office.

2. PATENTS ⟸16—VALIDITY—IMPROVEMENT PATENTS.
A device may be at the same time an infringement upon the relatively generic claim of a prior patent and also be a patentable improvement thereon, and there is no inconsistency, even presumptive, between these conclusions.

3. PATENTS ⟸328—LAMP—EFFECT OF INTERFERENCE.
The Kuch patent, No. 1,090,992, for a mercury vapor lamp, *held* not invalidated by interference proceedings with Bastian in the Patent Office, in which priority was awarded to Bastian as to certain claims then included in Kuch's application, but not as to the claims finally allowed.

4. PATENTS ⟸328—INVENTION—INFRINGEMENT.
The patent further *held* to disclose an improvement which involved patentable invention; also *held* infringed.

5. PATENTS ⟸167(1)—VALIDITY AND INVENTION—IMPROVEMENT PATENTS.
When a supposed invention is considered with reference to a prior patent, to determine whether there was inventive advance, the claims of that prior patent are wholly immaterial, unless in some possible instances where the claims might interpret an obscurity. The question is whether there has been inventive advance upon the structure disclosed by the specification and drawings, and if the claims seem to reveal the later form, when the specification and drawings do not, it must be because of the generic language of the claims, interpreted in the light of the later device.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Ohio; John H. Clarke, Judge.

Suit in equity by the General Electric Company against the Cooper Hewitt Electric Company. Decree for defendant, and complainant appeals. Reversed.

Squire, Sanders & Dempsey, of Cleveland, Ohio, and Pennie, Davis & Marvin, of New York City (W. B. Morton and Wm. H. Davis, both of New York City, of counsel), for appellant.

Parker W. Page and Thomas B. Kerr, both of New York City, for appellee.

Before KNAPPEN, MACK, and DENISON, Circuit Judges.

DENISON, Circuit Judge. This is the ordinary suit for infringement, based upon patent No. 1,090,992, issued March 24, 1914, to Kuch for an improved mercury vapor lamp. Appellant acquired title to the patent and was the plaintiff below. The bill was dismissed because the patent was thought to be invalid, and the plaintiff appeals.

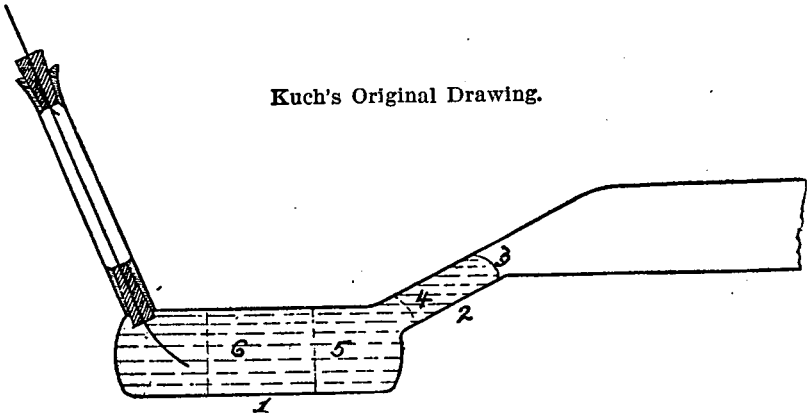
The conclusion of invalidity is rested upon two grounds: First, that new matter was introduced into the application and was not supported by new oath; and, second, that Kuch was anticipated by Bastian, and that this priority had been adjudicated in an interference between them. A due understanding of the questions thus presented requires a brief explanation of the invention. Lamps of this type consist essentially of a sealed glass tube, more or less exhausted, having a mercury electrode at each end. When the tube is filled with the mercury vapor and the electric current passed through, the vapor becomes luminous or incandescent. One of the recognized difficulties is that, since greater heat develops at the anode than at the cathode, there is at the anode a greater vaporization, and the mercury is distilled over and accumulates at the cathode, so as to destroy the proper balance. This difficulty had been met by devices or constructions which caused or permitted the excess mercury at the cathode to run back occasionally along the tube to the anode; but this remedy brought new operating difficulties in the high pressure lamps. Kuch's object was to find a better way to preserve an automatic balance between the two electrodes. He took that style of lamp which had a horizontal tube carrying the mercury at each end in a depending enlargement or bulb, and he accomplished a first or general automatic balance by directly attacking the vaporization at the anode. His remedy for the excess was to make the anode bulb larger than the cathode bulb. It followed that the outer surface of the former bulb, which would radiate heat, would be larger, and would therefore by radiation subtract heat from that generated inside the bulb, and so diminish what may be called the net heat of the mercury, and the comparative resulting anode vaporization. He knew that the effect of a given current upon these electrodes and under given conditions could be computed, and his inventive thought was that, if the radiating surfaces of the two bulbs were proportioned to the amount of the heat to be generated in each, there would be corresponding radiation and the proper vaporization balance would be maintained.[1] He thus brought about a rough and general equalization by attacking the cause of inequality; but changes of external temperature or other conditions would prevent this preliminary regulation from entirely and always stopping the accumulation of excessive mercury at the cathode, and so Kuch provided a further and final automatic regulation. He knew that there occurred at the cathode a phenomenon called the "cathodic aigret." This was an agitation suggestive of boiling, and it extended a certain depth from the surface of the mercury in the cathode. Obviously, the bulb surface adjacent to the mercury thus agitated would radiate heat much

[1] Theories of heat transmission to the mass of mercury in the bulb are also involved, but do not need statement.

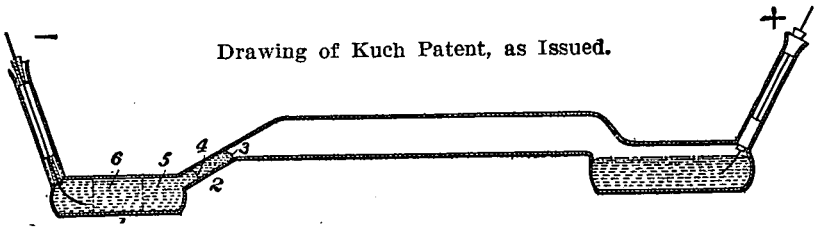
more actively than the remaining and lower part of the bulb surface. Kuch utilized this effect of this phenomenon by interposing, between his horizontal illuminating tube and his depending cathode bulb, an intermediate upwardly-inclined tube of much less diameter than the illuminating tube. A small excess accumulation of mercury in this intermediate tube would very considerably raise the lowest point of this aigret agitation and so diminish radiation, increase the net heat, and promote vaporization. A slight drop in the mercury in this tube would have the converse magnified effects; and the mercury level would, automatically, maintain itself substantially constant. We here reproduce Fig. 1 of the Kuch patent as originally filed and as amended. Claims 2 and 3 are given in the margin.[2] Claims 1 and 4, also sued upon, do not require separate consideration.

[1] The original drawing did not show any anode bulb or passage thereto from the illuminating tube, nor did the specification contain any particular description of either. During the progress of the ap-

Kuch's Original Drawing.



Drawing of Kuch Patent, as Issued.



[2] "Claim 2. The herein described gas or vapor electric lamp comprising a tube having electrode chambers at its ends, the cathode chamber being connected with the tube by a passage smaller than that connecting the tube and anode chamber, a body of mercury in the cathode chamber and partly filling the passage connecting said chamber with the body of the tube, and a body of mercury in the anode compartment.

"Claim 3. A vapor electric device comprising an anode bulb partly filled with mercury, a main illuminating tube communicating with said anode chamber and a tube of lesser diameter than said illuminating tube connecting the latter with the cathode chamber."

plication, an amended drawing was filed as above, and the specification was made to say, in so many words, that the anode bulb was larger than the cathode, and that the passage leading from the illuminating tube to the anode was larger than the passage or intermediate tube leading to the cathode bulb. The claims, as issued, are made to depend in part upon these things not originally specified. Hence it is plausibly argued that the insertion was of new matter and was vital to the invention as patented; and thereupon it is said that the patent is void. Railroad v. Sayles, 97 U. S. 554, 563, 24 L. Ed. 1053; Railroad v. Consolidated Co. (C. C. A. 6) 67 Fed. 121, 129, 14 C. C. A. 232. This view overlooks the substance of the invention, as disclosed in the original specification and drawing. The rule is that insertions by way of amendment in the description or drawing, or both, do not hurt the patent, if the insertions are only in amplification and explanation of what was already reasonably indicated to be within the invention for which protection was sought—"something that might be fairly deduced from the original application." Hobbs v. Beach, 180 U. S. 383, 395, 21 Sup. Ct. 409, 45 L. Ed. 586; Cleveland Co. v. Detroit Co. (C. C. A. 6) 131 Fed. 853, 857, 68 C. C. A. 233; Proudfit Co. v. Kalamazoo Co. (C. C. A. 6) 230 Fed. 120, 123, 144 C. C. A. 418; Cosper v. Gold, 36 App. D. C. 302. When we seek to apply this rule in this case, we first observe that the alleged new matter was not only permitted by the Patent Office, but was required, because an element claimed was not shown or sufficiently described. The Patent Office has a strict rule on this subject. It fully recognizes that new matter must not be permitted, and it is constantly engaged in defining what is and what is not new matter. The application of the rule must, of necessity, be more or less arbitrary, and the presumption of correctness which attends Patent Office rulings must apply with especial force to this class of ruling; and most peculiarly is that true when the applicant has only complied with the demands which the Patent Office made.

It is clear to us that Kuch's original application did cover and include these features sufficiently to justify the later fuller description and drawing. After reciting that the evolution of heat at the anode was greater than at the cathode, so that the vaporization at the latter was less, he said that the first object of his invention was to so determine the sizes of the two electrode vessels that they should be in the same proportion as the heats developed in them, and that the second object was to connect the cathode with the illuminating tube by means of a narrow intermediate tube. He also says:

"It is easy to so proportion the positive and negative electrode vessels that the proportion of the heats given off at both electrodes is approximately the same as the proportion of heats developed at both electrodes."

He also says:

"The size of the cathode vessel in proportion to that of the anode vessel is from the beginning so determined that" the desired results are effected.

His first claim was,

"In a gas or vapor electric lamp the combination with an illuminating tube of an anode vessel at the one end of said illuminating tube, a cathode vessel, a

narrow intermediate tube between the other end of said illuminating tube and said cathode vessel, and a metal liquid doing work in said anode vessel, said cathode vessel and said narrow intermediate tube."

The second claim specified that the sizes of the anode and the cathode vessels should be in proportion to the developed heats. Later claims had specific reference to the function of the narrow intermediate tube in controlling the cathode heat through the aigret action. Thus we find repeated and direct reference to the fact that the anode bulb is to be larger than the cathode bulb, and in the very proportion which has always been specified in the claims. Since Kuch did not illustrate this anode vessel, he must be deemed to have referred to the well-known form in common use. Cosper v. Gold, supra. In this form, the illuminating tube entered the anode chamber without any constriction, but by an opening which was the full cross-section area of the illuminating tube. It follows that when Kuch specified that at the cathode end of the illuminating tube he had a narrower tube entering the cathode chamber, he naturally implied that this entrance was smaller than the entrance to the anode chamber at the other end of the illuminating tube.[3] It surely is not the insertion of new matter to put into express words a structural characteristic already fairly implied. The attack upon the patent on this ground must fail. The situation is closely analogous to that in Abercrombie Co. v. Baldwin, 245 U. S. 198, 38 Sup. Ct. 104, 62 L. Ed. ——, decided by the Supreme Court December 10, 1917.

[2, 3] After most of Kuch's claims, about 20 in number, were allowed, the Office suggested to Bastian 16 of these claims. Bastian adopted them, and an interference was declared. Since both applicants were foreigners, and Bastian's filing date was earlier, the Office awarded him priority. So far as the inventions pertained to a proportioning of the anode and cathode bulbs, this award of priority is the end of the matter; but at the time of the declaration of interference Kuch's application contained claims identical with 1 and 2 in his issued patent, and these claims were not included in the interference. Like claims 3 and 4, added after the interference, they were characterized and limited by the provision that there should be between the illuminating tube and the cathode tube an "intermediate tube" or a "contracted passage" of less diameter than the main part or other end of the illuminating tube. Count 11 of the interference, which had been one of Kuch's claims and which became claim 11 of the Bastian patent, was:

"In a vapor lamp, the combination with the horizontal illuminating tube of an anode, a cathode chamber, a narrow upwardly inclined intermediate tube connecting the illuminating tube and the cathode chamber, an active fluid in the cathode chamber and partly filling the intermediate tube."

Since this count plainly reads upon Kuch's form, and priority was awarded to Bastian, the court took the view that the invalidity of Kuch's patent necessarily followed, and assumed that a decree accordingly was in substantial conformity to the Patent Office decision.

[3] When he made his new drawing, he showed a passage to the anode which may be slightly constricted, but his claims do not involve this feature.

We think this view does not give due force to the rule that a device may be at the same time an infringement upon the relatively generic claim of a prior patent and also be a patentable improvement thereon, and that there is no inconsistency—even presumptive—between these conclusions. Herman v. Youngstown (C. C. A. 6) 191 Fed. 579, 584, 112 C. C. A. 185). The intermediate tube of smaller diameter than the illuminating tube, or, in other words, the passage to the cathode chamber constructed so as to be smaller than the illuminating tube, was a feature certainly not shown by Bastian, and its addition to or substitution in Bastian's structure might well be a patentable improvement upon anything which Bastian had invented. In careful observance of this distinction and purported compliance therewith, the Patent Office reserved out of the declaration of interference two claims which were limited to this additional feature, and later issued to Kuch the patent in suit, based on these and similar claims. To hold these claims invalid on account of the result of the interference is not to affirm but is to reverse the Patent Office conclusions on the subject; and the claims cannot be held invalid for that reason.

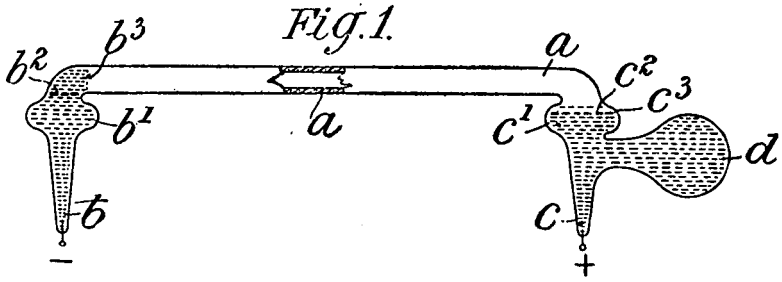
[4] This leaves only the question whether this so-called improvement, when considered with Bastian put in the prior art (where, for the fourth defense, he must be placed—Lemley v. Dobson [C. C. A. 6] 243 Fed. 391, 395, — C. C. A. —), involved patentable invention. This is the controlling question in the case. It is not free from doubt, and very likely the decree below was intended to rest substantially upon a negative answer thereto.

Here, again, the patentee has the benefit, in rather unusual degree, of that presumption of correctness which attaches to the Patent Office rulings. After the interference was finished, the examiner rejected two of the remaining claims of Kuch upon the ground that they were identical with the interference issues, but allowed two others of those reserved from the interference (present 1 and 2). He also rejected, on the same ground, two new claims tendered (present 3 and 4). Kuch finally conceded that the interference adjudication covered the first two just mentioned, but argued that it did not reach 3 and 4, for the same reason that 1 and 2 were not included. To these arguments the Patent Office yielded. Its action in this respect was therefore most deliberate and considered, and especial deference is given to such rulings. Canda v. Michigan Co. (C. C. A. 6) 124 Fed. 486, 493, 61 C. C. A. 194.

[5] Plainly, when we consider a supposed invention with reference to a prior patent, to determine whether there was inventive advance, the claims of that prior patent are wholly immaterial—unless in some possible instances where the claims might interpret an obscurity. We must look, rather, to the structure disclosed by the specification and drawings, and the question is whether there has been any inventive advance upon that structure. If the claims seem to reveal the later form, when the specification and drawings do not, it must be because of the generic language of the claims, interpreted by our knowledge of the later device. We therefore cannot depend upon the language of Bastian's claim 11 (and similar claims, 10 and 12) in which alone

there was any reference to a "narrow intermediate tube" as distinguished from the illuminating tube and the cathode chamber, and we refer to the specification and drawings to see whether Bastian has the equivalent of the "tube of lesser diameter than the illuminating tube" upon the presence of which the Kuch patent depends. Bastian's specification does not mention any "narrow" tube or any "intermediate" tube. Since Bastian's claim 11 declares that this "narrow intermediate tube" is found in connection with the horizontal illuminating tube, we may well look for it in his Fig. 1, showing his horizontal form and here reproduced.

Fig. 1.



Yielding to the Patent Office conclusion that Bastian could make this claim on his disclosure, it follows that this element must be there somewhere. It cannot be a part of the cathode bulb. It therefore must be that end of the illuminating tube which turns downwardly into the cathode bulb. It is rather an awkward conception that, of a unitary tube of constant diameter all of which seems to be the illuminating tube, part is iluminating tube and part is a "narrow intermediate tube" between the illuminating tube and the cathode; but there is no other solution. Bastian's "narrow tube" is therefore an extension of the illuminating tube, and of precisely the same diameter, and is "narrow" only with reference to the greater diameter of part of the cathode bulb, while Kuch's tube is also narrow with reference to the illuminating tube. Is Kuch's form only such a variation as any one skilled in the art might naturally make? Defendant insists that the vital relationship is between the size of the intermediate tube and the size of the cathode bulb, and that, since it was common practice to increase the size of the illuminating tube proportionately to the increase in the current to be used, there was no invention in maintaining that part of Bastian's tube which served as the cathode extension at the small size shown by Bastian, and then expanding the remainder of the tube into any size which the current required.

We are not convinced that we should accept this conclusion. In the first place, Bastian certainly contemplated nothing of the kind. Not only is it evident that his entire illuminating tube must be of such very small diameter that superficial tension will prevent the flow of the mercury along the horizontal part, but in another patent, issued upon a divisional application, he expressly claimed this feature. Next, we observe that in Kuch, the mercury arc initially fills the main illumi-

nating tube and usually extends part of the length of the intermediate tube. So far as shown by the records in this and in the companion case (No. 3028) relating to the same art (249 Fed. 69, —— C. C. A. ——), there had never been a lamp with mercury electrodes in which the arc or its containing tube was constricted at or toward the cathode; on the contrary, the area of the active cathode surface had always been at least as great as the cross-section area of the arc tube; and we cannot now say that an innovation in this respect presented no new problems as to radiation, amperage or other elements. If the arc has become limited to a central "string," then the constriction would be of the space between the arc and the tube walls, and there is no presumption that this would be immaterial.[4] The Bastian device was inoperative, except with a small amperage. That its beneficial effects could be retained, and that it could be made to operate with a high amperage, by expanding part of the tube and leaving the remainder untouched, seems now entirely obvious to the defendant's expert; but we think we have no right to say that this was ordinary skill in 1906. Such a change would involve, not only expanding part of the tube, but (probably) changes in the quantity of mercury to be vaporized and readjustment of the anode and cathode sizes—in fact, every factor involved would be disturbed and subject to recomputation if not to experimental research.

When to these considerations we add the fact that defendant, owner of the Bastian patent, has abandoned his specific form and adopted Kuch's, thus paying the "tribute of imitation" (Diamond Co. v. Consolidated Co., 220 U. S. 428, 441, 31 Sup. Ct. 444, 55 L. Ed. 527), we conclude that the presumption of validity is not sufficiently overcome, and that there must be the usual decree for injunction and accounting.

[4] We do not overlook Fig. 2 of Hewitt patent No. 682,690 (using one mercury electrode). The inserted guide or collar which produced restriction was for a different purpose, and was of opaque and nonheat-conducting material. It is not more than a suggestion of one element of Kuch's combination. If it were more, it would anticipate Bastian's claim 11.

GENERAL ELECTRIC CO. v. COOPER HEWITT ELECTRIC CO.

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

No. 3028.

PATENTS ⟸328—INVENTION—METHOD OF OPERATING VAPOR LAMPS.

The Kuch patent, No. 883,725, for a method of operating mercury vapor lamps, claim 1, *held* void for lack of invention, in that the process or method of the patent was previously known and used for some purposes where the cost was not considered, and that the discovery of the patentee was only of its commercial utility when used under certain conditions.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Ohio; John H. Clarke, Judge.

Suit in equity by the General Electric Company against the Cooper Hewitt Electric Company. Decree for defendant, and complainant appeals. Affirmed.

Squire, Sanders & Dempsey, of Cleveland, Ohio, and Pennie, Davis & Marvin, of New York City (W. B. Morton and Wm. H. Davis, both of New York City, of counsel), for appellant.

Thos. B. Kerr and Parker W. Page, both of New York City, for appellee.

Before KNAPPEN, MACK, and DENISON, Circuit Judges.

DENISON, Circuit Judge. The appellant, as owner of the Kuch patent, No. 883,725, issued April 7, 1908, for a method of operating vapor lamps, brought this action in the court below against the appellee, for infringement of claim 1. The bill was dismissed because this claim was held invalid.

We think the judgment below may rightly be sustained upon a comparatively simple ground, which makes unnecessary any extended consideration of vapor lamps or of the operative principles involved. The mercury arc lamp is the most familiar type of the class to which the patent refers, and its general theory is recited in our opinion in the companion case (No. 3036). 249 Fed. 61, — C. C. A. —. The electric energy passed through such a lamp may be measured in terms of volts per centimeter of the lamp's length, the consumption of current in terms of watts, and the light-giving result in terms of candle power. Efficiency was, therefore, a matter of candle power per watt or watts per candle power. In the former method of statement, the extreme high point in the curve plotted upon a chart would represent the highest efficiency—that is, the most light in proportion to the electric energy used. It was well known that, as the voltage was increased, the efficiency increased until a certain point was reached, and thereafter further increase diminished the efficiency. Selecting the conditions of the alleged infringing lamp in order to get concrete figures, it was found that about 2 volts per centimeter gave the best result, and indicated the high point in the curve of candle power results, while 2¼, 2½, 2¾, and 3 volts per centimeter gave progressively diminishing results. We assume it to be the fact, as claimed in be-

half of the patent, that the experts in the art had accepted this as the fixed law of the operation of the lamp, and had therefore abandoned any thought of carrying the pressure higher in commercial lamps where economy of operation was important. Kuch discovered that, if the voltage was increased considerably beyond the supposed end of the economy road, contrary results followed, and, with very high pressures, the efficiency curve could be carried well above the formerly understood high point, thus achieving a second and greater maximum of efficiency. His discovery is broadly formulated in his patent by the first claim which reads:

"The method of working gas or vapor electric lamps having mercury electrodes to increase thir efficiency, which consists in applying to said electrodes an electric potential greater for unit length of column of light than that corresponding to the minimum point of its curve of efficiency, substantially as described."

Confessedly, Kuch devised no new apparatus. He only employed, in an existing apparatus, a potential greater than what had been supposed to be the limit of efficient use. Whether such a discovery is a patentable invention under any circumstances—one of the questions considered below—we pass by. For the purposes of this opinion, we assume that, if he had been the first person who intelligently and purposely persisted in such use of such potential, or to disclose that it could be used with some useful result, the discovery would have been a patentable process or method. See Bethlehem Co. v. Niles Co. (C. C.) 166 Fed. 880.

However, we cannot give him credit for this priority. High voltage develops great heat, and great heat melts glass. This fact, pehaps as much as the discouraging look of the efficiency curve, had prevented the use of very great pressures; but at least two or three years before Kuch's discovery mercury arc tubes had been made of fused quartz, which would endure extremely high temperatures. The physical obstacle to the increase of voltage in these lamps had therefore disappeared. We think the only reasonable interpretation of the record, giving Kuch the benefit of some doubts, is that, at the date of his discovery, all attempts to use, for commercial lighting, a voltage per centimeter of more than the equivalent of 3 in a tube of the diameter used in the infringing lamp had been abandoned, but that much higher voltages were in use in quartz tube lamps for laboratory experimental and scientific use. Even if it ought not to be assumed that these voltages above the formerly supposed "critical point" of the particular lamp were actually used from time to time as there was scientific or experimental need for lights of greater intensity, certain it is that from the time of Cooper Hewitt's first disclosure it was a commonly understood law of operation that the total light produced increased with the density of the vapor; that the necessary voltage per centimeter, with a given diameter of tube, increased at the same time, or, put the other way around, that an increased voltage produced greater density and more intense light. No one had ever supposed that there was any maximum limit to the light intensity thus to be obtained, short of atmospheric pressure or the destruction of the tube. It was, therefore, common knowledge, after the quartz tubes were in use, that lights

of highest intensity could be produced by the process of the patent, if anybody wanted such a light and did not care what it cost. It is quite immaterial whether we say that the patented process had been in use to accomplish a useful result by those who did not know that they were thereby accomplishing another useful result, or say that it was well known in the art that the use of the patented process would produce a useful result, although nobody had used it to produce that result because every one thought it would cost too much to do so. From either point of view, the sum of the matter is that Kuch only discovered a previously unknown law of operation involved in a known method; he discovered that light, produced by known lamps, operated by a known method, had not only the known quality of intensity, but also the previously unknown quality of cheapness. In still other words, while he was the first to make completely intelligent use of this high potential, he was not the first to use it—or, at least, to disclose that it could be used—for one useful and understood purpose. We are clear that such a discovery does not constitute a patentable invention—indeed, when the matter is thus stated, we do not understand counsel to contend otherwise. O'Reilly v. Morse, 15 How. 62, 14 L. Ed. 601; Burr v. Duryee, 1 Wall. (68 U. S.) 531, 17 L. Ed. 650; Wall v. Leck (C. C. A. 9) 66 Fed. 552, 13 C. C. A. 630; Carmichael v. Jackson (C. C. A. 7) 192 Fed. 937, 113 C. C. A. 327. In each one of the cases specially relied upon by plaintiff[1] it appears that the process or method was previously unknown, and not merely that its commercial utility was unknown.

Even if we accept plaintiff's theory that the low pressure lamp and the high pressure lamp should be considered as separate things, and not as a unit embodying the progressive pressure, yet plaintiff is no better off; they are certainly very analogous to each other. In the low pressure lamps, it was the common practice to increase the voltage until tests indicated that the high efficiency point for that particular lamp had been reached; and this is what Kuch did with the high pressure lamp.

The decree below proceeded in part upon the theory that the infringing lamp—which plaintiff must consider the patented lamp—had its minimum point of efficiency at about 3 volts per centimeter, but in operation used a potential increased to about 8 volts per centimeter, thus indicating that the use of the latter voltage would infringe or would anticipate. It was conceded that earlier lamps had been operated at a pressure of 8 or more volts per centimeter, and thus, it was thought the patent's invalidity was shown. Plaintiff now says that there is no necessary relationship between volts per centimeter and the efficiency curve, but that the diameter of the tube, or amperage, must be taken into account, and that, when the figures are thus rectified, it will be found that (e. g.) the voltage per centimeter of 8, used on the Bastian early lamp, was equivalent to a voltage per centimeter of 2

[1] Nielson v. Harford, Webster's Patent Cas. 275; Badische Co. v. Kalle (C. C.) 94 Fed. 163; American Co. v. Howland Co., 80 Fed. 395, 25 C. C. A. 500; Byerley v. Sun Co., 184 Fed. 455, 106 C. C. A. 537; Carnegie Co. v. Cambria Co., 185 U. S. 403, 22 Sup. Ct. 698, 46 L. Ed. 968.

on the infringing lamp, and hence the Bastian voltage of 8 was before his lamp touched its minimum efficiency, just as the defendant's voltage of 2 is above or before the minimum efficiency point of defendant's lamp. We are inclined to the view that plaintiff is right in this position, and that earlier lamps cannot be pronounced anticipations of Kuch's actual discovery merely because they were operated at voltages per centimeter higher than the defendant now uses; but the misapprehension now charged against the court below seems to have been shared by the patentee. Plaintiff now says, in effect, that the efficiency curve is determined by the watts input instead of by the voltage per centimeter; but the patent itself suggests no measure save the latter, and the second claim (not in suit) is drawn in terms of the latter measure. Plaintiff, in effect, confesses that the second claim fails to formulate the invention, unless the claim happens to be applied to a lamp of the same diameter as the one which the patentee was using. We see, therefore, that plaintiff's attack upon the decree below in this respect, if the attack is in truth well founded, develops a very considerable defect in the patent specification. Nowhere does the patent indicate that the amperage, or the diameter of the tube, is an essential factor in determining the existence or use of the patented invention. Whether this incompleteness of explanation might be fatal, or whether the profession, to which it was addressed, ought to be thought sufficiently skilled to supply the deficiency, we need not consider.

There is another difficulty in plaintiff's way: The claim in suit includes any use of a voltage per centimeter greater that that "corresponding to the minimum point" of that particular lamp's curve of efficiency. Taking the same concrete instance which we have used, the defendant's infringing lamp, the plotted curve shows that an increase of the voltage from 3 per centimeter, which is the minimum point of the curve, up to about 6 per centimeter, gives no efficiency above the first maximum which had been reached with about 2 volts per centimeter. We find, therefore, a range of increase within the terms of the claim which seemingly produced no new result whatever along those lines of efficiency in which the invention consisted. If the claim had called for using a voltage greater than that corresponding to the minimum point of efficiency, and continuing that increase until the lamp passed its former known maximum of efficiency, it would have defined the invention which is now claimed to be new and useful. As the claim now reads, it is broader than this definition will justify. We do not overlook some considerations tending to weaken the conclusion of invalidity claimed to result on this ground; but at least there is, in this matter, a considerable difficulty to be overcome by plaintiff before the less technical questions can be reached.

The decree below is affirmed.

KINTNER et al. v. ATLANTIC COMMUNICATION CO. et al.

(District Court, S. D. New York. November 19, 1917.)

1. PATENTS ⊜328—VALIDITY AND INFRINGEMENT—WIRELESS TELEGRAPHY.
The Fessenden reissue patent, No. 12,168 (original No. 706,737), for improvements in transmission of energy by electromagnetic waves, claims 2, 3, 10, 15, 16, and 17, for a sending conductor, are within the original specification, and first disclosed clearly and definitely a system of continuous generation, and such disclosure involved invention. Such claims also *held* infringed. Claims 19, 20, and 21, for a system of transmission, are void as too broad.

2. PATENTS ⊜170—CONSTRUCTION AND SCOPE—STATE OF THE ART.
An inventor is entitled to all the benefits of his invention, notwithstanding the fact that he may not have fully appreciated those advantages, especially in the early stages of an extremely difficult art.

3. PATENTS ⊜170—VALIDITY—STATE OF THE ART.
Where, when an application was filed, the art was new, and some of its definitions and phraseology were still in the making, and where it is apparent that the patentee was not endeavoring to utilize after-acquired knowledge, courts should not be astute to find obstacles against the inventor.

In Equity. Suit by Samuel M. Kintner and Halsey M. Barrett, receivers of the National Electric Signaling Company, against the Atlantic Communication Company and others. On final hearing. Decree for complainants.

Suit for infringement of claims 2, 3, 10, 14, 15, 16, 17, 19, 20, and 21 of reissued letters patent No. 12,168, to Reginald A. Fessenden, dated November 10, 1903, the original patent No. 706,737, being dated August 12, 1902, and the application for reissue having been filed October 20, 1903.

Frederick W. Winter, of Pittsburgh, Pa., and Drury W. Cooper, of New York City, for plaintiffs.

Charles Neave and Harry E. Knight, both of New York City, and Hervey S. Knight, of Washington, D. C., for defendants.

MAYER, District Judge. This is the usual patent infringement suit, the defenses relied upon being invalidity and noninfringement. Two grounds of invalidity are urged: (1) Noninvention; and (2) that the subject-matter of the claims was injected into the application after the original date of filing, and therefore constitutes an invalid enlargement of the application.

[1] Noninfringement is urged on the ground that defendants do not use instrumentalities coming within the claims in issue, when interpreted as defendants insist they must be. The subject-matter of the patent is addressed to the transmission of energy by electromagnetic waves. The patentee states:

"The invention described herein relates to certain improvements in transmission of energy by electromagnetic waves, and has for its object the production of more efficient sending or generating conductors. It is a further object of the invention to provide for the production of mechanical movements

by the direct interaction of currents induced in the receiving conductor by electromagnetic waves and constant or varying magnetic fields."

"In the experiments heretofore made in wireless transmission of energy, as in telegraphy, relatively high frequencies—e. g., of the order of 2,000,000 periods or more per second—have been used. It is impossible to produce or utilize mechanical movements directly by the interaction of a constant or independently varying magnectic field and a current induced by electromagnetic waves of such high periodicities, for the reason that either the element to be moved (as the diaphragm of a telephone) is incapable of such rapid vibrations or the vibrations are too rapid to be utilized. In order to utilize directly the interaction between currents induced by electromagnetic waves and a constant or independently varying magnetic field to produce motion in one of two members, of a receiving instrument, one member thereof, consisting of a contant or independently varying magnetic field, the sending conductor is so constructed that its capacity or self-induction, or both, are large as compared with the value of the aerial wire commonly used in the art and distributed with practical uniformity along the conductor from or near its top to a point at or near the instrument. By thus increasing the capacity and self-induction of either of them, the frequency of the electric oscillations in the conductors, and consequently of the waves generated, will be sufficiently low to produce utilizable motion in the instrument. By 'low frequency' is meant low relative to the frequency hitherto used in wireless telegraphy."

The claims fall into two groups, the first of which relates to the "sending conductor" and the second to a "system," in which continuous electromagnetic waves are radiated for the transmission of energy. In the first group are claims 2, 3, 10, 15, 16, and 17, and in the second group are claims 19, 20, and 21. Claims 2 and 19 are quoted as substantially typical of the two groups.

"2. A sending conductor for electromagnetic waves, having its capacity so adjusted that the waves radiated therefrom have a low frequency, substantially as set forth."

"19. A system for transmission of energy by electromagnetic waves in combination with a radiating conductor and a source of alternating electrical energy or potential, said radiating conductor and source being co-ordinated and relatively adjusted to radiate a substantially continuous stream of electromagnetic waves."

Apparently there is no attack on the reissue as such, but defendants attack the original patent on the ground that there was an unwarranted departure from the disclosure in the application as originally filed. The changes (many of which were evoked by discussions with and the action of the Patent Office examiner) are too numerous to analyze in detail. The contentions of defendants as to the interpretation of the patent are concisely stated as follows:

"The only teachings that could possibly be gathered from the Fessenden specification, as originally filed, were:

"Ia. A sending conductor, identified as—(1) The antenna or radiating part of a transmitting system. (2) Having its constants adjusted to transmit frequencies receivable mechanically and therefore audio frequencies. (3) Having 'a source of alternating voltage' directly connected therewith, and delivering its original frequency directly thereto, without use of a spark device, stepping up device, or other intervening oscillation producing device; the old form of induction coil (with its current interrupter) or else the dynamo or the transformer were recognized by him as equivalent for all results then conceived of.

"Ib. That on May 29, 1901 (the filing date), Fessenden had not the slightest thought of teaching the existence of, or any manner of advantage in—(4) Substantially continuous radiation, or waves of uniform strength, or any

manner of advantage in the characteristic output of a dynamo per se or any difference between a dynamo, as the source, and well-known damped wave sources such as an induction coil (which always has a vibrator) or a transformer having its primary supplied from any source (including direct current sources acting through a Wehnelt interrupter or the usual induction coil)."

The application as originally filed illustrated and described a dynamo connected directly to the aerial. The specification mentioned only one numerical value of the frequency, to wit, a frequency of 100,000 or less. The original specification also stated that:

"The best results are obtained when the frequency of the source of alternating voltage, as a dynamo, is equal or approximately equal to the natural frequency of the radiating system."

The evidence warrants the conclusion that a 100,000-cycle alternator, or an alternator of any other frequency, directly connected to the antenna as shown in Figs. 1 and 2 of the patent, with the alternator frequency equal or approximately equal to the natural frequency of the radiating system, will produce a continuous electromagnetic wave having a frequency equal to that of the alternator, and of constant amplitude.

It is true that in referring to the "exciting generator" Fessenden did not limit himself to a dynamo; for he said: "As, for example, the exciting generator may be a dynamo, a transformer, or an induction coil. * * *" It is, however, immaterial whether or not Fessenden placed his strongest emphasis on the dynamo. The evidence, in my opinion, warrants the belief that Fessenden fully appreciated the value of the dynamo in his combination as one of the elements by means of which the desired continuous or sustained waves could be attained. But whether or not this conclusion is correct is again immaterial, because the point is that Fessenden disclosed to the man skilled in the art, the means of obtaining the result, to wit, continuous generation.

[2] An inventor, of course, is entitled to all the benefits of his invention, notwithstanding the fact that he may not have fully appreciated those advantages, especially in the early stages of an extremely difficult art.

[3] It must not be forgotten that, when this application was filed, the art was young, and some of its definitions and phraseology were still in the making, and where, as here, it is apparent that the patentee was not endeavoring to utilize after-acquired knowledge (as in Kintner v. Atlantic Communication Co. [D. C.] 230 Fed. 829, affirmed 240 Fed. 716, 153 C. C. A. 514), courts should not be astute to find obstacles against the inventor.

In part answer to the contentions of defendants, as quoted supra, it appears that in the original specification the conductor was described as a "generating conductor." This was changed to "sending conductor," and supplemented by a definition consistent with "generating" conductor as follows:

"The terms 'sending conductor' and 'receiving conductor,' as hereinafter employed, indicate all of the circuits of the sending and receiving stations from top to ground, * * * including all apparatus in series with the circuits, while the term 'radiating portion' indicates substantially all of the

sending conductor from top or extreme end of same to a point at or near junction with the apparatus for effecting the oscillatory charging and discharging thereof, such as sparking terminals, transformer coils, armature windings, etc."

Since claims 2, 3, 15, 16, and 17 are drawn explicitly to a "sending conductor," they must be read to mean what the specification defines to be the sending conductor, and cannot be construed to cover merely the radiating portion or aerial. In other words, they must be read to include, not only the aerial, but all of the sending circuits, including the generator. In effect, they mean a sending or generating system having the necessary high capacity, small inductance, and low resistance, to radiate waves of low frequency. Further, the disclosure was not limited to audio frequencies, but broadly to "transmission of energy by electromagnetic waves."

As to the criticism in respect of Fessenden's lack of appreciation of the characteristic output of a dynamo, it has already been shown that he clearly indicated that a dynamo could or should be used. It is immaterial that a dynamo producing frequencies of 100,000 or less was not then in existence. Fessenden believed that such a dynamo could be constructed; he pointed out that it was part of his system, and, as matter of fact, he persisted until the General Electric Company (with the aid of its own expert staff), acting on his orders and at the expense of Fessenden's employer, finally built the dynamo desired.

Perhaps the strongest point suggested by defendants on the file wrapper branch of the case is that which calls attention to the references of Fessenden to the use of the spark discharge. See reissue patent, line 39 et seq. After describing his system, Fessenden said:

"I am able to substitute for the induction coil a spark gap now in use, a dynamo or similar source of alternating voltage."

He then continued:

"If the dynamo be used without the spark gap, I am able at once to produce a continuous train of radiant waves; * * * furthermore, where the spark discharge is used, I am able * * * to completely bridge over the intervals of no radiation."

Apparently Fessenden supposed that he could work out continuous generation with the spark gap as well as with the dynamo without the spark gap; or, it may be, that this was in the nature of an anchor to windward in the characteristically Fessenden hope of covering everything which might thereafter be discovered or invented. But, because Fessenden advanced this theory as to spark discharge, it does not follow that the patent failed to disclose a system of continuous generation and the physical means therefor. It is enough that the specification disclosed the invention, even though in so doing extraneous or irrelevant or useless matter was also inserted in the specification.

In brief, the original specification was clear enough to instruct the art, and the amendments thereto, so far as affect this case, were mainly in the nature of elaboration and clarity. Boyce v. Stewart-Warner Speedometer Corporation, 220 Fed. 118, 136 C. C. A. 72. From the foregoing summary outline, it follows that there was no enlargement or departure in respect of claims 2, 3, 15, 16, and 17.

Claims 19, 20, and 21 are on a basis quite different from the other claims in issue. In claim 2, for instance, the sending conductor, when read with the definition in the specification, is clearly described, and the adjustment of capacity so as to accomplish low frequency was something readily understandable In claim 19, however, such an expression as "being co-ordinated and relatively adjusted to generate and radiate a substantially continuous stream of electromagnetic waves" amounts practically to stating a result—contrary to the doctrine of Corning v. Burden, 15 How. 252, 14 L. Ed. 683. Further, the terms are very indefinite and not within the principle of Eibel Process Co. v. Remington-Martin Co., 234 Fed. 624, 148 C. C. A. 390. No reference is made to the "sending conductor" of the patent, but, inter alia, to "a" source of alternating electrical energy; i. e., to any source without describing the character of the source. Further, there is no restriction as to the frequency to be used. This group of claims (19, 20, 21) represents an effort to corral the art by the use of comprehensive indefinite terms, and the specification does not help out nor limit these claims to explicitly stated instrumentalities which shall make up the "system." That these claims are intended to be broad and all-gathering is illustrated by the fact that most of the other claims were for more or less specific instrumentalities, such as (to illustrate) claims 2 and 23. The effort, as set forth in claims 19, 20, and 21 to foreclose broadly against the future a continuous generation system, cannot be approved and these claims are held void.

Starting with the foregoing interpretation of the patent, attention must next be turned to the prior art. Many prior patents, publications, drawings, and apparatus were introduced in evidence, which are of no service and tend only to swell the record; but in a case of this character, which is unfolded gradually as it proceeds, the trial court is largely helpless, because, before the subject is grasped, error may be committed by excluding some apparently irrelevant or useless previous patent or publication, which, perhaps, later may appear to the trial or appellate court to be germane and important.[1] I shall therefore refer only to so much of the prior art as seems to me worthy of discussion.

On May 29, 1901, the art needed many advances, one of the most important of which was increased power, which could be utilized at the receiver. The elements of the claims in issue are concededly old, and, while there is a wealth of scientific discussion of many subjects, both by the experts and in the pertinent literature of this record, the essential questions are (1) whether spark generation was in 1901 the accepted method; (2) whether Fessenden was the first to disclose clearly and definitely a departure therefrom—i. e., a system of continuous generation with the practical means for its production; and (3) whether such disclosure rose to the dignity of invention.

In approaching the subject, it is extremely important to think, if possible, as of 1901. In this case, that is a troublesome task, because of the extraordinary progress in this art since then, and the consequent

[1] This observation does not apply to Mr. Tesla's testimony, which took the form of a lecture, for the failure to limit which I hold myself responsible.

difficulty of discarding from consideration many items of after-acquired knowledge. It is also necessary in this case not to accord undue importance to isolated suggestions in scientific papers and discussions. Such suggestions are not infrequently controlling in a well-developed and well-understood art where skilled men can readily appreciate the disclosure. In the infancy of a new, and, at the time, little understood, art, however, the alleged prior art necessary to negative invention must be clear, and doubts as to its meaning and disclosures should ordinarily be resolved in favor of the inventor.

The Lodge patents, infra, are, in my opinion, the most important prior art, and they will be discussed last.

Tesla. While the world is indebted to this inventor for some highly valuable contributions, his work and his patents and publications have added nothing to the branch of the art here under consideration. Time alone will determine whether some of his theories are right, but patent causes cannot be decided on speculation. Tesla's two-path conduction method depends upon impressing enormous voltages mounting to the millions, upon a terminal extending so high above the earth's surface as to bring it into or close to an air stratum sufficiently rarified to become a good conductor. To attain the enormous pressures it was necessary to store the energy in a condenser and then set it free at once. Such a system is far removed from accomplishing continuous wave transmission. (See Hogan's discussion.) Tesla's one-path conduction method seems too late; but, in any event, as Hogan, plaintiffs' expert, said:

"The whole proposition is highly speculative. * * * It offers a complete series of contrasts as opposed to radio telegraphy, either in theory or in practice."

Finally, Tesla's work was purely experimental, and added nothing to the practical art; nor did Bissing's article in the Electrical World of January 21, 1899, p. 85, add anything. Indeed, Bissing's reference to the Edison patent, 465,971, indicates that he classed Tesla's disclosure with the Edison and similar systems, whose effects are attributable to electrostatic induction and not to electromagnetic radiation.

German Braun Patent of July 7, 1900 I accept Hogan's views as to this patent. They are concisely stated as follows:

"The first part of the specification classifies electrical oscillations into three groups, the first of which may be produced mechanically by machines, et cetera, and which necessarily have extremely limited numbers of periods. The second group is the one where the number of oscillations is determined by Leyden jars and induction coils, and has frequencies so very much higher that it is exceedingly difficult to reduce the number to such an extent that it will approach the number of oscillations producible by machines. The third group of frequencies has become well known through the studies of Hertz, and is determined by the discharge of the capacities of 'simple bodies,' such as the normal conductor of a Hertzian oscillator or a small rod. Braun states that so far in the development of spark telegraphy only discharges of simple bodies, such as the Hertz oscillator, have been used, and that 'in this telegraphy by means of the electromagnetic waves of Hertz it is an essential condition that receiver and transmitter should be visible to each other uninterruptedly and to their entire extent. The sails of a vessel, smoke, trees, buildings, et

cetera, weaken the effect when intercepting the vision, or interrupt the effect entirely.' He then proposes to get longer waves than those of Hertz—that is to say, waves longer than two or three meters in length (which are of the sort which would be affected by the interposition of objects which would prevent complete visibility of the receiving station from the transmitter)—and says that these increased wave lengths will be secured from the discharge of a Leyden jar. These wave lengths, somewhat longer than the exceedingly short disturbances of Hertz, are nevertheless much shorter than the wave lengths used by Marconi in 1901. The oscillator, as shown in the drawings and as operated for the production of wave lengths, say, of 20 or 30 meters, will have enormous periods of inactivity between each spark discharge of the Leyden jar or condenser. There is no suggestion of longer wave lengths than those used in the practice of the art of radiotelegraphy, but merely of wave lengths longer than those of Hertz's original experiments. There is no suggestion of continuity of generation, and in fact the exact opposite must result from the use of such an arrangement of apparatus; and there is no antenna shown or described, except that near the end of the specification a 'longitudinally stretched transmitter wire' is referred to."

Marconi Four-Circuit Tuner Patent, Belgian 162,810. For convenience, the experts have considered British patent 7,777 of 1900. See, also, United States patent 763,772, discussed in Marconi Wireless Tel Co v. National Electric Sig. Co. (D. C.) 213 Fed 815 Marconi, under this patent, used the spark gap. By his arrangement he succeeded in producing quite persistent wave trains, but only damped wave groups could be produced. There is no disclosure of low frequency, nor of continuous waves. The longest wave length in the early practice under this patent was about 300 meters, corresponding to a frequency of 1,000,000 per second.

Lodge British Patent, No. 11,575 of 1897, and United States Patent No. 609,154, August 16, 1898. I think Judge Veeder has correctly summarized the main features of the Lodge advance in the following language:

"The capacity of a vertical wire is not great, and the extent to which it may be increased by lengthening the wire or adding capacity areas is obviously limited. Lodge came forward with a new idea. Although he recognized the impossibility of having a circuit which should be at once a good radiator or absorber and a persistent oscillator, he proposed a compromise. He increased the persistence of vibration of his radiating circuit at the expense of its radiating qualities, and increased the accumulative power of his receiving circuit at the expense of its absorbing qualities. Effecting this compromise by means of the introduction of an induction coil in an open circuit, he obtained a train of waves of approximately equal amplitude and thus rendered effective syntony possible. But the syntony thus obtained was utilized for selectivity alone. It was attained at the expense of the radiating and absorbing qualities of the circuit; and Lodge still supposed that for distant signaling the single pulse or whip crack was best." Marconi Wireless Tel. Co. v. National Electric Sig. Co. (D. C.) 213 Fed. 815, 847.

Undoubtedly, the Lodge antenna was of much greater capacity than was then in vogue. Lodge reduced the frequency of the ordinary Marconi system and secured a more persistent wave train by the insertion of the loading coils. The Lodge patent was a marked step forward, but it cannot be construed into a disclosure of continuous generation.

Going beyond the patent, I inquired quite at length as to the result to be expected if the linear dimensions of the Lodge antenna were

increased to those of the tallest Marconi antenna in use in 1901, viz. 180 feet; the point being to ascertain whether the wave frequency would be so much reduced as to get a substantially continuous wave. I think it is a fair assumption that the skilled man of the time would have investigated the problem along these lines, and this branch of the case has presented the greatest difficulty on the question of invention. However, I have finally concluded that Hogan is right in his opinion that the engineer of that time would not have increased the linear dimensions of the antenna without correspondingly increasing the loading coil, with the result of an increase in resistance so great as to impair seriously the radiating power. In any event, it is certain that no one has produced continuous waves by any system which follows the teaching of Lodge or any other spark system.

As in previous cases in this art, I have not attempted to cover the whole field of discussion found in this extended record; but I think enough has been touched upon to make clear that, although the art was advancing with an appreciation of the advantages of decreased wave frequency, the desirability of increased capacity, and the necessity for increased persistence, yet spark generation was still the accepted method, from which Fessenden departed, and thus contributed another way and means of transmission. Certain it is that Fessenden's patent substantially has ultimately been utilized in actual and successful commercial practice, and it is fairly entitled to be characterized as invention. I conclude, therefore, that claims 2, 3 10, 15, 16, and 17, are clearly valid. The validity of claim 10 is not so clear; but, reading it with the specification, I have resolved the doubt as to this claim in favor of plaintiffs.

The question of infringement does not invite discussion. The specific differences between the Sayville transmitter of defendant company and the transmitter of the patent do not avoid infringement. While, for instance, the frequency changers at Sayville are undoubtedly ingenious devices, their use does not affect infringement. Indeed, infringement of claims 2, 3, 10, 15, 16, and 17 seems plain.

There is no evidence against the individual defendants, and I see no occasion to prolong the case as to them; but, as in the heterodyne case, this can be taken up on the settlement of the decree. The usual decree will pass, holding defendant company for infringement of claims 2, 3, 10, 15, 16, and 17, and holding claims 19, 20, and 21 void.

Plaintiffs may have half costs. Submit decree on five days' notice.

RALPH v. COLE et al. (two cases).

(Circuit Court of Appeals, Ninth Circuit. March 8, 1918. Rehearing Denied May 13, 1918.)

Nos. 2952, 2953.

MINES AND MINERALS ⟸38(23)—ACTIONS—SUBMISSION OF ISSUE OF ADVERSE POSSESSION.

In actions begun in the state court, pursuant to Rev. St. §§ 2325, 2326 (Comp. St. 1916, §§ 4622, 4623), to determine contests over Nevada mining claims, which were removed to the federal court and consolidated, the refusal of instructions, requested by defendant, submitting the issue of adverse possession, which was raised by the evidence, was prejudicial error; limitations being a defense under the Nevada statutes applicable to actions to recover mining claims.

Gilbert, Circuit Judge, dissenting.

Appeals from and in Error to the District Court of the United States for the District of Nevada; Edward S. Farrington, Judge.

Action by George A. Cole and others against Joseph Ralph, begun in the state court and removed to the federal court, and consolidated with a second action by the same plaintiffs against the same defendant, also begun in the state court and removed. There were judgments for plaintiffs, and defendant appeals and brings error. Appeals dismissed, and in each case judgment reversed and cause remanded.

The basis of these actions were contests which arose in the United States land office at Elko, Nev., under the provisions of sections 2325 and 2326 of the Revised Statutes (Comp. St. 1916, §§ 4622, 4623), concerning certain mining ground situated in the Battle Mountain mining district in Lander county, of that state. In the case first above entitled and here numbered 2952, the present plaintiff in error filed an application in that land office for a patent to various specifically described lode claims alleged to have been theretofore located by his predecessors in interest, and among them one called and known as Salt Lake No. 3 lode, against which application, in so far as concerned the last-mentioned claim, one or more of the present defendants in error and the predecessors in interest of the others filed in the land office a protest and adverse claim, basing their alleged rights upon a placer claim to substantially the same ground, called Guy Davis placer, located September 6, 1913—years after the location under which the plaintiff in error claims.

Within the time prescribed by section 2326 of the Revised Statutes one or more of the present defendants in error and the predecessors in interest of the others commenced in the district court of the Third judicial district of the state of Nevada, in and for the county of Lander, the first of the present actions against the present plaintiff in error, alleging in substance as follows:

(1) That ever since the ——— day of September, 1913, plaintiffs and their predecessors in interest were the owners of and in the actual possession and occupancy of the Guy Davis placer mining claim, 1,500 feet in length by 600 feet in width, said claim being situated in the Battle Mountain mining district, county of Lander, state of Nevada, and plaintiffs and their predecessors in interest ever since have been and now are the owners of and entitled to the possession of said mining claim.

(2) That plaintiffs are the owners of and entitled to the possession of

said Guy Davis placer mining claim by virtue of a full compliance with the local laws, rules, and customs of miners in said mining district, the laws of the United States, and the state of Nevada relating to mining claims, and by actual prior possession, location, and discovery thereof by these plaintiffs, their grantors, and predecessors in interest.

(3) That on or about August 1, 1914, the defendant wrongfully and without right entered certain portions of said Guy Davis placer mining claim, and on or about said day said defendant filed in the United States land office at Elko, Nev., diagram and field notes of the Salt Lake No. 3 lode, and also the John John and other lodes, and filed therewith an application for patent of the United States for said Salt Lake No. 3 lode, said application being designated as "M. A. No. 01544, Min. Sur. No. 4175," and caused the register of said land office to give notice of said application for patent by publication, as required by law, in the Battle Mountain Scout, a newspaper published in said mining district at Battle Mountain, Nev., the first publication thereof being made on the 1st day of August, 1914, and in said application said defendant did apply for patent of all of said Salt Lake No. 3 lode, and more particularly described as follows (giving specific description); that by said application for patent, and by said wrongful entry aforesaid, defendant wrongfully and without right entered said Guy Davis placer, and practically all of that part of the Guy Davis placer which is intersected by the exterior lines of said "Sur. No. 4175," as shown by plat marked "Exhibit B," filed on the 24th day of September, 1914, in the land office of the United States at Elko, Nev., with the adverse claim of the present defendants in error against an entry of said "Min. Sur. Co. 4175, Mineral Application No. 01544" for patent, said ground so intersected being described as follows (giving specific description), containing 19.86 acres.

(4) That said adverse claim was filed in the said land office within the period of 60 days of notice of said application for patent to said Salt Lake No. 3 lode, and that the present action was commenced before the expiration of 30 days after the filing of the said adverse claim, and is brought in support thereof.

The prayer of the complaint is for judgment against the defendant to the action, for the recovery of the possession of said Guy Davis placer claim, and for a decree that the plaintiffs are the owners, in the possession, and entitled to the possession, of said placer claim, and for the sum of $500 alleged to have been expended in the preparation of said adverse claim, and for the sum of $500 as damages.

In his answer the defendant to the action denies that the plaintiffs, or either of them, or that their predecessors in interest, are or ever were the owners of, or in actual possession of, or entitled to the possession of, any portion of the "so-called" Guy Davis placer mining claim, or to any of the ground embraced within its side lines, by virtue of a full compliance with local laws, rules, or customs of miners in said mining district, or the laws of the United States or the laws of Nevada, relating to mining claims, or by actual prior possession, location, or discovery by plaintiffs, their grantors, or predecessors in interest, or any one, or at all.

The defendant further denies that on the 1st day of August, 1914, or at any other time, or at all, he or his predecessors in interest, or any one on his behalf, wrongfully and without right entered certain portions of said "so-called" Guy Davis placer mining claim, but admitted that on said date he filed in the United States land office at Elko, Nev., an application for patent to the said Salt Lake No. 3 lode claim, together with a like application for patents to the John John and other lodes, and with a diagram and notes of the surveys, and caused the register of the said land office to give the required notice of such applications, and admitted that the first publication thereof was made on the 1st day of August, 1914, and admitted that such application covered all of the ground embraced within the side lines of said Salt Lake No. 3 lode as alleged in the complaint, but denied that any of the said acts were without right, but, on the contrary, alleged that all of them were rightful and in accordance with law.

The defendant further denies that by his said application for patent, or by said entry, or in any other way, he wrongfully or without right entered upon any of the portion of the "so-called" Guy Davis placer, as set forth in the complaint, but, on the contrary, alleges that he is and at all the times mentioned was the owner of and entitled to the possession of all of the ground covered by the adverse claim of the plaintiffs. And by his answer the defendant as a further defense alleges:

(1) That the plaintiffs and each of them are and were at all the times mentioned in the complaint residents and citizens of the state of Nevada, and the defendant a resident and citizen of the state of Utah, and over the age of 21 years.

(2) That the amount involved in the action is over $3,000, exclusive of interest and costs.

(3) That on or about February 2, 1897, the grantors of the defendant, then being citizens of the United States and over the age of 21 years, were, and ever since that date the defendant and his said grantors have been, the owners, in the actual possession of, and entitled to the possession of, the said Salt Lake No. 3 lode mining claim.

(4) That he has and claims the legal right to occupy and possess said Salt Lake No. 3 lode mining claim, by virtue of a full compliance with the local laws, rules, and customs of miners in said mining district, the laws of the United States, and of said state of Nevada, by pre-emption, purchase, and subsequent transfer, and by actual prior possession as a lode mining claim located upon the public domain of the United States.

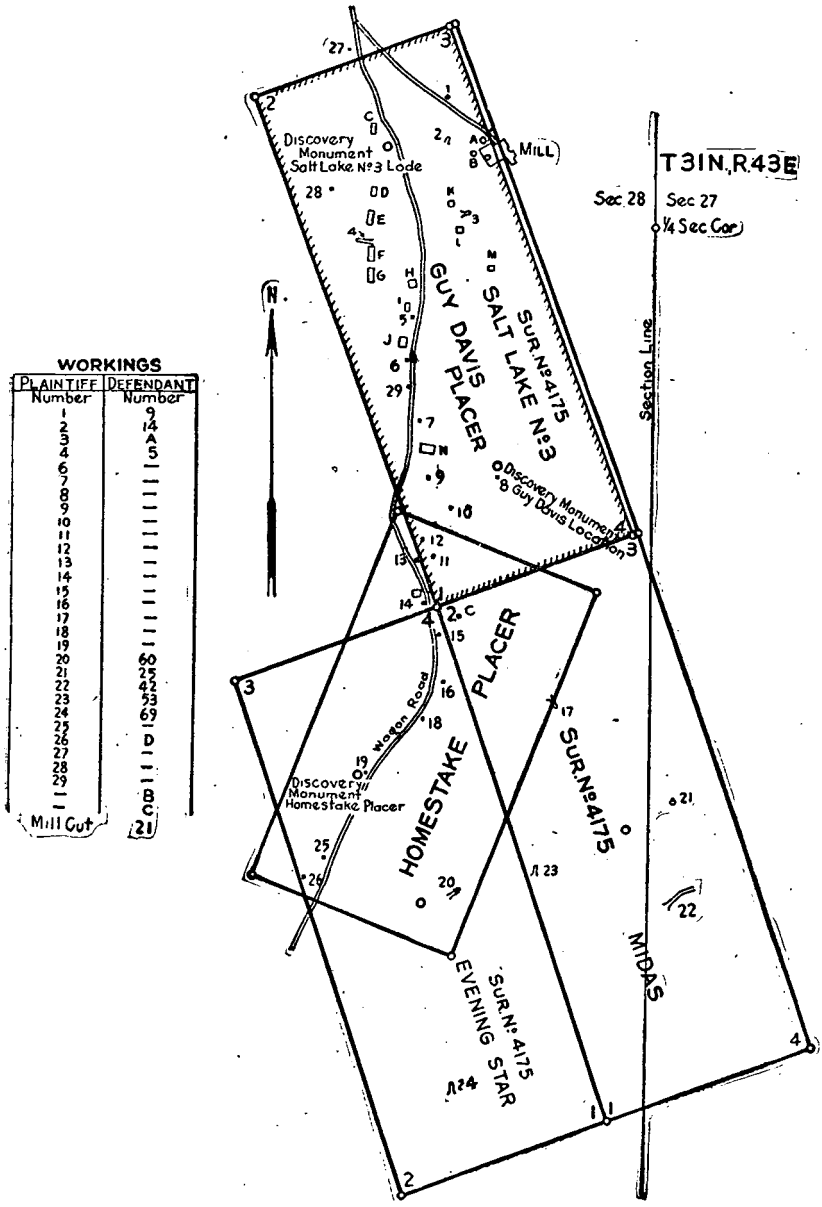
(5) That on or about February 2, 1897, the grantors and predecessors in interest of the defendant, being then citizens of the United States, entered upon its then unappropriated public domain and located the Salt Lake No. 3 lode mining claim, by then and there marking the boundaries thereof as required by law, and ever since said date the defendant and his grantors were, until September 5, 1913, in the quiet and undisputed possession of said lode mining claim, and during all of said time, and for more than 16 years, the defendant and his grantors and predecessors in interest were in the open, notorious, adverse, and undisputed possession of said mining claim, holding, working, and living thereon; that on or about September 6, 1913, while said claim was so being held, owned, occupied, and possessed by the defendant, his grantors, and predecessors, and with full knowledge, the plaintiffs and their grantors wrongfully and without authority entered upon said lode mining claim, without the knowledge or consent of the said defendant or his grantors, and attempted to locate upon the ground embraced within the said Salt Lake No. 3 lode the Guy Davis placer claim; that by reason of the premises alleged the defendant has become and is now the owner and holder of the said ground and the whole thereof, and that the said attempted location of the plaintiffs and their grantors was and is wholly void and of no effect.

The prayer of the answer is that the plaintiffs take nothing upon their complaint, that judgment be given defendant for the possession of said Salt Lake No. 3 lode mining claim, and for costs of suit.

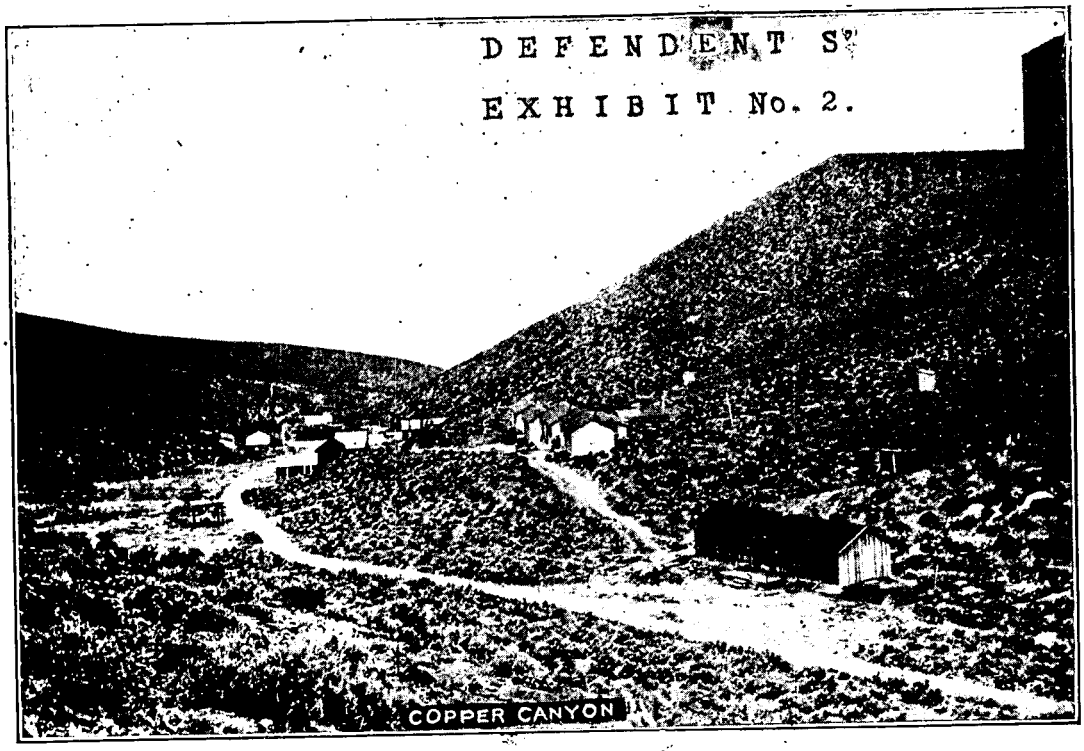
The reply of the plaintiffs put in issue the affirmative allegations of the answer.

In the second of the suits above entitled, being No. 2953, the pleadings are in all respects similar, except as to the property in controversy. In that action the patents applied for by the defendant to the action were for two lode claims, named, respectively, Midas and Evening Star, across the surface of which the plaintiffs and their predecessors in interest located a placer mining claim called Homestake placer, based upon which claim they filed in the land office a protest against the application of the defendant to the action and asserted their adverse claim to such placer, and in pursuance of which they filed the complaint in the district court of the state of Nevada, in and for Lander county, involved in the second of the actions above entitled.

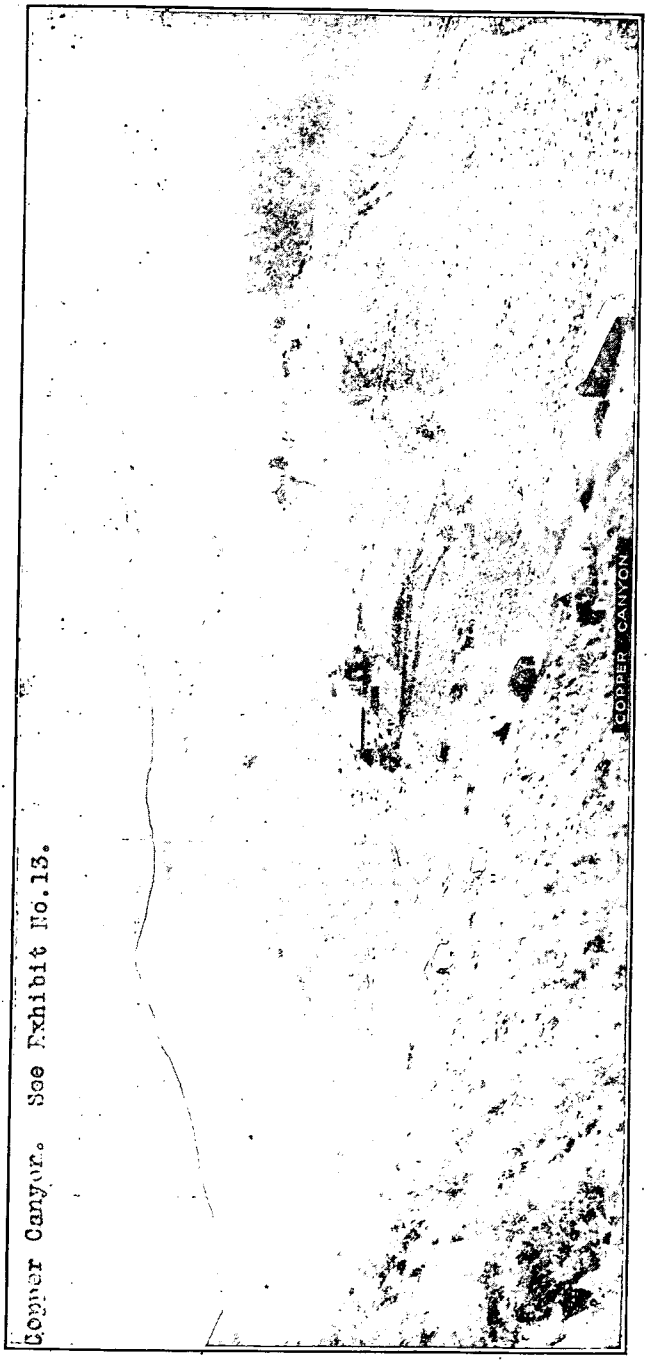
As illustrative of the respective claims of the parties, the following diagram is inserted, together with some representations found in the record of the character of the surrounding ground:



MAP OF MINING CLAIMS INVOLVED
COMPILED FROM
PLAINTIFF'S EXHIBIT "A", DEFENDANT'S EXHIBIT "5"



Showing topography, contour of bed rock, and evident depth of soil at different points, about the buildings on Salt Lake No. 3. Looking south.



Copper Canyon. See Exhibit No. 13.

The two actions were by stipulation of the respective parties thereto consolidated and tried together in the court below upon the same evidence, and resulted in a general verdict in each case in favor of the plaintiffs, together with a special verdict to the effect that there was no valid discovery of mineral within either of the lode claims relied on by the defendant to the actions, prior to the entry on the ground embraced by them on the part of the plaintiffs and their grantors, upon which verdicts respective judgments were entered in favor of the plaintiffs for the possession of the ground embraced by the respective placer claims.

From those judgments the respective appeals were taken, as well as from the order denying a new trial in each case; the plaintiff in error also suing out a writ of error in each of the cases.

P. G. Ellis, of Salt Lake City, Utah, for appellant and plaintiff in error.

George B. Thatcher, of Carson City, Nev., William Forman, of Tonopah, Nev., F. H. Norcross, of Reno, Nev., and A. A. Rosenshine, of San Francisco, Cal., for appellees and defendants in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge (after stating the facts as above). The act of Congress of July 26, 1866 (14 Stat. 251, c. 262), in which provision was made for contests of rival mining claims to mining ground by the filing of adverse claims in the land office and their subsequent trial in a court of competent jurisdiction, was subsequently made more specific by the act of May 10, 1872 (17 Stat. 91, c. 152), and from that carried into the Revised Statutes as sections 2325 and 2326. An amendment to the latter section was made by act approved March 3, 1881 (21 Stat. 505, c. 140 [Comp. St. 1916, § 4625]), by which it was declared:

"That if, in any action brought pursuant to section twenty-three hundred and twenty-six of the Revised Statutes, title to the ground in controversy shall not be established by either party, the jury shall so find, and judgment shall be entered according to the verdict."

Referring to the latter act in the case of Perego v. Dodge, 163 U. S. 160, 167, 168, 16 Sup. Ct. 971, 974 (41 L. Ed. 113), the Supreme Court said that it did not regard it "as intended or requiring all suits under section 2326 to be actions at law and to be tried by a jury"—saying:

"We do not think the intention of this act was to change the methods of trial. Its manifest object was to provide for an adjudication, in the case supposed, that neither party was entitled to the property, so that the applicant could not go forward with his proceedings in the land office simply because the adverse claimant had failed to make out his case, if he had also failed. In other words, the duty was imposed on the court to enter such judgment or decree as would evidence that the applicant had not established the right of possession, and was for that reason not entitled to a patent. The whole proceeding is merely in aid of the land department, and the object of the amendment was to secure that aid as much in cases where both parties failed to establish title as where judgment was rendered in favor of either, and while the finding by a jury is referred to, we think that, where the adverse claimant chooses to proceed by bill to quiet title, and as between him and the applicant for the patent neither is found entitled to relief, the court can render a decree to that effect, just as it would render judgment on a verdict if the action were at law. If Congress had intended to provide that litigation of this sort must be at law, or must invariably be tried by a jury,

it would have said so. There is nothing to indicate the intention thus to circumscribe resort to the accustomed modes of procedure or to prevent the parties from submitting the determination of their controversies to the court."

By section 2325 the applicant for a patent to a mining claim is required to file with his application the evidence of his right to it, and the register of the land office is thereupon required to cause notice of such application to be published in a prescribed way for 60 days, during which time any adverse claimant to any part of the location described in the application is required to file an adverse claim in the land office. The next section—2326—is as follows:

"Where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim. After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof, may, without giving further notice, file a certified copy of the judgment-roll with the register of the land office, together with the certificate of the surveyor general that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the receiver five dollars per acre for his claim, together with the proper fees, whereupon the whole proceedings and the judgment roll shall be certified by the register to the Commissioner of the General Land Office, and a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear, from the decision of the court, to rightly possess. If it appears from the decision of the court that several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim, with the proper fees and file the certificate and description by the surveyor general, whereupon the register shall certify the proceedings and judgment roll to the Commissioner of the General Land Office, as in the preceding case, and patents shall issue to the several parties according to their respective rights. Nothing herein contained shall be construed to prevent the alienation of the title conveyed by a patent for a mining claim to any person whatever."

It will be seen from the express language of this statute that the question so to be transferred from the land office to a court of competent jurisdiction for decision is that of the right of possession of the mining ground respecting which the contest has arisen in the land office—the title to the ground of course remaining in the government for disposal in accordance with the judgment of the court and after compliance with all the other requirements of the statute. No form of action is prescribed by the statute, and no court other than one of competent jurisdiction is designated.

Prior to the passage of any mining law by Congress, both the Land Department and the courts always acted upon the rule that all mineral locations were to be governed by the local laws, rules, and customs in force at the time of the location. Glacier Mining Co. v. Willis, 127 U. S. 471, 482, 8 Sup. Ct. 1214, 32 L. Ed. 172, and cases there cited. That such practice was intended by Congress to be continued is clearly

shown by the express provisions of section 2 of the act of July 26, 1866 (14 Stat. 251), and by section 2332 of the Revised Statutes (Comp. St. 1916, § 4631), the former of which provides, among other things, that:

"Whenever any person or association of persons claims a vein or lode of quartz or other rock in place, bearing gold, silver, cinnabar, or copper, having previously occupied and improved the same according to the local customs or rules of miners in the district where the same is situated, and having expended in actual labor and improvements thereon an amount of not less than $1,000, and in regard to whose possession there is no controversy or opposing claim, it shall, and may be lawful for such claimant or association of claimants to file in the local land office a diagram of the same so extended laterally or otherwise as to conform to the local laws, customs, and usages of miners, and to enter such tract and receive a patent therefor granting such mine," etc.

—and the second of which, to wit, section 2332 of the Revised Statutes, declares, among other things, that:

"Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the state or territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter, in the absence of any adverse claim."

Looking at the scheme presented by sections 2325 and 2326 of the Revised Statutes, said the Supreme Court in Richmond Mining Co. v. Rose, 114 U. S. 576, 584, 5 Sup. Ct. 1055, 1059 (29 L. Ed. 273)—

"and which relates solely to securing patents for mining claims, it is apparent that the law intended, in every instance where there was a possibility that one of these claims conflicted with another, to give opportunity to have the conflict decided by a judicial tribunal before the rights of the parties were foreclosed or embarrassed by the issue of a patent to either claimant. The wisdom of this is apparent when we consider its effect upon the value of the patent, which is thereby rendered conclusive as to all rights which could have been asserted in this proceeding, and that it enabled this to be done in the form of an action in a court of the vicinage, where the witnesses could be produced, and a jury, largely of miners, could pass upon the rights of the parties under instruction as to the law from the court. It is in full accord with this purpose that the law should declare, as it does, that when this contest is inaugurated the land officers shall proceed no further until the court had decided, and that they shall then be governed by that decision; to which end a copy of the record is to be filed in their office. They have no further act of judgment to exercise. If the court decides for one party or the other the Land Department is bound by the decision. If it decides that neither party has established a right to the mine or any part of it, this is equally binding as the case then stands. With all this these officers have no right to interfere. After the decision they are governed by it. Before the decision, once the proceeding is initiated, their function is suspended."

In the subsequent case of Iron Silver Mining Co. v. Campbell, 135 U. S. 286, 299, 10 Sup. Ct. 765, 769 (34 L. Ed. 155), the same court, in speaking of the same statute, said:

"The purpose of the statute seems to be that, where there are two claimants to the same mine, neither of whom has yet acquired the title from the government, they shall bring their respective claims to the same property, in the manner prescribed in the statute, before some judicial tribunal located in the neighborhood where the property is, and that the result of this judicial investigation shall govern the action of the officers of the land department in

determining which of these claimants shall have the patent, the final evidence of title, from the government."

Neither the specific courts authorized by section 2326 to try the right of possession of the ground to which conflicting claims arise in the land office, nor the character of such actions being designated by the statute, different rulings were made by the courts, many holding, as was done by a number in this circuit—Shoshone Mining Co. v. Rutter et al., 87 Fed. 801, 31 C. C. A. 223, Doe v. Waterloo Mining Co. (C. C.) 43 Fed. 219, and other cases there referred to—that such actions were equitable in their nature, and that the federal courts had jurisdiction of them regardless of the citizenship of the parties; but on appeal of the case of Shoshone Mining Co. v. Rutter et al., reported in 177 U. S. 505, 20 Sup. Ct. 726, 44 L. Ed. 864, the Supreme Court, while conceding that the question was not free from doubt, held that, inasmuch "as the 'adverse suit' to determine the right of possession may not involve any question as to the construction or effect of the Constitution or laws of the United States, but may present simply a question of fact as to the time of the discovery of mineral, the location of the claim on the ground, or a determination of the meaning and effect of certain local rules and customs prescribed by the miners of the district, or the effect of state statutes, it would seem to follow that it is not one which necessarily arises under the Constitution and laws of the United States," and accordingly concluded that while such suits may sometimes so present questions arising under the Constitution and laws of the United States that the federal courts will have jurisdiction regardless of the citizenship of the parties, yet the mere fact that a suit is an adverse suit authorized by the statutes of the United States is not in and of itself sufficient to vest such jurisdiction, and reversed the judgment appealed from.

From the pleadings in the present cases it is plain that they were actions at law in which the sole issue was the right of possession of the respective mining claims. Being such, the parties were of right entitled to a jury trial; besides which it appears from the records that they expressly stipulated for such a trial in the court below, to which court the cases were, on motion of the defendant thereto, transferred from the state court in which they were commenced, because of the diverse citizenship of the parties.

It is apparent from what has already been said that the issue in the cases depended for its determination upon the above-cited provisions of the statutes of the United States and upon the local laws, rules, and customs of the state and district where the ground in dispute is situate, applied to the facts of the case. A statute of limitations of Nevada regarding mining claims originally enacted as early as November 21, 1861, as amended in 1867, reads as follows:

"3706. Sec. 4. No action for the recovery of mining claims, or for the recovery of the possession thereof, shall be maintained, unless it appear that the plaintiff, or those through or from whom he claims, were seized or possessed of such mining claim, or were the owners thereof, according to the laws and customs of the district embracing the same, within two years before the commencement of such action. Occupation and adverse possession of a mining claim shall consist in holding and working the same, in the usual and cus-

tomary mode of holding and working similar claims in the vicinity thereof. All the provisions of this act, which apply to other real estate, so far as applicable, shall be deemed to include and apply to mining claims: Provided, that in such application 'two years' shall be held to be the period intended whenever the term 'five years' is used; and provided, further, that when the terms 'legal title' or 'title' are used, they shall be held to include title acquired by location or occupation, according to the usages, laws, and customs of the district embracing the claim." Cutting's Compiled Laws of Nevada, 1861–1900.

By virtue of that statute and of the provisions of section 2332 of the Revised Statutes, the defendant to these actions in his answer to the complaints set up, among other defenses, that on or about February 2, 1897, the grantors of the defendant, being then citizens of the United States, entered upon its then unappropriated public domain and located the Salt Lake No. 3 lode mining claim, by then and there marking the boundaries thereof as required by law, from which time the defendant and his grantors and predecessors in interest remained in the open, notorious, adverse, and undisputed possession of the said lode mining claim, holding, working, and living thereon; that on or about September 6, 1913, while the said claim was so being held, owned, occupied, and possessed by the defendant, the plaintiffs and their grantors, with full knowledge, wrongfully and without authority entered upon said lode mining claim, without the knowledge or consent of the said defendant, and attempted to locate upon the ground embraced within the said Salt Lake No. 3 lode the Guy Davis placer claim, which attempted location of the plaintiffs and their grantors was and is wholly void and of no effect, and that by reason of the premises alleged the defendant became and now is the owner and holder of the said Salt Lake No. 3 lode claim and the whole of the ground embraced thereby.

In support of that plea of the statute of limitations the defendant to the actions introduced much evidence tending to support it, and going to show that the Salt Lake No. 3, Midas, and Evening Star were three of a dozen or more neighboring lode claims known as the Copper Canyon group of mines that were located by the predecessors in interest of the plaintiff in error many years before the entry upon the same by any of the defendants in error or any of their predecessors in interest and that all of such lode claims have been duly patented by the government except the three here in contest. Evidence was given that the Salt Lake No. 3 was located by two men named, respectively, Clive and Johnson, on the 2d day of February, 1897, and the Midas and Evening Star by Joseph and William T. Jurey March 27, 1907, and that the notices of location thereof were duly recorded and recited on their face the discovery of a vein within the ground so located. Evidence was given of the performance of the required annual assessment work on each of the lode claims in dispute by the locators thereof and their successors in interest, and tending to show their continued adverse occupancy by the successors in interest of the original locators and the doing from time to time of a large amount of work thereon—there having also been erected on the Salt Lake No. 3 claim, as will be seen from the photographs that have

been inserted, a mill and other buildings, in one of which houses a watchman of the properties was at all times kept during the times when active work thereon was suspended. Evidence was also given on the part of the plaintiff in error tending to show that, prior to the entry upon any of the ground here in controversy by the defendants in error or any of their predecessors in interest, the plaintiff in error or his predecessors in interest had discovered in the gravel of the narrow canyon that comes down from the hills placer gold, and that that discovery was the cause of an inrush of people, among whom were one or more of the present defendants in error and the predecessors in interest of the others of them, the latter of whom proceeded to make the placer locations Guy Davis and Homestake on the ground previously located by the predecessors in interest of the plaintiff in error.

The record shows without dispute that the sole basis of such intrusion upon the actual possession of the plaintiff in error was and is the contention that no discovery of a lode or vein was ever made within the boundaries of either the Salt Lake No. 3, Midas, or Evening Star lode claims. That discovery of a vein or lode within its boundaries is essential to the validity of any lode claim is beyond question, and the law is well settled that at any time previous to such discovery ground within the boundaries of such a claim, although within the actual possession of the claimant, is open to the entry of others by any legal means for the purpose of locating it under the mining laws. See the numerous cases cited in the recent case of Consolidated Mut. Oil Co. v. United States, 245 Fed. 521, — C. C. A. —.

In the present cases, however, the record shows that there was much evidence introduced on the part of the plaintiff in error tending to show, not only that there was such a discovery within the boundaries of each of the lode claims here in controversy years before the entries thereon and the placer locations under which the defendants in error claim, but that for many years those lode claims had been possessed, worked, and claimed as lode mining ground adversely to all the world except the government. There was, therefore, ample basis in the evidence for some of the instructions to the jury requested by the plaintiff in error on the question of such adverse holding by him and his predecessors in interest, all of which the court below refused to give, to which ruling exceptions were duly reserved. That error was thereby committed, requiring a reversal of the judgments appealed from, we think clear. We need only cite the case of 420 Mining Co. v. Bullion Mining Co., 9 Nev. 241, where the Supreme Court of Nevada said:

"To avoid the statute of limitations, it is claimed by appellant that this action is brought under an act of Congress, and hence that the limitations provided for by the statute of this state do not apply. The act of Congress provides that, where an adverse claim is filed within the time and in the manner specified in said act, certain proceedings 'shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within 30 days after filing his claim, to commence proceedings in a court of competent jurisdiction to determine the question of the right of possession and prosecute the same with reasonable diligence to final judgment, and a failure to do so shall be a waiver of his adverse claim.' The act fur-

ther provides that 'after such judgment shall have been rendered, the party entitled to the possession of the claim * * * may * * * file a certified copy of the judgment roll with the register of the land office,' and upon compliance with this and other provisions in said act 'a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear, from the decision of the court, to rightly possess.' U. S. Stats. 1872, p. 91, § 7. Congress did not, by the passage of this act, or by the acts passed July 26, 1866, and July 9, 1870, confer any additional jurisdiction upon the state courts. The object of the law, as we understand it, was to require parties protesting against the issuance of a patent to go into the state courts of competent jurisdiction, and institute such proceedings as they might under the different forms of action, therein allowed, elect, and there try 'the rights of possession' to such claim and have the question determined. The acts of Congress do not attempt to confer any jurisdiction, not already possessed by the state courts, nor to prescribe a different form of action. If the parties protesting are in possession of the ground in dispute, they can bring their action under section 256 of the Civil Practice Act (Stats. 1869, p. 239), or, if they have been ousted from the possession, they could bring their action of ejectment; and in either action 'the rights of possession' to such claim could be finally settled and determined. We are of opinion that when the action is brought, whatever may be its character, it must be tried by the same rules, governed by the same principles, and controlled by the same statutes that apply to such actions in our state courts, irrespective of the acts of Congress. The fact, as found by the court, that the defendant had been in the actual, exclusive, and uninterrupted occupation and possession of all the mining ground in dispute, claiming title thereto adversely to plaintiff, for more than seven years prior to the commencement of this suit constitutes a complete bar to this action. 1 Comp. Laws, 243, 244, §§ 4, 5. To have maintained any action in our state courts 'to try the rights of possession' to a mining claim, the plaintiff must have shown that it, or those through or from whom it claims, 'were seized or possessed of such mining claim, or were the owners thereof, according to the laws and customs of the district embracing the same, within two years before the commencement of such action.' 1 Comp. L. 1019, § 4."

Besides the testimony of the witnesses regarding the essential discovery within each of the lode claims and regarding the adverse holding and working of the disputed ground by the plaintiff in error and his predecessors in interest for much more than the period prescribed by the statute of limitations, each of the notices of location of the lode claims in controversy, duly recorded, expressly recited, as has been said, the fact of such discovery. Such recital we held in the case of Vogel v. Warsing, 146 Fed. 949, 951, 77 C. C. A. 199, 201, "creates a presumption of discovery of mineral and of a valid location." See, also, Harris v. Equator Mining & Smelting Co. (C. C.) 8 Fed. 863; Cheesman v. Shreeve (C. C.) 40 Fed. 791; Cheesman v. Hart (C. C.) 42 Fed. 98.

The appeals are dismissed, and in each case the judgment is reversed, and the cause remanded to the court below for a new trial.

HUNT, Circuit Judge (concurring). Among other requests for instruction upon adverse possession, the defendant asked the court to charge as follows:

"The court instructs the jury that if you find from the evidence that the defendant and his grantors had entered and held possession of the lode mining claims involved in these actions, and worked the same in the usual and customary way in the vicinity thereof for a period of two years prior to the making of the placer locations of the plaintiffs, then the law presumes in aid thereof that all the acts necessary to a valid location of said lode mining claims had

been done and performed at the time of such lode mining locations, and that such possession (having the legal effect of a location under the law) is sufficient to give the defendant's grantors a lawful right to the possession of said mining claims, if kept alive as required by law, as against the subsequent placer locations of the plaintiffs' grantors."

The court, however, entirely disregarded the question of adverse possession, and said:

"In the first place, I don't think there is any adverse possession in the case, so the instructions based on adverse possession will not be given. I exclude them, not because they do not correctly state the law, but simply because I regard them as unnecessary."

Thus the jury were not advised that any presumption existed by reason of long-continued possession, claim, and working or improvement by defendant, and the court expressly confined the issues to the question of a valid discovery by the lode locators prior to the time when the placer locators went on the ground. Refusal to consider and instruct upon the question of adverse possession I think was material error. Open and exclusive possession had been in defendant or his predecessors for years. It was accepted that location notices in compliance with law had been posted and filed, that the annual assessment work had been done, and that much additional expenditure was made upon the claims before the placer locations were filed. Witnesses also testified to facts tending to show the existence of veins and lodes at the time of original location; and the general mineral character of the country was not disputed. This evidence made a strong prima facie conclusion as against the placer claimants in favor of discovery by defendant. It established a presumption whereby the truth of a discovery was to be assumed, and the legal consequences attaching to it, and the burden thrown upon the plaintiff by reason of the presumption, should have been explained to the jury. As a general rule the benefit of such a presumption is specially important in a mining case, for it might very properly, in a case otherwise difficult to solve, save the rights of a mine owner as against one who, after many years have gone by, seeks to maintain another location, contending that there never was a discovery by the original locator. Common experience tells us that death or inability to gather witnesses often makes it practically impossible to prove as an affirmative physical fact an original discovery of mineral at the time of location. The presumption should serve as evidence in favor of the claimant until his opponent has produced evidence which overthrows the presumption. It seems to me that any other rule would imperil the value of unpatented mines located a long time ago and conveyed by the locators to bona fide purchasers who may have expended large sums in development. In commenting upon the reasonableness of the presumption in favor of discovery where there has been staking off, location filing, possession for years, and prosecution of work, Judge Philips, in Cheesman v. Hart (C. C.) 42 Fed. 98, said:

"After this he sells to an honest man, and passes out of view or dies. All the subsequent workings go to show the existence of a lode or vein on the claim of more or less importance. Can it be that after the lapse of many years the assignee must lose his claim because of his inability to produce

the lost or the dead, and prove affirmatively an actual visible discovery by the original locator of ore in place where he dug? Possibly the charge in this particular would have been more theoretically correct, had the court told the jury that it was not necessary that defendants should establish such discovery by witnesses to the physical fact at the time. But the same might be inferred from the certificate of location, the manifestations of workings done, the long tenure of the claim, the development of a vein on the claim by subsequent working, and from all the surrounding circumstances."

GILBERT, Circuit Judge (dissenting). The court below properly submitted to the jury the question whether a valid discovery had been made by the lode locators prior to the placer locations and discoveries, and instructed the jury that the locators of the placer claims had each performed all of the acts necessary and required by the statutes of the United States and the laws of the state of Nevada in the discovery and location of a placer claim. No exception was taken to that instruction. Again, the court said to the jury:

"A competent person may go on the public domain of the United States with the bona fide intention of making a discovery of mineral, and may define the boundaries of his claim by means of notices and monuments thereon, and so long as such locator is in the actual possession of the location so defined, endeavoring to make a discovery, he will be entitled to the peaceable possession of such claim, as against one entering thereon as a trespasser; but in the absence of a discovery, should he permit another competent person to go peaceably upon the claim, and should such person make a valid discovery of mineral, and locate the same, and in all things comply with the requirements as to monumenting, posting notices, and recordation, then such subsequent locator would acquire title to such claim so located, subject only to the paramount title of the United States."

The jury returned three special verdicts, finding that no valid discovery of a lode within the limits of either of the lode claims was made by the defendant or his grantors prior to the dates when the placer claims were located. In the opinion of the majority of this court the judgment of the court below is to be reversed for the refusal of the trial court to give a requested instruction on the subject of adverse possession. The statute of Nevada fixes a period of two years as necessary for title by adverse possession, and provides that the "occupation and adverse possession of a mining claim shall consist in holding and working the same in the usual and customary mode of holding and working similar claims in the vicinity thereof." It is by that statute that the defendants' claim of adverse possession must be measured. The defendant had pleaded adverse possession, but not in the language of the statute. He alleged only that he and his predecessors in interest had been, for the designated period of time, in the "open, notorious, adverse, and undisputed possession of said mining claim, holding, living and working upon said lode mining claim."

The requested instruction, which was refused, was framed in the language of the statute of limitations of Nevada. It was refused, evidently because the trial court found that there were in the evidence no facts to constitute such adverse possession. In so holding the trial court was clearly right. There was no evidence whatever that the lode claim had ever been worked "in the usual and customary manner of holding and working similar claims in the vicinity," or had ever been

worked at all. All the proof of work done on the lode mining claim prior to the plaintiff's placer locations was proof to show that the annual assessment work had been done thereon. That work consisted in sinking shafts and excavating tunnels on the claims; but in none of them and nowhere on any of the claims was an ore body developed, from none of them was any ore ever taken, and in none of them was there any "working" of a claim. No witness testified that either of the claims had been worked in the usual and customary mode of holding and working similar claims. It seems too clear to require discussion that doing the annual assessment work, building a road upon a claim, or erecting a structure upon it is not working the same as a mining claim. The statute of Nevada can avail the holder of a mining claim by adverse possession only upon the theory that the claim has been shown to be a workable claim, and that the act of working it involves discovery and stands for proof of discovery. If the defendant claimed adverse possession under the statute of Nevada, it was for him, not only to plead the statute, but to prove compliance with the same in all particulars.

I submit that the decision of the majority of the court wholly disregards the provisions of that statute, and commits this court to the proposition that in Nevada mining land, or indeed any land, may be acquired as against all except the United States by filing a location notice, marking the ground, and doing the annual assessment work for a period of two years, and without making a discovery. Such is not the law. The words of the statute are:

"Holding and working the same in the usual and customary mode of holding and working similar claims in the vicinity."

Obviously this should mean more than merely holding. One who locates a claim, remains in the possession thereof, and does the annual assessment work thereon, but makes no discovery, may be conceded to be holding the claim; but he is not working it in the manner prescribed by the statute. If it had been the intention of the Legislature to say that title to a mining claim may be had, as against all but the government, by locating and holding the same and doing the annual assessment work thereon for a period of two years, we must assume that such would have been the language of the act, and, if such had been the language of the act, I submit that it would have been void, for it is a fundamental doctrine of the mining law that one who locates and occupies and does the annual assessment work on mineral land cannot hold the same against another who peaceably, and not fraudulently or clandestinely, locates the ground and is the first to make discovery thereon. Section 2320 of the Revised Statutes says that no location of a mining claim shall be made until discovery of the vein or lode within the limits of the claim located, and numerous decisions affirm the rule that location can rest only upon actual discovery, and that without discovery no rights can be acquired save the right to retain possession while seeking discovery. King v. Amy & Silversmith Min. Co., 152 U. S. 222, 227, 14 Sup. Ct. 510, 38 L. Ed. 419; Mining Co. v. Tunnel Co., 196 U. S. 337, 345, 25 Sup. Ct. 266, 49 L. Ed. 501; Jupiter Min. Co. v. Bodie

Consol. Min. Co. (C. C.) 11 Fed. 666; Steele v. Tanana Mines R. Co., 148 Fed. 678, 78 C. C. A. 412. The true doctrine is stated in Humphreys v. Idaho Gold Mines Development Co., 21 Idaho, 126, 120 Pac. 823, 40 L. R. A. (N. S.) 817, where the court said:

"It still remains, however, for the person who asserts claim by adverse possession to have made a mineral discovery, and to have performed the annual assessment work, and to have had the boundaries of his claim so marked and indicated as to afford actual notice of the extent and boundaries of his claim and possession, and to have maintained an actual possession and excluded all adverse claimants for the full period prescribed by the statute."

Our decision in Vogel v. Warsing, 146 Fed. 948, 951, 77 C. C. A. 199, sustaining a prima facie presumption of discovery, and other similar cases cited in the opinion of the majority of this court herein have no application to the present case. There is no place here for the indulgence of a presumption of discovery. The question of discovery by the lode claimants was directly placed in issue. It was a question of fact. It was the principal issue in the case. The defendant presented all his available testimony to show actual discovery. The jury by special verdicts on that issue alone found that there was no discovery.

MORRISON v. RIEMAN.

(Circuit Court of Appeals, Seventh Circuit. September 4, 1917. Rehearing Denied December 20, 1917.)

No. 2451.

1. BANKRUPTCY ⟸93—PROCEEDINGS—JURY TRIAL.
Where a bankrupt, having demanded a jury trial on the question of his insolvency, as allowed by Bankruptcy Act July 1, 1898, c. 541, § 19, 30 Stat. 551 (Comp. St. 1916, § 9603), moved for leave to withdraw the request, which was denied, a jury being called notwithstanding, the calling of a jury was upon the court's own motion, and the verdict was merely advisory.

2. BANKRUPTCY ⟸467—APPEAL—MATTERS ASSIGNABLE AS ERROR.
Where the bankruptcy court on its own motion submitted to a jury the question of the alleged bankrupt's insolvency, the verdict of a jury is merely advisory, and error is not predicable on the court's remarks, or on its charge to the jury.

3. BANKRUPTCY ⟸91(2)—INSOLVENCY—FINDINGS.
In a proceeding in bankruptcy, evidence *held* to warrant a finding that, after the bankrupt conveyed all but one parcel of his lands, he was insolvent.

4. BANKRUPTCY ⟸57—ACTS OF BANKRUPTCY—WHAT CONSTITUTES.
Where property conveyed by an alleged bankrupt largely exceeded debts discharged or assumed by the grantee, the conveyance must be deemed an act of bankruptcy, and intended to hinder and delay the petitioning creditor, whose claim was not assumed, though the grantee, as part of the consideration, executed and secured the approval of a bond superseding, for purposes of appeal, a judgment in favor of the petitioning creditor.

5. BANKRUPTCY ⊂⊃76(1)—PETITIONING CREDITORS—"SECURED CREDITOR."
While Bankruptcy Act, § 1a (23) (Comp. St. 1916, § 9585), provides that the term "secured creditor" shall include a creditor who has security for his debt upon the property of the bankrupt, or who owns such a debt for which some indorser, surety or other person secondarily liable, has such security upon the bankrupt's assets, and sections 56b, 57e, 57g, and 57h (Comp. St. 1916, §§ 9640, 9641), contain no express provision allowing a secured creditor to surrender his security, so as to come within section 59b (section 9643), and file a petition, a judgment creditor, whose judgment had been superseded by a bond signed by a grantee of a bankrupt, may surrender his security and file a petition in bankruptcy, for, if such creditor's judgment were reversed and the cause remanded, his security would be lost, although he might still have a claim provable within section 63a (4) (Comp. St. 1916, § 9647).

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

6. BANKRUPTCY ⊂⊃84—PETITION—AMENDMENT.
In view of Bankruptcy Act, §§ 59f, 59g, allowing creditors other than original petitioners to join in an involuntary petition in bankruptcy, and rule 86, making provision for amendments, a petitioning creditor, who was secured, may thereafter waive his security and amend his petition.

7. BANKRUPTCY ⊂⊃84—AMENDMENTS—ALLOWANCE.
The general power to permit amendments, within sound discretion, inheres in bankruptcy as well as in other courts.

8. BANKRUPTCY ⊂⊃76(1)—SECURITY—WAIVER.
Where a secured creditor deliberately, and not through error or inadvertence, files his claim as unsecured, making no mention of his security, he waives it in favor of the estate, and cannot, after adjudication, assert it; so a petitioning creditor, who was secured, may by express waiver and surrender of his security bring himself within the terms of Bankruptcy Act, § 59b, and alone file an involuntary petition.

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

On petition of Charles S. Rieman, Edward W. Morrison was adjudicated a bankrupt, and he appeals. Affirmed, on condition, and, in event of petitioner's failure to comply with condition, cause held for further consideration.

Appeal from order adjudicating Morrison a bankrupt. Morrison's property consisted of real estate in Chicago valued at over $500,000. Rieman, having a claim in contract against Morrison, on March 22, 1916, recovered a judgment thereon in the municipal court of Chicago for $90,188.01, and execution on the judgment issued. By warranty deed of April 20, 1916, Morrison made absolute conveyance of all his real estate to James R. Ward, for a recited consideration of "$100,000 in hand paid and other consideration." Morrison and Ward testified that the consideration for the conveyance was the cancellation of all then existing indebtedness of Morrison to Ward, and the assumption and payment by Ward of all Morrison's then outstanding debts, except that to Rieman (to whom Morrison denied owing anything), and the undertaking by Ward to prosecute for Morrison appellate proceedings from the Rieman judgment, and secure requisite bond for staying collection of the judgment pending such determination of such proceedings. A writ of error was sued out in the Appellate Court of Illinois, and on June 7, 1916, a supersedeas bond in penal sum of $100,000, signed by Ward as surety, was approved by that court and filed, and supersedeas issued accordingly. The proceeding on error is still pending and undetermined. August 16, 1916, Rieman alone filed petition in bankruptcy, alleging the indebtedness to him from Morrison to be $90,206.76, upon a contract, the debt being evidenced by a judg-

ment for that amount, and alleging Morrison's insolvency, that his creditors were less than 12, and that he had committed acts of bankruptcy by conveyance of his property within four months by way of preference to certain creditors, to Rieman's detriment, and through such conveyance hindering, delaying, and defrauding his creditors other than those so preferred. Morrison filed his answer denying insolvency and the commission of the acts of bankruptcy charged, and asking for a jury trial of the issues. In his amended answer the demand for a jury trial was not renewed. On trial of the issues by a jury there was a verdict against Morrison, and November 15, 1916, he was adjudicated bankrupt.

At the time of the adjudication there was produced in court, and was thereafter filed for record, a deed from Ward reconveying to Morrison a piece of the said real estate, known as the Sebor street property. It was testified by Ward and Morrison that this piece had been inadvertently included in the deed to Ward; that such fact was discovered during the proceedings for obtaining the supersedeas; that the deed back to Morrison was executed and delivered to him on the day of its date, July 17, 1916; and that it remained in Morrison's possession unrecorded, Morrison continuing as theretofore to collect the income from that property. There was sharp contrariety of evidence as to the value of this piece, the testimony of the expert witnesses ranging from $130,000 to $41,000. After verdict, and before adjudication, petitioner by leave of court filed a verified amendment to his petition as follows: "That whatever lien or security your petitioner has or had at the time of the filing of the petition herein by reason of his said judgment, or by virtue of the execution issued thereon, the said petitioner does hereby release and waive as to any estate which the said alleged bankrupt possessed or owned at the time of the filing of the original petition herein, and does hereby surrender any such security or lien to the estate of the said alleged bankrupt. This petitioner further hereby releases and surrenders whatever lien or security he has or may have on any property or estate of the said alleged bankrupt, or which may hereafter come into the estate or be recovered for the estate of the said alleged bankrupt."

The assignment of errors challenges the finding of insolvency and of commission of acts of bankruptcy, the provability of Rieman's claim, and his right to be a petitioning creditor, and the propriety of certain remarks of the court made in the presence of the jury, and of certain parts of the court's charge to the jury.

James R. Ward and Frank H. Culver, both of Chicago, Ill., for appellant.

James Rosenthal, of Chicago, Ill., for appellee.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

ALSCHULER, Circuit Judge (after stating the facts as above). [1, 2] Respecting the errors alleged based on remarks by the court, and the charge to the jury, it appears that in appellant's original answer jury trial was demanded, but in his amended answer such demand was not renewed; and before the jury was called he moved the court for leave to withdraw his demand for a jury, and appellee joined in this request, which was denied by the court, and a jury was called notwithstanding. While the alleged bankrupt may demand a jury trial (Bankruptcy Act, § 19), these facts amounted to a waiver of jury trial, and the calling of the jury thereafter was upon the court's own motion, just as would have been the case had the court called a jury without any demand therefor having ever been made. The verdict is therefore not of binding force, but is advisory to the court as in issues out of chancery (Carpenter v. Cudd, 174 Fed. 603, 98 C. C. A. 449, 20 Ann. Cas. 977; Oil Well Supply Co. v. Hall, 128 Fed. 875, 63 C. C.

A. 343), and as in chancery this court will search the record to determine therefrom whether a proper order or decree has been entered, regardless of the jury's verdict, save only so far as the court may thereby be advised. In such case error is not predicable on the court's remarks or its charge to the jury.

[3] On the question of Morrison's solvency, if it be assumed that the title of the Sebor street property was all the time in Morrison, it is apparent that it alone would not rescue him from the charge of insolvency as against Rieman's claim for over $90,000. The evidence of its value ranged from a maximum of $130,000 to a minimum of $41,000, with but little, if anything, in the evidence corroborative of the one more than of the other figure. The finding was thus warranted that the Sebor street property was not worth enough to meet the Rieman claim; and of course all his other property, which, as was testified, had been absolutely and irrevocably conveyed to Ward, could have no bearing on appellant's solvency.

[4] Assuming that Rieman was properly a petitioning creditor, was the finding unwarranted that acts of bankruptcy were committed through the conveyance to Ward? Ward and Morrison both testified that by the conveyance Ward and all other creditors of Morrison, except Rieman, were paid or to be paid. The amount of such debts is not certain under the evidence. Ward claims it was about $100,000, but, whatever the amount, the payment through the conveyance was clearly preferential as against Rieman, thus constituting an act of bankruptcy by Morrison. The fact that Ward signed the supersedeas bond and secured its approval in part consideration of the conveyance to him cannot as against a petition in bankruptcy be regarded as a consideration, which, as between Morrison and Rieman, would support the conveyance for the concededly large surplus in value of the property conveyed, over and above Morrison's debts so discharged or assumed. As to such surplus in value, the conclusion was warranted that the conveyance was in hindrance and delay of Rieman, and an act of bankruptcy. That Morrison and Ward may have believed Rieman's claim unconscionable, and that ultimately it will be defeated, is beside any question here.

[5] The main contention of appellant is that through the lien of Rieman's judgment upon all of Morrison's real estate—the Sebor street property as well as that which was conveyed to Ward, and through the supersedeas bond given in the Illinois Appellate Court, Rieman's judgment was fully secured; that being a secured creditor within the meaning of the Bankruptcy Act, with security valued at more than the amount of his claim, he did not have a provable claim against the bankrupt, and not having such provable claim he was disqualified from being a petitioning creditor.

Section 59b of the Bankruptcy Act requires that the single petitioning creditor (where the creditors are less than 12) shall have a provable claim of $500 or more in excess of the value of securities held by him. Section 1a (23) provides that:

"'Secured creditor' shall include a creditor who has security for his debt upon the property of the bankrupt, of a nature to be assignable under this

act, or who owns such a debt for which some indorser, surety, or other persons secondarily liable for the bankrupt has such security upon the bankrupt's assets."

Whether the lien of this judgment, and the supersedeas bond, did constitute Rieman a secured creditor, within the meaning of the quoted section, may be unnecessary to be considered in view of certain other proceedings in the cause. It appears that after the verdict of the jury, and before the adjudication, by leave of court Rieman filed an amendment to his petition, undertaking to release and to waive the lien of his judgment against any property of the bankrupt subject thereto, presumably with the view of surrendering any security for his claim. If holding security rendered his claim unprovable, and himself therefore disqualified to be a petitioning creditor, may he by voluntarily surrendering the security make his claim provable, and thus qualify him to be a petitioning creditor?

There is no section of the Bankruptcy Act which specifies that this may be done. Sections 56b and 57e, 57g, and 57h deal with the ascertainment of the amount of claims above the value of securities, and with the surrender of preferences, and the like. The surrender of securities is not dealt with. But we see no reason why one holding security may not surrender it and prove his whole claim. Collier states the rule as follows:

"A secured creditor may or may not surrender his security as he chooses. If he does, it inures to the benefit of all creditors, and his claim, if otherwise unobjectionable, is allowable at the full amount." Collier on Bankruptcy (1914) pp. 721, 722.

Brandenburg says:

"A secured creditor may file proof of claim at his option, but unless a secured creditor surrenders his security, and proves his debt as unsecured, he is required to make proof of the whole debt as in the case of an unsecured debt, except a statement of all securities should be included in the proof." Brandenburg, Bankruptcy (1917) § 631.

In the same section it is stated that a secured creditor has three alternatives: First, he may prove the amount of his claim, specifying the securities held; second, he may decline to make any proof and retain his security; and, third, he may either directly or indirectly waive his security and prove his claim as unsecured. Assuming that the judgment lien and the supersedeas bond constituted Rieman a secured creditor, the instant case illustrates the embarrassment and disadvantage which might ensue if he may not waive and surrender the security and proceed as an unsecured creditor. If, by the conveyance to Ward, Morrison preferred certain of his creditors, any creditor injured thereby, holding a provable claim, could within four months resort to bankruptcy for relief. The state law would not assist him, since in Illinois an insolvent debtor may with impunity give preference to some creditors over others. Farwell et al. v. Nilsson et al., 133 Ill. 45, 24 N. E. 74; Morriss et al. v. Blackman et al., 179 Ill. 103, 53 N. E. 547; Friedman v. Lesher, 198 Ill. 21, 64 N. E. 736, 92 Am. St. Rep. 255. But Rieman, if considered a secured creditor, and therefore not qualified to be a petitioner, could do nothing but take

his chances on maintaining his lien through affirmance of his judgment. If this were reversed, and the cause remanded for a new trial, his security would at once vanish; but, his claim being founded in contract, he might still have a provable debt against Morrison. Section 63a(4). In the meantime, however, four months would have elapsed since the preferential payment through the conveyance, and he would then be wholly without relief against the preference, although his claim might be eventually adjudged in his favor. This would in a sense be penalizing a creditor who reduces his claim to judgment, which may for the time being be a lien on the debtor's real estate, through withdrawing from him the protection of the bankruptcy law against preferential payments—protection which is accorded to those creditors who had not yet proceeded so far as to obtain judgment which gave its holder a lien which would afford him sufficient security if the judgment remains unreversed.

[6-8] Appellant insists that, since the waiver or surrender was not made before or at the time the petition was filed, it could not subsequently be made by way of amendment or otherwise. We think the act manifests a policy of liberality in regard to amendment. Section 59f provides that creditors other than original petitioners may at any time enter appearance and join in the petition to file answer and be heard in opposition to it; and section 59g requires a notice to other creditors before any petition shall be dismissed for want of prosecution or by consent evidently in order that there may be no dismissal of a petition if as to any one it ought to be retained. Rule 86 makes provision for amendments. The general power to permit amendments within sound discretion inheres in bankruptcy as well as in other courts. Armstrong v. Fernandez, 208 U. S. 324, 330, 28 Sup. Ct. 419, 52 L. Ed. 514; Chicago Motor Vehicle Co. v. Am. Oak Leather Co., 141 Fed. 518, 72 C. C. A. 576 (7th C. C. A.); In re Shoesmith, 135 Fed. 684, 68 C. C. A. 322 (7th C. C. A.). Instances are quite frequent where adjudications of bankruptcy or allowance of claims have been made contingent upon the petitioner or claimant doing things which in strictness should before have been done and set forth in petition or proof of claim. In re Murphy (D. C.) 225 Fed. 392; Stevens v. Nave-McCord Co., 150 Fed. 71, 80 C. C. A. 25; In re Gillette (D. C.) 104 Fed. 769. But even if the amendment, made when it was, were of no avail, and appellee must rely on his petition as first filed, the rule seems well established that where a secured creditor deliberately, and not through error or inadvertence files his claim as unsecured, making no mention of his security, he thereby waives it in favor of the estate, and cannot, after adjudication, assert it. White v. Crawford (C. C.) 9 Fed. 371; In re Bloss, Fed. Cas. No. 1,562; Brandenburg, Bankruptcy (4th Ed.) p. 479; Collier, Bankruptcy (10th Ed.) pp. 726, 727.

The amendment, however, in our judgment falls short of its probably intended purpose of investing the trustee in bankruptcy, for the benefit of the estate, with whatever right to the security which the petitioner in bankruptcy had. This is particularly so as to the second paragraph of the amendment, which seems to deal with other than the

Sebor street property. Waiver and surrender alone might extinguish the lien without benefiting the estate; and unless the estate can have the benefit of the security, the waiver might serve only to increase the general claims against the estate without augmenting its assets. In the instant case we cannot assume that in a proceeding to set aside the conveyance to Ward, if such becomes necessary and is authorized, the trustee will prevail. In the event, therefore, that the Rieman judgment is affirmed, if Rieman should merely have waived his security, and the estate not become invested with it, Ward, holding the title to the property, might become the beneficiary, leaving the unsecured Rieman judgment a general claim against the estate, payable out of assets other than the bond and the lien on the property now held by Ward. If Rieman's judgment is affirmed, it is possible that the Sebor street property plus what the trustee might then realize on the supersedeas bond, if available to him, would prove sufficient to meet the claims allowed for payment, without need to bring into the bankruptcy the property conveyed to Ward, with which, of course, the trustee has no business, save only in case it may become necessary to undertake resort to it in order to pay the debts. While it may be that the waiver and surrender would alone invest the trustee with Rieman's title to the security thus surrendered, there should be no question in this regard.

If, therefore, within 30 days after this date appellee will file with the clerk of the District Court an instrument in writing conveying to the trustee in bankruptcy, hereafter to be named, for the benefit of this bankrupt estate, all interest of appellee in and to any and all lien and security which he holds for the payment of his said judgment, including the supersedeas bond, and the lien acquired through the rendition of the judgment and the execution issued thereon, the order of adjudication will be affirmed, with costs. Otherwise, the cause will be held for further consideration.

HAIKU SUGAR CO. et al. v. JOHNSTONE.

(Circuit Court of Appeals, Ninth Circuit. April 1, 1918.)

No. 3090.

1. CORPORATIONS ⇐379—PARTNERSHIP—LIABILITY.
   Where corporations are by law authorized to form copartnerships, each corporate member of such a firm is liable as a partner to third persons.

2. JOINT-STOCK COMPANIES ⇐8—PARTNERSHIP — DISTINCTION — TRANSFERABILITY OF SHARES.
   The changeability of membership or transferability of shares is often used as a determining criterion between ordinary partnerships and joint-stock companies.

   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Joint-Stock Companies and Associations; Partnership.]

3. CORPORATIONS ⊂⊃379—PARTNERSHIP—MANAGEMENT—CORPORATE MEMBERS.
Where corporations are allowed by law to form ordinary partnerships with other corporations, it is an incident of such right that representatives of the corporate members can for convenience be selected to manage the firm.

4. JOINT-STOCK COMPANIES ⊂⊃10—PARTNERSHIP ⊂⊃224—DISTINCTION BETWEEN PARTNERSHIP AND JOINT-STOCK COMPANY.
In a joint-stock company, the members have no right to decide what new members shall be admitted; on the other hand, the right of delectus personarum is an inherent quality of an ordinary partnership.

5. PARTNERSHIP ⊂⊃264—CHANGEABILITY IN MEMBERSHIP—BY-LAWS.
The provision in the by-laws of a partnership composed of corporations for existence of the association for 45 years, unless sooner terminated by mutual consent, does not show any plan for changeability in the membership, and dissolution would probably be effected through the transfer of any partner's interest.

6. JOINT-STOCK COMPANIES ⊂⊃23—PARTNERSHIP ⊂⊃227—DISTINCTION.
A joint stock company usually consists of a large number of persons between whom there is no special relation of confidence and the retirement or death of a member works no dissolution, while a partnership though it may consist of several is ordinarily made up of members who are drawn to each other by feelings of mutual confidence and no member is at liberty to retire and substitute another.

7. JOINT-STOCK COMPANIES ⊂⊃18—PARTNERSHIP ⊂⊃139—DISTINCTION.
In a joint-stock company, the business is generally managed by directors or other designated officers of the association, and a shareholder as such is without power to contract for the company; whereas, in a partnership, any member may bind the partnership, this being true, though the partnership is composed of corporations.

8. INTERNAL REVENUE ⊂⊃7—INCOME TAXES—PARTNERSHIP.
Under Sess. Laws Hawaii 1903, Act 51, § 1, permitting any two or more corporations organized under the laws of Hawaii to enter into partnership with each other for the transaction of any lawful business, several corporations, by an agreement dated October 30, 1903, formed a partnership, the by-laws of which provided for management by representatives selected by the several partners, who were to represent the partners according to their respective interests. There were no special partners, and there was no partnership capital stock. *Held* that, as the partnership was lawful under the laws of Hawaii, it could not be treated as a joint-stock company, and so subject to taxation under Income Tax Law Oct. 3, 1913, c. 16, 38 Stat. 114, which applies to every corporation, joint-stock company, or association, no matter how created or organized, not including partnerships; but it must be treated as a partnership for purposes of collecting of income taxes.

9. STATUTES ⊂⊃245—TAXATION—CONSTRUCTION.
In the interpretation of statutes levying taxes, it is the established rule not to extend their provisions by implication beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out, and in case of doubt they are to be construed most strongly against the government.

10. INTERNAL REVENUE ⊂⊃38—INCOME TAX—ILLEGAL EXACTIONS—RECOVERY—INTEREST.
Where a collector of internal revenue, acting under Income Tax Law Oct. 3, 1913, illegally collected taxes from a partnership composed of corporations, the members of the firm are entitled to recover the exaction, with interest and costs.

In Error to the District Court of the United States for the Territory of Hawaii; Horace W. Vaughan, Judge.

Action by the Haiku Sugar Company, the Paia Plantation, the Kalialinui Plantation Company, Limited, the Pulehu Plantation Company, Limited, the Kula Plantation Company, Limited, the Makawao Plantation Company, Limited, and the Kailua Plantation Company, Limited, copartners doing business under the firm name of the Maui Agricultural Company, against Ralph S. Johnstone, executor under the will and of the estate of John F. Haley, late Collector of Internal Revenue for the District of the Territory of Hawaii. There was a judgment for defendant, and plaintiffs bring error. Reversed and remanded, with instructions.

Suit to recover certain moneys paid under protest in September, 1916, as income taxes under the federal Income Tax Law of October 3, 1913 (Act Oct. 3, 1913, c. 16, 38 Stat. 114). Demurrer to the complaint was sustained, and judgment went against the plaintiffs. The facts as alleged are: That the Maui Agricultural Company is made up of several corporations, each of which was incorporated under the laws of Hawaii; that the plaintiffs, since January, 1904, have been copartners under the firm name and style of Maui Agricultural Company, sugar growers of Hawaii; that the partnership has existed under an agreement of partnership, dated October 30, 1903, and adopted by-laws in 1904; that it was intended to be a general partnership, each partner a general partner therein, with unlimited liability upon each of the partners or members for the debts of the partnership; that by the laws of Hawaii (Session Laws of 1903, entitled "An Act Concerning Corporations," approved April 28, 1903; sections 2631 and 2632 of the Revised Laws of 1905; sections 3388 and 3389 of the Revised Laws of Hawaii of 1915) corporations in Hawaii are authorized to enter into general or special partnership with each other; that the general partnership was duly registered, pursuant to the registration law of Hawaii (chapter 28, Session Laws of Hawaii of 1880, re-enacted as chapter 162, Revised Laws of 1905, and chapter 189, Revised Laws of Hawaii, 1915); that under the provisions of the indenture of partnership the several partners or members have definite shares in the capital of the partnership, and that, while the by-laws provided that the respective interests of the partners or members shall be evidenced by a certificate, no stock or shares of stock or certificate of stock in the partnership or company has ever been issued, except as to certificates of the respective interests of the partners or members; that it never was intended that the partnership should have any capital stock, as distinguished from capital assets or working capital, nor has the capital of the partnership, or any share or interest therein, of any of the partners, ever had any par or face value; that it was never intended that the respective shares or interests of the partners in the capital assets of the company should be sold or transferred in any manner, whereby any assignee or transferee could succeed to the rights of the assignor or transferror to continue in the business of the partnership or to carry on the business with the other partners without their consent, and that the shares or interests of the partners in the partnership have never been divisible; that the capital assets consist mainly in the use during the existence of the partnership of the property and rights of the several partners which were contributed by them, respectively, to the partnership as required by the indenture of partnership, and are to revert to the respective partners or members upon the termination of the partnership or company; that the Maui Agricultural Company was never intended to be a corporation, joint-stock company, or association within the provisions of the Corporations Tax Law of August 5, 1909 (Act Aug. 5, 1909, c. 6, 36 Stat. 112), or within the meaning of the Income Tax Law of October 3, 1913; that the company as a partnership has made statements of profits to which its partners would be entitled after the same were divided, and given the names of the partners or members who would be entitled to the same, if distributed in compliance with the act of October 3, 1913, and particularly the fifth proviso of paragraph D of section II of the said act, and made statements to the revenue officials accordingly for the year 1914; that the plaintiffs,

members of the company, have been liable for corporation excise tax and income tax only in their several individual capacities, and have returned statements accordingly for taxes for the years previous to 1915, showing the respective shares of the profits of the company for the said years, and the profits to which each member would have been entitled if they had been divided; and plaintiffs say they were assessed accordingly and paid the assessment so made, but that in 1916 the revenue authorities took the position that the company was not subject to the special corporation excise tax under the act of August 5, 1909, but was subject to the income tax under the act of October 3, 1913, and that plaintiffs, members of the company, are severally subject to the corporation excise tax for 1909, 1910, 1911, and 1912, inclusive, and to the income tax for 1913, 1914, and 1915, inclusive, in respect to the shares distributed to and received by them, respectively, of the net income of the company in each of the said years, as distinguished from their respective shares in the net income of the company earned and distributed in each of the said years, whether distributed or not.

Smith, Warren & Whitney and Frear, Prosser, Anderson & Marx, all of Honolulu, T. H., for plaintiffs in error.

John W. Preston, U. S. Atty., and Caspar A. Ornbaun, Asst. U. S. Atty., both of San Francisco, Cal., and S. C. Huber, U. S. Atty., and J. J. Banks, Asst. U. S. Atty., both of Honolulu, T. H., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge (after stating the facts as above). [1-3] The question for decision is whether the Maui Agricultural Company is an organization excepted from the Income Tax Law of 1913, which, besides applying to persons, applies, subject to certain enumerated exceptions, to:

"Every corporation, joint-stock company or association, and every insurance company, organized in the United States, no matter how created or organized, not including partnerships."

It is clear, we think, that the company is not a legally created corporation. It was originally formed in 1903, solely by agreement of its members. The statute of Hawaii (section 1, act 51, Session Laws of Hawaii 1903) permitted any two or more corporations, organized under the laws of Hawaii, to enter into partnership with each other for the transaction of any lawful business; but a partnership formed of corporations is not in itself a corporation. The right given to a corporation to become a member of a partnership pertains to the power of the corporation to gain membership in a partnership, but does not make the aggregation of partners itself a corporation. There may yet be upon a corporation member the liability of a partner as to third persons. Butler v. Am. Toy Co., 46 Conn. 136; Bates on Partnership, § 1; Lindley on Partnership, p. 86. The partnerships into which corporations may enter in Hawaii are general and special. Chapter 70, § 1, Session Laws 1886. In the association in question there were no special partners, nor was there limited liability; nor, indeed, was any attempt made to form any but a general partnership. Strong evidence of this is the fact that the company registered as a general partnership under the law. Chapter 189, Revised Laws of Hawaii 1915.

In so far as intent may serve to determine the character of the agreement made between the parties, the theory of a partnership is reasonable. Fechteler v. Palm Bros. & Co., 133 Fed. 462, 66 C. C. A. 336. The provisions of the agreement are arranged with titles, for example, "Objects of Copartnership," "Term of Partnership," "Dissolution of Partnership," and the second recital of the "Indenture of Partnership" is that the parties "have mutually agreed each with the other to enter into partnership," while the first object stated is that the parties associate themselves together as partners under the firm name and style of the Maui Agricultural Company, and throughout the whole agreement the references are to the parties as partners and to the association as a partnership. After specifying the respective proportionate interest of the several partners, the agreement provides for sharing profits and losses as owners, and for the division in the same proportion of all surplus funds of the company when dissolution is had. Meehan v. Valentine, 145 U. S. 611, 12 Sup. Ct. 972, 36 L. Ed. 835.

But, notwithstanding the intent to form an ordinary partnership, must it be held that the legal effect of the language used by the parties has been to create a joint-stock company rather than a partnership? If it is such, then the lower court should be sustained, and taxation should be upon the income of such legally created joint-stock company. This is the pivotal point in the case, for in making distinction between joint-stock associations and partnerships Congress must have had in mind that there are substantial points of difference between such relationships. It is noticeable that the arrangement under examination lacks the element of changeability of membership or transferability of shares, an element often used as a determining criterion as between ordinary partnerships and joint-stock companies. Bates on Partnership, § 72. Nor has the agreement reference of any kind to indicate any purpose that the interests of members should be transferable; on the contrary, there are evidences of intent that the contract was solely between the parties thereto and no others. Hedge's Appeal, 63 Pa. 273. It is conceded that the provision for the management of the company by a board of managers is such as is frequently a characteristic of a joint-stock company, but this feature is not inconsistent with the right of partners to make their own arrangements for the management of the partnership affairs. If the right to form the ordinary partnership existed, it should follow that representatives of members of the partners could, for convenience, be selected to manage. McAlpine v. Millen, 104 Minn. 289, 116 N. W. 583; Fleming v. Lay, 109 Fed. 952, 48 C. C. A. 748. This would seem to be an inevitable result of the exercise of the right of a corporation to enter a partnership with another corporation.

We find, however, that in the present case the management of the concern is as much like that of an ordinary partnership as possible, considering the fact that the several members are corporations. The members of the board are not chosen at large by a majority vote of unit shares, but each member of the board is a special representative of the particular members of the partnership. To illustrate: It is provided in the by-laws (article IV) that the Haiku Company shall

appoint two managers, the Paia Company three, and the five other companies one jointly. These managers are to represent the respective partners by whom they are appointed, and a vacancy in the board is to be filled by appointment by the particular partner which "such manager represents." It is also provided in the by-laws (article VI) that a quorum at a meeting of the partnership is to consist of a majority of the partners, both in numbers and interest. The by-laws (article 16) also give to the stockholders of each of the corporate members, although not themselves partners, the same rights to inspect and examine the books and records of the partnership, and to investigate into the partnership affairs, as such stockholders have in the several corporate members in which they hold stock.

[4-8] In a joint-stock company the members have no right to decide what new members shall be admitted to the firm; on the other hand, the right of delectus personarum is an inherent quality of the ordinary partnership. Oak Ridge Coal Co. v. Rogers, 108 Pa. 147; Ashley v. Dowling, 203 Mass. 249, 89 N. E. 433. The provision for existence of the association for 45 years, "unless sooner terminated by the mutual consent of the parties hereto," does not show a plan for changeability in the membership. Karrick v. Hannaman, 168 U. S. 328, 18 Sup. Ct. 135, 42 L. Ed. 484. Dissolution would probably be effected through a transfer of any partner's interest, and there would be a liability for the breach, to be compensated in damages. Lindley on Partnership, *230, *231. A joint-stock company often consists of a large number of persons, between whom there is no special relationship of confidence; the retirement or death of a member works no dissolution; while a partnership, although it may consist of several persons, generally is made up of a few, who are drawn to each other by feelings of mutual confidence, and no member is at liberty to retire and substitute another as a partner. In a joint-stock company the business is generally managed by directors or other designated officers of the association, and a shareholder as such is without power to contract for the company; whereas, in a partnership any member may bind the partnership. Where a corporation is a partner, the doctrine of mutual agency may make business administration more intricate, but does not affect the legal question. Mallory v. Hanaur Oil Works, 86 Tenn. 598, 8 S. W. 396; News-Register Co. v. Rockingham Publishing Co., 118 Va. 140, 86 S. E. 874.

Stress is laid upon the provisions of the partnership agreement, wherein what is termed the "capital stock" is divided into 35 shares of interests. It is to be remembered, however, that the company had no nominal or fixed capital stock apart from the capital assets it owned—that is to say, there was no capital stock of a corporation or joint-stock company, divided, as is usually done in corporations or joint-stock companies, into nominal transferable shares of specified par value. When the agreement and by-laws are looked upon as a whole, the capital stock referred to is the capital or capital assets, and reference to the shares or interests is a method used to express the entire proportional indivisible interests of the seven named members of the partnership. These respective interests of the partners were different, as is shown by article II of the by-laws; and as already

indicated in another by-law (article IV), the managers are required to represent the partners in accordance with their respective interests. State v. Cheraw & Chester R. Co., 16 S. C. 524; Goodnow v. Am. Writing Paper Co., 73 N. J. Eq. 692, 69 Atl. 1014.

[9] In conclusion, while the case is not free from doubt, we think that its determination should be had in conformity with the intent of the several members of the association, and that by so resolving it we are accepting the latest expression of the Supreme Court, as announced in Gould v. Gould, 245 U. S. 151, 38 Sup. Ct. 53, 62 L. Ed. ——, where it was said:

"In the interpretation of statutes levying taxes it is the established rule not to extend their provisions by implication beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government, and in favor of the citizen."

[10] The judgment of the District Court must be reversed, and the cause remanded, with instructions to enter judgment for plaintiffs for the amount claimed, with interest and costs. Erskine v. Van Arsdale, 15 Wall. 75, 21 L. Ed. 63; Herold v. Shanley, 146 Fed. 20, 76 C. C. A. 478.

TAYLOR v. WELLS FARGO & CO.

(Circuit Court of Appeals, Fifth Circuit. February 28, 1918. Rehearing Denied April 15, 1918.)

No. 3102.

1. CARRIERS ⟸4—"COMMON CARRIERS"—EXPRESS COMPANY.
   An express company is a common carrier.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Common Carrier.]

2. MASTER AND SERVANT ⟸100(1)—LIABILITY FOR INJURIES—EXEMPTION CONTRACTS—"COMMON CARRIER BY RAILROAD."
   Within the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. 1916, §§ 8657-8665]), providing that every common carrier by railroad, engaged in interstate commerce, shall be liable to employés suffering injury, and in section 5 (section 8661) that any contract, etc., exempting from such liability shall be void, an express company is a common carrier by railroad, though it uses other facilities in its business; consequently an agreement between an express company and its messenger that neither the company, nor any railroad company on whose lines the messenger might travel, should be liable for any injury to him while so traveling, is invalid.

Appeal from the District Court of the United States for the Northern District of Mississippi; Henry C. Niles, Judge.

Suit by Wells Fargo & Co. against Oscar G. Taylor. From a decree for complainant, defendant appeals. Reversed and remanded, with directions to dismiss.

See, also, 220 Fed. 796, 136 C. C. A. 402.

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

Thomas Fite Paine, of Aberdeen, Miss. (Paine & Paine, of Aberdeen, Miss., on the brief), for appellant.

E. O. Sykes, of Jackson, Miss. (E. O. & J. A. Sykes, of Aberdeen, Miss., and Branch P. Kerfoot, of New York City, on the brief), for appellee.

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

BATTS, Circuit Judge. A contract between the St. Louis & San Francisco Railroad Company and Wells Fargo & Co., providing for the operations of the express company over the lines of the railroad company, contained a provision to this effect:

> The express company agrees "that it will and does hereby assume all risk and damage to its agents and employés while engaged in its business on any of the railways or property of the railroad company, and hereby agrees to indemnify and hold harmless the St. Louis & San Francisco Railroad Company on account for all claims for damages suffered by the agents and employés of the express company, while engaged in its business on any of the railways or property of the Railroad Company."

An instrument introduced in evidence, marked "Messengers' Agreement," and reciting that it was an agreement between Wells Fargo & Co. and Taylor, the plaintiff in error, but signed alone by the latter, contains a provision to the effect:

> "That neither the party of the first part [Wells Fargo & Co.] nor any railroad or steamboat company, or other carrier, on whose lines said party of the second part may travel as such messenger or guard, shall, under any circumstances, or in any case whatever, be liable for any injury occurring to said party of the second part, while so traveling, whether such injury arises from any fault, carelessness, or negligence, gross or otherwise, on the part of said railroad or steamboat company, or other carrier, its agents or servants; it being the intent of this contract that said party of the second part shall and will assume all and every risk incident to said employment, from whatever cause arising."

Taylor, having been injured while discharging his duties as an express messenger, in an accident on the St. Louis & San Francisco Railroad, instituted suit against the railroad company in a state court of Mississippi. The express company filed a petition in that court, setting out the contracts, and asked to be made a party defendant, in order that it might remove the case to the federal court. The prayer of the petition was refused. It thereupon instituted a suit against appellant in the District Court of the United States, setting up the facts with reference to the agreements, and other facts, and, in addition to the prayer for general relief, asked for a temporary injunction, which was refused. The case in the state court proceeded to trial, resulting in a judgment for $4,000 for the plaintiff, which was affirmed by the Supreme Court of that state. Upon trial of the suit instituted by the express company a judgment was rendered for the company. An appeal to this court resulted in a reversal; the judgment being based upon the insufficiency of the pleadings. 220 Fed. 796, 136 C. C. A. 402. The bill was amended, and, upon a new trial, judgment was again for the express company, and the collection of the judgment

rendered in the state court was enjoined. From that judgment this appeal is taken.

Appellant contends that the former judgment in this court was final, and that this court, not having permitted an amendment, the bill could not be amended below; that the suit was in violation of section 720 of the Revised Statutes (Comp. St. 1916, § 1242); that the contracts between the express company and the express messenger, and between the express company and the railroad company, whereby the railroad company was to be relieved from the effect of negligence, were void; and that, by virtue of section 5 of the second Employers' Liability Act (35 Stat. 65, c. 149), and the amendment of April 5, 1910 (36 Stat. 291, c. 143), the contract between the express company and the appellant is void. If the last-mentioned contention of appellant is meritorious, it will not be necessary to consider the other questions.

[1, 2] The Employers' Liability Act provides:

"Every common carrier by railroad while engaging in commerce between any of the several states, * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce. * * *" Section 1.

Section 5 provides that:

"Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void."

If the terms of the act apply to express companies, the contract between Wells Fargo & Co. and the messenger is void. Second Employers' Liability Cases, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44; Phila., Balt. & Wash. R. R. v. Schubert, 224 U. S. 603, 32 Sup. Ct. 589, 56 L. Ed. 911.

An express company is a common carrier. Bank of Kentucky v. Adams Express Co., 93 U. S. 174, 23 L. Ed. 872. An express company is a common carrier by railroad. If this fact were not universally known, it would be sufficiently indicated by the contract between the appellee and the St. Louis & San Francisco Railroad Company. It is not seen how an insistence to the contrary can be made. Indeed, there is no contention that the express company is not a common carrier by railroad; but the proposition is that, notwithstanding the language, the act does not apply to express companies. The argument seems to be based upon rulings to the effect that the original Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 379) was not applicable to express companies, and upon the case of Robinson v. B. & O. R. R. Co., 237 U. S. 84, 35 Sup. Ct. 491, 59 L. Ed. 849, which holds that an employé of the Pullman Company is not an employé of the railroad company.

The Interstate Commerce Commission, in the Matter of the Express Cos., 1 Interst. Com. Com'n R. 349, held that the original Interstate Commerce Act was not intended to apply to express companies. The language of that act was to the effect:

"That the provisions of this act shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water."

In reaching a conclusion that the express companies were not included an unconvincing argument was based upon the use of the word "wholly." The Commission says:

"The use of that word in the section which was evidently framed with the greatest care affords a fair foundation for the claim that the act does not describe the modes of transportation employed by express companies with sufficient precision to bring them within its terms."

The proposition which seems to have been most meritorious in reaching the conclusion was:

"That the details of the law in its various provisions are so framed as to apply distinctly to railroads and railroad companies, and that they do not apply to the carriage of property by express companies without various implications and eliminations which give a somewhat strained construction to the language used."

A number of examples are then given in support of this proposition. The Commission finally suggests:

"In case of doubtful jurisdiction, it is far better that the legislative body should resolve the doubt."

This holding of the Interstate Commerce Commission was not more than acquiesced in by the courts. Am. Ex. Co. v. U. S., 212 U. S. 522, 29 Sup. Ct. 315, 53 L. Ed. 635. It is to be observed that the language of the act which was under construction is very different from that employed in the Employers' Liability Act. Even if the processes of reasoning were entitled to greater respect, the decision would not be held applicable to the present case.

Robinson v. Baltimore & Ohio R. R. Co., is cited by appellee as decisive of the proposition that the Employers' Liability Act does not apply to an express company and its employés. That was a suit instituted by a Pullman porter, injured while performing his duties, against the railroad company. The Supreme Court says:

"The inquiry is whether the plaintiff comes within the statutory description; that is, whether, upon the facts disclosed in the record, it can be said that, within the sense of the act, the plaintiff was an employé of the railroad company, or whether he is not to be regarded as outside that description, being in truth on the train simply in the character of the servant of another master, by whom he was hired, directed, and paid, and at whose will he was to be continued in service or discharged."

The court continues:

"We are of the opinion that Congress used the words 'employé' and 'employed' in the statute in their natural sense, and intended to describe the conventional relation of employer and employé."

And it concludes:

"We conclude that the plaintiff in error was not an employé of the defendant company within the meaning of the Employers' Liability Act, and that the judgment must be affirmed."

A ruling that a porter, hired by the Pullman Company, is not a railroad company employé, is not conclusive that a messenger, hired by an express company, is not an express company employé.

It would not be difficult to make a fairly satisfactory argument to the effect that an express messenger is an employé both of the ex-

press company and of the railroad company. In the case of B. & O. R. R. Co. v. Voigt, 176 U. S. 498, 20 Sup. Ct. 385, 44 L. Ed. 560 (decided before the passage of the Employers' Liability Acts), recovery was refused an employé of the express company, in a suit against the railroad company; the court in argument suggesting that the relation between the express company and the express messenger more nearly resembled that of an employé than a passenger, since "his position is one created by an agreement between the express company and the railroad company, adjusting the terms of a joint business," and that the express messenger could not recover for the negligence of a fellow servant.

The relations between an express company and a railroad company have the elements of a partnership, of agency, of a common enterprise. Oliver v. Northern Pac. R. R. Co. (D. C.) 196 Fed. 432. It is not necessary, however, to determine whether appellant could have recovery against the railroad company under the act or otherwise. The issue necessary to be determined is whether the fifth section of the Employers' Liability Act renders void so much of the contract between the messenger and the express company as undertakes to negative the right of the messenger to recover for injuries. This answer is dependent upon whether the act applies to express companies. The language of the act does not seem to leave any ground for construction or interpretation. It is perfectly clear and absolutely unequivocal. The terms of the act apply to every common carrier by railroad. The circumstance that the common carrier may also conduct a business other than by railroad cannot destroy the fact that it conducts a common carrier's business by railroad. If the fact that an express company may also be a common carrier by water, or by stage, could destroy the applicability of the act, railroad companies that utilize water transportation would also be exempt.

The transportation which is conducted on a railroad by an express company is properly within the function of the railroad. All of the handling of freight by express companies could be by railroad companies, and shippers could compel the acceptance by railroad companies of such freight. The arrangement between railroad companies and express companies, by which they co-operate in handling part of the freight which railroad companies are compelled to carry, is regarded as legal. There would be nothing to prevent a railroad company from making somewhat similar arrangements with express companies or freight lines, by which the balance of its freight might be handled by intermediary transportation companies. It could, doubtless, in the same way farm out its passenger transportation business. The exercise, with regard to the balance of its business, of the rights which it has exercised with reference to that portion of it which has gone to the express companies, would dispense with a very large per cent. of all of the direct employés of the railroad company. The arrangement would, in very large measure, nullify the Employers' Liability Act, if it is limited in its application as contended by appellee.

It was the purpose of the Congress to provide special protection to persons subject to the hazards incident to the operation of railroads. There could have been no reason for giving the protection to a rail-

road conductor, and refusing it to an express messenger. It will not be assumed that Congress intended to make a distinction in the absence of language that would so indicate. It will certainly not be assumed in the face of language which is clear and unambiguous. Those of the decisions which seem to sustain the right of a railroad company and an express company, between them, to contract away the right of a human being to protection against negligence, are entirely out of harmony with fundamental principles of right and the ordinary conceptions of law. No court ought at this time, in the face of the unequivocal language of the Congress, to make a ruling which would differentiate express company messengers, not alone from other persons engaged in the hazards of railroading, but from all other persons engaged in hazardous businesses. The Employers' Liability Act is proof that Congress was not unresponsive to the universal feeling that every business should carry its hazards. It will not be assumed that language, which is properly and logically comprehensive, is to be so construed as to exclude a class dependent on legislation even for protection against negligence.

Appellant is not seeking relief under the terms of the Employers' Liability Act, but he is insisting that that part of the contract which the express company claims deprived him of all protection is void. We so hold. The judgment of the lower court is reversed, and the cause remanded, with directions to dismiss.

Reversed.

STOKES v. WILLIAMS et al.

(Circuit Court of Appeals, Third Circuit. February 27, 1918.)

No. 2298.

1. RECEIVERS ⟸170—ACTIONS AGAINST—DEFENSES—LIMITATION.
   While it is the general rule that the defense of the statute of limitations, though personal to a corporation, passes to its receivers, such rule is based in principle on the fact that the receivers represent the interests of the corporation, its stockholders, and creditors, and succeed to the defense for the protection of those interests; and where by reason of peculiar circumstances the receivers do not represent such interests, the rule does not apply.

2. RECEIVERS ⟸170—ACTIONS AGAINST—DEFENSES—LIMITATION.
   A committee of creditors purchased from receivers the property of a corporation, except its credits and cash, for a sum represented as more than sufficient, with the assets retained, to pay all the debts of the corporation. The purchase, however, was subject to the condition that any surplus remaining after such payment should be returned to the committee. *Held* that, assuming that the assets so secured were sufficient to pay all the corporation's debts, the receivers could not set up the defense of limitation to an otherwise valid claim against the corporation, since such defense was not for the protection of the corporation or its property, but solely for the benefit of the purchasing committee.

3. LIMITATION OF ACTIONS ⟸148(4)—ACKNOWLEDGMENT OR NEW PROMISE—SUFFICIENCY.
   The statute of limitations of New Jersey (3 Comp. St. N. J. 1910, p. 3167, § 10) provides that "no acknowledgment or promise by words only

shall be deemed sufficient evidence of a new or continuing contract whereby to take any case out of the operation of this act * * * unless such acknowledgment or promise shall be made or continued by or in some writing to be signed by the party chargeable thereby." A corporation declared a dividend on its preferred stock, which was paid to all stockholders, except claimant. A year later the corporation wrote claimant a letter as follows: "The executive committee took up the question of payment to you of the dividend on the preferred stock, and decided that, owing to the present money conditions, it would be unwise, from the company's standpoint, to make any payment at this time." *Held*, that such letter was an unqualified acknowledgment of an antecedent indebtedness, and that such acknowledgment carried with it by implication a promise to pay which was sufficient to raise the bar of the statute.

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

Appeal in equity by William E. D. Stokes from an order disallowing his claim against the Standard Plunger Elevator Company, Howard H. Williams and Albert C. Wali, as receivers, and others. Reversed.

Charles L. Craig, of New York City, for appellant.

Howard H. Williams, of New York City, and Albert C. Wall, of Jersey City, N. J., for appellees.

Before McPHERSON and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. The claimant filed two claims against the defendant corporation. The receivers rejected both as barred by the Statute of Limitations of New Jersey. On exceptions, the District Court referred the question of allowance to a master. He sustained the receivers. On exceptions again, the District Court affirmed the master, and the claimant took this appeal.

[1] *Claim 1.* The first claim is for $9,258.15, and is not disputed. As the indebtedness is more than six years overdue and is not revived by a written acknowledgment or promise to pay, it is conceded that the claim is barred by the New Jersey statute if the defence of the statute of limitations is available to the receivers in this case. The learned trial judge held that a receiver succeeds to all defences of the corporation, and, accordingly, the defence of the statute of limitations was here available to the receivers and barred recovery on the claim.

But the facts of this case are peculiar, and give the question a turn, which requires, we think, something more than a consideration in the abstract of what defences are available to receivers. We do not question the general rule that the defence of the statute of limitations, though personal to a corporation, passes to its receivers, and is available to them in caring for and protecting the interests of the corporation, its stockholders, and creditors. In fact, we freely recognize the rule; but in doing so we recognize also that the rule is based in principle on the protection which the law intends to afford those whom the receivers represent. Whom do the receivers represent in this case? It is on the answer to this question that the peculiarity of the facts of this case has a bearing.

[2] A conflict between stockholders of the Standard Plunger Elevator Company, which had long been waged, culminated in the ap-

pointment of receivers and an order for the sale of its property. The validity of the order and subsequent sale was the subject of litigation previously in this court. Stokes et al. v. Williams et al., 226 Fed. 148, 141 C. C. A. 146.

The corporation's assets were of a character that did not invite extensive bidding. A committee of creditors, composing or representing one faction of stockholders in the corporation controversy, offered to purchase all assets of the corporation, excepting its accounts and bills receivable and cash, for the sum of $250,000. The proposed purchase price and the assets to be retained, it was represented, together amounted to a sum exceeding all the corporation's debts. This offer was opposed by creditors and stockholders of the corporation comprising the other faction to the controversy; but, as they had nothing better to offer, the court ordered the sale on the offer made. At the sale, the committee purchased the corporation's property pursuant to its offer, and the sale was confirmed. 226 Fed. 148, 141 C. C. A. 146.

So far, there was nothing very unusual in the transaction; but the committee's bid, on which the sale was ordered, contained a peculiar feature, which has, we think, a controlling bearing on the question now before us. This was a provision or rather a condition, that any excess of the purchase price over and above the claims approved and allowed, should be returned to the purchasing committee. Assuming as we do the correctness of the representation that the purchase price when added to the assets retained will more than pay all the corporation's debts (that being the representation which induced the court to order the sale, and afterward to confirm it), the net results of the sale made upon the offer containing this drawback, are, first, that there will be money enough to pay all creditors in full; second, that no money whatever will be paid stockholders; and, third, that some part of the purchase price will be returned to the committee.

As these facts make the case, we must find the person, natural or artificial, for whom the receivers were acting when they rejected the claim on the statute of limitations.

Manifestly, they were not acting for the corporation's stockholders, because the receivership funds could not under the terms of purchase reach them in any event. They were not acting for the corporation's creditors, because they had already been protected by the size of the purchase price. Were they acting then for the corporation in its purely impersonal artificial sense? The allowance or disallowance of the claim was a matter of entire indifference to the corporation. Its allowance would take nothing from the corporation; it would simply diminish the balance of the purchase price to be returned to the committee. Its disallowance would add nothing to the funds of the corporation, its stockholders, or creditors; it would simply increase the balance of the purchase price to be returned to the committee.

If the claim had been asserted against the corporation before receivership, the corporation's property would have been liable for the payment of its debt. This liability, the corporation could have protected of course by the defence of the statute of limitations. But the defence as here pleaded on the claim filed against the receivers, is not

for the protection of the corporation's property but is for the protection of the committee's property as represented by the balance to be returned to it. When the corporation ceased to be liable to respond with its property for the payment of its debt, it ceased to be entitled to the defence of the statute. It occurs to us that a defence which is purely personal to the corporation and is afforded it solely for the protection of its property cannot pass to its receivers to be employed by them for the protection of the property of another. That the defence if sustained will inure solely to the protection of the committee is clear. Then it must be that the receivers pleaded the statute for the committee. If so, then certainly, a defence which the law affords the corporation cannot be pleaded for a person or a body of persons that has not in any sense succeeded to the corporation or to any of its rights, and has no relation to the corporation other than that of purchaser of its assets.

We are of opinion, that, under the facts of this case, the plea of the statute of limitations is not available to the receivers in defending the claim in question, unless, indeed, the allowance of the claim, in consequence of the withdrawal of the defence of the statute, should so diminish the fund that all other creditors would not receive payment of their claims in full, in conformity with the representation upon which the bid of the committee was made and accepted and upon which the sale was ordered and confirmed. In such an event, we hold the defence would be available to the receivers to the extent necessary to protect the corporation's liability and to conserve the funds in the hands of the receivers to the payment in full of the corporation's debts, but not to protect any balance payable to the purchasing committee under the rebate provision of its bid.

[3] *Claim 2.* The second claim is for an unpaid dividend amounting to $3,666. This claim went through the same legal procedure as the first and was ultimately rejected on several grounds, of which we think, but two are substantial enough to require mention, and of these, but one calls for discussion. We believe there is no difference between this claim and the first in the reasoning by which we have held that the defence of the statute of limitations is not available to the receivers, yet we prefer to decide the appeal on the question upon which it was argued and decided below. This involves the interpretation of a letter written by the defendant corporation and offered as evidence of a new promise to remove the bar of the Statute of Limitations of New Jersey, and to satisfy the requirements of the statute, that, "no acknowledgment or promise by words only, shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of this act, or to deprive any person of the benefit thereof, unless such acknowledgment or promise shall be made or continued by, or in some writing to be signed by the party chargeable thereby." 3 Comp. St. 1910, p. 3167, § 10. Parker v. Butterworth, 46 N. J. Law, 244, 245, 50 Am. Rep. 407; Hewes v. Hurff, 69 N. J. Law, 263, 55 Atl. 275.

The letter offered as a distinct and unqualified acknowledgment of the existing obligation bears date April 30, 1908, and is as follows:

"The Executive Committee took up the question of payment to you of the dividend on the preferred stock and decided that owing to the present money conditions, it would be unwise, from the company's standpoint, to make any payment at this time."

This letter calls for construction, but construction in the light of facts that are not disputed. These are: (1) That a dividend was declared on May 1, 1907; (2) that the dividend was paid, directly or indirectly, to all stockholders excepting to the claimant; (3) that the claimant's share in the dividend was not paid him; and, (4) that by the declaration of the dividend, the corporation became indebted to the claimant. In this state of facts the letter was written. While the master conceded that the dividend referred to in the letter was the dividend that had previously been declared, the court rather regarded the dividend mentioned in the letter as a dividend yet to be declared, both, agreeing, however, that the writing did not constitute an unqualified acknowledgement of the debt, implying an unconditional promise to pay it, within the meaning of the New Jersey cases.

We can readily dispose of any question as to whether the promise, if one is implied, was conditional or unconditional, because, if unconditional, it is sufficient, and if conditional, the evidence shows the happening of the event upon which the condition was made.

As we read the writing, we do not gather the impression that the writer was speaking of the inadvisability of *declaring* a dividend, for language naturally to be employed to convey the meaning of future action would be very different from that actually used. What the writer said was, that the committee had taken up the question "of *payment* * * * of *the* dividend on the *preferred stock*" (which is *the stock* on which *a* dividend *had been declared* and which had not been *paid* to the addressee of the letter), and had taken up also the question of "payment *to you* of the dividend," not of the *declaration* of a dividend to stockholders generally. The conclusion of the paragraph, in which the writer refers to the unwisdom, in "the *present money conditions* * * * to make any *payment at this time*," does not suggest the idea that payment was declined, nor does it negative the idea that payment would be made at some time. While the writing is of a character that admits of diverse interpretations, our construction is that it relates to an antecedent debt, that it unqualifiedly acknowledges the existence of the debt, and that the acknowledgment embodies the implication of a promise to pay.

We are of opinion, therefore, that the writing raises the bar of the statute of limitations and allows the claimant to prosecute his claim.

We direct that the order of the court be reversed and the claimant be allowed to proceed with proof of his two claims in conformity with this opinion.

CLINTON v. SMITH & TERRY, Inc.

SMITH & TERRY, Inc., v. EBNER.

(Circuit Court of Appeals, Fourth Circuit. January 25, 1918.)

Nos. 1572, 1573.

1. MARITIME LIENS ⊂=9—CHARTERS—LIEN—CLAIM FOR DEAD FREIGHT.
A claim of a charterer for dead freight, which is in the nature of one for loss of profits, is not enforceable in a suit in rem as a lien on the vessel.

2. TOWAGE ⊂=9—TOWAGE SERVICE—BREACH OF EXECUTORY CONTRACT—LIEN.
That a charterer accepted delivery of a barge at a point distant from the place of loading, and had her towed there, did not make such transfer the beginning of a voyage under the charter, and the unaccepted offer of services by tugs before she was ready to proceed on her voyage did not give them a lien on the barge.

3. ADMIRALTY ⊂=66—PLEADING—AMENDMENT OF LIBEL.
The allowance of an amendment of the libel in a suit in personam, setting up an additional claim for damages growing out of the same alleged breach of charter, *held* within the discretion of the court.

4. SHIPPING ⊂=58(3)—CHARTER—DAMAGES FOR BREACH.
Where the charterer of a coal barge for three months, with the privilege of renewal for another like term, surrendered the barge during the first term for unseaworthiness, and did not exercise its option for renewal, it could not recover in a suit for breach of charter for loss of prospective profits during the renewal term.

Cross-Appeals from the District Court of the United States for the Eastern District of Virginia, at Norfolk; Edmund Waddill, Jr., Judge.

Suits in admiralty by Smith & Terry, Incorporated, against the barge Benefactor, John Ebner, master and claimant, and by Smith & Terry, Incorporated, against Joseph F. Clinton. Decree for libelant in the first suit, from which it appeals. Affirmed. From the decree in the second suit, both parties appeal. Modified and affirmed.

For opinion below, see 242 Fed. 582.

Francis S. Laws, of Philadelphia, Pa., and John W. Oast, Jr., of Norfolk, Va. (Lewis, Adler & Laws, of Philadelphia, Pa., on the brief), for Clinton and Ebner.

Edward R. Baird, Jr., of Norfolk, Va. (Baird & Swink, of Norfolk, Va., on the brief), for Smith & Terry, Inc.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

KNAPP, Circuit Judge. These cases were argued together and may be disposed of in one opinion. The following facts appear:

Smith & Terry, Incorporated, chartered the barge Benefactor for three months from December 13, 1915, with the option of three additional months, to carry coal from Hampton Roads to Sound ports. After one load had been taken from Newport News to Providence, the charterer canceled the contract and returned the barge to her owner on the ground that she was unseaworthy. Subsequently the charterer brought two actions in admiralty, one a libel in rem against

the barge, and the other a libel in personam against the owner. In the in rem proceeding five items of damage were set up for which a lien was claimed, namely: (1) Cost of towing the barge from Providence to New York; (2) loss of time of a tug, which went to take the barge in tow at Hampton Roads before she was ready to go to sea; (3) loss of time of another tug, which also went to take her out before she was ready; (4) loss of profits on the difference between the number of tons which the barge carried on the trip mentioned and the number of tons which it is claimed she should have carried; and (5) loss of profits on the earnings of the barge for the three additional trips it is claimed she could have made, if seaworthy, within the first three-months period. The answers of the owner deny that the barge was unseaworthy and by way of cross-bill ask to recover the amount agreed to be paid for her use. Upon objections filed in the first action, the court below struck out the item of damage for loss of profits which the barge would have earned, if seaworthy, on the ground that it was not a lien on the barge. The other items were permitted to stand. The trial court, also, against the objection of the owner, permitted an amendment of the in personam libel, by which the item of loss of profits stricken from the in rem proceeding was inserted in the in personam proceeding. The cases were tried together, though not consolidated.

[1] Upon the evidence adduced the court below found as a fact that the barge was unseaworthy. It is enough to say that this finding is supported by adequate proof, and that no sufficient reason appears why it should not be accepted. In the in rem case the item for towing the barge from Providence to New York was allowed, and the correctness of that ruling is not challenged by assignment of error. The two items for loss of time by the tugs which went to take the barge in tow and found her not ready were disallowed, and that ruling will be presently considered. The "dead freight" item was likewise disallowed, because the court found that the number of tons carried by the barge on the trip she made was as great as she could reasonably carry. This finding also has the support of substantial evidence and should be accepted. Even if the fact were found otherwise we should feel constrained to hold that this item of damage, which is in the nature of prospective profits, is not sustainable as a lien on the barge. In the in personam case, and under the amended libel, the court awarded libelant the sum of $3,351.50 for profits which the barge, if seaworthy, would have earned during the first three months, but disallowed the claim for profits that would have been earned during the second three months. Both parties appeal.

[2] The libelant's claim of lien for the hire of tugs which offered to tow the barge before she was ready to go to sea is based on the contention that the service for which she was engaged had then been in some part performed, and therefore the contract was not wholly executory; this because the barge was delivered to the charterer at Philadelphia, and had to be moved from there to Lambert's Point to take on a cargo of coal. But the circumstance that the barge when hired was at a distance from the intended place of loading did not serve to make her transfer to that place the beginning of a voyage,

or a partial performance of her undertaking. It was only the incident of her location when the charter party was signed. This being so, the unaccepted proffer of service by the tugs did not give them a lien on the barge, whatever claim they might have against the person that employed them. And if the tugs had no lien for mere loss of time, without any actual service, it seems manifest that libelant cannot recover for that loss in an in rem proceeding. We are of opinion that the two items in question were properly disallowed. The Francesco (D. C.) 116 Fed. 83; The Thomas P. Sheldon, 118 Fed. 952, 55 C. C. A. 439; The Rupert City (D. C.) 213 Fed. 263.

[3] It is insisted that the trial court erred in allowing the in personam libel to be amended in the manner above recited, but the argument is unconvincing. In our judgment this amendment did not introduce a new and independent cause of action, for the reason that both claims for loss of profits, one for the agreed three months and the other for the optional three months, grew out of the same alleged breach of the charter party, namely, in that the barge proved to be unseaworthy. It seems evident that the first of these claims, as well as the second, might have been set up in the original libel, since it was the proper subject of an in personam proceeding. As the matter stood, therefore, we do not perceive that the amendment operated in any wise to the prejudice of the owner, and the surety is not objecting. Moreover, the answer in this proceeding, which serves also as a cross-libel, seeks recovery from libelant for the stipulated hire of the barge and certain expenses incurred in putting her in repair. In short, we are satisfied that the allowance of the amendment was within the discretionary power of the court below and should not be held erroneous.

It was found by the trial court that the barge, if seaworthy, could have made three additional trips during the three months for which she was chartered. There was testimony to that effect, although the fact was in dispute, and we cannot say that the finding is unwarranted. It will therefore be assumed to be correct. The damages awarded for loss of profits were on the basis of $2.50 per ton of coal, that being the rate at which the barge was subchartered by libelant to another concern. This subcharter was entered into without the knowledge or consent of the owner, and consequently its terms were not binding upon him. Obviously, the charterer cannot recover from the owner, for the breach of his contract, any more than it was to get from the subcharterer, since that in any event would be the extent of its loss; and it cannot recover as much as the subcharterer was to pay, if when the breach occurred it could have hired another barge or procured equivalent tonnage at a lower rate. On conflicting testimony relating to this question, the trial court found in effect that the charterer could have obtained cargoes at an average of not less than $2.50 per ton during the three months for which the barge was hired. Accepting this finding, which seems to be justified, we cannot see that it was unfair to the owner or otherwise incorrect to assess damages on that basis.

But the amount awarded appears plainly excessive, because it assumes that the barge would have carried 1,350 tons on each of the

three additional trips she might have made during the three months in question, whereas the court has found, and we uphold the finding, that 1,200 tons was as much as she could safely carry. The estimate is therefore too great by 450 tons, which at $2.50 per ton would amount to $1,125, and the award must be reduced accordingly.

[4] We are of opinion that the trial court was right in rejecting libelant's claim for prospective profits during the optional three months. In point of fact, the option was not exercised by notice to the owner or by any act indicating a desire to retain the barge after the first three months. Moreover, in our judgment, the cancellation of the charter party and return of the barge were in the circumstances tantamount to a declaration that the option would not be exercised, and no further comment seems to be necessary.

It follows that the decree in the in rem case should be affirmed, with costs. The decree in the in personam case should be modified, by deducting from the award of damages, the sum of $1,125, with interest from April 24, 1917, and, as thus modified, affirmed, but without costs to either party as against the other.

ATLANTIC COAST LINE R. CO. v. SELDEN.*

(Circuit Court of Appeals, Fourth Circuit. January 19, 1918.)

No. 1559.

MASTER AND SERVANT ⊂=278(18)—ACTION FOR INJURY TO SERVANT—SUFFICIENCY OF EVIDENCE.

A verdict finding a railroad company chargeable with negligence and liable for the death of a switchman, who was struck by a train moving backward at night on the main track through the yard, *held* not supported by the evidence under the instructions of the court, although plaintiff was entitled to more favorable instructions.

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

Action at law by Jennie C. Selden, administratrix of John R. Selden, deceased, against the Atlantic Coast Line Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

Edwin P. Cox, of Richmond, Va., and Bernard Mann, of Petersburg, Va., for plaintiff in error.

Brockenbrough Lamb, of Richmond, Va. (Keith & Hurt and Lamb & Lamb, all of Richmond, Va., on the brief), for defendant in error.

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

PRITCHARD, Circuit Judge. This action was instituted in the District Court of the United States for the Eastern District of Virginia by defendant in error, administratrix of her deceased husband, against the Atlantic Coast Line Railroad Company, plaintiff in error, to recover damages for the death of her husband. The deceased was employed by the Atlantic Coast Line Railroad Company as a yard

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

*Rehearing denied May 8, 1918.

switchman, and was killed while performing his duties as such on the company's yard, which is known as "the South Richmond yard." This action was instituted under what is known as the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. 1916, §§ 8657–8665]), and it is conceded that the act in question applies to the case at bar.

The company's main line runs from Byrd Street station, on the north side of the James river, in the city of Richmond, Va., in a southwesterly direction over a bridge across the river, and then turns and proceeds in a southerly direction. The South Richmond yard is located on the south side of the river, a short distance beyond the end of this bridge, and through this yard the main track runs in a sharp curve, upon the inside of which and close to the main line is an embankment more than 30 feet high. There is but one track, called for convenience the storage track, between the main line and this embankment. On the other side of the main line track, (on the outside, or convex, of the curve) there are 12 tracks, all of which run upon approximately the same curve, parallel to the main track, which tracks are in the yard. The limits of this yard may be roughly said to be a footbridge over the tracks at the northern end, and Semmes avenue bridge, which carries Semmes avenue and the street car tracks over the railroad, at the southern end. North of this footbridge the railroad is a single track to Byrd Street station, and south of Semmes avenue bridge there are 3 tracks for a distance of some miles. The distance from Semmes avenue bridge to the footbridge is 976 feet.

It appears that at the time deceased was killed he was engaged in shifting a train of cars which were moving in a southerly direction on the track next to and just west of the main line track, viz., the first track on the outer side of the curve formed by the main line track; that the cars with which the deceased was engaged were running on track No. 5. It further appears that deceased was temporarily in charge of this operation; the regular conductor having gone a few moments before to the yard office for orders. The duties of the deceased required him to be on the inner side of this train, the main line side, in order for his signals to be properly transmitted. The locomotive had been attached to the cars on the track No. 5—had been coupled to them by the deceased—and they had begun to move in a southerly direction out of track No. 5, and as soon as this movement began deceased walked northwardly, as plaintiff contends, along the main line track for the purpose of noting the chalk marks on the cars, in order that they might be switched to their proper locations. It is also insisted that the deceased, for his own protection, walked in the middle of the main line track; that the space between the main line track and No. 5 was not a safe place to walk, because of the danger of swinging doors and projections on the cars on track No. 5, as well as the danger from the roughness and unevenness of the ground and the projection of exposed tie ends, all of which rendered the main line track the safest place for him to walk.

It is insisted that while thus engaged with the cars on track No. 5 deceased was, without warning, struck and killed by a train of 34

cars which approached him from the rear on the main line; that the train which struck him was coming northwardly towards Richmond, and that the same was being pushed by a locomotive from the rear around this curve and embankment. It appears that there was no light upon the leading box car, and it is contended that no warning of any kind was given of the approach of the train. It also appears that owing to the method of running this train the engineer was about 1,400 feet from the leading car, and therefore had no view whatever of the track ahead of his train; such view as he might have had being entirely cut off by the curve in the embankment.

It further appears that this north-bound train was in charge of Conductor Jones, who was standing on the top of the leading box car, about midway thereof. It is admitted that it was the duty of Jones to keep a lookout on the track, and to warn employés in danger of being struck by this train, and to relay to the engineer such signals as might be required. On account of the length of the train, the signals had to be relayed from the conductor on the leading box car to a brakeman about the middle of the train, who in turn repeated the signals to another brakeman near the locomotive, who repeated them to the engineer.

As the leading car of this north-bound train entered the yard under Semmes avenue bridge, the conductor was able to see and did see a signal light a considerable distance north of the footbridge, and this signal light indicated a clear track and gave him his clearance through to Richmond. When this signal was seen, the leading car was not less than 650 feet south of the point where deceased was struck. The only duty that Conductor Jones had to perform while his train was running this distance, as shown by his own testimony, was to look out for and warn with his voice employés engaged in the yard and in danger of being struck by his train. A great number of employés were customarily at work on this yard at night, passing to and fro across and along the main track.

The deceased was run down and killed, and the noise of the breaking of his lantern was the only thing that gave warning of the accident to the colored brakeman, John Montgomery, who was engaged with Capt. Selden's crew and was walking northwardly along the main line some distance north of Capt. Selden. The noise of the breaking glass attracted the attention of Montgomery, who testified that he looked around and saw the silent, unlighted bulk of the leading car bearing down upon him out of the darkness, and that he barely escaped with his life by jumping from the main line track.

Conductor Jones, a witness for the plaintiff, who, as we have stated, was standing near the center of the leading car, said that when he "got his signal to proceed he gave the signal to go ahead to the man in the middle of the cut of cars on which he was, so that that man could give it to the man next to the engine, and that after he gave the signal he was standing in the same position on the car, looking straight ahead, and that he did not see anything on the track."

A number of witnesses were introduced, but we think that this statement covers the facts material to the question before us, in view of the charge of the court below. The jury found a verdict in favor

of the plaintiff, and judgment was entered accordingly, to which defendant excepted. The case now comes here on writ of error.

The court below, among other things, gave the following instruction:

"(6) The court instructs the jury they cannot find a verdict for the plaintiff in this case, unless it has been shown to their satisfaction by the greater weight of evidence that Mr. Selden was, at the time of the accident, walking on the main line track, and not between the track and No. 5, and that Conductor Jones saw and knew that he was in a position of danger, or by the exercise of ordinary care and caution ought to have seen him on said track, and to have known that he was in a position of danger, and that after he had such knowledge or opportunity of knowledge there was sufficient time for the defendant company, acting through its train crew on the cut of cars going north, to have prevented the accident."

In granting this instruction the court excluded all other theories involved in this case, only submitting to the jury the issue whether Conductor Jones had an opportunity to see Selden's danger and warn him of the approaching train; the negligence of Selden being assumed. Therefore, in determining the point involved, we must confine ourselves to the evidence which relates to the question as to whether the defendant company complied with the rule or custom which requires that in making a yard movement a conductor or other person assigned to that duty should stand at the center of the leading car with a lantern to warn those who might be on the track of the approaching train.

Conductor Jones, whose evidence was not contradicted, stated, among other things, that he was on the car at the proper place and that his lantern was in good condition, which afforded him an opportunity to have a clear view of the track in front of the moving train, and that he did not see deceased until after the accident occurred. This witness also testified that this was a custom of long standing in the operation of trains in the vicinity where the accident occurred; that plaintiff's decedent had, on many occasions, performed the same service and in precisely the same manner. Other witnesses corroborated the testimony of Conductor Jones as respects this point. Indeed, a careful search of the record fails to disclose any evidence tending to show that Jones was in any way negligent in performing the duty required of him. Under these circumstances we fail to see how the jury, restricted as it was by the instructions submitted, could have found that decedent's death was due to the negligence of the defendant or any of its employés.

However, we think that the proof shows that the movement in question was a main line movement. It appears from the evidence that the rules of the defendant company, among other things, provide:

"Rule 24. When cars are pushed by an engine (except when shifting or making up trains in yards) a white light must be displayed on the front of the leading car by night."

This rule is eminently proper, providing as it does that when cars are being pushed by an engine that a white light must be displayed on the front of the leading car as a warning of its approach. When trains are operated in the regular way, the engine precedes the cars

and is equipped with a powerful light, which serves a two-fold purpose, to wit: (1) To enable the engineer at all times to have a clear view of the tracks in front of him; and (2) to indicate to those who may be on or about the tracks the approach of the train, but in this instance, as we have stated, the train was being pushed backwards and going at a rate of speed which did not create much noise, and there being no light on the end of the leading car rendered this method of operation exceedingly hazardous to those who might be walking upon the main line track.

In view of this phase of the case, the plaintiff was entitled, if he had so requested, to have the jury pass upon the question as to whether the defendant company was guilty of negligence in operating a train on the main line without placing a light on the front of the leading car, subject to the defense of assumption of risk.

From what we have said, it follows that the judgment of the court below should be reversed, and the cause remanded, with instructions to proceed in accordance with the views expressed herein.

Reversed.

THE BARON NAPIER.

(Circuit Court of Appeals, Fourth Circuit. January 9, 1918.)

No. 1558.

1. SEAMEN ⊜29(5)—INJURY IN SERVICE—LIABILITY OF VESSEL—EVIDENCE.
Libelant was hired as muleteer on a British steamship transporting mules for the Allies from Newport News to Salonica. His duties had to do only with the care of the mules, and were in no way connected with the navigation of the ship, but when within two days from Salonica he was called upon by the foreman to act as watchman, and upon objecting was told that he would be imprisoned and fined if he refused. He requested a lantern, but was not given one, although other watchmen had lanterns the same night. On going in the dark upon the roof of a temporary structure built for stalls on the main deck, for air, as was customary with the watchmen, as he testified without serious contradiction, he fell through an opening over a stall, from which the removable cover had been left off, and was seriously injured. He knew of the opening, but not that it was ever left uncovered at night, and the captain of the ship testified that it was not, and that it was not on the night in question; but there was no testimony of an examination afterward to ascertain the fact. Libelant was not sent to a hospital in Greece, and received little, if any, medical attention until his return to the United States two months later, where he was discharged without any provision being made for his care. *Held*, that a finding by the trial court that libelant was injured through the negligence of those in authority on the ship, which also failed to give him proper care and attention, was fully supported by the evidence, and that under Seamen's Act March 4, 1915, c. 153, § 20, 38 Stat. 1185 (Comp. St. 1916, § 8337a), which 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," the ship was liable for the injury.

2. ADMIRALTY ⊂118—REVIEW ON APPEAL—FINDINGS OF FACT.
While findings by an admiralty court on questions of fact are reviewable on appeal, when made on conflicting evidence they are entitled to and are given great weight, and will not be reversed, except for plain error.

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk; Edmund Waddill, Jr., Judge.

Suit in admiralty by Robert Lee against the steamship Baron Napier; D. McDonald, master and claimant. Decree for libelant, and claimant appeals. Affirmed.

Leon T. Seawell, of Norfolk, Va. (Hughes, Little & Seawell, of Norfolk, Va., on the brief), for appellant.

Allan D. Jones, of Newport News, Va. (W. R. Walker, of Newport News, Va., on the brief), for appellee.

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

PRITCHARD, Circuit Judge. This is a libel filed on behalf of Robert Lee against the British steamship Baron Napier in the District Court of the United States for the Eastern District of Virginia for damages for personal injuries growing out of an accident on board the steamship in December, 1916. The court below held that the injuries arose by reason of the negligence of the steamship, and assessed the damages at $1,500. The facts may be epitomized as follows:

Lee was employed by the master of the ship in November, 1916, while the ship was at Newport News, Va., destined on a voyage to Egypt. He signed as a muleteer; the ship being engaged in carrying mules to the Allies. His duties had only to do with the care of the mules, and were in no way connected with the navigation of the ship. In order that the ship might carry animals on deck, as well as between-decks, a wooden structure of a temporary nature was constructed on the forward main deck, running forward on port and starboard from the bridge to the forecastle. The width of this structure, on each side, was twelve feet; it was eight feet high, and fitted with stalls to take care of the animals. As a part of this structure, running across the ship and joining the port and starboard structure was a connecting platform about five feet wide, and eight feet above the main deck. This platform or bridge was reached by a flight of wooden steps rising from the main deck. It was in front of the steel deck, which ran athwart ship; the steel deck had a railing—"iron railing, iron stanchions and rails." There was no railing along the outer edge of this five-foot wooden platform, the same being used as a passageway by the men. On the roof of the stalls on the main deck, on the starboard side, a row of planks was laid to protect the canvass which covered the roof from the wear of the men's shoes in passing thereon. A portion of the roof of the stalls was removable, just opposite hatch No. 2. When this portion is off there is no walkway along and over the roof of the stalls.

The evidence shows that the muleteers, when serving as watchmen, were accustomed between rounds to go upon this superstructure to get fresh air. The ship, being tightly closed, was very warm, the air in the hold was foul, and it was necessary for a watchman to go out of the hold from time to time in order to keep fit for his duties. Lee testified that he went up the wooden stairway from the main deck, and, turning to his left to go upon the roof of the stalls, advanced but a step along the walkway and fell through the opening in the roof. The appellant contended that the boards had not been removed, and that Lee did not fall at the point he claims, but that he fell from the wooden passageway, which appellant's witness McIntyre stated was eight feet above the main deck and without a handrail. Appellant, in the third paragraph of his answer, contends that appellee should not have used this passageway, but should have passed along in front of the captain's cabin over a passageway on the bridge deck.

As we have stated, Lee had been employed as a muleteer, and not as a watchman, but three days from Salonica, at midday, was called upon by the foreman of the muleteers to watch that night. He was not provided with a lantern, though he asked both the foreman of the muleteers and at the engine room for one, nor was he instructed in his duties. Appellee declined to watch, but was threatened with fine and imprisonment if he did not obey. He thereupon entered upon his duties, and on the first night fell, as he contends, into an unguarded and unlighted trap, and was seriously injured. In falling, appellee struck his head, broke one or two ribs, and seriously injured his left kidney. He also asserts that he received little attention from the ship's doctor, who claimed that he was feigning, and not really injured; that he was placed in his bunk in an insanitary room with 40 men; that he was not sent to a hospital in Greece, but was brought back to the United States and discharged without any provision being made for his care.

The case was heard in the lower court upon oral and written testimony, and the District Judge held:

"That the personal injuries to the libelant, Robert Lee, alleged in the libel, arose by reason of the negligence of the steamship Baron Napier, and that said ship also negligently failed to take proper care to furnish medical attention and to take proper steps to effect his cure, and that the said libelant is entitled to recover against the steamship Baron Napier damages sustained, doth so decree, and, proceeding to assess the damages of said libelant upon the evidence heard in open court, doth assess the damages at $1,500."

Appellee, in the court below, alleged that he was entitled to have his expenses incident to his cure and care, and damages for failure of the ship to furnish medical attention. There are five assignments of error, but counsel for appellant, at the conclusion of their brief, stated their contention as to the points involved as follows:

"The libelant in this case has failed utterly to show by the weight of the evidence that his injury was caused by the negligence of any one upon the steamship. Having furnished all proper medical attention and settled all claims for wages, nothing further should be paid, and the decision of the District Court should be reversed."

The foregoing statement brings the matters in controversy within a narrow compass. Appellant bases its appeal in this instance upon the ground that the findings of fact by the court below were erroneous.

[1] The first question is as to whether "the accident was caused solely by the negligence of the appellee, for which the steamship is not responsible in damages." It was shown by the evidence of appellee that he was engaged as muleteer, for which service he was to receive the sum of $20 for the trip. He further testified that his duties as muleteer consisted of feeding and watering the animals and cleaning out the stalls, and that this service was performed in the daytime; that the ship proceeded from the point of departure and thence sailed for Salonica; that when 2½ days out of Salonica, at noon, he was ordered by the head foreman of the muleteers to turn in and rest, as he wished him to be night watchman, to take the place of a watchman who had been caught asleep the night before.

The witness McCormack was introduced by appellant, and, among other things, testified that he was "head foreman" in charge of the muleteers, "everything except the crew"; that "these men have nothing whatever to do with the navigation of the ship"; that "I signed as head foreman and am paid by the ship." Lee testified that McCormack told him that he had orders from the captain to put him on as night watchman; that he (appellee) did not want to serve as night watchman, but was ordered to do so and admonished that, if he did not serve in that capacity, he would be put in the forepeak and fined £1; that he asked McCormack for a light, and he referred him to the engineer; that he did not receive a light, nor did McCormack or any one else undertake to get him one, in order that he might safely go about his work. He also stated that two watchmen were aft and two forward; those aft being Quarles and Nelson.

The witness Quarles, among other things, testified as follows:

"I have a lantern. Lee could have got a lantern, if he wanted it. There are plenty on the ship at that time, and he could have gotten a light up there if he wanted it. I do not know whether he asked for a lantern or not. When we were down there in the Mediterranean, about two days from Salonica, I was carrying a light; but you have to blind it with a bag. I don't know about other lights forward. I had one back aft. Me and another fellow named Nelson, he had one."

Appellee stated positively that he made every effort to secure a lantern, but failed to do so, and that he had no lantern at the time he was injured. He further says:

"I had been up on that superstructure in the daytime. I worked there several days, carrying hay and carrying feed. At a point in the superstructure the diagrams show that the boards might be taken out the whole width of the superstructure, to hoist up and throw manure and trash out, and when they are loading mules they take the top off also. When I went up on the superstructure and fell, I came from the well deck up those wooden steps to the bridge over the top. I could not get on the bridge deck. I had no business there. I was watchman and ordered to stay off, and had I been found there I would have been fined £1. * * * I was on this side night watching, and there was no place for me to go but up on the superstructure to sit down. I went up the steps and on the superstructure, and on the third step I seen myself falling right on the horse stall where the cleats are. I came upon the

superstructure, where I had been accustomed to carry hay back and forth. As to why I fell, I never knew how it happened; never saw it open at night before; never knew it was open at night before. Everything was moved; there was nothing there; there was a great big hole. I had no lantern; did not have any light; if I had, I would not have fallen; * * * hot in the ship, and the night watchman told me to go up and get air; and as I was walking out on the steps on the third step I came down in the stall."

The witness McIntyre, who contradicts Lee's evidence as to how the accident occurred, among other things, said:

"I could not see whether he had a lantern or not. If he had a lantern, it was not lit."

He then proceeded to give his version as to how the accident occurred in the following language:

"I was on the Baron Napier, on her voyage in December, when the man named Robert Lee claimed that he fell. It was at night. The man standing here in the cabin is the man that claimed to have been injured. I was standing with Moore, the night foreman, and the boy, Lee, was standing out right on the superstructure running amidships, and the foreman said something to him about going in the bridge space to see about some pans that were under some mules, or something to that effect, and he started down to go to the steps, and when he started to the steps, instead of going to the steps, he stepped off the plank, off the superstructure, and went down to the edge of the hatch coamings, which is covered with hay, and then crawled out of there and sat down by No. 2 hatch; and a fellow by the name of Tom King was the night watchman at that time, and he asked him, did he hurt himself, and he said, 'Yes,' he hurt his back; and the foreman told him, if he hurt his back very bad, he had better go and turn in his quarters."

In support of appellee's contention we have his positive evidence that he fell through an opening into a stall, and that there were no mules in the stall at the time, and it is significant that appellant offered no evidence directly contradicting him on this point. It is further insisted by appellant that appellee must have visited this stall earlier in the evening, and, therefore, should have known that the roof was off. This is bare conjecture, and cannot be taken as evidence.

Appellant also insisted that it was shown by the evidence of McDonald, master of the ship, and McCormack, foreman of the muleteers, and McIntyre, that the roof was on the stall and that the walkway thereon was unbroken. McDonald, in testifying, says:

"On the night of the accident there was no part of it removed. I make an inspection—a point of seeing that all these openings, if they were used at any time, are put on before the night comes on, and I can say positively that they were on."

When being asked on cross-examination if he had any particular reason for remembering the opening was closed on the night in question, other than his general practice, this witness said that he made a careful examination every evening with a view of ascertaining whether the places were closed, as he regarded them as dangerous, and stated further that:

"I made a point of it that night, the same as any other night, to see that they were closed."

He also testified that the places were kept open at sea, but that he was positive that they were closed that night, because they were usually

closed. Counsel for appellee insisted that at most this witness was testifying—

"as to the usual order of things; but, like most accidents, this arose because a duty was neglected, and the usual order not observed."

McCormack, among other things, testified:

"I did not make any examination of the superstructure after the accident was reported."

It further appears that he did not make any examination of Lee to ascertain the extent of his injuries, nor did he secure any medical attention, notwithstanding the fact that he admits that he learned of the accident a half hour after it occurred.

McIntyre also testified that:

"The point from which Lee fell is also a part of the wooden superstructure, and there is no rail from where he fell."

This witness further testified:

"Yes; he could have been required to be on the part of the superstructure on which I saw him before he fell. Those horses back here would have called him."

When witness spoke of the horses "calling him," he evidently intended to convey the idea that the care of the horses required him to go to this particular point. This witness was introduced by appellant, and according to his testimony the appellee fell from a dangerous and unguarded place, where he was required to be in the discharge of his duties.

Charles Stoval, the second cook, testified that he saw appellee at 6 o'clock the morning after the accident in his bunk, and that appellee told him how he had been hurt. He also stated that, when McIntyre came to the kitchen on the morning after the accident to get his coffee, that witness told him about appellee being injured at which time McIntyre did not appear to have any knowledge of the accident, but rushed down to the quarters of the muleteers, saying to Stoval, "I will go right down and see him."

The witness McIntyre testified that he saw Lee fall, but that he appeared to fall from the passageway. This corroborates the testimony of Lee to the effect that he fell from some portion of the ship. Witness McIntyre further testified that:

"The point from which Lee fell was a part of the wooden superstructure, and there was no rail from where he fell."

This witness also testified that it was Lee's duty as watchman to be on the superstructure where he saw him just before he fell. Under these circumstances appellee contends that, even though appellant's contention as to where he was when he fell, to wit, on an unguarded passageway over which he was required to pass in the performance of his duties, be correct, that the ship would be liable.

There is one significant point in this case, which we think should be given great weight in determining the questions involved, and that is that, when appellee started on the trip, he was healthy and strong. The appellee, in his testimony as to his condition after the accident, among other things, said:

"* * * That bone was broken on the ship; never had a accident before that; had been a strong working man. My duties as muleteer were in picking up hay and putting it on my shoulder, and carrying 100-pound sacks of bran. If you did not do it, you were logged and put in the forepeak."

This evidence clearly shows that he must have been in good physical condition, and it is but fair to assume that the ship would never have employed him to perform duties of this character, had he not been an able-bodied man. Further, the appellant failed to offer any evidence tending to show that he was not able to do the work assigned to him when he went on the ship. It also appears from the evidence of Dr. Martin, who examined appellee when the ship reached port on its return trip, about two months after the accident happened, that appellee was seriously injured. Among other things Dr. Martin said:

"I do not think a man with a rib broken as shown there, and in that condition, could have lifted hay or performed duties of a laborer."

This testimony tends to corroborate the statement of appellee, and, we think, shows conclusively that appellee must have received his injuries while engaged in work on the ship.

[2] It is a well-established rule in admiralty that the conclusions of the lower court on questions of fact will not be disturbed or reversed, unless it should clearly appear that the court had erred. In other words, great weight should be attached to the findings of fact, where there is a conflict of evidence in the court below. This court, in the case of Baker-Whiteley Coal Co. v. Neptune Navigation Co., 120 Fed. 249, 56 C. C. A. 85, said:

"We have uniformly held that, while the findings of the court on questions of fact can be reviewed in this court, the conclusion of the District Court on a conflict of evidence is entitled to and treated with great respect."

In this instance we think it is clearly established that Lee was injured while discharging a duty which he was required to perform by one who had the power to direct his movements. That he was injured cannot be doubted, when we consider all the evidence; and that his injury was, in all probability, due to the fact that he was not furnished a lantern by the use of which he could have observed any dangers incident to the duty which he was performing. If, thus employed, he fell from any portion of the ship in consequence of not being able to see his way, and was injured, we think the finding of the court below that the ship was negligent was proper.

However, it is insisted by counsel for appellant that the liability of a vessel for injuries received by a seaman depends upon the unseaworthiness of the ship, or her failure to supply and "keep in order proper appliances appurtenant thereto"; that the crew, except, perhaps, the master, are between themselves fellow servants; and that, therefore, the fellow-servant doctrine applies to such employé. In this instance the captain or the head foreman should have furnished Lee with a lantern, when they directed him to perform the duties incident to the work assigned to him; but this was not done.

Section 20 of what is known as the "Seamen's Act," enacted on

the 4th day of March, 1915, abolishes what is known as the fellow-servant doctrine by providing:

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

By the second assignment of error it is insisted that the court erred in holding that the steamship negligently failed to take proper care or to furnish proper medical aid to the injured man. It is contended by appellant in support of this proposition that Dr. Wimbish, the ship's physician, made a thorough examination of the appellee after his injury, and that he received the necessary and proper treatment. Dr. Wimbish, in testifying as to the extent of his examination, said:

"I did not have reason to believe there was anything wrong with his kidneys. I did not examine his urine. He did not pass any blood on board ship as far as I knew. * * * As to his rib, this enlargement I referred to, to judge by the result, it looked like it might be a tubercular drain. No, sir; I did not find the broken rib. * * * I could not say positively now whether I examined his head or not. I discovered no condition that necessitated any particular treatment. * * * I thought he was pretending to keep from working so far as that bone was concerned."

The testimony of Dr. Martin, a disinterested witness, is sufficient to convince any one that appellee did not receive proper medical treatment. Counsel for appellant strenuously insist that appellee was not telling the truth when he said that his ribs were broken on the ship, and in this connection in their brief refer to that part of Lee's testimony where he says that "I am going to tell the truth if I can." An examination of the record discloses the fact that at the time he made this statement he was being cross-examined by counsel for appellant as to the width of the horse stalls. Among other things, he said:

"As to their width, one from here to there (indicating about four feet wide). Eighteen feet tall and four feet wide, and that is the idea. I never measured it but about four feet wide. It looked to me as wide as from here to there (indicating). I cannot say; I am going to tell the truth, if I can, but I never measured it."

It clearly appears, from the testimony of this witness, that he is not educated, and his statement, while being somewhat involved, is not such as to discredit his testimony, and, further, he was talking about measurements, and his testimony could not be reasonably construed so as to apply to the injury he received to his ribs, or that he was not disposed to tell the truth. A great deal of the testimony was oral, and the learned judge who heard the case had an opportunity to observe the conduct of the witness, and under the circumstances we are convinced that his findings of fact are correct, and therefore should not be disturbed. It is manifest that the ship's physician was under the impression that appellee was not badly injured when he was called upon to attend him, and it is also clear that he was prejudiced against appellee, and this is no doubt the view that the court below took about the matter in passing upon the testimony.

As we have already said, the court below should not be reversed,

except for plain error, and the appellant has failed to convince us that the decision of the lower court was erroneous.

For the reasons stated, we are of opinion that the decree of the lower court should be affirmed.

HORNER v. HAMNER.

(Circuit Court of Appeals, Fourth Circuit. February 5, 1918.)

No. 1556.

1. BANKRUPTCY ⟸414(1)—DISCHARGE—SPECIFICATIONS—BURDEN OF PROOF.
One filing specifications against a discharge in bankruptcy has the burden of proving them.

2. JUDGMENT ⟸721—CONCLUSIVENESS—MATTERS CONCLUDED.
A judgment recovered in the state courts by claimant against a bankrupt, on the theory that he was liable as an indorser of notes executed by a partnership subsequently adjudged a bankrupt, is not, where the claimant, at the time of rendition of the judgment, did not know the bankrupt was then a member of the firm, a conclusive adjudication as to the bankrupt's liability as a member of the partnership.

3. BANKRUPTCY ⟸31—SCHEDULES—FILING—EFFECT.
The filing of schedules in a proceeding in bankruptcy is an ex parte act on the part of the bankrupt, and in that proceeding is a solemn admission, which, unless corrected, binds him, but it is in no proper sense res judicata, either as to creditors or the bankrupt; hence the filing of schedules by one member of a firm is not a conclusive adjudication against another, who did not participate therein, but whose liability as a partner was subsequently established.

4. BANKRUPTCY ⟸404(2)—DISCHARGE—FAILURE TO APPLY.
A failure to apply for a discharge in bankruptcy has the same effect as if the discharge in that proceeding had been denied.

5. BANKRUPTCY ⟸404(2) — DISCHARGE — FAILURE TO APPLY — PARTNERSHIP DEBTS—"BANKRUPT."
The bankrupt, believing that a furniture business had been incorporated, sold his interest and received two notes, one signed in the purported corporate name of the partnership and the other signed by the purchasers. These notes he indorsed, and judgment was thereafter recovered against him in the state court as an indorser. The company thereafter was adjudicated a bankrupt as a partnership, and the purchasers listed the notes as liabilities; but the partnership, as such, did not apply for a discharge. Bankruptcy Act July 1, 1898, c. 541, § 1, 30 Stat. 544 (Comp. St. 1916, § 9585), declares that "bankrupt" shall include a person against whom an involuntary petition, or an application to set a composition aside or to revoke a discharge has been filed, or who has filed a voluntary petition, or who has been adjudged a bankrupt, while section 5 (Comp. St. 1916, § 9589) declares that a partnership during the continuation of the partnership business, or after its dissolution and before final settlement, may be adjudged a bankrupt. *Held* that, notwithstanding the entity theory of a partnership, the bankrupt was not as an individual precluded from obtaining a discharge from his liability, as a member of the partnership, on the notes mentioned, because of the failure of the partnership to apply for a discharge, for, in view of the entity theory, the adjudication of the partnership did not affect the bankrupt's individual liability.

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

Appeal from the District Court of the United States for the Western District of Virginia, at Lynchburg; Henry Clay McDowell, Judge.

In the matter of the bankruptcy of J. W. Horner. From an order granting the bankrupt a discharge from all debts provable against him, excepting two claims of S. G. Hamner, trustee, the bankrupt appeals. Reversed.

A. S. Hester, of Lynchburg, Va., for appellant.

J. Easley Edmunds, Jr., of Lynchburg, Va., for appellee.

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

CONNOR, District Judge. While the transcript does not disclose specific findings of fact, the objection and specifications to appellant's petition for discharge and the answer thereto disclose the following case:

Prior to April 28, 1914, the Weaver Furniture Company, a corporation, was operated by appellant, J. W. Horner. Some time prior to that date counsel was employed for the purpose of securing an amendment to the charter, changing the name of the corporation to the People's Furniture Company. Acting upon the advice of the attorney, stationery carrying the name, the People's Furniture Company was used by the managers of the corporation, although the charter had not been amended, as they supposed. On April 28, 1914, appellant sold his entire stock in said corporation to R. A. Dearing and C. S. Dearing, and received in payment therefor, one note for $254.60, signed "The People's Furniture Co., Inc., by R. A. Dearing, Secy. and Treas.," and one other note for $366.67, signed "R. A. Dearing and C. S. Dearing." Those notes were indorsed, by appellant, to appellee "as attorney," in payment of certain debts which he held for collection against the People's Furniture Company. After the purchase of appellant's stock by R. A. and C. S. Dearing, they changed the name of the company to the Dearing Furniture Company and it so continued until November 6, 1914. It appears from the record that, at the October term, 1914, of the corporation court of Lynchburg, appellee recovered judgment against the Dearing Furniture Company and appellant, J. W. Horner, on the two notes in controversy.

On November 6, 1914, "The Dearing Furniture Company, composed of R. A. Dearing, C. S. Dearing, and J. W. Horner, was adjudicated a bankrupt," upon the petition of certain creditors of said company. Neither the Dearing Furniture Company nor either of the partners applied for a discharge. Appellee says:

> "In the schedule filed in the said bankruptcy proceedings by R. A. Dearing he listed the debt due your respondent as trustee, as one of the firm debts. Your respondent did not know, until that time, that the said J. W. Horner was a partner in said firm, but, being informed of this fact, he filed proof of his said claim in the said bankruptcy proceedings."

Appellant says that "he sold his entire stock" in the People's Furniture Company, and received the notes in payment; that he then had no interest in the said company"; that some time afterwards, in the

year 1914, he purchased, or acquired, some 4 shares of stock in the Dearing Furniture Company, which he continued to hold up to the filing of the bankruptcy proceedings, October 17, 1914.

In view of this statement of appellant that he did not know that appellee was a member of the company until the schedule in the involuntary proceeding was filed, it is manifest that, in the judgment which he recovered against the Dearing Furniture Company and Horner, at the October term of the court, the latter was liable, not as a partner, but as indorser. Appellee says that appellant, when he sold to the Dearings, "retained a small interest." There is no evidence, nor finding in this respect. Appellant took no part in filing the schedules.

On October 5, 1916, appellant filed his voluntary petition and was adjudicated bankrupt in the District Court for the Western District of Virginia. He scheduled the judgments obtained by appellee on the notes in controversy—and several other debts, with the following statement:

"The claims hereinafter mentioned and attached hereto * * * are the same that were filed by the Dearing Furniture Company, in response to the adjudication of the company, being bankrupt in the petition of Mamie J. Rucker and others against the Dearing Furniture Company, Incorporated, a partnership composed of R. A. Dearing, C. S. Dearing, and J. W. Horner, which adjudication was of November 6, 1914, in which the judge of the District Court of the Western District of Virginia, adjudicated the Dearing Furniture Company, a partnership composed of R. A. Dearing, C. S. Dearing, and J. W. Horner, a bankrupt, and the individual members of said partnership not being mentioned or adjudicated bankrupts in said order, which claims are as follows, to wit."

No part of the record in that proceeding was introduced in this proceeding. It is conceded that the Dearing Furniture Company, and not the individual partners, was adjudicated "a bankrupt." On April 18, 1917, appellant filed his petition for a discharge "from all debts provable against his estate under said bankrupt acts, except such debts as are excepted by law from such discharge." Appellee filed objections to the granting of the petition, as to all debts which were provable in the involuntary proceeding against the Dearing Furniture Company. The District Judge granted to appellant a discharge from all debts provable against him, August 31, 1916, excepting "the two claims of appellee, which are specifically described, being the claims evidenced by the judgments, recovered on the notes referred to." To this exception appellant assigns error and appeals.

Were the notes held by appellee debts of either the People's Furniture Company, or its successor, the Dearing Furniture Company, at the date of the adjudication of the latter? Does the failure of the Dearing Furniture Company to apply for a discharge in the involuntary proceeding against it, bar his petition for a discharge in this proceeding from his individual liability, on account of the debts of the company?

[1, 2] While the facts, upon which the order appealed from, are not found, we assume that the District Judge based his conclusions upon the objections and answer. The burden of proof was upon the appellee to establish the truth of his specifications. The appellee insists

that, upon the record, appellant is estopped to deny that the notes held by him, and the judgments thereon, are the debts of the Dearing Furniture Company and that he is bound therefor as a partner—that these facts are res judicata. It is manifest that these notes were not, when contracted, the debts of the People's Furniture Company. It is true that the name of the company is signed to one of the notes. The other is signed by the Dearings. It is difficult to see how the purchase price of the stock of the company, bought by the individuals, can be made a liability of the company. If Horner, as suggested, retained an interest in the company, it is difficult to understand why he was willing to have the purchase money for the interest which he was selling made a liability of the company, thereby becoming individually liable for the debt due to himself. It is probable from what appears that, acting under the advice of counsel, the parties supposed that the People's Furniture Company was a corporation—that is, the Weaver Furniture Company under the new name. Horner seems to have become entangled in a medley of errors. After selling his stock and, in the present proceedings, surrendering his individual property, he finds himself held liable without possibility of release from notes which he accepted in payment therefor, because the Dearing Furniture Company did not apply for a discharge. This contention challenges careful investigation. The first judicial decision which the record discloses is that of the corporation court of Lynchburg, in October, 1914, when the appellee recovered judgment on the notes against the People's Furniture Company and J. W. Horner, as indorser. This we must assume, because appellee says that, at that time, he did not know that J. W. Horner was a partner. This judgment is not, therefore, res judicata as to any other liability of Horner than an indorser.

[3, 4] It is said, however, that R. A. Dearing, in the involuntary proceeding in bankruptcy against the Dearing Furniture Company, scheduled the notes as the debts of the company. That J. W. Horner was a party to that proceeding and is estopped to deny the truth of the statement of R. A. Dearing. Horner says that he took no part in the proceeding, or filing the schedules. It is manifest that this is true. Filing the schedule in a proceeding in bankruptcy is an ex parte act on the part of the bankrupt, and in that proceeding is a solemn admission which, unless corrected, binds him. It is, in no proper sense, res judicata, either as to creditors or the bankrupt. Certainly, in another and independent proceeding, it has no other force against the bankrupt than evidence of the truth of the statement.

Appellant, in this proceeding, schedules this, with other debts of the Dearing Furniture Company, stating his reason for doing so. He was evidently acting under the advice of counsel and for the manifest purpose of complying with the requirements of the statute. His action in this respect, while entirely proper, for the purpose of giving to the court, its officers, and his other creditors notice of the debts which he owed, entitled to share in the distribution of his assets, is not, in any sense, res judicata; it is not the judgment of the court. It is, by no means, clear that, appellee was entitled, in the involuntary proceeding against the company, to prove the debt which he held

against the members, and share in the distribution of the partnership assets. While one of them purported to be the debt of the company, it was competent for the trustee, or creditors of the company, to show by parol evidence that it was given for the benefit of the Dearings—and not of the company; the other note does not purport to be the debt of the company. There is a suggestion, but no proof, that the Dearing Company assumed the debts of the People's Company. This did not confer any new right upon the holder of the notes against the Dearing Company. Assuming that the notes were the debts of the Dearings, and that after their execution Horner became a partner in the People's Company, we are unable to perceive how he became liable for the notes otherwise than as indorser. R. A. Dearing, whose interest it was to do so, having scheduled appellee's debt as partnership liabilities, he was permitted to prove and share in the distribution of the assets, and now proves against Horner, individually, as he is clearly entitled to do on his liability, as indorser of the notes, and objects to his discharge because, as he alleges of his liability as a partner of the People's Furniture Company.

Conceding pro hac vice such liability, the question is presented whether, because of the failure of the Dearing Furniture Company to apply for a discharge in the proceedings against it, he is barred quoad this debt of a discharge in this proceeding. It may be conceded that a failure to apply for a discharge has the same force and effect as if the discharge in that proceeding had been denied. It is so uniformly held. Collier, Bankruptcy (11th Ed.) 347; In re Springer (D. C.) 199 Fed. 294.

[5] This, however, is not determinative of the question presented upon this record. The question relating to the effect of an adjudication of a partnership, but not of the individual partners, has given the courts much concern. It is conceded that the decisions are not uniform. The conclusion at which Mr. Collier has arrived, after a careful examination of the decisions, is:

> "That it is difficult to declare a rule based upon the majority of the cases. A very unsatisfactory conflict exists among the authorities." Collier, Bankruptcy (11th Ed.) 181.

That a partnership is a "person," who may be adjudged a bankrupt, either in a voluntary or involuntary proceeding, is clear—it is so declared in the act. Bankruptcy Act, § 1. This is based upon, and results from, the "partnership entity" doctrine recognized by Bankruptcy Act 1898, § 5. That an adjudication may be made of the partnership, as distinguished from, and exclusive of, the individuals composing it. Collier (11th Ed.) 181, and cases cited.

This was done in the proceeding against the Dearing Furniture Company—the individual members were not adjudged bankrupt. The company was the "person" adjudged bankrupt. It is insisted that, because appellant did not apply for a discharge in that case from his personal, individual liability, on account of the partnership debts, he is estopped from doing so in this proceeding. That the Bankruptcy Act of 1898 recognizes a partnership as a legal entity, a "person,"

which owns property and owes debts as distinguished from the individual partners, is unquestionably true. Bankruptcy Act, § 5. The partnership creditors appoint the trustee, the partnership estate is administered separately from the estates of the partners, and applied to the discharge of partnership debts, which must be proven against the partnership. "A partnership being a distinct entity, it owns its property, and owes its debts, apart from the individual property of its members, which it does not own, and apart from its individual debts, which it does not owe. It may be adjudged bankrupt, although the partners who compose it are not so adjudicated." Collier, Bankruptcy (11th Ed.) 168, citing many cases sustaining the text. While the decisions of the federal courts discover some divergence of opinion regarding the administration of estates of partnerships, and the individual partners, when all, or several, of them are also adjudicated, the question presented, upon this appeal has not, so far as our investigation goes, been discussed or decided. Whatever confusion of thought, either real or apparent, is found in the decisions, in dealing with bankruptcy proceedings, wherein partnerships are parties, relates to questions of adjustment of priorities and administration. That Congress did not intend, by introducing the "partnership entity doctrine" into the Bankruptcy Law of 1898, based upon equitable principles applied in administering estates of insolvent partnerships, to disturb the relation of partners to the debts of the partnership, or change their liability, is pointed out by Mr. Justice Holmes in Francis v. McNeal, 228 U. S. 695, 33 Sup. Ct. 701, 57 L. Ed. 1029, L. R. A. 1915E, 706. He says:

"Since Cory on Accounts was made more famous by Lindley on Partnership, the notion that the firm is an entity, distinct from its members, has grown in popularity, and the notion has been confirmed by recent speculations as to the nature of corporations, and the oneness of any somewhat permanently combined group, without the aid of law. But the fact remains as true as ever that partnership debts are debts of the members of the firm, and that the individual liability of the members is not collateral, like that of a surety, but primary and direct, whatever priorities there may be in the marshaling of assets. The nature of the liability is determined by the common law, not by the possible intervention of the Bankruptcy Act. * * * The question is whether the Bankruptcy Act has established principles inconsistent with these fundamental rules, although the business of such an act is, so far as may be, to preserve, not to upset, existing relations."

After citing the language of the act, defining the word "person," including a partnership, which may be adjudged bankrupt, the learned justice says:

"No doubt these clauses taken together recognize the firm as an entity for certain purposes, the most important of which, after all, is the old rule as to the prior claim of partnership debts on partnership assets and that of individual debts upon the individual estate. Section 5g. But we see no reason for supposing that it was intended to erect a commercial device for expressing special relations into an absolute and universal formula—a guillotine for cutting off all the consequences admitted to attach to partnerships, elsewhere than in the bankruptcy courts."

The liability of the "person"—the partnership—for partnership debts may be enforced by subjecting the partnership property to their payment, when this "person" has been adjudicated a bankrupt; such

"person" may, upon complying with the provisions of the act, be discharged from its debts. This discharge is not granted to the individual partners, "trading" or "carrying on business" as partners, but to the partnership, a legal entity. This discharge has no effect upon the individual liability of the partners. It has been uniformly held that in a proceeding by a partnership, in which the individuals are not adjudicated bankrupt, they are not entitled to a discharge. In re Hale (D. C.) 107 Fed. 432. Judge Lowell, in Re Forbes (D. C.) 128 Fed. 137, discussing the "partnership entity" doctrine, says:

"Under an adjudication merely joint, it is impossible to discharge the partners as individuals, even from their joint debts, for every joint debt of the partnership is also a separate debt of each partner, and separate debts can be discharged only after an individual adjudication, operating upon the separate estate."

Finding difficulty in applying the entity doctrine, and to avoid confusion, the judge says that:

He "has consistently refused to make the adjudication of a partnership, unless all the partners be adjudged bankrupts at the same time."

Whether this is the correct view is not material here, because the "partnership entity" was, upon the petition of its creditors, adjudged "a bankrupt." The court was not asked to adjudge the individual partners; there was no suggestion that they were insolvent, or had committed an act of bankruptcy. Judge Lowell was of the opinion that a partnership was not "insolvent," unless each and all of the partners were so. This discards the "entity doctrine," with its logical results. In re Blair (D. C.) 99 Fed. 76; Vaccaro v. Security Bank, 103 Fed. 442, 43 C. C. A. 279. That this last view had not been adopted uniformly by the federal courts is manifest from an examination of a number of cases, in which the partnership has been adjudicated "a bankrupt," exclusive of the individual partners. Judge Sanborn, in Re Bertenshaw, 157 Fed. 363, 85 C. C. A. 61, 17 L. R. A. (N. S.) 886, 13 Ann. Cas. 986, says:

"Since the property of the unadjudicated partners does not vest in, and may not be administered by, the trustees of the bankrupt partnership, the discharge of the partnership discharges that entity only from its debts, and leaves the partners still subject to their liability to pay the unpaid balance of the claims of the partnership creditors."

We are not inadvertent to the language found in the concluding sentence of the opinion of Mr. Justice Holmes in Francis v. McNeal, supra, but do not think it affects the clause quoted. Judge Sanborn was, in the Bertenshaw Case, discussing the question regarding the administration of the estate. The language quoted is used, in the discussion, as expressing clearly what is in our minds upon the question presented in this record.

Judge Hough, in Re Pincus (D. C.) 147 Fed. 621, says:

"In a proceeding of this kind [an involuntary proceeding against a partnership] under section 5, the partnership is declared to be a 'legal entity, irrespective of the status or the separate rights or the status of the individual copartners.' * * * Individual discharges cannot be granted, under an adjudication against the partnership only. * * * No steps having been

taken in this matter by or against the partnership, as individuals, the only thing adjudicated was the partnership entity, and the only thing dischargeable is the same entity."

Assuming that Horner could not, in the proceeding against the Dearing Company, have been discharged from his individual liability for the debts of the company, and that a discharge of the company would not affect his individual liability, it is difficult to perceive why, in this proceeding, the only one in which he could have a discharge, he is barred of having a discharge of his liability for such debts, because the partnership did not apply for a discharge. It may be suggested that he should have been adjudicated a bankrupt, individually in that proceeding. To this the answer is manifest: The partnership creditors did not ask the court to do so, and there is no evidence, or suggestion, that he was, at that time, insolvent. There is no suggestion in the statute, or any decision which we have found, that Horner was under any legal obligation to become a bankrupt individually. It may be that he was of the opinion that he was not a partner, or that, after applying the partnership assets to the debts, he was able to pay the balance. However this may be, it is manifest that the only discharge which could have been granted in that proceeding was to the partnership—the Dearing Furniture Company—which would not have availed Horner. He would have been still liable individually for the debts. He has, in this proceeding, surrendered his individual property for the payment of his individual debts, among them those due appellee, either because he was a partner, or as an indorser on the notes. This is the first and only opportunity which has come to him to take the benefit of the protective provisions of the act. The court finds that he has complied with its requirements.

We are of the opinion that he is entitled to be discharged from all debts provable against his estate on the date of his adjudication. There was error in denying his discharge from the debts for which he was found to be liable because he was a partner in the Dearing Furniture Company. This will be certified to the District Court, to the end that a discharge may be granted, according to his petition.

Reversed.

McCORMICK et al. v. PROVIDENT LIFE & TRUST CO. OF PHILADELPHIA et al.

(Circuit Court of Appeals, Fourth Circuit. January 25, 1918.)

No. 1549.

1. WILLS ⇐681(2)—TESTAMENTARY TRUST—POWERS OF TRUSTEES.
Under a will by which the testator devised and bequeathed his residuary estate in trust, with power in the trustees to continue to hold the property, or to sell any of it and reinvest the proceeds, the trustees took a legal title to the real estate, which will support an action of ejectment.

2. EJECTMENT ⇐88, 93—TRIAL—FINDINGS BY COURT.
Rulings on the admissibility of evidence and findings of the court on the trial of an action of ejectment without a jury affirmed.

In Error to the District Court of the United States for the Southern District of West Virginia, at Charleston; Chas. A. Woods, Judge.

Ejectment action by the Provident Life & Trust Company of Philadelphia and Edward R. Wood, Jr., executors and trustees of Stuart Wood, deceased, against David McCormick, the United Fuel Gas Company, Rebecca C. Davis, Henrietta Daingerfield, and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

George J. McComas, of Huntington, W. Va. (Enslow, Fitzpatrick & Baker, of Huntington, W. Va., on the brief), for plaintiffs in error.

C. W. Campbell, of Huntington, W. Va. (Campbell, Brown & Davis, of Huntington, W. Va., on the brief), for defendants in error.

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

PRITCHARD, Circuit Judge. This is an action in ejectment, instituted in the District Court of the United States for the Southern District of West Virginia to recover a certain tract of land situated in the county of Mingo, state of West Virginia. By stipulation of counsel a jury trial was waived and the case was heard before Woods, Circuit Judge, sitting in the District Court. The court found in favor of the plaintiffs, and judgment was entered accordingly, to which the defendant excepted, and the case comes here on writ of error.

[1] There are eleven assignments of error, eight of which relate to the conclusions of law reached by the court below upon the testimony. Three of the assignments, to wit, the eighth, ninth, and tenth, pertain to the ruling of the court in holding that certain documents were admissible. The eighth assignment is to the effect that:

"The court erred in allowing the introduction as Exhibit 9 of the last will and testament of Stuart Woods over the petition of the defendants."

The defendants insist that the will of Stuart Wood does—

"not confer power on the plaintiffs to bring this or any other suit. This property would go to the heirs as named in the will, unless disposed of in some of the ways specifically set forth in the said will."

After disposing of certain articles of personal property the following provision is contained in the will:

"All the residue of my estate I bequeath to my said trustees, viz., the Provident Life & Trust Company, Edward R. Wood, Jr., in trust, however, for the purposes following."

The will then, among other things, provides:

"That the trustees may, in their discretion, continue to hold any property, real or personal, that I own, and may dispose of the same to the best advantage and reinvest the proceeds. * * *"

These words empower the trustees, not only to develop the property, but also give them unqualified power in their discretion to sell and convey the same and reinvest the proceeds. The will of the testator was duly probated in Philadelphia, Pa., where he resided at his death; a copy of the same containing the probate being recorded in the clerk's office for the county of Mingo, W. Va., in accordance

with the provisions of section 35, chapter 77, of the Code of that state. Thus it will be seen that by virtue of the will the legal title to the property in question became vested in the executors and trustees, with the right and authority, as we have stated, of selling and disposing of the same. Under these circumstances, we think the ruling of the lower court was eminently proper.

The ninth assignment of error provides that:

"The court erred in holding that under the said exhibit and the said will the Provident Life & Trust Company could maintain this suit."

In view of what we have said as respects the eighth assignment of error, we feel that it is not necessary to enter into a discussion of the question sought to be raised by this assignment.

[2] By the tenth assignment of error it is contended that:

"The court erred in allowing the introduction of what is known and described as Plaintiffs' Exhibit No. 10.

Defendants, among other things, introduced Exhibits Nos. 22 and 23. Exhibit No. 22 contains a list of real estate sold in March, 1886, for the nonpayment of taxes for 1883 and 1884, and purchased by the state. Among other tracts of land this list contains the 135 acres in controversy. Exhibit No. 23 purports to be a copy of the land book by which it is shown that the tract consisting of 135 acres was assessed to George R. C. Floyd for the year 1884. Defendant also introduced Exhibit No. 24 containing the certificate of the clerk of the circuit court of Logan county showing that the assessment book for the year 1883 was lost. Nothing else appearing, this would put the legal title in the state of West Virginia. However, under the law in force in West Virginia in 1887 the former owner, and his heirs or assigns, are permitted to redeem his lands from the forfeiture and thus reinvest himself with the title. Chapter 105, Code of West Virginia. Plaintiffs' Exhibit No. 10, the introduction of which was objected to by the defendant, shows that on the 12th day of October, 1887, when the special commissioner made the deed for the 135 acres to John F. Keator, that the latter applied to the clerk of the circuit court of Logan county and upon such application a decree was entered permitting Keator to redeem the 135 acres of land, along with numerous other tracts. We think the ruling of the court below in permitting the introduction of this exhibit as a link in the chain of plaintiffs' title was correct.

The learned judge who heard this case filed an opinion, in which he found certain facts relating to the plaintiffs' chain of title and right to recover. The opinion is as follows:

"In this action of ejectment a jury trial was waived and the cause was submitted to me for determination. The plaintiff made out a complete chain of title to the tract of land of 135 acres described in the declaration, commencing with a grant from the state of Virginia to William Paisley dated February 1, 1854. Paisley conveyed to George R. C. Floyd and John W. Johnson August 9, 1855, and Johnson conveyed his interest to Floyd December 5, 1855. The creditors of Floyd instituted proceedings in the state court to subject his land to the payment of debts, and on October 12, 1887, J. C. Bing and H. C. Ragland, special commissioners, conveyed to John F. Keator. Keator con-

veyed to Stuart Wood March 23, 1888. Wood devised the land to the plaintiffs in trust by his will dated March 3, 1914.

"The defendants set up three defenses by which they undertake to break into the plaintiffs' title:

"(1) A sale for delinquent taxes for the years 1883 and 1884, and purchase by the state.

"This defense seems to be sufficiently disposed of by the showing on the part of the plaintiffs that on October 12, 1887, Keator redeemed the land from the state.

"(2) Adverse possession under color of title, consisting of numerous conveyances made at different times to defendants and those under whom they claim.

"Some of these colors of title seem to embrace the 135-acre tract here involved, but the acts of possession relied on were not on the tract in dispute. Under the well-known principle, therefore, they could not affect the superior legal title.

"(3) In 1870 George R. C. Floyd, under whom plaintiffs claim, instituted a suit in a court of chancery against James Step and A. S. Gray for the purpose of enforcing specific performance of a contract to convey to him certain lands described in the bill. In 1882 a decree was made in this cause, adjudging Floyd to be entitled to the relief asked and directing William Straton, a commissioner of the court, to convey the land to him; the defendants being nonresidents. Straton executed the conveyance on May 24, 1882, and there is little doubt but what he undertook to embrace in the conveyance the 135-acre tract here in dispute. Subsequently in the same cause, on the 6th of February, 1882, Floyd was enjoined from 'selling, disposing of, or in any way incumbering the real estate mentioned in his bill or his amended bill and conveyed to him by Special Commissioner William Straton, under a decree in this case until further order of this court.' On the 14th of April, 1887, a decree was made in which the following recital appears: 'And it appearing to the court that under a contract of November 8, 1865, mentioned in said amended answer and special replication, that the plaintiff, George R. C. Floyd, is entitled to one-fourth of the tract of land named therein in the plaintiff's bill, and the heirs of A. S. Gray, deceased, are entitled to three-fourths of said land, to-wit, the Burning Spring tract bought by A. S. Gray of James Step and about 15 acres bought by said Gray of Isaac Brewer, and that title to said land is still in said James Step, party defendant to this suit, excepting as to the 15 acres, and the title to the 15 acres is in the heirs of the said Gray, party defendant hereto; and it further appearing to the court that the land should be partitioned between the owners of the land as aforesaid.' The decree proceeds to direct a partition.

"The position is taken by the defendant that this decree embraces the tract in dispute. If that be so, then at most the plaintiffs can recover only the one-fourth interest, since the title which their grantor derived from Floyd was not acquired until August, 1887, after this decree of the court in April. The plaintiffs having shown a perfect title in Floyd from the state, when the defendant asserts that a court of equity adjudged him to be entitled to only one-fourth interest, they assume the burden of showing that the court incorporated such a mistake in its decree by clear and satisfactory evidence. As I construe the proceedings in the equity case of Floyd v. Gray, Straton did undertake to embrace the tract of 135 acres in his conveyance, and had it surveyed as part of the land; but this conveyance was never confirmed, and it did not estop Floyd from holding the entire fee under his title previously acquired from an entirely independent source. The deed did not have the effect of conveying anything which the court did not authorize the commissioner to convey, and it was a nullity in so far as it went beyond the authority conferred on the commissioner, which was to convey the land described in the bill. Ronk v. Higgenbotham, 54 W. Va. 137, 46 S. E. 128. It is true the court in the order of September 6, 1882, does enjoin Floyd from disposing of the land conveyed to him by Special Commissioner Straton 'under a decree in this cause.' But even this could not have had the effect of enjoining Floyd from conveying land which he acquired otherwise, and which Straton

had no authority from the court to convey. The language used by the court in its decree of April 14, 1887, in describing the land in which it held that Floyd had only one-fourth interest, as the Burning Springs tract 'bought by A. S. Gray of James Step,' seems to exclude the 135-acre tract. There is no evidence that that tract was ever bought by A. S. Gray of James Step, or that James Step ever owned it.

"There are other considerations supporting the conclusion that the court was not dealing with the 135 acres when it adjudged that Floyd was entitled to only one-fourth interest. In this very confusing record there are also some considerations leading to the opposite conclusion. On the whole, according to the decided preponderance of evidence, I am of the opinion that the tract of 135 acres here in dispute was not embraced in the land in which the court decreed that George R. C. Floyd had only one-fourth interest. My conclusion is that the plaintiff is entitled to recover the land in dispute, having established a complete legal title thereto."

It is well settled that findings of fact by the court below will not be disturbed where the evidence is conflicting. In this instance we think the evidence is such as to establish beyond controversy the state of facts found by the court below. We are likewise of opinion that the conclusions of law as reached by the court below were proper and in harmony with the authorities; but inasmuch as we have quoted the opinion of the court below in full, which disposes of these points, as we think, properly, we do not deem it necessary to cite any additional authorities in support thereof, nor to enter into a discussion of the same further than to say that we think that the judgment of the lower court is proper and should be

Affirmed.

WAGNER et al. v. CENTRAL BANKING & SECURITY CO.*

(Circuit Court of Appeals, Fourth Circuit. January 9, 1918.)

No. 1542.

1. ASSIGNMENTS ⟸126—ACTIONS BY ASSIGNEE—DEFENSES.
   All defenses and set-offs available against an assignor of a chose in action are available against his assignee.

2. BANKS AND BANKING ⟸117—TRANSACTIONS BETWEEN BANKS—REPRESENTATION BY OFFICERS.
   Officers of bank A executed their individual notes to each other, which they indorsed and, attaching a guaranty by the bank, discounted them with a correspondent bank, B. Although bank A did not own nor indorse the notes, it was agreed that their proceeds should be placed to its credit by bank B, and that the greater part of such credit should remain untouched until the notes were paid. The greater part of the amount of the notes was subsequently charged to the account of bank A. The only entry of the transaction on its own books was the charge of the amount of the deposit to bank B, and the same amount was placed to the credit of the individual officers or others designated by them. The guaranty of the notes was not authorized by the directors of bank A, and sufficient appeared in the transaction to charge bank B with notice that it was for the personal benefit of the makers of the notes and not of their bank. *Held* that, on a subsequent settlement, bank B could not enforce such charges against bank A, which derived no benefit therefrom, on the principle that, where one of two parties must suffer from the fraud of a

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

*Rehearing denied May 7, 1918.

third, the loss must fall on him who by his imprudence or co-operation enabled such third party to commit the fraud.

3. BANKS AND BANKING ⊂=109(1)—REPRESENTATION OF BANK BY OFFICERS—INDORSEMENT OR GUARANTY.

An officer of a bank without express authority from the directors has no power to bind the bank by an accommodation indorsement or guaranty, and an attempted guaranty of notes that the bank has never owned is illegal, unless for the benefit of the bank in the conduct of its business.

4. BANKS AND BANKING ⊂=117—REPRESENTATION OF BANK BY OFFICERS—INDIVIDUAL INTEREST OF OFFICER.

There is a dead line between the area of official representation of a bank by its officers and the area of their personal interest, and when they cross that dead line, to the knowledge of one with whom they are dealing, they leave behind all power of representation.

Cross-Appeals from the District Court of the United States for the Northern District of West Virginia, at Parkersburg; Alston G. Dayton, Judge.

Suit in equity by the Central Banking & Security Company against P. E. Wagner, receiver of the First National Bank of Sutton, W. Va., and another. From the decree, all parties appeal. Reversed.

Connor Hall and D. C. T. Davis, Jr., both of Charleston, W. Va. (Davis, Davis & Hall, of Charleston, W. Va., on the brief), for appellants and cross-appellees.

C. D. Merrick and B. M. Ambler, both of Parkersburg, W. Va., for appellee and cross-appellant.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

WOODS, Circuit Judge. On January 15, 1914, a contract was made between the Farmers' Bank & Trust Company of Sutton, W. Va., and the First National Bank of Sutton, which was intended as a transfer of the business and the commercial assets of the Farmers' Bank to the First National Bank. By the contract the Farmers' Bank turned over to the First National Bank cash, notes, and other assets to the amount of $198,506.31. The First National Bank assumed liability for the Farmers' Bank's deposits, balances, and notes due to other banks to the amount of $203,970.02. For the difference, $5,463.71, between the liabilities assumed and the assets turned over the Farmers' Bank gave its note. Assets and liabilities were carefully specified and scheduled. Among the assets of the Farmers' Bank so assigned was a balance of $7,694.94 appearing on its books as due to it by the Central Banking & Security Company of Parkersburg, W. Va. For this balance the Farmers' Bank made a draft on the Central Bank in favor of the first National Bank. The Central Bank had at this time a note of H. H. Dean and a note of T. G. Dean, his brother, each for $5,000 indorsed in the name of the Farmers' Bank by H. H. Dean as treasurer which it had discounted, placing the proceeds to the credit of the Farmers' Bank. As a condition of paying the draft of $7,694.94 by transferring the credit from the Farmers' Bank to the First National Bank, the Central Bank stipulated that these notes should be replaced by similar notes indorsed by the First National Bank, under

authority of a resolution to be adopted by the board of directors of the First National Bank. These Dean notes did not appear at all on the books of the Farmers' Bank; and the paper purporting to be a copy of a resolution authorizing discounts with the Central Bank was fictitious, the Central Bank accepting the certificate of authenticity of Dean alone as vice president to the fictitious resolution. On the faith of this fictitious resolution the Central Bank charged to the First National Bank the Dean notes for $10,000, purporting to be indorsed by the Farmers' Bank, and credited to the First National Bank the new Dean notes, purporting to be indorsed by the First National Bank.

The First National Bank continued business with the Central Bank until August, 1914, when it failed and P. E. Wagner was appointed receiver. At the date of suspension there was a balance appearing on the books of the First National Bank in its favor against the Central Bank of $9,161.91. This balance the Central Bank refused to pay, alleging a liability of the First National Bank to it as indorser on several notes, two of them being notes of H. H. Dean for $5,000 and $500, and one of them a note of T. G. Dean for $5,000. In July, 1915, P. E. Wagner, as receiver of the First National Bank, brought an action to recover the alleged balance of $9,161.91 due by the Central Bank. Thereafter, on September 1, 1915, the Central Bank instituted this suit in equity to enjoin the action of the receiver, alleging that by reason of the liability of the First National Bank as indorser of the notes of the Deans and of other persons, the First National Bank would be indebted to it on settlement to the amount of $3,612.90. Confirming the report of the master in all respects, the District Court entered a decree in favor of the Central Bank against the First National Bank for $807.28. Both parties appeal.

The claim of the receiver now is that a balance of $6,891.11 should have been found in favor of the First National Bank against the Central Bank, after allowing all proper credits and charges. The claim of the Central Bank is that the balance found in its favor should have been $3,108.09.

[1, 2] The mere fact that the First National Bank, in acquiring the chief assets of the Farmers' Bank on January 15, 1914, purchased the balance of $7,694.94 appearing on its books against the Central Bank, without notice of defenses or set-offs against the Farmers' Bank, did not deprive the Central Bank of the benefit of such defenses or set-offs. All defenses and set-offs available against an assignor of a chose in action are available against his assignee. New York, etc., Bank v. Massey, 192 U. S. 138, 24 Sup. Ct. 199, 48 L. Ed. 380. The First National Bank having acquired by the assignment of the balance all the rights, both legal and equitable, of the Farmers' Bank, and nothing more, the main question upon which the case hinges is what was the real balance in favor of the Farmers' Bank against the Central Bank on January 15, 1914, the date on which it was assigned to the First National Bank. The effort to arrive at this balance requires analysis of somewhat complex transactions of earlier dates.

H. H. Dean was treasurer of the Farmers' Bank, and on January 15, 1914, when that institution transferred its active business and assets, he became vice president of the First National Bank. He was the active

managing officer of each institution; the other directors and stockholders relying largely upon him. He was faithless to both trusts.

In November, 1909, the Central Bank, at the request of Smith, Mollohan, and Dean, all officers of the Farmers' Bank, discounted a note of Mollohan for $5,000, payable on demand to Smith, and indorsed by him, and a note for $4,450 of Smith and Mollohan, payable on demand to themselves, and indorsed by them, to which was attached as collateral 50 shares of stock of the Farmers' Bank. These notes were not indorsed by the Farmers' Bank, and there was nothing to indicate that they had ever been its property. Nevertheless, the Central Bank took them on a guaranty made in the name of the Farmers' Bank by Smith, and by Dean as treasurer and Mollohan as vice-president. These persons also undertook to contract further in the name of the bank that the proceeds should be credited to the Farmers' Bank, and that the notes might be charged to its account at any time, and that at least $7,500 of the credit should remain untouched until the notes were paid. It was also agreed that the Central Bank should charge 6 per cent. on the discount and allow 3 per cent. on the balance. There was no resolution of the board of directors authorizing the use of the Farmers' Bank's name in such a transaction as guarantor or otherwise. The whole amount, $9,450, was credited to the Farmers' Bank; the only entry on the books of the Farmers' Bank relating to the transaction was a corresponding charge against the Central Bank, "Notes, $9,450," which was disposed of at Mollohan's direction by crediting $2,500 to the account of Mollohan and the remainder to two trust companies. As no indebtedness of the Farmers' Bank to Mollohan or to these trust companies appears justifying these entries, the inference follows that the proceeds of the notes were thus disposed of for the private purposes of Smith, Mollohan, and Dean, as the evidence shows was clearly the design of the transaction.

On September 1, 1911, the Smith and Mollohan notes were canceled by a new note of S. M. Smith for $2,225 and a charge made against the Farmers' Bank for $7,225. These transactions were admittedly out of the usual course of business. Langfitt, the treasurer of the Central Bank, when he afterwards became uneasy as to the solvency of the makers of the notes, earnestly requested payment or a resolution of confirmation by the directors of the Farmers' Bank, saying in his letter to Dean, treasurer, of August 19, 1911:

"In justice to yourself, you should either secure the payment of these notes, or secure renewals, or rather new notes for same, and pass them through your books as regular rediscount matter, as it is unusual with banks to guarantee for their customers without specific instructions from their board of directors."

[3] The absence of the indorsement of the Farmers' Bank showed that the notes had never been its property. The attempted guaranty of notes that a bank has never owned is not only unusual, but illegal, except for the benefit of the bank in the conduct of its business. An officer of a bank, without express authority from the directors, has no power to bind the bank by an accommodation indorsement or guaranty. West St. Louis Savings Bank v. Shawnee County Bank, 95 U. S. 557, 24 L. Ed. 490. There was nothing before the Central Bank,

and there is nothing in the record, to show that the Farmers' Bank needed funds, or was unable to raise them on its own resources, or that there was any necessity for it to carry any fixed balance with the Central Bank to meet notes which it had never owned.

The application for the loan was made by Smith individually, and not as an officer of the bank, and he pledged his own stock to secure it. The letter of Dean, as treasurer, to the Central Bank, guaranteeing the notes, recites that they were discounted for Smith and Mollohan; thus indicating clearly that the Farmers' Bank was being used merely as an instrumentality to obtain money from that bank for its officers. The Central Bank thus had full notice from the whole course of the transaction that the discount was not for the benefit of the Farmers' Bank, but of Smith, Mollohan, and Dean, who undertook to bind it. It is evident, therefore, that if the Central Bank had paid the proceeds of the notes to these persons, it could not have held the Farmers' Bank liable on the attempted guaranty. West St. L., etc., Bank v. Shawnee, etc., supra; First National Bank v. Drovers' & Mechanics' Nat. Bank, 244 Fed. 135, — C. C. A. — (4th Cir. July 12, 1917).

But it is earnestly insisted that, since the Central Bank gave the Farmers' Bank credit for the proceeds of the note, the balance $7,694.94 appearing on its books in favor of the Farmers' Bank being a result of that credit, neither the Farmers' Bank nor its assignee, the First National Bank, could recover this balance without assuming liability for the notes which produced it. The general rule is well settled that a bank cannot take the benefit of an illegal or fraudulent transaction of its officer, and repudiate the obligation out of which the benefit arose. National Bank v. Petrie, 189 U. S. 423, 23 Sup. Ct. 512, 47 L. Ed. 879; People's Bank v. National Bank, 101 U. S. 181, 25 L. Ed. 907; Rankin v. City National Bank, 208 U. S. 541, 28 Sup. Ct. 346, 52 L. Ed. 610. But the question here is deeper than that. As we have seen, the Central Bank was chargeable with notice that Smith, Mollohan, and Dean negotiated the notes for the purpose of raising money for themselves. This design could only be accomplished by drawing from the Farmers' Bank the amount which had been credited by the Central Bank to the Farmers' Bank. That this was the natural and inevitable sequence of the transaction must have been evident to the officers of the Central Bank. It was in this transaction that the loss to the Farmers' Bank occurred. This loss runs through the entire account, and the case turns on the responsibility of the Central Bank for it.

Doubtless the officers of the Central Bank were guiltless of any formed purpose to defraud the Farmers' Bank. They no doubt expected both banks to be saved harmless by the payment of the notes by the makers. But when the Central Bank was put on notice of the scheme of the officers of the Farmers' Bank to use its guaranty for their individual benefit and entered into that scheme, the Central Bank became party to it, and took on itself, as a participant in the transaction with notice of its purpose, all the risk of resulting loss to the Farmers' Bank into whose affairs it unwarrantably entered for the benefit of its officers. The transaction must be looked at in its en-

tirety and the consequent loss must fall on all the wrongdoers severally and jointly, to the exemption of the Farmers' Bank, whose rights they undertook to invade.

[4] Where one of two parties must suffer from the fraud of a third party, even if both are innocent, the loss must fall on him who by his imprudence or co-operation enabled such third party to commit the fraud. Western Union Cold Storage Co. v. Bankers' Natl. Bank, 176 Ill. 260, 52 N. E. 30; Western Union Tel. Co. v. Schriver, 141 Fed. 538, 72 C. C. A. 596, 4 L. R. A. (N. S.) 678; 12 Rul. Cas. L. 401. Attributing to Dean, Mollohan, and Smith full power to manage the credits of the bank of which they were officers, the instant they proposed a breach of trust by using the bank's name for their own benefit, and the Central Bank accepted the proposition, Dean, Mollohan, and Smith were stripped of their representative character and their power to bind the Farmers' Bank. By its first step taken in the matter thereafter the Central Bank tied itself to Smith, Mollohan, and Dean as a participant in their breach of trust. There is a dead line between the area of personal interest and the area of official representation. When the officers of the Farmers' Bank crossed that dead line to the knowledge of the Central Bank they left behind all power of representation. Thereafter the Central Bank and the officers of the Farmers' Bank were jointly and severally responsible for any damage which resulted to the Farmers' Bank from their unwarranted dealing with its credit and money.

Applying this rule, since the Central Bank had enabled Smith, Mollohan, and Dean to appropriate $9,950 of the Farmers' Bank's money by means of an entry on its books in favor of the Farmers' Bank for that amount, it was bound by that entry, and could not afterwards discharge itself by charging to the Farmers' Bank the notes of Smith and Mollohan for which the Farmers' Bank was never liable. In other words, Mollohan having paid $2,225 of the $9,550, the net loss to the Farmers' Bank was $7,225 and interest, and this loss the Central Bank must bear. It is true that the burden of showing the fraud—that is, that the name of the Farmers' Bank was used for the benefit of Smith, Mollohan, and Dean, and that the Central Bank entered into the transaction with notice of that intention—was on the receiver. Rankin v. Chase Bank, 188 U. S. 557, 23 Sup. Ct. 372, 47 L. Ed. 594. But as we have seen, the receiver discharged that burden. He showed further that the proceeds of the notes were misapplied by putting them to the credit of Mollohan and to two trust companies at Mollohan's instance. When this proof was made, the obligation then fell upon the Central Bank to show that the proceeds of the notes so apparently misapplied were actually used for the benefit of the Farmers' Bank. Western National Bank v. Armstrong, 152 U. S. 346–351, 14 Sup. Ct. 572, 38 L. Ed. 470. This obligation the Central Bank failed to discharge.

It follows that in arriving at the real balance due to the Farmers' Bank by the Central Bank, the charge to the Farmers' Bank of $7,225 and $97.65, interest thereon, aggregating $7,322.65, representing the unpaid portion of the notes of Smith and Mollohan, must be canceled.

At and after the time that the Central Bank charged to the Farmers' Bank $7,322.65 of the principal and interest of the Smith and Mollohan notes, Dean discounted at the Central Bank two notes, one of himself and one of his brother, T. G. Dean, each for $5,000, indorsing them in the name of the Farmers' Bank, as already stated. In this instance, also, the correspondence and all the circumstances furnished ample notice to the Central Bank that the discount was for the benefit of Dean and not of the Farmers' Bank. The discount seems however, to have been made for the purpose of renewing the credit of the Farmers' Bank on the books of the Central Bank which had disappeared, when the Mollohan and Smith notes were charged, to the extent of $7,322.65, and concealing the misappropriation of the funds in that transaction. The net proceeds were placed to the credit of the Farmers' Bank and there is no sufficient evidence in the record that Dean on this occasion and on the faith of these notes withdrew from the Farmers' Bank any funds for his own use. These notes were renewed from time to time, the last renewal being under the indorsement of the First National Bank which Dean essayed to make as vice president. Corresponding debits and credits were made at the renewal of the notes. This being so, both the indorsement in the name of Farmers' Bank, and the First National Bank on the notes, and also the credits given for their net proceeds, should be canceled. The Central Bank having notice that they were made for the benefit of Dean and not for the benefit of the Farmers' Bank or the First National Bank cannot set them up. The Farmers' Bank and the First National Bank not having shown any loss on account of them cannot claim their proceeds in the credit which they produced.

The evidence is too plain for discussion that the Central Bank discounted the other note of $500 for Dean individually with knowledge that the First National Bank was to derive no benefit from it, and that the District Court was right in refusing to charge it to the First National Bank. The result is that the decree of the District Court should be in favor of P. E. Wagner, receiver, for such balance as may remain in favor of the First National Bank, as assignee of the Farmers' Bank, after disallowing the charge of $7,322.65 entered by the Central Bank against the Farmers' Bank on September 1, 1911.

The decree of the District Court is therefore reversed.

SKINNER, Collector of Internal Revenue, v. UNION PAC. COAL CO.

(Circuit Court of Appeals, Eighth Circuit. February 23, 1918.)

No. 4957.

INTERNAL REVENUE ⊂=7—INCOME TAX ON CORPORATIONS—"ACCRUING" OF INCOME.

An annual dividend received by a corporation on the stock of another corporation is subject to the tax imposed by Income Tax Act Oct. 3, 1913, c. 16, § 2, G(a), 38 Stat. 172, for the calendar year in which it was declared and paid, as income "accruing" during such year, although half of the profits out of which the dividend was paid accrued prior to the passage of said Income Tax Act.

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

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

Action by the Union Pacific Coal Company against Mark A. Skinner, Collector of Internal Revenue. Judgment for plaintiff, and defendant brings error. Reversed, with directions to dismiss complaint.

John A. Gordon, Asst. U. S. Atty., of Denver, Colo. (Harry B. Tedrow, U. S. Atty., of Denver, Colo., on the brief), for plaintiff in error.

John Q. Dier, of Denver, Colo. (N. H. Loomis, of Omaha, Neb., C. C. Dorsey, of Denver, Colo., and Henry W. Clark, of New York City, on the brief), for defendant in error.

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

AMIDON, District Judge. The Union Pacific Coal Company brought this suit against the defendant, Skinner, as collector, to recover a tax collected upon its income for the year 1913, and paid by it under protest.

The Union Pacific Coal Company is the owner of all the capital stock of the Superior Coal Company. The latter, on June 18, 1913, declared, and on June 19 paid to plaintiff, a dividend arising out of the profits of its business for the fiscal year extending from June 30, 1912, to June 30, 1913, of 50 per cent., amounting to $500,000. In March, 1914, plaintiff made its return under the Income Tax Law for the calendar year 1913, but instead of including in its income the entire dividend, included only one half, or $250,000, stating that the other half was not income of the calendar year 1913, for the reason that it was earned by the Superior Coal Company during the latter half of the calendar year 1912. The Commissioner of Internal Revenue amended plaintiff's return, so as to include the $250,000, and levied a tax of 1 per cent. thereon. Plaintiff paid the tax under protest, and brought this action to recover it back. Defendant demurred to the complaint setting up the above facts. The court overruled the demurrer, and, the defendant declining to answer, judg-

ment was entered against him in the sum of $3,052.30, to reverse which he brings error.

The case must be determined by deciding whether the dividend constituted income of the Union Pacific Coal Company "arising or accruing" within the calendar year ending December 31, 1913. The argument of plaintiff really comes to this: That the dividend did not accrue to it in 1913, because the profits of the Superior Coal Company, out of which it was paid, did not all accrue to that company from its business during the calendar year 1913, but half of it accrued in 1912. This statement of the question indicates its decision. The Income Tax Law does not deal with the period during which a corporation which pays a dividend accumulates the profits out of which the dividend is paid. It is concerned with the income of the corporation receiving the dividend. Viewed in that light, the dividend accrued to the Union Pacific Coal Company in the year 1913, and all of it was taxable. We think annual dividends, paid out of the profits of the business of a corporation declaring the same, do not accrue to a stockholder until they are declared and paid by the paying corporation. Until that is done they represent mere profits of the corporation earning the same, and that corporation may, in the exercise of a proper discretion, apply the same as it sees fit. The stockholder does not acquire any interest in the fund until the dividend is paid.

Subdivision (a) of subsection G of section 2 of the act (38 Stat. 172) provides that the tax shall be levied "upon the entire net income arising or accruing from all sources during the preceding calendar year." Counsel urges that the words "arising or accruing" do not mean the same as "received." The statute itself shows the contrary, for subdivision (b) of subsection G provides that the "net income shall be ascertained by deducting from the gross amount of the income of such corporation * * * *received* within the year from all sources" certain specified allowances. This comparison shows that the net income "arising or accruing" to the corporation is to be ascertained by deducting from the gross income "received" by the corporation the specified allowances. It follows necessarily that in the judgment of the framers of the act the words "arising or accruing" are equivalent to the word "received." The only question left, therefore, is whether an annual cash dividend paid out of the annual profits of a corporation is income of the stockholder for the year in which he receives it or is to be treated as his income as the profits out of which it is paid are accumulated from month to month by the corporation which pays the dividend. We have not been cited to any decision holding that a dividend is income of the stockholder as fast as the profits out of which it is paid are accumulated by the corporation. On the other hand, the courts have uniformly held that the stockholder acquires no interest whatever in such a dividend until it is paid.

Plaintiff relies upon Lynch v. Turrish, 236 Fed. 653, 149 C. C. A. 649. That case is clearly distinguishable. The corporation there involved was not engaged in active business. It purchased in 1903 timber land which steadily increased in value. None of the increase, however, occurred after March 1, 1913. The company sold its land in 1913, and distributed money realized from the sale ratably among

its stockholders. Lynch, the collector, levied a tax upon Turrish, one of the stockholders, for that part of the dividend paid by the corporation which represented the increment in the value of its property. The question before the court was whether this sum was such a "dividend" as came within the term "income" under the income law. This court ruled that it was not; that the division which was made among the stockholders was a division, not of profits but of the capital of the corporation.

A case more nearly in point for plaintiff is Towne v. Eisner, 245 U. S. 418, 38 Sup. Ct. 158, 62 L. Ed. —, decided by the Supreme Court of the United States January 7, 1918. There a corporation transferred $1,500,000 from a surplus fund which had been set aside as surplus, before January 1, 1913, to capital account, and then in exchange for this fund issued stock for a like amount, and distributed the same as stock dividends to stockholders of record December 26 of that year. The collector levied a tax upon the plaintiff, who received a stock dividend of this character, the same as if it had been an ordinary annual cash dividend. The Supreme Court ruled that under the facts of that case the fund which was distributed was capital, and not income. The court says:

"We cannot doubt that the dividend was capital as well for the purposes of the Income Tax Law as for distribution between tenant for life and remainderman. * * * What has happened is that the plaintiff's old certificates have been split up in effect and have diminished in value to the extent of the value of the new."

The entire reasoning of the opinion rests upon that ground.

As pointed out by Judge Sanborn in the Turrish Case, 236 Fed. 660, 149 C. C. A. 649, and by the Sixth Circuit in Doyle v. Mitchell Bros. Co., 235 Fed. 686, 687, 688, 149 C. C. A. 106, L. R. A. 1917E, 568, the distinction running through all the cases is this: Is the fund paid to the stockholder a division of profits earned by the corporation, or a division of its capital? If the former, it is income; if the latter, it is not income, but a partition of property or capital. By conceding, as plaintiff does, that half of its dividend was income, plaintiff puts itself out of court, for the concession is an admission that the entire dividend was income, and not capital.

The judgment is reversed, with directions to dismiss the complaint.

In re DUNCAN.

(Circuit Court of Appeals, Fourth Circuit. February 8, 1918.)

No. 1609.

MANDAMUS ⊂⊃4(1)—GROUNDS—REMEDY BY APPEAL.

A writ of mandamus will not be granted to require a District Judge to correct alleged errors occurring on the trial of a cause, where they can be brought up for review by appeal.

In the matter of the application of Cloyd H. Duncan for leave to file a petition for a writ of mandamus, directed to Hon. Alston G. Dayton, District Judge of the United States for the Northern District of West Virginia. Denied.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

Cloyd H. Duncan, in pro. per.

PRITCHARD, Circuit Judge. In the above-entitled matter Cloyd H. Duncan, complainant in the court below, presents a petition in which he states that his attorney is not a member of the bar of this court. The petitioner seeks to have this court issue an alternative writ of mandamus, directing the District Judge for the Northern District of West Virginia to correct alleged errors at law in the trial of a cause. The questions which petitioner seeks to have us pass upon can be considered by this court if the cause should be brought here on appeal, provided such questions are raised by a proper assignment of error. No ground is stated for interfering with the District Judge in the discharge of his duties upon the showing made. Therefore the application for leave to file a petition for a writ of mandamus is denied.

DIAMOND PATENT CO. v. WEBSTER BROS.

SAME v. MURRAY et al.

(Circuit Court of Appeals, Ninth Circuit. February 18, 1918.)

No. 2997.

1. PATENTS ⊂⊃328—INFRINGEMENT—GLASS SHOWCASE.

The Weber patent, No. 801,944, for a glass showcase having the plates separated by a cushion of felt or other elastic material to prevent the vibration of one plate from being imparted to the conjoining plate, *held* not infringed.

2. WORDS AND PHRASES—"PLASTIC"—"ELASTIC."

The words "plastic" and "elastic" have entirely different meanings. "Plastic" applies to a substance capable of being molded and pressed into form, while "elastic" applies to a substance having the property of returning or springing back to its original form after being disarranged by pressure or applied force.

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

3. PATENTS ⟸324(5)—SUIT FOR INFRINGEMENT—REVIEW ON APPEAL.
Where the trial court, in an infringement suit, has had the advantage of examining the alleged infringing article, an appellate court, without such advantage, will not disturb the conclusion reached, unless clearly against the weight of the evidence.

Appeal from the District Court of the United States for the Southern Division of the Southern District of California; Oscar A. Trippet, Judge.

Suits in equity by the Diamond Patent Company against Webster Bros., a corporation, and against C. F. Murray and others. Decrees for defendants, and complainant appeals. Affirmed.

J. J. Scrivner, of San Francisco, Cal., and George E. Harpham, of Los Angeles, Cal., for appellant.

M. G. Gallaher, of Fresno, Cal., for appellees.

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

WOLVERTON, District Judge. These cases were consolidated in the court below for trial. Both are for injunction, one to restrain the manufacture and the other the use of a patented invention. The question presented is one of infringement. The patent pertains to glass showcases, and consists in the means of fastening one glass surface to another by use of an elastic substance, composition, or contrivance, so as to prevent breakage through communication of vibration of the glass plates. The conception is the insertion of a felt strip between the glass surfaces, bound thereto by cement applied to both sides of the felt, of such consistency and adaptability that it does not permeate the felt, forming a skin upon either side, thus producing a cushion having an elastic or resilient property, which serves to absorb vibration of the plates, and prevents its communication from one to another, and likewise breakage of the plates themselves. It is unnecessary to pursue the details of the invention further. A particular description of it may be had by reference to Diamond Patent Co. v. S. E. Carr Co., 217 Fed. 400, 133 C. C. A. 310.

[1] The claims are two in number, and are as follows:

"1. A structure comprising a plurality of glass plates, the edges of which are spaced from the adjacent plates, a felt cushion filling the space between the adjoining plates, the plates being cemented to the felt, each plate being adapted to freely vibrate in its natural plane of vibration, and prevented by the felt cushion from imparting its vibration to the adjacent plates.

"2. A structure comprising a plurality of glass plates, an unconfined edge of one plate nearly but not quite meeting another plate also with unconfined adjacent edge, an elastic material filling the space thus existing between the nearest adjacent surfaces of the plates, said plates being attached to the elastic material, whereby the plates by reason of their unconfined edges and the intervening elastic material can each vibrate or move in any direction independently."

The important feature of claim 1, so far as it pertains to the present controversy, is the felt cushion filling the space between the adjoining plates, and so adapted as to prevent the vibration of one plate from

being imparted to the conjoining plate. The distinguishing feature of claim 2 is that an elastic material for filling the space is substituted for the felt and its combination. There is testimony in the record tending to show that plaintiff has a compound of ground felt, combined with a special quality of cement, that has and retains the property of elasticity or resiliency, which absorbs vibration in the same way as the felt contrivance, thus forming a like cushion between the surface contact of the glass plates. It is claimed for this compound that it comes within the scope of the second claim, but, whether it does or not, the present controversy must be determined solely upon the evidence adduced at the trial.

[2] The witnesses for plaintiff, namely, Fred Weber, the patentee, and James P. Shaffer, have applied certain tests to glass showcases, manufactured by one of the defendants and now being used by the other, which they seem to think prove that the composition used in these showcases to unite the glass plates at their surface bearings possesses the same property of elasticity and resiliency as the invention of Weber, now the property of plaintiff. One of the tests consisted in inserting a knife blade or some sharp instrument between the plates, thus penetrating the compound for uniting the plates; and it is asserted that the compound was found to be soft, or plastic, and yielding, and to possess elasticity and resiliency, thus performing the same function as the Weber invention. These witnesses, however, confuse the terms "plastic" and "elastic," which do not mean the same thing at all. "Plastic" applies to a substance capable of being molded and pressed into form, while "elastic" applies to a substance having the property of returning or springing back to its original form, after being disarranged by pressure or applied force. The former becomes dead matter as its form is changed, while the other has the property of resuming its natural shape. The latter has resiliency; the other has not. Another test was to observe whether the compound would yield under pressure. If it did, the witnesses seemed to think that it was plastic or elastic, without distinction as to the signification of the terms.

Upon the other hand, defendants produced evidence to the effect that the substance used for uniting the glass plates in some of the cases consisted in the combination of a very narrow strip of felt with a cement that permeated the felt and overlaid the edges, and, when applied, became hard and practically homogeneous, thus destroying the resiliency of the felt. In other cases, the substance used was cement alone, which soon became rigid after use, and was without elasticity or resiliency. It was further claimed for the defendants that elasticity in the substance used for uniting the plates was of no advantage in preventing breakage, and that a substance which, while plastic when applied, became rigid when in place, was useful in the art, and was not attended with breakage of the glass after use. Tests were made by defendants' witnesses, who claim to have found that, while some of the substance used in the showcases was plastic and yielding, yet it was not elastic. Some of it, they say, was rigid and unyielding. The trial judge, however, with all the evidence before him, personally

inspected the showcases, and eventually denied the plaintiff's contention. While he rendered neither oral nor written opinion, he gave a decree dismissing the complaints. From all this we must presume that the court was of the opinion that the substance used in these showcases for uniting the glass plates did not infringe the plaintiff's patent, thus deciding the fact in issue.

[3] In such a case, the trial court having the advantage of seeing and especially examining the material which it is claimed infringes, an appellate court, without such advantage, will not disturb the conclusion reached, unless it appears clearly that the finding is against the obvious weight of the testimony.

We find no reason for disturbing the decree, and therefore affirm it.

FULLER et al. v. REED et al.

(Circuit Court of Appeals, First Circuit. June 16, 1917.)

No. 1209.

1. APPEAL AND ERROR ⊜1009(1)—REVIEW—FINDING OF FACT.
Where the witnesses appeared before the judge of the lower court, a finding of fact in an equity suit will not be disturbed on appeal, unless it clearly appears to be wrong, because of the superior opportunity of the lower court to determine the question of the witnesses' credibility.

2. PATENTS ⊜200—CANCELLATION OF ASSIGNMENT—EVIDENCE—SUFFICIENCY.
In a suit to avoid an assignment of a patent on the ground of fraud, evidence *held* insufficient to establish the alleged fraud.

Appeal from the District Court of the United States for the District of Massachusetts; Frederic Dodge, Judge.

Bill by Charles D. Fuller and others against Philip L. Reed and others. From a decree dismissing the bill (229 Fed. 737), complainants appeal. Decree affirmed.

Thorndike Saunders, of New York City, for appellants.

Philip C. Peck, of New York City (J. Sidney Stone, of Boston, Mass., on the brief), for appellees.

Before BINGHAM, Circuit Judge, and ALDRICH and MORTON, District Judges.

MORTON, District Judge. [1] The misrepresentations relied on by the complainant to avoid the assignment from Thurston are alleged to have been made orally by Calder to Thurston at the interview between them. The only persons in a position to testify to what then occurred were Thurston, Calder, and Thurston's niece, Rose Thurston. All three were examined and cross-examined before the learned judge who heard the case in the District Court. The only substantial question before us is whether his refusal to accept the testimony of Thurston and Rose Thurston (which in the vital parts was contradicted by Calder), as establishing fraud, was erroneous. He had so much better opportunity than this court to judge correctly the accuracy and credibility of the various witnesses that, on familiar and established prin-

ciples, his conclusions will not be disturbed unless they are clearly wrong. Trujillo & Mercado v. Rodriguez, 233 Fed. 208, 212, 147 C. C. A. 214 (C. C. A. 1st Cir.).

[2] Thurston was, when he testified, nearly 80 years old, and of greatly impaired health. His appearance and manner on the stand were obviously of unusual importance in considering his testimony. Rose Thurston does not claim to have been a participant in the conversation between her uncle and Calder; she had no pecuniary interest in the matter under discussion, and was not familiar with it; she was admittedly out of the room part of the time; and her attention was not sharply recalled to the talk until almost 2 years after it occurred. The difficulties which actual participants in a conversation experience in correctly restating it after a considerable lapse of time is well known. The difficulty and uncertainty are greatly increased in the case of a person not directly interested, not participating, and not continuously present during the whole talk. There were important differences between the account given by Thurston and his niece of the interview between him and Calder, and that given by Calder. The opinion of the learned judge in the District Court shows that he considered the testimony with the most painstaking care and was not satisfied that material and fraudulent misrepresentations were made by Calder.

We cannot say that he was clearly wrong in so deciding. While several things suggest that Calder's testimony ought to be received, as it was received, with caution and with sharp scrutiny, there are circumstances which tend to disprove the complainant's assertions of fraud. The most important ones are noticed in the opinion of the District Court. Moreover, the alleged misrepresentation that "Calder came from Fuller," or "was sent by Fuller" (which is the one now principally relied on in argument by the complainant), does not touch either the value of the patent, or the consideration paid therefor; in other words, it did not directly enter into the bargain which Thurston made. There is no evidence, and indeed it is not claimed, that Calder represented himself as the agent of Fuller. Thurston admittedly understood which patent he was selling, and received the full agreed price.

The alleged misrepresentations by Calder as to the length of time which the patent had to run were disposed of by the trial judge's finding that a copy of it was shown to Thurston at the interview—a finding which is by no means so plainly erroneous that we can reject or disregard it. The remaining misrepresentations charged by the complainant relate, speaking generally, to alleged statements by Calder bearing on Thurston's right to assign the patent, and are adequately dealt with in the opinion of the District Court.

Undoubtedly, the aged and infirm inventor was no fair match in trading for an experienced and able negotiator in the prime of life. But superior strength and ability do not imply dishonesty, and the bill is founded on fraud. It does not allege either that Thurston was mentally incapable, or that he was coerced or unduly influenced by Calder; the evidence would not sustain such allegations if made. This aspect of the case received careful and considerate attention from the trial

judge. If Thurston had been Calder's equal in health and ability, the claim that he had been defrauded would, upon the evidence before us, be so obviously unfounded as to require little discussion. Upon this phase of the case, and also upon the question of gross inadequacy of price, we agree with the opinion of the District Court.

The decree dismissing the bill is affirmed, with costs to the appellees.

THE SANTA ROSA.

(District Court, N. D. California, S. D. February 20, 1918.)

No. 15289.

1. SHIPPING ⟸203—LIMITATION OF LIABILITY—STATUTES—CONSTRUCTION.
While the Harter Act (Act Feb. 13, 1893, c. 105, 27 Stat. 445 [Comp. St. 1916, §§ 8029–8035]) and other laws providing for limitation of liability of shipowners should be construed so as to effect their purpose of promoting shipbuilding, they should not be so liberally construed as to deprive passengers and cargo owners of that degree of care on the part of those owning ships which safety demands.

2. SHIPPING ⟸209(3)—LIMITATION OF LIABILITY—BURDEN OF PROOF.
Under statutes providing that the liability of the owner of a vessel for any act, matter, or thing, loss, damage, or forfeiture, occasioned or received without the privity or knowledge of such owner, shall not exceed the value of owner's interest in the vessel, and her freight then pending, a shipowner has the burden of establishing that the loss for which a limitation of liability is sought occurred without its privity or knowledge.

3. SHIPPING ⟸208—LIMITATION OF LIABILITY—RIGHT THERETO.
Early on a foggy morning a vessel, on a course set to pass not more than 1½ miles outside of a point over 100 miles away, struck on a rock or sand bar inside the point as a result of currents setting in shore. There was no storm. After the ship company was notified by wireless of the accident, and that it was advisable to transfer passengers to a steamer standing by, the company forbade the master to transfer passengers until arrangements were made for payment, or to accept the assistance of such vessels, save under fixed conditions as to payment. In the afternoon the vessel broke up as the result of heavy seas, and passengers were injured while being sent ashore. *Held* that, as it undertook to control the master after the vessel struck, and failed to show that the speed and course of the vessel near a dangerous point was not the ordinary course and speed of vessels of its fleet on that run, the company is not entitled to a limitation of liability on the theory that the loss occurred without its privity or knowledge.

In Admiralty. In the matter of the petition of the Pacific Coast Steamship Company, a corporation, owner of the steamship Santa Rosa, for limitation of liability. Limitation of liability denied.

Geo. W. Towle, Edwin T. Cooper, Ira A. Campbell, and McCutcheon, Olney & Willard, all of San Francisco, Cal., for petitioner.

William Denman, Harold Ide Cruzan, and Denman & Arnold, all of San Francisco, Cal., for certain claimants.

DOOLING, District Judge. This case was tried long since. An unusual delay in filing briefs and thereafter my own enforced absence

from court have delayed a decision up to the present time. Even now the press of other matters does not allow me the time to review the cause with such care and to such extent as its nature and importance demand.

The proceeding is one brought by Pacific Coast Steamship Company for limitation of any liability arising out of the wreck of the steamer Santa Rosa which occurred in July, 1911. The vessel left San Francisco with 300 souls on board on July 6, 1911, and about 3 o'clock in the following morning struck on a rock or sand bar 1½ miles inside Point Arguello, and at least 3 miles east of where she should have been. There was no storm, there was nothing wrong with the vessel's motive power, there appears no reason why she could not have safely steamed her course, except that in a fog she hugged the shore, instead of proceeding, as she could have proceeded with perfect safety, upon a course further out to sea It is one more of those unfortunate accidents, far too common on this coast, and perhaps elsewhere, due to the desire of the steamship companies, and perhaps to the passengers, to get there quickly. Experience does not seem to have taught the lesson that it is better to arrive a little late than not to arrive at all.

The fault in this particular case was that in a fog when off Point Sur, where the vessel's exact position could not be determined by a view of anything on shore, a course was set for Point Arguello, over 117 miles away which, if not interfered with by currents known to exist, would pass that point at a distance of from but 1 mile to 1½ miles. Unfortunately the currents setting inshore did take the vessel off her course, so that, instead of passing Point Arguello a mile or a mile and a half to the westward, she struck shore inside the point by about the same distance.

[1-3] The law is generous with shipowners in that it provides (Harter Act) that if the owner of any vessel transporting merchandise or property to or from any port in the United States shall exercise due diligence to make the vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner, agent, nor charterer shall become or be held responsible for damage or loss resulting from faults or errors of navigation or in the management of the vessel. This applies to questions arising between the vessel and shippers of cargo on board of her The law further provides (limitation of liability) that the liability of the owner of a vessel for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or received without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in the vessel and her freight then pending. These statutes are, of course, to be enforced in such spirit and with such liberality as will effect their purpose—the encouragement of shipbuilding and the employment of ships in commerce. But such liberality of enforcement should not be carried to an extent that will deprive cargo owners and passengers of that degree of care on the part of those owning and operating ships which their safety demands and to which they are entitled.

It is urged by claimants in the present case that it was grossly negligent on the part of the master of the vessel to set his course for a run of 117 miles on such line as would miss Point Arguello under the most favorable circumstances by not more than 1½ miles, and to run on this course towards a fog-bound point at the full speed of 14 knots, where, as was well known, there is frequently a current setting on shore which may take a vessel off her course by several miles, and that the owners must have been privy to such negligence, because the logs of their vessel on this run in previous trips would show that this was the customary route and speed in rounding this point. For this asserted negligence the court is asked to award exemplary damages to claimants During the trial the production of these logs was demanded by claimants, and petitioner promised to produce them. This was not done, so that it may at least be assumed that their production would not have helped petitioner's case.

I am not a navigator, but it does not seem to me that it is necessary to be such in order to know that danger lies in proximity to the coast in a fog; and the number of vessels that go ashore in the fog on this coast, with nothing the matter with their motive power, and while under full control, affords grave reasons for inquiring whether the risks undertaken by their masters in thus hugging the shore are not undertaken with the knowledge and consent, if not under the express orders, of their owners, either for the purpose of shortening the time of the voyage, or for some other purpose not disclosed or apparent The safety of the thousands of persons who travel by sea up and down the coast requires that the court should not listen with over-eager ears to the excuses offered for the loss of vessels which should never have occurred, or to the general disclaimer of responsibility for wrecks that could have so easily been avoided.

In these proceedings the burden of proof is upon the petitioner to show that the loss occurred without its privity or knowledge. It did not show, nor did it attempt to show, that the course and speed of the Santa Rosa at the time she went ashore were not the usual course and speed of the vessels of their fleet upon this run, alike in foggy and in clear weather Indeed, the failure to produce the logs requested and promised would indicate that they were. If this be so, and if it were negligence on the part of the master to lay a course of that length with currents setting on shore, and leaving such a slight margin of safety as a mile or a mile and a half in that long course, and to run that course as he did in the fog, then such negligence was with the privity and knowledge of petitioner, if it had knowledge that such was the usual course and speed in a fog . I cannot find that this was without petitioner's privity or knowledge. So much for what occurred before the vessel went ashore.

She struck at about 3 o'clock a. m., and early in the morning sent word by wireless to petitioner's San Francisco office. After consultation with the insurance agent and others, the only person connected with this office who could be found at that hour sent word to the master of the vessel, advising him as to what he should do, and continually during the day messages were passing between the vessel and the office on shore. All this time the vessel was hanging on the rock or

sand bar with all the passengers on board. For a great portion of the day the sea was sufficiently smooth to allow the transfer of the passengers to other vessels then in attendance, though the breakers on the shore would not permit their landing in small boats.

It would serve no purpose to introduce here all the telegrams that indicated to what extent the office on shore undertook to control the action of the master, in the emergency in which he and his vessel were placed. They advised him to put out a kedge anchor; they advised him that they wished to avoid any unnecessary salvage claim, and that they did not consider that two steam schooners, the Centralia and the Drew, that were standing by, could be of any assistance, and if he had not engaged them at not less than $200 per day they wished him to release them, and, if unable to force them to withdraw otherwise, to cut their lines and not to allow them to refasten. They told him the important thing was to get his anchors in such position that he could put a strain on them with the windlass, and that this was worth a dozen steam schooners' towing. They told him they had arranged with the steamer Argyle to render assistance, but coupled this information with suggestions as to how such assistance should be rendered.

All of this advice, instruction, and suggestion may have been sound; but they were not at the scene of the disaster, as the master was, and their recommendation, advice, instruction, suggestion, or whatever it may be called, did not tend to leave to him that free exercise of his own judgment in the emergency to which, if he were competent, those on board were entitled. So much for the attempted control by the office of the maneuvers relating to the vessel itself. As to the passengers the record discloses that the office, having received information that the vessel was swinging back and forth as though lodged on a rock under her center, and that there was too much surf to permit the landing of the passengers on shore, sent to the master the following message:

"If you transfer passengers by steamer, make arrangements for payment of a lump sum or so much per passenger."

The master sent word:

"Argyle hawser carried away. All working to get her off at high tide 9 p. m. So far hull and machinery O. K. Advisable to get passengers off as soon as possible. Would like to transfer passengers to Centralia to Port Hartford."

To this the office replied:

"Transfer passengers to Port Hartford by Centralia, but agree on the price before doing so."

The master replied:

"Centralia refuses to make any arrangement for towage and passengers. Centralia and Drew want all arrangements settled in S. F."

And later:

"Centralia will take passengers, but will not make any price. Matter must be settled in San Francisco."

And finally, after the sea had roughened and it was too late, the office sent the master the following message:

"Give due consideration to passengers without regard to expense."

It is the opinion of the court that this message last sent, and in the evening when it was too late, is the one which should have been first sent on the morning of that eventful day. In the meanwhile, and while the messages were passing between the office and the master, ineffectual efforts were being made to pull the vessel off. It is evident that the master wanted to transfer the passengers to the Centralia, but was restrained from so doing at the time when it could be done by the directions from the office to arrange the terms and his inability to do so. It is true that he testified that he had not been in any way influenced by the messages from the shore; but his actions and his messages contradict this statement, and the testimony of the passengers establishes the contrary. To one the master declared:

"You see that steamer lying out there. We are just planning making arrangements to get you off on that steamer, and we are only waiting to settle terms. They know we are in a hard fix, and they want to hold us up."

To another, who asked him, "Why don't you put us off?" he said "he was waiting for orders as to what to do with us." To another he stated "he could not put us ashore; he was working under orders of his company and it was impossible; that he had a wireless, and was working, under orders." To another he said, "I can't do nothing until I hear from the steamship company."

The master was therefore prevented by the office from exercising his own judgment, the result being that the passengers were left on board until the heavy seas broke the vessel apart in the afternoon, and then they had to be sent ashore in nets, swinging on a line from the vessel to the shore, and buffeted by the breakers. Many of the claims here are for injuries and suffering thus occasioned. Others are for loss of baggage, and some for loss of life. The latter loss, however, occurred, not when the passengers were sent ashore, but when a boat capsized during the day.

There is sufficient preliminary evidence to show that there is some liability on the part of petitioner, and the matters hereinbefore set out, in my judgment, preclude it from the right to have such liability limited in this proceeding. The claimants may either pursue their remedies here or in the state courts, as they may be advised. If they elect to remain here, their claims will be referred to the commissioner. If they do not so elect, any order restraining them from proceeding will be vacated.

A decree will be entered accordingly.

CORRADO v. PEDERSEN.

(District Court, N. D. California, First Division. February 23, 1918.)

No. 16128.

1. SEAMEN ⊜29(2)—SHIPOWNERS—DUTY OF.
A shipowner owes to a seaman the positive and nondelegable duty to see that the ship is seaworthy, and that her equipment is in condition for safe use when she starts on her voyage.

2. SEAMEN ⊜29(4)—DUTY OF SEAMEN—NEGLIGENCE.
It is not the duty of an ordinary seaman to see that the gear is in proper condition. Therefore a seaman of no unusual size, injured by a fall from the topsail yard when a manrope to which he was clinging gave way, cannot be deemed negligent; the rope being provided for his protection.

3. SEAMEN ⊜29(3)—PROTECTION OF—FIRST OFFICER.
Under Seamen's Act March 4, 1915, c. 153, 38 Stat. 1164, the first officer of a vessel is not deemed a fellow servant, and the owner is liable, where gear gave way, either as the result of the owner's failure to furnish proper gear or the failure of the first officer to replace the gear after it became unsafe by reason of exposure to the weather.

In Admiralty. Libel by Cosmo Corrado against L. A. Pedersen, doing business under the name and style of the Bristol Bay Packing Company. Decree for libelant.

F. R. Wall and I. F. Chapman, both of San Francisco, Cal., for libelant.

Pillsbury, Madison & Sutro, of San Francisco, Cal., for libelee.

DOOLING, District Judge. Libelant, a seaman and fisherman, shipped at San Francisco for a voyage to Alaska, there to work during the fishing season, and was injured on the return trip by falling from the lower topsail yard; the fall being due to the carrying away of a manrope to which he was clinging while at work handling the sail. The manrope was there for the sole purpose of affording to the seamen at work on the yards a safe and convenient appliance by which to sustain and steady themselves. It was a circular loop of rope affixed to the jackstay by means of seizing. The seizing gave way under the strain put upon it by libelant, and he fell to the deck, sustaining grave and painful injuries.

The manrope being there for the very purpose for which it was used by libelant, it is not easy for the court to see upon what theory he is chargeable with negligence in having used it. The seaman is entitled to a safe appliance, and this one, at the time of the accident, was not safe. Libelant is not an unusually heavy man, and the manrope was not subjected to an unusual strain.

The vessel was an old one, and had been lying in Oakland creek for seven or eight years before the voyage on which libelant was injured. Preparatory to this voyage the owner gave orders and furnished materials for the complete overhauling of her rigging, most of which was in bad condition. Whether these orders were carried out

as to this particular manrope it is impossible to say. But this is true: The vessel proceeded to Alaska, and remained there with her rigging exposed to the weather for the whole of the fishing season, and no inspection was made as to the condition of her gear before she started on the return voyage.

[1-3] There was considerable testimony on the part of the respondent to the effect that the seizing by which the manropes are attached to the jackstay are liable to become chafed and worn. This being so, it is manifest that safety for those who use them lies only in their frequent inspection, for the purpose of ascertaining whether or not they should be renewed. The duty of caring for the gear of the vessel falls, according to the testimony, upon the first officer, and that duty manifestly requires a frequent inspection of the manropes, which are liable to become chafed and worn, and upon the strength and stability of which the very lives of the seamen depend.

The shipowner owes to the seaman a positive and nondelegable duty to see that the ship is seaworthy, and that her equipment is in condition for safe use, when she starts on her voyage; and while in the present case the owner furnished materials, and gave instructions that all the gear be overhauled before the vessel left here for the north, and also furnished materials for the proper repair of the gear during the voyage, yet it is not certain that his directions were obeyed as to this manrope before the ship sailed, and it is certain that nobody paid any attention to it afterwards. That it was unsafe is proved by the fact that it carried away. It was not the fault of libelant, as it was not his duty to see that the gear was in proper condition. It was the fault of the owner, if the vessel left here with the gear in poor condition, or of the first officer, if the gear became unsafe on the trip north, or while exposed to the weather during the fishing season.

If the fault were that of the owner, he is liable. If the fault were that of the first officer, he is still liable, in my judgment, because, under the Seamen's Act, the first officer is not to be regarded as a fellow servant of the libelant, but as the agent of the owner, in so far as the security of the vessel's gear is concerned.

The libelant's injuries are not permanent, but he lost some time while unable to work, and was put to the expense of $240 in effecting a cure. He also suffered a great deal of pain. For all of these I think $1,200 a not unconscionable award. There is also a claim for wages, which is admitted.

A decree will be entered for $391.55 for wages, and $1,200 for damages, together with costs. On this decree will be credited $300 already received by libelant for wages since this action was begun.

UNITED STATES v. HONOLULU CONSOL. OIL CO.

(District Court, S. D. California, N. D. March 2, 1918.)

No. B–46.

1. MINES AND MINERALS ⟸2—OIL OR GAS BEARING LAND—WITHDRAWAL—DILIGENT PROSECUTION OF WORK.

   Under Pickett Act June 25, 1910, c. 421, 36 Stat. 847 (Comp. St. 1916, §§ 4523–4525), declaring that rights of any person who at the date of any withdrawal order is a bona fide occupant or claimant of oil or gas bearing land, and who is in diligent prosecution of the work leading to discovery shall not be affected by the order, the drilling of an oil well on one location cannot, where the group theory was inapplicable to the several locations, be treated as work leading to discovery on another.

2. INJUNCTION ⟸1—RECEIVERS ⟸1—GRANTING—APPOINTMENT.

   The granting of an injunction or the appointing of a receiver is ordinarily a harsh remedy, and such relief will only be granted in a clear case.

3. MINES AND MINERALS ⟸38(7)—OIL AND GAS LANDS—INJUNCTION AND RECEIVER.

   Where the question whether defendant, the occupant of oil and gas bearing lands, who sought patents therefor, was in diligent prosecution of work of discovery at time of presidential withdrawal, within Pickett Act June 25, 1910, c. 421, was debatable, particularly as it was uncertain whether the group theory was applicable, an injunction to restrain further drilling for oil on disputed claims, unless necessary for the protection of the property, should be granted, and a receiver appointed to take charge of the proceeds of oil from wells on the disputed claims, though the proceeds of such oil were practically impounded under defendant's present contract with an oil company, and defendant was solvent, for the contract might be changed, and defendant's assets dissipated.

In Equity. Suit by the United States against the Honolulu Consolidated Oil Company. Injunction granted, and receiver appointed.

Henry F. May and Frank Hall, Asst. U. S. Attys. Gen.

Morrison, Dunne & Brobeck, of San Francisco, Cal., for defendant.

RUDKIN, District Judge. The lands in controversy in this case are within the presidential withdrawal of September 27, 1909, and the rights of the parties depend largely upon the construction to be given the proviso to the so-called Pickett Act of June 25, 1910 (36 Stat. 847, c. 421 [Comp. St. 1916, §§ 4523–4525]), which reads as follows:

"The rights of any person who, at the date of any withdrawal order heretofore or hereafter made, is a bona fide occupant or claimant of oil or gas bearing lands, and who, at such date, is in diligent prosecution of work leading to the discovery of oil or gas, shall not be affected or impaired by such order, so long as such occupant or claimant shall continue in diligent prosecution of said work."

The material facts are these: For some considerable time before the presidential withdrawal order, the defendant, or its predecessor in interest, was the owner of a patented section of land in the vicinity of Taft and Maricopa, in the state of California, designated as section 10, also of another patented quarter section, and held by assignments

from the original locators 31 quarter sections surrounding and in the immediate vicinity of section 10; such locations having been made under the mineral land laws of the United States. When drilling operations actually commenced on patented section 10 does not appear from the records before me, but at all events work had so far progressed as early as June, 1909, that large quantities of gas were encountered in the drilling operations on that section. This caused a suspension of work for a time, but as soon as the gas was brought under control the drilling continued, and oil was actually discovered on February 1, 1910. It might be said in this connection that a disclaimer has been filed by the defendant as to 14 of the 31 quarter sections, so that on the present hearing we are only concerned with the remaining 17. During the year prior to the withdrawal order a cabin, or a skeleton derrick, or in some cases perhaps both, was constructed on each of these quarter sections, and the defendant had expended considerable sums in this way, and in the building of roads, making surveys, piping water from a distant lake, and otherwise providing for the general development of the property. In due time the defendant made application for patents, submitted its proofs, and final certificates issued, accompanied by a notation, however, that the government protested against the acceptance of the proofs or the issuance of patents. On two ex parte hearings thereafter the Commissioner of the General Land Office decided the controversies in favor of the defendant; but a hearing has since been ordered by the Commissioner for the purpose of inquiring into the rights of the respective parties, and the applications for patents are thus pending at the present time. The present suit was instituted by the government to enjoin the defendant from drilling further wells on the disputed tracts, and for the appointment of a receiver for the wells now in operation, until the matters are finally disposed of by the Land Department, and until patents issue or the applications for patents are finally rejected.

[1-3] The case hinges upon the true intent and meaning of the words "in diligent prosecution of work leading to discovery of oil or gas," and upon this question the decisions do not seem to be entirely harmonious. If the title to all these lands was vested in a common ownership, the testimony leaves no doubt in my mind that at the date of withdrawal the defendant was diligently engaged in the development of the entire group in a practical, businesslike, economic way, for it would not be the part of prudence to drill wells simultaneously on these 17 or 31 claims to a depth of from 2,000 to 4,000 feet before the oil-bearing quality of the lands was ascertained or proven. Indeed, such a course would seem to involve a profligate and useless waste of money. But the title to the unpatented lands was not vested in a common ownership, and the question arises: Can the group system of development be applied to such a case? If not, and if each of the several unpatented claims must be deemed a separate entity or a single unit for the purposes of development, a grave and doubtful question arises as to whether, on each individual claim, work leading to the discovery of oil or gas was in diligent prosecution on the date of withdrawal. I say the question is doubtful and debatable, because the testimony would warrant, though it would not impel, a finding that the

prosecution of further work on the unpatented claims was dependent entirely upon the results obtained or the conditions found in the drilling on section 10.

In reaching this conclusion I am not controlled by the provisions of the contract between the predecessor in interest of the defendant and his assignors, for by that contract Matson had an undoubted right to limit his obligation to any extent he saw fit, and the obligation of his contract would throw but little light on his future intentions. But there is other evidence in the record, and other inferences that may be drawn from undisputed facts. Under date of March 6, 1909, Matson, the predecessor in interest of the defendant, wrote to his agent, Crandall, as follows:

"Would it be practical to order the lumber for the rigs, without ordering the rig irons, as it runs into money, and I do not feel we should spend too much money until we are sure of getting oil there. We are still 'wild-catting,' and have spent considerable money up to date, and I do not want to dump in any more until there is surety of success. If you think it is absolutely necessary to order the lumber, why I think I will order it up here."

These views may have been somewhat modified by the later discovery of gas on section 10; but, however strong the indications of oil might then be, the discovery of gas is not the discovery of oil, and with my limited knowledge of the oil industry it seems incredible to me that the defendant would proceed to drill wells on these quarter sections, one after another, if neither oil nor indications of oil were discovered on section 10, or on the quarter sections previously drilled. For these reasons, as already stated, I am of opinion that the testimony would warrant a finding that future operations on the unpatented sections depended entirely upon the results obtained from the drilling on section 10. It must be understood that I am not holding or intimating that such a finding should be made, because that question rests entirely with another department of the government. I merely hold that the case presented is not entirely one-sided, as claimed, and that a finding either way would find its warrant in the record before me. We are then brought back to the question: Can the development work in progress on section 10 be held to be development work on the remaining quarter sections within the meaning of the law? In discussing this question in United States v. Thirty-Two Oil Co. (D. C.) 242 Fed. 723, 735, Judge Bean said:

"Now, it is clear from the testimony, and in fact undisputed, that there was no work in progress or immediately contemplated at the date of the withdrawal looking to discovery, or intended for the discovery, of oil thereon, and had not been for some months prior thereto, if at any time, unless the drilling of a well by the oil company on another location, half a mile distant, with the intention on its part, if oil was discovered thereon, to thereafter proceed with the development of the location in question, is held to be such work. Whether an occupant or claimant of oil or gas bearing land at the date of a withdrawal order was at that time engaged in diligent prosecution of work leading to discovery is a question of fact. No hard or fast rule applicable to all cases has or can be laid down by which it can be determined. Each case must depend to a large extent upon its own facts and circumstances. General principles only can be stated. It is not necessary that the work being performed at the time of the withdrawal was on the particular tract in question, but before it can be deemed work leading to discovery

thereon it must have been such as would reasonably tend to that end, and been presently and purposely designed for that purpose. Now, the drilling of an oil well on one location would not, however long continued, lead to discovery of oil on another. It might afford evidence of the probable existence of oil on the other, and justify the expenditure of money in exploring it. Indeed, it might, by disclosing the formation, materially aid in subsequent drilling, and lessen the expense. This result, however, would follow, whether the well was drilled by the occupant or claimant of the land in controversy, or by a neighbor, and hence I do not think that such work on one location can be held to be work leading to discovery on another. The proviso in the Pickett Act is somewhat indefinite and uncertain; but when interpreted in the light of the known conditions and the purpose of Congress, it was intended, I take it, to confer upon those occupying or claiming in good faith at the time of withdrawal public lands within a withdrawn area, with a bona fide intention of complying with the mining laws, and who were at such time in diligent prosecution of work leading to discovery thereon, the right to continue such work, if discovery was subsequently made, and the right to retain possession and extract the oil, or take title by patent, the same as if the land had not been withdrawn."

The foregoing is, in my opinion, a correct statement of the law, and does not necessarily conflict with either United States v. Grass Creek Oil & Gas Co., 236 Fed. 481, 149 C. C. A. 533, from the Eighth Circuit, or Consolidated Mut. Oil Co. v. United States, 245 Fed. 521, — C. C. A. —, from this circuit. It does not appear in either of these cases that the drilling for oil upon the lands in controversy was at all dependent upon results to be obtained from drilling on another and independent location. If it should be held in this case that the defendant was on the date of the withdrawal in the diligent prosecution of work leading to discovery of oil or gas on some particular quarter section, and it should later develop that no drilling was thereafter done on such location by reason of the fact that it had been fully demonstrated by drilling elsewhere that the land was not oil bearing, we would have this peculiar anomaly: The defendant would be found in the diligent prosecution of work leading to the discovery of oil or gas on a particular location, when as a matter of fact it never did any work leading to that end on that location, and never contemplated any such work except provisionally. For these reasons, as already stated, I am of opinion that there are two sides to the controversy, and that there is a debatable question before the Land Department for its determination.

I fully realize that the granting of an injunction or the appointment of a receiver is ordinarily a harsh remedy, and that such relief will only be granted in a clear case. Every case, however, depends upon its own peculiar circumstances, and the granting or withholding of the relief rests largely in the sound discretion of the court. Whether the relief should be granted or withheld depends upon many circumstances, among them the injury which will result to the defendant by granting the relief and the injury that may result to the plaintiff from withholding it. In the present case, the granting of an injunction against further drilling will not harm the defendant, unless it proposes to exercise that right, and there is nothing in the record to indicate that it intends to do so until the pending controversies are settled. If the appointment of a receiver should result in taking the management of this vast property away from the defendant, I would hesitate

long before taking such drastic action, and in my opinion the record before me would not justify such a course. But the authority of the receiver may be limited, as well as the duration of the receivership, and, if thus limited, little harm or inconvenience will result. Indeed, the proceeds of the oil from the disputed claims are practically impounded at the present time under the contract between the defendant and the Standard Oil Company, and if that contract should continue in force and if the parties should observe its provisions, there would be no necessity for the appointment of a receiver. But, as suggested on the argument, it rests entirely with the parties to that contract whether they continue it in force or abide by its terms. I realize also that there is nothing in the record to indicate that the defendant is insolvent, or in imminent danger of insolvency. In fact, the contrary is clearly shown. However, the life of oil wells is uncertain, assets of corporations may be distributed in dividends and what a few months may bring forth we do not know.

Under the circumstances, therefore, but not without doubt and misgivings, I have concluded to grant the injunction and to appoint a receiver for a limited time and with limited authority only, and to the end that the parties may be able to agree upon the form of decree without the necessity of my returning to California, the injunction granted will operate to restrain further drilling for oil on the claims in dispute, unless such drilling becomes necessary for the protection of the property. In that event leave will be granted upon further application to the court. A receiver will likewise be appointed, but the receiver will in no wise interfere with the present management of the property by the defendant. If in the future mismanagement is shown, which will result to the prejudice of the plaintiff, further authority will be granted to the receiver on his application. Furthermore, I see no reason why there should be any interference with the outstanding contract between the defendant and the Standard Oil Company, or why the receiver should not carry out its provisions. All moneys received, however, will go to the custody of the receiver, and, if deemed necessary, he will be authorized to pay operating expenses and the salaries of officers therefrom, although there seems to be no such provision in the Standard Oil contract. These in general will be the provisions of the decree, and to avoid the expense of an unusually large bond some provision should be made for depositing the moneys that come into the hands of the receiver in bank, with proper restrictions on their withdrawal.

I will only add, in conclusion, that the government must prosecute its protests before the Land Department with diligence, and the court will entertain a motion to terminate the receivership whenever satisfied that such a course is not pursued. Jurisdiction is reserved to make such other and further orders as may be found necessary or proper in the premises. Let a decree be submitted accordingly.

UNION SULPHUR CO. v. REED, Tax Collector, et al.

(District Court, E. D. Louisiana. February 18, 1918.)

No. 15737.

1. LICENSES ⟸1—LICENSE TAXES—WHAT ARE.
Act La. No. 145 of 1916, requiring miners of sulphur to file statements showing the amount mined in the preceding three months, and imposing a tax of 10 cents per ton on that amount for privilege of continuing operations during the ensuing quarter, must be deemed a license tax, as no lien on the sulphur mined is provided for, and the tax can be recovered only by a proceeding in a court of competent general jurisdiction.

2. COURTS ⟸366(6)—FEDERAL COURTS—DECISIONS OF STATE COURTS AS PRECEDENTS.
Decisions by the Louisiana Supreme Court, holding that similar laws were not invalid under Const. La. art. 229, are binding on the federal court, in considering the contention that Act La. No. 145 of 1916 was invalid under the same article.

3. CONSTITUTIONAL LAW ⟸229(1)—EQUAL PROTECTION OF LAW—FOURTEENTH AMENDMENT.
The states may classify the property within their borders and impose unequal taxation, provided the taxes are uniform on all property in each class, without violating the provisions of Const. U. S. Amend. 14.

4. CONSTITUTIONAL LAW ⟸208(3)—MINES AND MINERALS ⟸87—CLASS LEGISLATION—WHAT CONSTITUTES—LICENSES.
That plaintiff was the only person engaged in sulphur mining in Louisiana does not render invalid Act La. No. 145 of 1916.

5. INJUNCTION ⟸152—PLEADINGS—QUESTIONS RAISED.
On final hearing on a bill to enjoin and have declared void an act imposing license taxes, matters not raised by the pleadings cannot be considered.

6. INJUNCTION ⟸85(2)—GROUNDS OF RELIEF—ADEQUATE REMEDY AT LAW.
As a suit in the state court was necessary to enforce Act La. No. 145 of 1916, imposing license taxes on the business of mining sulphur, complainant, which was engaged in that business, had an adequate remedy at law, and was not entitled to enjoin enforcement of the act on the ground that the greater part of the sulphur mined was sold in interstate and foreign commerce.

In Equity. Bill by the Union Sulphur Company against Henry A. Reed, Tax Collector, and others. Bill dismissed, without prejudice to any rights of defendant arising from the fact that its sulphur is sold in interstate commerce.

Howe, Fenner, Spencer & Cocke, of New Orleans, La., Sullivan & Cromwell, of New York City, and Pujo & Williamson of Lake Charles, La., for complainant.

Elias R. Kaufman, of Lake Charles, La., for defendant tax collector.

A. V. Coco, Atty. Gen., for defendant auditor.

FOSTER, District Judge. This is a bill to have declared void, as against plaintiff, Act 145 of 1916 of the General Assembly of Louisiana, and to enjoin the collection of the taxes assessed under its provisions. Plaintiff prays for an injunction pendente lite, but no hearing

has been asked on that issue, and the case is submitted for final hearing on the pleadings and an agreed statement of facts.

Under the said act, at stated times, plaintiff is required to file a statement showing the amount of sulphur mined during the preceding three months, and is then required to pay a tax of 10 cents per ton on that amount for the privilege of continuing operations during the ensuing three months.

It is contended by plaintiff that the tax is a direct tax upon property, and not a license tax, and therefore violates article 225 of the Constitution of Louisiana. Plaintiff further contends that the severing of minerals from its land is an incident of ownership, and, whether the 10-cent tax be considered a direct or a license tax, it violates the equal protection clause of the Fourteenth Amendment of the Constitution of the United States.

Defendants contend that Act 145 of 1916 imposes a license tax upon the business, or occupation, of severing minerals from the soil and is valid under the provisions of article 229 of the Constitution of Louisiana. The question presented is a very close one. Its decision depends upon the peculiar facts of this case and cannot be controlled by any case not based upon practically identical facts.

[1] In Louisiana it is the general law that nearly all occupations and businesses are required to pay a license. The lawyer and the doctor must each pay a license for the privilege of practicing his profession; the merchant pays an ad valorem tax on the stock of merchandise in his store, and is also required to pay a license tax for the privilege of doing business during the ensuing year. This tax is graduated and based on the receipts of the preceding year. Under the provisions of Act 145 of 1916, a license is required of the plaintiff for the privilege of doing business during the ensuing three months and it is based on the amount of sulphur mined during the preceding three months. If the plaintiff should desire to avoid payment of this license, it could do so by ceasing to do business. No lien is imposed on the amount of sulphur previously mined, and no direct seizure of the said sulphur is provided for. If not paid, the tax must be collected in the same manner as all other license taxes. This involves a suit in a court of competent general jurisdiction, either by a summary rule or an ordinary suit. In either event there is an appeal to the Supreme Court of Louisiana. Section 20, Act 171 of 1898; New Orleans v. Penn Mutual Life Insurance Co., 106 La. 31, 30 South. 254; State v. Allgeyer, 110 La. 839, 34 South. 798.

Plaintiff relies particularly on the case of Thompson v. McLeod (decided by the Supreme Court of Mississippi) 112 Miss. 383, 73 South. 193. That case arose under the provisions of chapter 110, Laws of Mississippi of 1912. There is a fundamental difference between that act and the act here in question. Under the Mississippi law the tax purports to be levied on the business of extracting turpentine from standing trees, and while the law classes it as a privilege tax, or occupation fee, no license to do business for the ensuing year is provided for, and the tax is collectable by distraint of the turpentine already manufactured. There is no way for the owner of the turpentine to escape the tax. This apparently is what moved the Mississippi

court to declare the law void. Plaintiff urges that it is impossible for it to stop operations without destroying its mine. This is unfortunate, if true, but does not affect the validity of the tax. It seems to me the tax imposed by the Louisiana law can be properly classed as a license tax.

[2] It is urged by plaintiff that, even if classed as a license tax, it is void under the provisions of article 229 of the Constitution of Louisiana. This contention has been disposed of adversely by the Supreme Court of Louisiana in considering the provisions of similar laws. State v. Stiles, 137 La. 540, 68 South. 947; Standard Oil Company v. Police Jury, 140 La. 42, 72 South. 802. While the federal courts are not bound by decisions of the state courts declaring the nature of the taxation (Olcott v. Supervisors, 16 Wall. 678, 21 L. Ed. 382; Choctaw, etc., Railroad Company v. Harrison, 235 U. S. 292, 35 Sup. Ct. 27, 59 L. Ed. 234), they are bound to follow the decisions of the highest court of the state regarding the constitutionality of its statutes under the state Constitution.

[3, 4] The question raised by plaintiff that the tax is void in any event as violating the Constitution of the United States is easily disposed of. It is well settled that the states may classify the property within the state and impose unequal taxation, provided the taxes are uniform on all property in each class, without violating the provisions of the Fourteenth Amendment of the Constitution of the United States. Bell's Gap R. R. v. Penn., 134 U. S. 232, 10 Sup. Ct. 533, 33 L. Ed. 892. That plaintiff is the only person engaged in sulphur mining in Louisiana does not affect the classification.

[5, 6] It appears from the agreed statement of facts that the greater part of the sulphur mined by plaintiff is sold in interstate and foreign commerce. If such is the fact, it may be that the license tax sought to be imposed is in part invalid. Crew-Levick Co. v. Penn., 245 U. S. 292, 38 Sup. Ct. 126, 62 L. Ed. ——, decided by the Supreme Court of the United States December 10, 1917; State v. Allgeyer, 110 La. 839, 34 South. 798. But this question is not raised by the pleadings, and I am not called upon to decide it. Furthermore, with regard to this the plaintiff has an adequate remedy at law, as the tax collector would be required to file a suit to collect the taxes under the state license law.

The bill will be dismissed, without prejudice to any rights of plaintiff arising from the fact that its sulphur is sold in interstate commerce.

McADAMS et al. v. WELLS FARGO & CO. EXPRESS.

(District Court, E. D. Louisiana. February 19, 1918.)

No. 15816.

INTOXICATING LIQUORS ⊂=138—INTERSTATE TRANSPORTATION—STATUTES.

Under Act March 3, 1917, c. 162, § 5, 39 Stat. 1069, declaring that whoever shall cause intoxicating liquors to be transported in interstate commerce except for scientific purposes, etc., into any state the laws of which prohibit the manufacture or sale therein of intoxicating liquors for beverage purposes shall be punished, it is unlawful for an interstate carrier to transport for beverage purposes intoxicating liquors from without the state into a Texas county which had adopted prohibition, Rev. St. Tex. 1911, art. 5727, declaring the sale, etc., within prohibition territory of intoxicating liquors with intent to violate the law, to be an offense.

In Equity. Bill by J. E. McAdams and others against the Wells Fargo & Co. Express. On application for preliminary injunction. Denied.

E. Howard McCaleb and Edgar Cahn, both of New Orleans, La., for plaintiffs.

Hunter C. Leake and Arthur A. Moreno, both of New Orleans, La., for defendant.

FOSTER, District Judge. This is a bill by a number of liquor dealers, on their own behalf and on behalf of all other persons similarly situated, to enjoin defendant from refusing to transport wines and liquors from points within the state of Louisiana, particularly Monroe and Alexandria, to Texarkana, Bowie county, Tex.

In answer to a rule nisi on an application for a preliminary injunction the defendant shows that an election was held in Bowie county, Tex., on the 5th day of March, A. D. 1910, at which prohibition carried, and that the defendant has been sued for penalties in excess of $300,000 by the district attorney of Bowie county because of the transportation by it of shipments of liquor into said county.

Plaintiffs rely upon the provisions of the law of Texas (Acts 33d Leg. First Called Session, c. 31 [Vernon's Ann. Pen. Code 1916, arts. 606a–606q]), known as the Allison Act, and upon two decisions of the Court of Criminal Appeals of Texas, to wit, Ex parte Peede (Tex. Cr. App.) 170 S. W. 749, and Longmire v. State, 75 Tex. Cr. R. 616, 171 S. W. 1165, Ann. Cas. 1917A, 726, which decisions hold that a shipment of liquor into Texas for personal use and not for sale is not prohibited by the Webb-Kenyon Act (Act March 1, 1913, c. 90, 37 Stat. 699 [U. S. Comp. St. 1916, § 8739]), or any law of Texas. In the brief filed the plaintiffs have modified their original prayer, and ask that the interlocutary injunction issue only to restrain defendant from refusing shipments of liquor intended for personal use and not for sale.

Since the adoption of the Allison Act and the Webb-Kenyon Act, and the rendition of the above-cited decisions, the Congress has seen

fit to enact additional legislation. Section 5 of Act March 3, 1917, c. 162, 39 Stat. 1069, provides:

"* * * Whoever shall order, purchase, or cause intoxicating liquors to be transported in interstate commerce, except for scientific, sacramental, medicinal, and mechanical purposes, into any state or territory the laws of which state or territory prohibit the manufacture or sale therein of intoxicating liquors for beverage purposes shall be punished as aforesaid. * * *"

The law of Texas (R. S. 1911, arts. 5715 to 5730) provide for the holding of local option elections. Article 5727 provides:

"When any such election has been held and has resulted in favor of prohibition, and the aforesaid court has made the order declaring the result, and the order of prohibition, and has caused the same to be published as aforesaid, any person who shall thereafter, within the prescribed bounds of prohibition, sell, exchange, or give away, with the purpose of evading the provisions of this title, any intoxicating liquors whatsoever, or in any way violate any of the provisions of this title, shall be subject to prosecution by information or indictment, and shall be punished as prescribed in the Penal Code."

No question is raised as to the constitutionality of the act of Congress of March 3, 1917, and I anticipate no such contention could be sustained. It is quite evident that Congress, in adopting said act, intended to aid the states in the enforcement of their prohibition laws. A transcript of the proceedings in the holding of the prohibition election in Bowie county and the subsequent promulgation of the result are in evidence and appear to be regular under the Texas statutes. It seems to me the federal law is broad enough to include the interstate carrier, and it is clear that the sale of alcoholic liquor for personal use is prohibited in Bowie county. It may be that Congress builded better than it knew in passing the act of March 3, 1917; but there is no doubt that it prohibits the shipment of liquor in interstate commerce for beverage purposes into the dry parts of the state of Texas wherein the sale of liquor is prohibited by the state law, though intended only for personal use.

The application for a preliminary injunction will be denied.

SEEGMILLER v. DAY.

(Circuit Court of Appeals, Seventh Circuit. January 2, 1918.)

No. 2478.

1. BANKRUPTCY ⊜293(1)—COURTS OF BANKRUPTCY—JURISDICTION OF PLENARY SUITS BY TRUSTEE.

A suit by the trustee of a bankrupt corporation to recover unearned dividends illegally paid to defendant as a stockholder from the capital of the corporation when insolvent, some within four months prior to the bankruptcy and some previous to that time, is within the jurisdiction of a court of bankruptcy, under Bankruptcy Act July 1, 1898, c. 541, §§ 60b, 70e, 30 Stat. 562, 565, as amended, respectively, by Act June 25, 1910, c. 412, § 11, 36 Stat. 842, and Act Feb. 5, 1903, c. 487, § 16, 32 Stat. 800 (Comp. St. 1916, §§ 9644, 9654).

2. BANKRUPTCY ⊜293(4)—SUITS BY TRUSTEE—JURISDICTION—"CONSENT."

The filing of an answer to the merits by the defendant in a plenary action by a trustee brought in a District Court, without objection to the jurisdiction of the court, *held* to amount to a consent to such jurisdiction within Bankruptcy Act, § 23b (Comp. St. 1916, § 9607).

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

3. BANKRUPTCY ⊜145(1)—CORPORATIONS—STATUTORY LIABILITY OF DIRECTORS—ENFORCEMENT BY TRUSTEE.

Under Hurd's Rev. St. Ill. 1915–16, c. 32, § 19, which provides that directors of a corporation, who declare and pay any dividend when the corporation is insolvent, "shall be jointly and severally liable for all debts of such corporation then existing, and for all that shall thereafter be contracted while they shall respectively continue in office," the liability so created is personal to the creditors, one which cannot be invoked by the corporation, does not become an asset of its estate in bankruptcy, and is not enforceable by its trustee.

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

Suit in equity by Edwin C. Day, trustee in bankruptcy of the Chicago Folding Box Company, against Charles H. Seegmiller. Decree for complainant, and defendant appeals. Affirmed in part, and reversed in part.

The trustee of the bankrupt corporation filed a plenary bill in equity against appellant and another, alleging they were directors of the corporation, that while the corporation was insolvent these directors declared and paid dividends in reduction of the capital stock of the corporation, a large amount of which dividends are alleged to have been paid to themselves as dividends upon their own stock: appellant being charged with having so secured $8,232.84 of such dividends prior to four months before the bankruptcy, and $1,156 within such four months. They were also charged with being the holders of certain corporate stock for which they had not paid. The relief in the bill demanded of appellant is "that said pretended dividends be decreed to have been declared in fraud upon the creditors and upon your orator herein, and that the said C. H. Seegmiller be ordered to repay to your orator the $1,156 taken within four months of bankruptcy, and the $8,232.84 taken within one year and a half prior to bankruptcy, and $6,300 as unpaid subscription to the capital stock," and such other relief as the nature of the case may require and the court deem proper. Detailed answer was filed, wherein it was denied that dividends were paid while the company was insolvent, and as to the alleged unpaid stock subscription it was stated that it was paid through a divi-

dend declared and paid on other of appellant's stock, and that if the subscription was not properly so paid appellant is prepared to surrender the stock.

The cause was heard and decree was entered, in which it was found that the evidence sustained the allegations of the bill; that appellant was a stockholder and director, and that while the corporation was insolvent he declared and paid dividends, himself receiving by way of such dividends the sum of $9,046.51; that he was a subscriber to 63 shares, of $100 par value, of the capital stock, for which he had paid nothing; and that by reason of the declaration and payment of dividends in reduction of capital stock appellant became liable under section 19, chapter 32, of the Revised Statutes of Illinois, for all of the debts of the corporation then existing or thereafter created while he remained in office as director, and found the total amount of such debts to be $79,853.72. And the court decreed that the trustee recover from appellant the sum of $9,046.51 as dividends thus improperly received by him, and the further sum of $6,300 for his unpaid stock subscription, and the further sum of $64,507.21 to pay the balance of the debts of the corporation for which he became liable as aforesaid under section 19, chapter 32, of the Revised Statutes of Illinois for his having while a director assented to the declaration of and paid dividends, while the corporation was insolvent. There was a further finding that the trustee recover from the defendants jointly and severally $79,853.72 as the total amount of such debts, which includes the amounts severally found due from each of the defendants and decreed to be paid by them.

William Slack, of Chicago, Ill., for appellant. Adams, Follansbee, Hawley & Shorey, of Chicago, Ill. (Mitchell D. Follansbee and Robert W. Schupp, both of Chicago, Ill., of counsel), for appellee.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

ALSCHULER, Circuit Judge (after stating the facts as above). [1] No other ground for federal jurisdiction appears than such as arises under the Bankruptcy Act, and it is maintained for appellant that the District Court did not have jurisdiction of the action. Section 23b of the Bankruptcy Act, as amended by Act June 25, 1910, c. 412, § 7, provides:

"Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee; might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, except suits for the recovery of property under section sixty, subdivision b; section sixty-seven, subdivision e; and section seventy, subdivision e."

So much of the recovery in the decree as represents what was wrongfully paid to appellant within four months of the bankruptcy was recoverable by the trustee under section 60b, and such of it as represents what he so received prior to the four months' period was recoverable under section 70e, both of which sections are excepted from the operation of the quoted section. Both section 60b and section 70e provide that in actions brought thereunder the bankruptcy court shall have concurrent jurisdiction with state court.

[2] But as to these items of the recovery, as well as that of the unpaid stock subscription, we are of opinion that, under the circumstances here appearing, that part of section 23b providing for jurisdiction of the bankrupt court through the consent of the proposed defendant is here effective to confer jurisdiction on the federal court. As to these items the bill fully informed appellant, and he filed full and specific answer to these charges, without suggestion of objection on his part to the jurisdiction of the bankruptcy court to hear and de-

termine those issues. The record disclosing no objection to the jurisdiction, but, on the contrary, showing active participation by appellant through full answer upon the merits, appellant's consent to the jurisdiction of the District Court, so far as his consent may have been necessary, thus sufficiently appears.

[3] Respecting that part of the decree against appellant which is predicated upon his alleged liability for the corporation's debts through declaring and paying dividends while the corporation was insolvent, a different question is presented. If, notwithstanding appellant's very plausible contention that recovery for corporate debts under the provisions of section 19, chapter 32, is wholly without and beyond the scope and purpose of the action, it be assumed that the bill is sufficient in this respect to sustain that part of the decree predicated thereon; and if it be further assumed, contrary to appellant's earnest insistence, that as to this subject-matter the jurisdiction of the bankruptcy court may be and was conferred by consent of appellant as provided in section 23b, yet is this liability in any event one to which the trustee succeeded, and enforceable by him? It arises solely under the Illinois statute, which is:

"If the directors or other officers or agents of any stock corporation shall declare and pay any dividend when such corporation is insolvent, or any dividend the payment of which would render it insolvent, or which would diminish the amount of its capital stock, all directors, officers or agents assenting thereto shall be jointly and severally liable for all the debts of such corporation then existing, and for all that shall thereafter be contracted, while they shall respectively continue in office."

Many of the states have statutes more or less similar, but it seems most of them have provisions limiting the gross liability for such transgression of the directors to the amount of dividends so declared and paid. In some the statute gives the right of action to the corporation and to its creditors. In others, as in Illinois, it is not stated to whom the right of action is given, except as this must be inferred from the provision itself. The adjudications on such statutes are singularly few, and on the Illinois statute we find practically none. Thompson, Corporations (2d Ed.) § 1372, says:

"Under these statutes almost without exception the liability imposed is to the creditor. * * * Under all such statutes it is a self-evident proposition that the party in whose favor the liability is imposed has the right of action to enforce it. * * * Whether a receiver can maintain an action, must depend in the main on the terms of the particular statute. If the statute makes the penalty a debt due to the corporation for a breach of duty on the part of the directors toward the corporation, then it is clear that the receiver who succeeds to the right of the corporation can maintain the action. The real test as to this right to sue, would probably depend on the question whether the penalty is made by the statute a part of the corporate assets, which it is the duty of the receiver to collect and distribute ratably among all the creditors, or whether the penalty is made a debt due from the directors jointly or severally to any creditor of the corporation."

And in section 1369:

"Where the directors are made jointly and severally liable such liability is not an asset of the corporation to be collected and marshaled between the creditors."

In 1 Loveland, Bankruptcy, it is stated (section 393):

"The right to enforce a statutory liability against an officer, director, or stockholder of a bankrupt corporation does not pass to its trustee in bankruptcy. The trustee is not entitled to maintain a suit to enforce such liability in a state or federal court. The reason for this is that such liability is not a part of the estate of the corporation. By virtue of statutes of this character the officers, directors, or stockholders, or some of them, become, as it were, sureties for the debts of the corporation to the extent provided by the statute. It is in the nature of a security to which a creditor may resort if the corporation does not pay its debts. The corporation could not enforce this liability."

Remington, Bankruptcy (2d Ed.) § 478, says:

"A statutory secondary liability of directors and stockholders is not an asset of the corporation; and such liability is not enforceable by the trustee in bankruptcy."

The words of the statute "jointly and severally liable for all of the debts of such corporation" clearly imply a liability to the creditors to whom such debts are owing. Similar words in the Vermont statute were so construed in Hilliard v. Lyman et al. (C. C.) 138 Fed. 469, where the court said:

"The liability for a debt must be a liability to the creditor, and the avails of the liability would not be assets of the corporation."

And its following further language is even more applicable to the Illinois statute than that of Vermont:

"There is no limit to liability upwards, but it extends as far as the assent goes; and no creditor would have any right to or interest in any recovery by another, as there would or might be if there was a limit to the amount that could be recovered by all. Each creditor must recover only upon the assent of each director to the indebtedness to him in excess, and what is so recovered belongs to that creditor only, and there could be no marshaling between these more than between any creditors of a common debtor."

In the earlier case of In re Crystal Spring Bottling Co. (D. C.) 96 Fed. 945, that same court, referring to the statutory liability of directors for corporate debts, said:

"The creditor is not obliged to exhaust that remedy; nor has the corporation, or the trustee of it in bankruptcy, any right to pursue it. It is not an asset of the corporation, but security for the creditors, who may follow it or not, at their pleasure, with all other securities, till they are paid in full."

In Re Beachy & Co. (D. C.) 170 Fed. 825, the court, commenting on the Illinois statute making directors liable for consenting to indebtedness beyond the capital stock, said:

"It seems clear, therefore, that this statutory cause of action belongs exclusively to the creditors. It is a secondary security which is not an asset of the estate and does not pass to the trustee. Such a claim may be enforced by the creditor in any court having jurisdiction, quite independently of the bankruptcy proceedings."

Where the conditions prescribed by the Illinois statute are present unlimited liability is created in favor of the creditor and against the director. There is not as under some other statutes a fund provided for wherein all the creditors may ratably participate, and in which all therefore have an interest. Each creditor may of his own volition

assert or refrain from asserting the liability, and against the creditor asserting it the director may make defense peculiar to such creditor, and perhaps to none others—possibly waiver, perhaps estoppel, maybe set-off. We are of opinion that the liability created under this statute is personal to the creditors, one which could not be invoked by the corporation, did not become an asset of the bankrupt estate, and is not enforceable by the trustee.

Without prejudice to the right of any creditor to pursue his remedy under section 19, the decree, in so far as it finds and imposes liability thereunder for the debts of the corporation, is reversed, and in the other respects, viz. as to the liability for dividends declared and paid to the defendants in the action, and liability for unpaid stock subscriptions, it is affirmed. Appellant is awarded costs of the appeal.

KNOTTS v. CLARK CONST. CO.

(Circuit Court of Appeals, Seventh Circuit. November 9, 1917. On Petition for Rehearing, January 2, 1918.)

No. 2358.

1. CONTRACTS ⊜313(2)—BUILDING CONTRACT—ACTION FOR BREACH—RENUNCIATION BY OWNER.
   The refusal of the owner to pay a building contractor on the monthly estimate of the architect as required by the contract, and his subsequent action in preventing the architect from giving further certificates, amounted to a renunciation of the contract, which justified its abandonment by the contractor and entitled him to recover damages for its breach.
2. DAMAGES ⊜124(3)—MEASURE—BREACH OF BUILDING CONTRACT BY OWNER.
   Where a building contractor was prevented from completing performance of the contract by the refusal of the owner to make agreed monthly payments as the work progressed, and the contract was single, specifying no fixed amounts for specific materials or labor, but only the price for the entire job, the minimum measure of damages for its breach is the outlay reasonably incurred by the contractor in the course of its due performance, and this is recoverable, without regard to whether or not there would have been a profit on full performance.

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

Action at law by the Clark Construction Company against Armanis F. Knotts. Judgment for plaintiff and defendant brings error. Affirmed.

W. J. Whinery, of Hammond, Ind., for plaintiff in error.

Sidney Stein, of Chicago, Ill., for defendant in error.

Before KOHLSAAT, MACK, and ALSCHULER, Circuit Judges.

MACK, Circuit Judge. While several counts were filed in this action, counsel agree that, the common counts and another count on the contract having been expressly abandoned, the trial proceeded on the amended first additional count. In this count plaintiff alleged the execution of a written contract to furnish the material and labor

for the construction of certain store and office buildings in Gary, Ind., to be completed by April 15, 1907, in accordance with plans and specifications made a part of the contract, for the consideration of $56,500, payable in monthly installments as the work progressed, with a right on the part of the defendant to retain 15 per cent. to secure the performance; payments to be made on the architect's certificate. It further averred waiver of the time requirement for completion; the issuance of an architect's certificate for $2,500 in April; the refusal of payment thereof; the demand for additional certificates in May, June, and July; defendant's direction to the architect to refuse them and his consequent refusal; the performance of work and delivery of material both before and after the delivery of the architect's certificate for $2,500; defendant's refusal to pay either the one certificate or any sum for the work performed and material furnished pursuant to the contract and amounting to over $13,000; plaintiff's abandonment of the work because of defendant's refusal to pay and the arbitrary and fraudulent act of the architect in the refusal of certificates; the sale by plaintiff of material on hand for $1,200, with a loss of $5,000; and defendant's further failure to pay any part of the moneys to plaintiff's damage in the sum of $25,000. The conflicting evidence was resolved by the jury in favor of the plaintiff. It found against the defendant on his claim of set-off, and returned a verdict of $10,000 in favor of the plaintiff. To reverse the judgment rendered thereon, defendant sued out a writ of error.

[1] 1. The cause of action as alleged in this count is for recovery of the sums expended under and pursuant to the contract as the damages alleged to have been sustained by reason of defendant's breach. This breach is alleged to have consisted in the refusal to pay the architect's certificate, and in the further refusal to pay for the work monthly as it progressed; the securing of an architect's certificate, condition precedent to the obligation so to pay, having, under the allegations, been waived by reason of the fraudulent and arbitrary action of the architect in refusing to give the certificate because of defendant's alleged direction to him so to act.

While the count does not state that the moneys so expended were the reasonable outlays of the plaintiff in the performance of the contract, the omission of this allegation could not be taken advantage of on motion in arrest of judgment or on writ of error. Any defect in this respect was cured by the verdict. The declaration furthermore states sufficient grounds for plaintiff's abandonment of the contract. Persistent refusal to pay installments due under a building contract, under the circumstances alleged in this declaration, amount to a renunciation on the part of the owner and justified abandonment of further performance; for obstruction to performance need not be physical. Actions such as those alleged are just as effective in absolving the other party from any further readiness or offer to perform as a condition to the enforcement of the liability to answer for the damages sustained by reason of the breach. Phillips & Colby Construction Co. v. Seymour, 91 U. S. 646, 23 L. Ed. 341; Dobbins v. Higgins, 78 Ill. 440; Keeler v. Clifford, 165 Ill. 544, 46 N. E. 248; National Tool Co. v. Standard Shoe Machinery Co., 181 Mass. 275, 63 N. E. 900.

For reasons more fully stated in considering the measure of damages, the declaration in our judgment states a good cause of action.

[2] 2. The vital question in this case is that of the measure of damages. Defendant contends, as stated by counsel in his supplementary brief:

"The claim in the case at bar is limited to compensation for the work actually done in an effort to carry out the contract. This work can only be measured by the contract price, and any other value regarding it is wholly immaterial. The contract provides no special price covering the alleged work and material furnished under the contract in the case at bar. Therefore its value could only be determined from evidence showing what work and material had been furnished, and what it would cost to complete the building; in other words, evidence from which the value of the labor and material done and furnished could be determined, as based upon the contract price."

The parties are agreed that the contract is single. While payments were to be made monthly as the work progressed, the contract itself furnished no basis for the separate items entering into the work. We need not, therefore, consider what the true measure of damages would be after such a breach, if the contract were divisible, or if a schedule of prices to be paid for each article forming part of the subject-matter were specified in the contract itself. But defendant's deduction, that in a contract such as this plaintiff can recover only the profit, if any, that he has been prevented from earning by reason of the breach, is contrary both to principle and to authority.

A substantial breach during the progress of the work justifying the abandonment by the other party gives rise either to an action for the damages sustained through the breach or to a quantum meruit. If the latter form be pursued, the measure of damages is the fair value of the work and labor performed and the materials furnished, with a conflict in the authorities as to whether or not schedule prices when specified in the contract should limit the recovery. But if a plaintiff not in default—and one who is justified in abandoning further work is not thereby in default—sues for the breach of the contract, he may, at his option, specify and claim as his damages either the profit which he has thus been prevented from earning or his actual outlays reasonably made in the performance of the contract plus the profits, if any, which he would have made if he had not been prevented from continuing to perform the contract.

It may well be that ordinarily there is no, or no substantial, difference in the result, because, ordinarily, an owner does not prevent further performance of a contract the carrying out of which would be unprofitable to the contractor. It may, however, happen, as defendant in the instant case claims, that such prevention is to the contractor's benefit, that if he had been permitted to carry out his contract his loss on the whole job would have equaled or exceeded the outlays made up to the time of the owner's breach, so that, if the sole specification of damages were the loss of profits, and the proof established no such loss, but, on the contrary, a gain, the plaintiff would get only nominal damages.

If, however, plaintiff specifies as his damages the outlays actually and reasonably incurred either with or, as in the instant case, without

a further claim for loss of prospective profits, he will not be deprived of reimbursement for these reasonable outlays because he does not prove the profit, or because defendant could establish that, if he had been permitted to finish the work, the net result would have been a loss equal to or greater than the outlays. This principle is clearly enunciated in United States v. Behan, 110 U. S. 338, 4 Sup. Ct. 81, 28 L. Ed. 168, and the same result is reached in Lodder v. Slowey, 1904, A. C. 442, affirming 20 New Zealand L. R. 321, and Philadelphia v. Tripple, 230 Pa. 480, 79 Atl. 703. See Doolittle v. McCullough, 12 Ohio St. 360. See, however, Wellston Coal Co. v. Franklin Paper Co., 57 Ohio St. 182, 48 N. E. 888, and Kehoe v. Mayor of Rutherford, 56 N. J. Law, 23, 27 Atl. 912.

3. While the evidence was conflicting, clearly there was sufficient to sustain the averments of the declaration. We deem it unnecessary to consider in detail the numerous assignments of error. While some evidence may have been improperly admitted, the error resulting therefrom was, in our judgment, entirely harmless. The testimony of the statements of the architect as to the statements made to him by the owner, while not admissible as evidence that the owner made the statements, were nevertheless admissible as statements of the reason that governed the architect's wrongful action.

Judgment affirmed.

On Petition for Rehearing.

PER CURIAM. In the petition for rehearing, it is again strongly urged that at best only the proportionate value of work done, in its relation to the entire work and on the basis of the entire contract price, can be recovered. To give the contractor his outlays reasonably incurred, might, it is urged, enable him in some cases to recover more than the entire contract price for an incomplete job.

As to whether or not the contract price is the maximum that in any event could be recovered, we express no opinion, because the facts in the case before us require none; and for the same reason, we express no opinion as to the proper measure of damages if a contract specifies fixed amounts for specific materials or labor, or provides for definite payments at successive times or stages of the work, deemed by the parties, either expressly or impliedly, as full compensation for so much as shall then have been completed, nor where, as is not here the case, the work has so far progressed that it is practicable to determine with reasonable definiteness what proportion of the entire work contracted for remains undone. Here the price of $56,500 was for the entire job; payments were to be made as the work progressed, but the contract fixes no basis for the amounts to be paid. After the foundation had been laid and considerable material delivered, defendant wrongfully stopped further work. We held that under these circumstances, the minimum measure of damages, whatever the form of action, is the outlay reasonably incurred in the course of due performance of the obligation.

The petition for rehearing is denied.

HORTON v. MENDELSOHN et al.

(Circuit Court of Appeals, Third Circuit. April 3, 1918.)

No. 2315.

BANKRUPTCY ⟸440—APPEAL—JURISDICTION OF COURT OF APPEALS.

Neither under Bankruptcy Act July 1, 1898, c. 541, § 24a, 30 Stat. 553 (Comp. St. 1916, § 9608), nor section 25a (Comp. St. 1916, § 9609), has the Circuit Court of Appeals jurisdiction to review on appeal an order of the bankruptcy court concerning the commitment of a bankrupt for contempt for not complying with an order to turn over to his trustee property belonging to the bankrupt estate, but that question is reviewable only by petition to revise under section 24b.

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

In the matter of the Bankruptcy of Moses Mendelsohn and Samuel Mendelsohn, as individuals and copartners trading as Mendelsohn Bros. A rule issued, on petition of Charles H. Horton, trustee, requiring the bankrupts to show cause why they should not be attached for contempt for failure to comply with an order directing them to turn over to their trustee funds found to have been concealed, was discharged, and the trustee appeals. Dismissed.

Lee P. Stark and George D. Taylor, both of Scranton, Pa., for appellant.

R. L. Levy and H. W. Mumford, both of Scranton, Pa., and E. H. Delaney, for appellees.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. On petition charging the bankrupts with concealing from the trustee property belonging to the bankrupt estate, the referee, after hearing, found that the bankrupts had retained and concealed $2,168.21, and, accordingly, entered an order directing them to turn over that sum to the trustee. Upon their failure to comply with the order, the trustee obtained a rule on the bankrupts to show cause why they should not be attached for contempt. The court, after hearing, discharged the rule. The trustee appealed.

The questions raised on appeal are in the main questions of fact as distinguished from matters of law. They arise from the fact that the bankrupts filed in the contempt proceeding the same answer in substance that they had filed in the turnover proceeding, and supported it in part by the same testimony. This was, that they had no money to conceal in the first instance, and, therefore, in the second instance, they had no money to turn over. The trustee maintains that while this defence was appropriate to the turnover proceeding, it was there adjudged against the bankrupts and finally disposed of, and, therefore, it could not be employed as a defence in a contempt proceeding where the issue only concerned the bankrupts' present ability to pay the money which the court had previously decided the bank-

rupts had. Stated differently, the trustee maintains, that on authority of In re Epstein (D. C.) 206 Fed. 568, and 210 Fed. 236, 127 C. C. A. 54, the turnover order was a final adjudication that the bankrupts had money and had concealed it, and that that adjudication concluded the court as well as the bankrupts as to that fact. But the trustee complains, that the court did not so regard the turnover order, but, in effect, set it aside by considering again the defence there made and by accepting the evidence there produced as evidence of the bankrupts' present inability to comply with the turnover order.

The single question whether in the contempt proceeding the trial judge disregarded the legal force of the final order in the turnover proceeding by opening the question of the bankrupts' possession and concealment of property and applying the evidence on that issue to the issue in the contempt proceeding affecting the bankrupts' present ability to turn over the money ordered—contrary to the rule In re Epstein—is a matter of law which the trustee might properly have raised by petition to review and revise (although it is perfectly clear from expressions in his order, quoted literally from the opinion of In re Epstein, that the trial judge had that decision before him, and, in an attempt to follow it, treated "as settled beyond further controversy" the fact that the bankrupts did have money and did conceal it, and that all he intended to decide in the contempt proceeding was the question whether the bankrupts were "merely defying the order" or were "really unable to obey" it). But the case is not before this court on petition to review and revise the court's order in a matter of law. It is here on appeal, charging error to the court, not only in disregarding the legal force of the turnover order, but in deciding matters of fact, which involve evidential inferences, competency of witnesses to give certain testimony, and generally the sufficiency of the evidence to sustain the court's order discharging the rule. Our first, and indeed, our final, inquiry in this case is whether this court has jurisdiction on appeal to review this contempt proceeding.

The appellate jurisdiction of Circuit Courts of Appeals over controversies arising in bankruptcy proceedings is conferred, of course, by the Bankruptcy Act. Judicial Code (Act March 3, 1911, c. 231) § 130, 36 Stat. 1134 (Comp. St. 1916, § 1122). We find nothing in the Act which confers appellate jurisdiction upon this court over a controversy of this kind. Such jurisdiction certainly is not conferred by section 25a; nor is it conferred by section 24a, where, as here, the question determined by the order of the bankruptcy court is between the bankrupt and his creditors and is of an administrative character. In re Mueller, 135 Fed. 711, 68 C. C. A. 349, cited and approved In the Matter of the Petition of Loving, Trustee, 224 U. S. 183, 32 Sup. Ct. 446, 56 L. Ed. 725. All Circuit Courts of Appeals in which the question has arisen have held, so far as we are informed, that an order of a court of bankruptcy concerning the commitment of a bankrupt for contempt for not complying with an order to turn over to his trustee property belonging to the bankrupt estate is reviewable only by petition to revise under section 24b. The cases are cited and considered in Kirsner v. Taliaferro, 202 Fed. 51, 54, 55, 126 C. C. A. 305.

We are of opinion that a question of the propriety of an order of the court of bankruptcy, committing or refusing to commit a bankrupt for contempt in failing to obey an order to turn over property to the trustee, is not within the appellate jurisdiction of this court, and, therefore, we direct that the appeal be dismissed.

In re WALLER.

NATIONAL CITY BANK OF CHICAGO v. WALLER.

(Circuit Court of Appeals, Seventh Circuit. January 2, 1918.)

No. 2499.

BANKRUPTCY ⊂=410—DISCHARGE—ENLARGEMENT OF TIME FOR FILING APPLICATION.

Under Bankruptcy Act July 1, 1898, c. 541, § 14a, 30 Stat. 550 (Comp. St. 1916, § 9598), which authorizes the judge to enlarge the time for filing an application for discharge, when it is made to appear that the bankrupt was unavoidably prevented from filing it within the year prescribed, a motion for such enlargement is addressed to the reasonable discretion of the court, and it is sufficient to sustain an order granting the same that bankrupt relied on his attorney, who promised to file the application within the year, but that he became ill three months before the expiration of the year, and at that time was in a sanitarium, and that bankrupt did not know that application had not been filed.

Petition for Revision of Proceedings of the District Court of the United States for the Northern District of Illinois; George A. Carpenter, Judge.

In the matter of Edward C. Waller, Jr., bankrupt. On petition of the National City Bank of Chicago to review an order permitting bankrupt to file application for discharge after the expiration of a year from the adjudication. Petition denied.

Adjudication in bankruptcy was had in this cause on April 5, 1916. No application for discharge was filed within the period of 12 months subsequent to adjudication. On April 20, 1917, 12 days after the expiration of the 12 months' period, the District Court entered an order allowing the bankrupt to file instanter his petition for discharge, which he did. Afterwards, and on May 19, 1917, the bankrupt filed, nunc pro tunc as of April 20, 1917, his further verified petition for leave to file his petition for discharge, setting out the grounds. From that petition it appears that bankrupt instructed his attorney to procure his discharge as soon as it could be done, and relied wholly upon the attorney to secure it; that from time to time he consulted his attorney on the matter, and was assured by him that he would attend to the matter; that for the 3 months next preceding the last day for filing his application for discharge his said attorney was sick, and for about a month of that time in a sanitarium at Battle Creek, Mich.; that owing to the situation, and to the bankrupt's reliance upon his attorney's promises aforesaid, together with the attorney's said illness, the bankrupt was unavoidably prevented from filing his petition for discharge within the statutory period. The petition thereupon prays for an extension of time to file the same. No new order was entered after the filing of the nunc pro tunc petition. The order extending the time and granting leave to file his application was entered without notice to any one.

From the petition to review and revise it appears that at the time adjudication was had there was pending in the superior court of Cook county, Ill., a suit brought by the petitioner herein against said bankrupt, in which the summons had been duly served, which was suspended by the filing of his voluntary petition in bankruptcy; that after the lapse of the 12 months succeeding his adjudication as a bankrupt, and on April 16, 1917, plaintiff in that case, petitioner herein, proceeded to judgment in said cause by default, for the sum of $5,555.15. Thereafter, when the bankrupt sought to ascertain why judgment was entered notwithstanding the bankruptcy proceedings, he was advised by petitioner's attorney that his (Waller's) time in which to file his application for discharge had expired. On April 20, 1917, the bankrupt advised the attorney for the petitioner of the order obtained that day for an extension of time to file his application. The petition herein to review sets out, further, that on April 30, 1917, the petitioner presented to the District Court its motion to vacate the order entered on April 20, 1917, extending the time to apply for discharge and granting other relief, together with an affidavit in support thereof, which motion was duly postponed to May 12, 1917, and on that date denied; that the notices, petitions, motions, and orders are all the motions, petitions, notices, steps, papers, and orders filed in said cause having any bearing on or pertaining to said petition for discharge. This affidavit purports to enumerate what evidence was before the court on the hearing of the motion to vacate.

The petition herein is brought to review and revise the order of May 12, 1917, overruling and denying said motion to vacate.

G. L. Wire, of Chicago, Ill., for petitioner.

John A. Bloomingston, of Chicago, Ill., for respondent.

Before KOHLSAAT, ALSCHULER, and EVANS, Circuit Judges.

KOHLSAAT, Circuit Judge (after stating the facts as above). We are unable to find from the petition herein that all the matters which were before the District Court have been here produced. Moreover, we are of the opinion that the order of the District Court should stand for other reasons. Section 14a of the Bankruptcy Act here involved reads as follows:

"Any person may, after the expiration of one month and within the next twelve months subsequent to being adjudged a bankrupt, file an application for a discharge in the court of bankruptcy in which the proceedings are pending; if it shall be made to appear to the judge that the bankrupt was unavoidably prevented from filing it within such time, it may be filed within but not after the expiration of the next six months."

The motion to enlarge the time to file the application for discharge at any time before the expiration of the 18 months' period is one addressed to the reasonable discretion of the court. In re Fritz (D. C.) 173 Fed. 560; In re Chase (D. C.) 186 Fed. 408; In re Churchill (D. C.) 197 Fed. 111; In re Swain (D. C.) 243 Fed. 781.

In the present case we are unable to say that the District Judge abused that discretion or exceeded his powers. The Bankruptcy Act was passed, among other things, to ameliorate the condition of certain debtors and for a benevolent purpose, and should not be harshly construed. In the case at bar it was not obligatory upon the bankrupt or his attorney to have made application for a discharge at some time prior to the last three months of the year succeeding the adjudication in order to escape the charge of negligence. He is chargeable

with only reasonable diligence in that respect, and might well assume that the application for discharge could be safely left till towards the end of the 12 months' period, and may claim the benefit of such unavoidable causes as excuse the failure to apply for discharge within the 12 months arising at any time prior to the expiration of the 12 months' period succeeding adjudication. The rule is well stated by Judge Geiger in In re Churchill, supra.

The motion to review and revise is denied.

GEALEY v. SOUTH SIDE TRUST CO.

In re NATIONAL HOG CO.

(Circuit Court of Appeals, Third Circuit. February 1, 1918.)

No. 2328.

1. BANKRUPTCY ⟸144—DEFECTIVE PROCEEDINGS—APPOINTMENT OF RECEIVER—EFFECT.

Where a receiver is appointed by a state court, and a petition in bankruptcy is subsequently filed, the proceedings in bankruptcy supersede those in the state court, yet as the receiver appointed by the state court is an officer of court, and the property in his hands is in custodia legis, he has no power to make surrender, but such surrender must be directed by the state court, and both it and the court of bankruptcy should be governed by the principles of comity.

2. BANKRUPTCY ⟸117(1)—PROCEEDINGS—SALES.

Where, as there were no funds to feed a herd of hogs belonging to the bankrupt and to conserve them, they were disposed of by the receiver, persons asserting claims to the hogs may be allowed to assert them against the moneys so realized.

On Petition to Revise an Order of the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

In the matter of the bankruptcy of the National Hog Company. Petition by T. M. Gealey, a receiver appointed by the state court to revise orders in favor of the South Side Trust Company, receiver in bankruptcy. Petition to revise dismissed.

Robert B. Ivory, of Pittsburgh, Pa., for petitioner.

Charles A. Woods and L. M. Alpern, both of Pittsburgh, Pa., for respondent.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. Stripped of all incidentals, this petition to revise finally narrows, first, to the question of the right of the District Court to appoint a receiver for the corporation against which a petition in bankruptcy was filed; and, secondly, whether such receiver was warranted in taking possession of a herd of hogs belonging to said company, which prior to the filing of said bankruptcy had

been seized by a receiver for said corporation, appointed by a state court.

[1] Without here reciting the several acts of the receivers of both courts and the differences between them which might have resulted in creating an unseemly conflict between the courts, whose officers they were, it suffices to say the state court, when the matter was called to its attention, properly announced the principle of jurisdictional control in such cases by quoting, with slight changes to fit the present case, the language of Chief Justice Fuller of the Supreme Court, in Re Watts, 190 U. S. 1, 23 Sup. Ct. 718, 47 L. Ed. 933, as follows:

"The proceedings in bankruptcy superseded further proceedings in the state court, but the receiver had no power to make a surrender. He was the representative of the state court. The property in his hands was in custodia legis and he had only such authority as was given him by the state court. It remained for the state court to transfer the assets, settle the account of its receiver, and close its connection with the matter. He also said: 'Necessarily, when like proceedings in the state courts are determined by the commencement of proceedings in bankruptcy, care has to be taken to avoid collision in respect of property in possession of the state courts. Such cases are not cases * * * of pre-existing liens or in aid of the bankruptcy proceedings. The general rule as between courts of concurrent jurisdiction is that property already in possession of the receiver of one court cannot rightfully be taken from him, without the court's consent, by the receiver of another court appointed in a subsequent suit; but that rule can have only a qualified application, where winding up proceedings are superseded by those in bankruptcy, as to which the jurisdiction is not concurrent. Still it obtains as a rule of comity. * * *"

The decision of the Supreme Court of the United States above referred to, of course, establishes the paramount jurisdiction of the District Court in bankruptcy in the present case; so its orders in the premises must stand. It also justifies the continued possession by that court of the hogs which the receiver obtained, and as they have since, by its order, been sold, it would be of no present avail to discuss the steps by which, without resort to the state court, the receiver obtained possession—steps which led the state court to add to what is above quoted the statement:

"Had it been recognized that frantic haste on the part of counsel was not necessary to protect the property, this unseemly conflict could have been avoided."

We are urged to lay down some rule of procedure in such cases hereafter. In the nature of things, this cannot be done farther than to call attention, as Chief Justice Fuller did in the case cited, to the fact that, although the paramount jurisdiction and the right of possession is in the District Court, yet, the goods of the bankrupt being already in possession of another court, there still exists, in the necessary change of possession, the rule of comity between courts, the application of which must, in the final analysis, be left to the good sense and considerate conduct of those controlling such comity-related courts.

[2] It has further been contended that certain stockholders of the National Hog Company had rights or claims to some of the hogs in the herd, and that their rights have been denied them by the seizure and sale of the herd. It is proper for us to add that it is quite apparent

that there was a pressing necessity to very promptly sell this herd, as there were no funds with which to feed the hogs. But the substitution of the purchase money for the herd in no way changes the rights of litigants, and, if any stockholders of the company had any rights, claims, or property in any of the hogs, it is certainly in the power, and we doubt not will be the wish, of the court below, if it be shown such rights exist, by proper proceedings and order to afford such persons an opportunity to litigate and establish their several rights.

Finding no reversible error in the orders made by the court below, the petition to revise is dismissed.

VOVES v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. March 5, 1918.)

No. 2536.

CRIMINAL LAW ⊜37—SALE OF LIQUOR TO INDIANS—OFFENSES—USE OF DECOY.

The selling of liquor to an Indian, in violation of Rev. St. § 2139 (Comp. St. 1916, § 4136a), and Act Jan. 30, 1897, c. 109, § 1, 29 Stat. 506 (Comp. St. 1916, § 4137), is an offense malum prohibitum, of which the intent or knowledge of the seller is not an element, and is immaterial; but the government cannot maintain an indictment for such offense, when by its own conduct, through its agents, it misled the defendant into believing that the act was lawful, as that the purchaser was not an Indian, but a Mexican.

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

Criminal prosecution by the United States against John M. Voves. Judgment of conviction, and defendant brings error. Reversed.

Arthur T. Holmes, of La Crosse, Wis., for plaintiff in error.

Arthur C. Wolfe, of La Crosse, Wis., for the United States.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

BAKER, Circuit Judge. Voves was convicted of selling liquor to an Indian in violation of section 2139, R. S. U. S. (29 Stat. 506). This offense is malum prohibitum; a criminal or wicked intent is not an element; and as the statute does not contain the word "knowingly," or other of like import, the seller's belief that the purchaser was not an Indian is immaterial. That the seller voluntarily made the sale is sufficient. Feeley v. United States, 236 Fed. 906, 150 C. C. A. 165.

In the present case there was testimony which the jury might have accepted as establishing the following facts: Voves had not been selling or giving liquor to Indians; the government agents had no reason to suspect that he had been or would; Mexican railroad laborers had recently moved into the neighborhood; the Indian in question looked like a Mexican; he was a government decoy; he wore a black suit, white soft shirt, and black slouch hat; he came in and asked for

liquor; Voves believed he was a Mexican; shortly he was followed by two white men, government detectives; as Voves was about to pass liquor to the decoy, one detective said to the other within the hearing of Voves, "I didn't know Indians were allowed to get whisky here;" whereupon Voves turned to them and said, "Why that man is a Mexican," and none of the three said a word in denial; they stood by while Voves made the sale on which the indictment was predicated. By exceptions to the charge the question is presented: Is the general rule, which is stated in the opening paragraph, of universal application?

Grant that the government may use a decoy to discover evidence of a committed crime of whatever nature; that, where one has the intent to commit a malum in se, or the willingness to do a malum prohibitum, a decoy may accompany the wrongdoer and even participate in the offense; that a liquor seller is guilty, despite his honest and reasonable belief respecting the age or race of the purchaser; and even that he must take his chance that a purchaser, who is not a government decoy, may willfully deceive him by camouflage—still the question remains: May the government maintain an indictment against a person for doing a malum prohibitum when the government's conduct has misled the person into believing that the prohibited act was a lawful act?

In a civil transaction between citizens such conduct as the jury might have found in this case would create an estoppel which would preclude a suit based upon the suppressed truth. Is our government of the superman type that releases the ruler from the obligations of honesty and fairness that are imposed upon the citizens? Is one's liberty or reputation as a law-abider to have less protection than his property? We are strongly of the view that sound public policy estops the government from asserting that an act which involves no criminal intent was voluntarily done when it originated in and was caused by the government agents' deception. United States v. Healy (D. C.) 202 Fed. 349. And on the subject of decoys generally, see Blaikie v. Linton, 18 Scottish L. R. 583; Woo Wai v. United States, 223 Fed. 412, 137 C. C. A. 604; Sam Yick v. United States, 240 Fed. 60, 153 C. C. A. 96; Grimm v. United States, 156 U. S. 604, 15 Sup. Ct. 470, 39 L. Ed. 550; Goode v. United States, 159 U. S. 663, 16 Sup. Ct. 136, 40 L. Ed. 297; Rosen v. United States, 161 U. S. 29, 16 Sup. Ct. 434, 480, 40 L. Ed. 606; Andrews v. United States, 162 U. S. 420, 16 Sup. Ct. 798, 40 L. Ed. 1023; Price v. United States, 165 U. S. 311, 17 Sup. Ct. 366, 41 L. Ed. 727; Scott v. United States, 172 U. S. 343, 19 Sup. Ct. 209, 43 L. Ed. 471; Goldman v. United States, 220 Fed. 57, 135 C. C. A. 625.

Judgment reversed, with direction to grant a new trial.

FALLER v. BOISOT et al.

BOISOT v. FALLER et al.

(Circuit Court of Appeals, Fifth Circuit. January 24, 1918. Rehearing Denied March 11, 1918.)

No. 3161.

STREET RAILROADS ⊂=55—FRANCHISE—OBLIGATION TO PAVE—ENFORCEMENT AGAINST MORTGAGEE.

Where a street railway company constructed its lines under a franchise ordinance, which required it, whenever a street upon which its road was operated should be paved, to put down similar pavement between and alongside its tracks, a mortgage subsequently given by the company on its property and franchise is subject to such obligation, and in a suit for its foreclosure, in which the court has taken possession of the property by a receiver, the city may intervene and obtain enforcement of the condition against the receiver. Such case is not one of assessment of benefits, but of enforcement of a contract right.

Appeals from the District Court of the United States for the Northern District of Texas; George W. Jack, Judge.

Suit in equity by Emile K. Boisot, trustee, against the Amarillo Street Railway Company, in which the City of Amarillo intervened. Complainant and Guy W. Faller, receiver of defendant, separately appeal from a decree in favor of intervener. Affirmed.

For opinion below, see 244 Fed. 838.

Thomas F. Turner and M. Cammack, both of Amarillo, Tex., for appellants.

W. H. Kimbrough, R. E. Underwood, and M. J. R. Jackson, all of Amarillo, Tex., for appellees.

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

WALKER, Circuit Judge. Under a bill for the foreclosure of a deed of trust given by the Amarillo Street Railway Company to secure an issue of bonds a receiver of the property of that company was appointed. That property included a line of railway on streets of the city of Amarillo. The right of the street railway company to construct and operate a railway in the streets of the city was conferred by an ordinance, which was in force prior to and at the time of the execution of the deed of trust sought to be foreclosed. That ordinance provided that:

"Wherever such streets and highways may have gravel or macadam, or may hereafter be graveled or macadamized or paved with any other material, the surface between the rails of said track and on each side to the extent of 12 inches from the outside of the rails, or, if the ties extend further than 12 inches from the rails, then to end of ties, shall be supplied with gravel or macadam, or other paving material, of uniform quality and depth with the rest of the street adjacent to such track," by the grantees of the franchise, their successors and assigns.

An intervening petition filed by the city of Amarillo, and evidence supporting averments of that petition, showed that performance of the obligation to pave the specified part of a street was, under the provision above quoted, due from the street railway company. By the decree of foreclosure the receiver was ordered to pay out of the proceeds of the sale of the property covered by the deed of trust the amount of the cost to the city of doing the paving which the quoted provision required the railway company to supply.

The deed of trust conveyed the properties and franchises of the street railway company, subject to the obligations imposed as conditions to the continuance of the privilege granted by the city to occupy and make use of parts of its streets. What the trustee acquired was burdened with the obligation to do what the franchise ordinance required. Resort to the court by the city for the enforcement of that obligation was made necessary by the fact that the properties of the railway company were in the custody of the court. The trustee was not entitled to have the properties and franchises covered by the deed of trust sold, and the proceeds applied to the payment of the bonds secured, without provision being made for compliance with the obligation imposed by the franchise ordinance. That was a contract right, which had priority over any right conferred by the deed of trust.

The right of the city to have the reasonable cost of the paving paid was not dependent upon the street railway company being benefited by the paving done, nor upon its solvency, nor upon the possibility of its properties being operated at a profit. Discussions of what may or may not be done in assessing the whole or a part of the cost of street improvements against the property claimed to be benefited thereby are not pertinent to the facts of the instant case. What was enforced was a contract obligation, not a charge undertaken to be involuntarily imposed by proceedings for the assessment against property claimed to be benefited of the cost of the paving in question.

The conclusion is that, for the reasons above indicated, and those stated in the opinion rendered by the District Judge, the court did not err in embodying the above-mentioned order in the decree appealed from.

That decree is affirmed.

In re CLOVERDALE CREAMERY CO.

COLLINS BROS. ICE CREAM CO. v. MAREMONT.

(Circuit Court of Appeals, Seventh Circuit. January 11, 1918. Rehearing Denied Feb. 19, 1918.)

No. 2555.

BANKRUPTCY ⊂=345—PRIORITY OF LIEN—TRUST DEED.

A creditor of a bankrupt corporation, which obtained a trust deed upon its property, expressly subject to a prior trust deed executed to secure the claims of other creditors, and which was delivered upon the condition and with the understanding that nothing was to be paid

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

thereon until all the claims of other creditors were satisfied, thereby made its lien subordinate to the claims of bankrupt's other creditors, irrespective of the validity of the first trust deed.

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

In the matter of the Cloverdale Creamery Company, bankrupt; Leo S. Maremont, trustee. The Collins Bros. Ice Cream Company appeal to review an order holding the lien of a trust deed to appellant subordinate to the claims of other creditors. Affirmed.

Wm. A. Bowles, of Chicago, Ill., for appellant.

Henry S. Blum, of Chicago, Ill., for appellee.

Before KOHLSAAT, ALSCHULER, and EVANS, Circuit Judges.

PER CURIAM. The bankrupt, an Illinois corporation, executed a trust deed, covering all of its real estate, to a trustee to secure certain creditors whose claims aggregated $90,000. A note calling for payment "on or before five years from date" was also given by the bankrupt as a part of the same transaction. Later bankrupt executed a second trust deed, covering the same property, running to appellant, to secure payment of $28,750, which sum appellant claims was due it. Concerning these two trust deeds, the referee found as follows:

"About the 19th day of July, 1915, the bankrupt company, being embarrassed financially, called a meeting of its creditors and at such meeting a committee of creditors was appointed, and pursuant to arrangements made at such meeting, a trust deed for the sum of $90,000, an amount then deemed necessary to liquidate all the liabilities of the Cloverdale Company, was executed. This trust deed was made * * * to secure a note due on or before five years. * * * Shortly after the execution of this trust deed for the sum of $90,000, the trust deed for the sum of $28,750 was executed, delivered and recorded. The trust deed for $28,750 delivered to Collins Bros. Company was expressly by its terms made subject to the payment of the trust deed for the sum of $90,000, and was delivered upon the condition and with the understanding that nothing was to be paid thereon until all the claims of the creditors of the Cloverdale Creamery Company were satisfied."

Appellant's contention is that at least part of the creditors whose claims were secured by the first trust deed never accepted the security, but in repudiation thereof filed an involuntary petition in bankruptcy against the Cloverdale Creamery Company, and later presented their claims against the bankrupt estate. Appellant's position is that its second lien became a first lien through failure of the creditors to accept the security represented by the first trust deed.

The basis of appellant's contention—that the creditors never accepted the security represented by the first trust deed, but instead thereof threw the debtor into bankruptcy—finds no support in the findings or conclusions of the referee. The evidence, upon which the referee's findings were based, is not preserved, and there is nothing to justify us in assuming that the creditors did not accept the trust deed executed for their benefit or that any of them joined in a petition to have the debtor adjudged a bankrupt.

The decree should be affirmed, for the additional reason that appellant's trust deed "was delivered upon the condition and with the understanding that nothing was to be paid thereon until all the claims of the creditors * * * were satisfied." Irrespective of the validity of the first trust deed, appellant's lien was (under this finding) made subordinate to the claims of the bankrupt's other creditors.

The decree is affirmed, but without prejudice to appellant's right to assert its demand as an unsecured claim, and its allowance, if proved.

NATIONAL SWEEPER CO. v. BISSELL CARPET SWEEPER CO.

(Circuit Court of Appeals, Second Circuit. January 16, 1918.)

No. 66.

1. PATENTS ⟸36—EVIDENCE OF INVENTION—COMMERCIAL SUCCESS.
That a patented article has been commercially successful is an unsafe test of invention, unless the art presents a case of earlier efforts, unsuccessful because of the absence of what the patentee contributed, and followed by a wide success after that contribution was made.

2. PATENTS ⟸328—INVENTION—CARPET CLEANER.
The Baender patent, No. 1,138,437, for a carpet cleaning device of the vacuum type and operated by hand, the wheels furnishing the power which operates the bellows, *held* void for lack of invention.

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

Suit in equity by the National Sweeper Company against the Bissell Carpet Sweeper Company. Decree for defendant, and complainant appeals. Affirmed.

For opinion below, see 242 Fed. 947.

Appeal from a final decree dismissing a bill in equity for the infringement of United States letters patent to C. L. Baender, No. 1,138,437, issued May 4, 1915, for a carpet cleaning device. The court below held the patent void for want of invention and the complainant appealed.

The patent was for a carpet cleaner operated by atmospheric exhaustion, or partial vacuum, and adapted to draw in along with the air and gather the dust from the carpet while the nozzle moved over its surface. The principle of its operation was that the hind wheels, upon which one end of the cleaner rested, were in mechanical connection with two bellows, so as to operate by their traction upon the carpet and in the forward motion of the cleaner alternately to compress and expand the bellows, thus creating a pressure less than one atmosphere. The air flowed in through the nozzle at the opposite end of the cleaner, which rested upon the carpet. There was a baffle plate within the dust chamber, designed to meet and throw down the heavier particles of dust, and at the top of the chamber a screen or filter to stop the finer particles of dust, so that they should not pass into the bellows. Claims 2 and 4 were in suit and read as follows:

"2. The combination in a pneumatic cleaner having traction wheels supporting the rear thereof, a dust receptacle removable from the cleaner and having a horizontal screen device in its upper portion, a suction nozzle supporting the front end of the receptacle, the exit from the nozzle entering the receptacle below the screen device, a suction device above the receptacle and connecting devices between the wheels and the suction device for operating the latter."

"4. In a sweeping appliance, the combination of a dust receptacle, a nozzle communicating therewith and supporting the front end thereof, a suction device over said receptacle and communicating therewith, screening means located between the nozzle and suction device, wheels forming the rear support of said appliance, and operative connections between the wheels and the suction device adapted to operate said device upon the rotation of the wheels."

The defendant's infringing device is a carpet sweeper of the same general character as that described in the patent, having a horizontal screen in its upper portion, through which the air must pass and be filtered before reaching the bellows, and distinguishable from the patent in suit only in that a portion of the weight is carried by two idler wheels near the nozzle. Some part of the weight of the forward end is, however, borne by the nozzle itself, and the issue of infringement turns upon whether, in spite of these wheels, the nozzle supports the front end of the receptacle. The greater part of the defendant's manufacture consisted of a cleaner of the same kind, except that, in conjunction with it, there was an old rotary broom operated by two traction wheels on each side. The issue of infringement is the same as to this machine as to the first; the nozzle bears some part of the weight of the forward end of the cleaner.

The art of vacuum cleaners was not new. In 1901 D. T. Kenney made application for a patent for such a cleaner, in which the suction apparatus was fixed permanently in the floor, preferably in the basement, and the partial vacuum was created by a suction pump operated by an engine connected with a large chamber. From the other side of the chamber there extended pipes of any length, which might go into several stories, and at the end of which there was a nozzle on a rod or handle. The operator could turn on or off the suction, and by pushing the nozzle over the carpet draw out the dust, which passed through the piping into the chamber. In Kenney's device two screens or filters were inserted between the pump and the chamber, so as to catch all dust which had passed into the chamber and had not been already precipitated to its bottom.

In 1896 J. J. Harvey applied for a patent (granted 1897, 577,854) of a similar sort, in which the suction bellows was operated at some distance from the nozzle by one man, while the nozzle was held and moved by another. This type is known as a two-man machine. In this a screen or filter was interposed between the nozzle and the bellows, to filter out all dust. In 1900 C. J. Harvey filed an application for a patent (granted in 1901, 673,603) for a vacuum cleaner operated manually by the compression of a piston within a cylinder. The piston was itself hollow, and had a nozzle at one end, and on expansion low pressure or partial vacuum was created within the interior of the piston, to equalize which air was forced through the nozzle and later passed into the cylinder chamber. Within the piston was placed a screen or sack filter to catch the dust and keep it from the valves in the piston head.

In 1905 one Conover applied for a patent (granted 1907, 847,278) for a vacuum cleaner in which the weight was supported in part by the nozzle and in part by two traction wheels about midway between the two ends, and in which the dust passed through the bellows and into a dust bag put over the top of the machine. This was the first machine driven by traction wheels and designed as a substitute for the old-fashioned hand-driven carpet sweeper. Buell, 949,370, and Dudley, 924,542, were machines of the same kind, each application being earlier than Baender's, but later than the date to which it must be assumed in this record he could carry back his invention.

The plaintiff's machine, which embodied not only the Baender patent, but Sturgeon's, 996,810, and Quist & Blanch reissue, 13,508, quickly attained wide popularity and sale. In its earlier form it contained no auxiliary carpet brush sweeper, but subsequently this was added to pick up the larger particles which would not pass through the nozzle.

C. L. Sturtevant, of Washington, D. C., Louis W. Southgate, of New York City, and L. S. Bacon, of Washington, D. C., for appellant.

Drury W. Cooper, of New York City, and Fred L. Chappell, of Kalamazoo, Mich., for appellee.

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

LEARNED HAND, District Judge (after stating the facts as above). The patent can succeed over Conover only by virtue of the position of the screen and of the wheels. To place the screen between the nozzle and the suction device was old in other forms of the art. It existed in Kenney, in C. J. Harvey, and J. J. Harvey. The only color for invention in this particular arises from the fact that these latter are not hand-driven machines, deriving their power from traction wheels, upon which their weight rests. As a new question, and without its subsequent success, we should have no question that the position of the screen on the near side of the bellows was not invention, in the face of the disclosures in this case. Indeed, we should have great doubt whether, without those disclosures, it would be invention to screen out the dust before it reaches the bellows, rather than to let it pass through and clog the valves. We find it difficult to look at this feature, except as one which the inevitable course of experience in the art would have soon suggested, if it has not been done at the outset, and as one which, once suggested, required no mechanical invention to adapt to a hand-driven carpet sweeper.

[1] The plaintiff must rely, therefore, and, indeed, it does largely rely, upon the success which its sweeper has attained, and we are forced, therefore, to a consideration of the propriety of that test here. It is true that the books are full of cases in which courts have regarded the success of the plaintiff's patent as an important test of invention, and we are in no sense disposed to question its value in proper cases. Yet it is a hazardous rule, and one which is quite likely to result in confusing genuine invention with imagination in advertising and energy and business skill in promotion. Where the art presents a case of earlier efforts, unsuccessful because of the absence of what the patentee contributed, and followed by a wide success after that contribution was added, it is reasonable to infer that the art needed that feature, and that it was not so easy to invent as might seem to us, who necessarily have no proficiency in the art.

It by no means follows that every successful exploitation of a patent complies with these conditions; there are many other reasons for success, which need not be detailed. In the case at bar three companies commenced the manufacture of these cleaners, all substantially similar in kind, and each competed with the other two. The Domestic Company commenced selling them as early as 1910, and its sales rapidly increased. The Wright Company began its sales early in 1911, and likewise quickly became successful. The National Company began at some time not definitely stated, before which and in 1908 Baender had made some 2,000 machines—at least, such is the assertion. The mutual competition of these companies compelled a consolidation of their interests, which occurred in January, 1916. Now, we may assume for argument's sake that each of these companies manufactured from the outset under each of the three patents, and that the credit of the invention is to be attributed equally to all; yet it is obviously quite impossible to say that the success was due to any one of the

elements contributed by all. It is, indeed, impossible, upon this record, or upon all three records, for us to say that the success was due to all three together, assuming that would serve if we did. We do not question that success awaited any successful hand-driven vacuum cleaner; but we must be able to attribute the success to the invention, and the dominant idea rested, as it seems to us, rather in the general conception of such an appliance, set forth certainly in Conover, which, if indeed it was as it stood, likely to become clogged in the valves, only required changes sure to be realized as the art progressed, and already disclosed in three varieties of existing cleaners of other species.

The "idea" of such a cleaner seems to have become fruitful at about this time in many instances: Buell, Dudley, Baender, Sturgeon, Applegate, and Quist, all between 1907 and July, 1910. Conover it is true, was earlier, his British patent dating from 1904; and if there was any basic disclosure it was this, upon these records. Yet, disregarding Conover, the art presents a picture suggestive rather of a commercial opportunity discovered than any necessary invention. Each of these patents would, so far as we can see, have answered as well as any other, with such modifications as would be sure to suggest themselves in the progress of the art. In such a case, we ought to scrutinize, not without some jealousy, the claims of any single contributor to a monopoly of his own details.

The conclusion of the examiners in chief finally granting the patent scarcely justifies the assumption that the position of the screen weighed very much in their minds. They appear to have depended quite as much upon the distribution of the load between the wheel and the suction nozzle, an advantage which turned out to be of no moment, or perhaps upon the general compactness and advantage of the arrangement of the parts, which is not claimed, and hardly could be. Furthermore, the appearance in the art, even if it was in fact later than Baender's invention, of the device of Ander's British patent, suggests that there was no divination necessary to the location of the screen where Baender placed it.

We agree, therefore, with the District Court in holding the patent void for lack of invention, and the decree will be affirmed, with costs.

M. S. WRIGHT CO. v. BISSELL CARPET SWEEPER CO.

(Circuit Court of Appeals, Second Circuit. January 16, 1918.

No. 67.

PATENTS ⇐328—VALIDITY—ANTICIPATION—CARPET CLEANER.

The Sturgeon patent, No. 996,810, for a pneumatic carpet cleaner, the special feature of which is the arrangement of the V-shaped bellows, *held* void for anticipation in the prior art.

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

Suit in equity by the M. S. Wright Company against the Bissell Carpet Sweeper Company. Decree for defendant, and complainant appeals. Affirmed.

For opinion below, see 242 Fed. 950.

Appeal from a judgment dismissing a decree in equity for the infringement of a patent to Harold M. Sturgeon dated July 4, 1911. The claims in suit, No. 1 and No. 2, are as follows:

"1. The combination in a pneumatic carpet cleaner, of a dust box, a screen device slidably mounted in the upper portion of said box adapted to be removed and replaced within said box, a suction nozzle secured to and supporting the front end of said box the exit therefrom entering said box under said screen device, journal bearings secured to the rear end of said box, a crank shaft in said bearings, cranks in said shaft, a suction device above said box communicating with the interior thereof above said screen device, pitmen extending between the cranks in said crank shaft and said suction device, and traction wheels secured on said crank shaft, adapted to support the rear end of said dust box and rotate said crank shaft, substantially as set forth.

"2. The combination in a pneumatic carpet cleaner, of a dust box, a drawer in the bottom of said box, a horizontal screen device in the upper portion of said box, a suction nozzle secured to and supporting the front end of said box the exit from said nozzle entering said box below said screen device, a suction device upon the top of said box, wheels supporting the rear end of said box, a crank shaft connecting said wheels, and pitmen extending between the cranks on said shaft and said suction device, substantially as set forth."

The patent is for improvements in a vacuum carpet cleaner of the same general type as that considered in the opinion handed down at the same time in National Sweeper Co. v. Bissell, 249 Fed. 196, — C. C. A. —. The peculiar improvement of this patent consists in the arrangement of the V-shaped bellows which are hinged at the forward end and move at the other, together with the crank and pitman mechanism attached to the traction wheels by which the bellows are operated. One of the purposes of the invention was to make the vibration of the bellows all at the wheel end, so that their movement should not jar the nozzle from the carpet and affect its suction.

In 1909 one Applegate applied for a patent, granted 1909, 1,016,600, for a vacuum cleaner driven by traction, and disclosed three V-shaped bellows, two hinged at the forward end, and one at the rear end. These were operated by the traction wheels through cam and pitman. Conover, 847.298, and Buell, 949,370, had a connection by crank and pitman between wheel and bellows, each in a machine of the carpet sweeper type. The Baender patent was also pleaded as an anticipation in this suit.

L. S. Bacon, of Washington, D. C., Louis W. Southgate, of New York City, and C. L. Sturtevant, of Washington, D. C., for appellant.

Drury W. Cooper, of New York City, and Fred L. Chappell, of Kalamazoo, Mich., for appellee.

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

LEARNED HAND, District Judge (after stating the facts as above). Applegate seems to us a complete anticipation of this patent. It was a pneumatic carpet cleaner having a dust box. It had a screen slidably mounted in the upper part of the box which could be removed and replaced. It had a suction nozzle in front, and while this nozzle did not support the front end in the same sense as Sturgeon's nozzle, it did so in the sense that even the defendant's first form supported it. To operate at all the nozzle of such a machine must bury into the nap

of the carpet far enough to establish a difference of air pressure within the box and the bellows. As the nap is resilient this necessarily involves some upward pressure against the nozzle, which means that the latter in some measure supports the front end. We do not say that the claims mean this; but, if they do not, the defendant does not infringe, and the plaintiff must insist upon that interpretation. If so, the only invention remaining must be in the percentage of the weight carried by the nozzle, which would not be the subject of a patent. Applegate has journal bearings and a crank shaft, with crank and pitman between it and the suction device. It is, of course, true that there is literally no crank, though there is a pitman; but we cannot treat very seriously any supposed distinction between Applegate's actual disclosure and Sturgeon's in this regard, in view of Conover and Buell in exactly the same art. Finally, Applegate has "suction devices," and, indeed, his suction devices are the same as those disclosed by Sturgeon. Now, it is true that one of his bellows is reversed, so that its hinge is to the front, and it may be argued with some plausibility that he could not have apprehended the advantage of Sturgeon's arrangement. The whole argument is, however, irrelevant, because not only does neither claim have any such limitation, but it is even apparent that the very V-shaped bellows was not an element of the patent. It is disclosed only as a preferable form (page 2, lines 31, 44), and the claims clearly pretend to generality in respect of the suction devices.

Claim 2 is no better, for we do not attach any importance to the "drawer therein" specified, as distinct from the "screen," merely, of claim 1.

Were Applegate alone not enough, we should not allow the claim any validity, after remembering Baender, Conover, and Buell, upon which it can at best be only an improvement.

No discussion of the success of the machine is necessary, beyond what we have said in the case of National Sweeper Company v. Bissell Carpet Sweeper Company.

Decree affirmed, with costs.

DOMESTIC VACUUM CLEANER CO. v. BISSELL CARPET SWEEPER CO.

(Circuit Court of Appeals, Second Circuit. January 16, 1918.)

No. 57.

PATENTS ⊜328—VALIDITY—INVENTION—CARPET CLEANER.

The Quist & Blanch reissue patent, No. 13,408 (original No. 976,494), for a pneumatic carpet cleaner, *held* void for lack of invention, in view of the prior art.

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

Suit in equity by the Domestic Vacuum Cleaner Company against the Bissell Carpet Sweeper Company. Decree for complainant, and defendant appeals. Reversed.

For opinion below, see 242 Fed. 943.

This is an appeal from an interlocutory decree for infringement of reissued patent 13,508 to Quist & Blanch, granted July 7, 1913. This patent is for an improvement upon vacuum cleaners of the carpet sweeper type and the suit involves claim 4, which is as follows:

"A pneumatic cleaner comprising a casing opening at its front end, a dust receptacle in said casing detachably connected therewith, a nozzle head detachably connected with said casing and covering the open front thereof and the open end of said dust receptacle to hold the dust receptacle in position, said nozzle being provided with an opening therethrough connecting with said dust receptacle, a suction creating device connected with said casing, and sustaining wheels connected with said casing and operatively connected with and operating said suction device by the backward and forward travel over any surface."

The essential novelty of the patent rests in the fact that the nozzle head is detachably connected with the casing and covers the open front. In the defendant's device the nozzle head and the screen or stiff bag within which the dust is drawn is all one piece. The screen is inserted into the dust chamber and the nozzle head fits close to the case, making an air-tight joint. A question of infringement arises since the defendant's dust receptacle is fixed to the nozzle head, while the defendant contends that the claim requires detachability between the nozzle head and the dust receptacle. The District Court construed the claim as not requiring such detachability and held the patent valid over all references.

Hatch & Goeser, 980,944, disclosed a vacuum cleaner which operated by an electric suction fan. The whole cleaner was compact in one piece and was rolled about the floor by the operator. It contained a small motor, which operated the fan, to which the current was brought by a wire attached to a socket in the room. At the end opposite to the wheels was a nozzle head fitted into the end of the dust chamber proper and within that chamber was the dust bag detachably connected with the nozzle. The nozzle was removable from the bag and from the end of the casing, and the front end of the machine rested upon the nozzle.

Drury W. Cooper, of New York City, and Fred L. Chappell, of Kalamazoo, Mich., for appellant.

Louis W. Southgate, of New York City, and C. L. Sturtevant and L. S. Bacon, both of Washington, D. C., for appellee.

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

LEARNED HAND, District Judge (after stating the facts as above). We think this patent void under Hatch & Goeser. The only differentiation between claim 4 in suit and the reference is the last part of the claim, which puts this cleaner into the class in which the suction is mechanically created by traction. In declaring invalid the Baender patent, we have determined that in all these species of cleaners the art had recourse to the various forms theretofore existing. There we said that the position of the screen in a large stationary cleaner like Kenney was available to an inventor of the carpet sweeper type; as was the position of the screen in "the two-man" type, and in the piston or plunger type. We draw no distinction between suction, created by mechanical and electrical energy, nor between a bellows and a fan. Indeed, this small one-man device of Hatch & Goeser seems to us nearer to the patent in suit than the installation of Kenney, or the "two-man" machine of J. J. Harvey was to Baender's disclosure, and of the patents Baender more nearly approaches the standard of invention than the other two.

Nor are we impressed with the suggestion that Hatch & Goeser's connection of nozzle to casing was not air-tight. We must take the patent as operative, because it passed the examiner and has not been successfully attacked in that respect. So far as our knowledge permits us an opinion the joint closed by the gasket *73*, which is pressed in place by the pressure of the threaded flange, *70*, would make an air-tight joint. Both faces against which the gasket is to bear are finished.

Nor may we, without redrawing the claim, rely upon the simplicity of the means by which the nozzle is detachably connected; the claim is barely for detachability. Indeed, we should a little hesitate to find any invention in a detachable nozzle without any reference whatever, though that question is not presented.

The decree is reversed, and the bill dismissed, for lack of invention, with costs.

McCORD & CO. v. WOODS et al.

(Circuit Court of Appeals, Seventh Circuit. October 26, 1917. Rehearing Denied December 18, 1917.)

No. 2356.

1. PATENTS ⇐328—VALIDITY AND INFRINGEMENT—JOURNAL BOX.
The Woods patent, No. 904,665, for a composite journal box, was not anticipated in the prior art, and discloses invention in the feature of corrugations extending continuously across the bottom and up the sides. Claim 2 *held* infringed, and claim 3 not infringed.

2. PATENTS ⇐328—VALIDITY AND INFRINGEMENT—JOURNAL BOX.
The Woods patent, No. 969,933, for a journal box, *held* not anticipated and infringed.

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

Suit in equity by Leonard G. Woods and Union Spring & Manufacturing Company against McCord & Co. Decree for complainants, and defendants appeal. Modified and affirmed.

Edward Rector, of Chicago, Ill. (James F. Williamson, of Minneapolis, Minn., on the brief), for appellants.

Frederick W. Winter, of Pittsburgh, Pa. (Thomas F. Sheridan, of Chicago, Ill., on the brief), for appellees.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

EVANS, Circuit Judge. From a decree sustaining two patents, issued to Leonard G. Woods, the first being No. 904,665, granted November 24, 1908, and the second being No. 969,933, granted September 13, 1910, adjudging both patents infringed by appellant, and enjoining further infringement, this appeal is taken. Defenses are invalidity and noninfringement.

[1] Both patents pertain to a journal box. Claims 2 and 3 of the first patent, found to be infringed, read as follows:

Claim 2: "A journal box composed of a pressed plated body portion comprising sides and bottom *provided with corrugations extending continuously*

across the bottom and up the sides, and rigid top portion of metal of a different character, secured to the body portion."

Claim 3: "A journal box composed of a pressed plate body portion comprising sides and bottom open at the inner end and provided with corrugations extending continuously across the bottom and up the side portions, a rigid top portion of metal of a different character secured to the body portion, *and a dust guard pocket spaced from the inner end of said body portion and secured thereto.*"

Claims 1 and 2 of the second patent, in issue in this suit, and found to have been infringed, read as follows:

Claim 1: "A journal box composed of a pressed plate body portion comprising sides and a bottom, and a rigid top portion of metal of a different character provided on its side edges with continuous deep vertical flanges to which the body portion is secured, and having outwardly projecting journal box lugs, *and braces extending from the side flanges to said lugs, said braces being provided with vertical slots or kerfs* for receiving the top edges of the sides of the body."

Claim 2: "A journal box composed of a pressed plate body portion comprising sides and a bottom, and a rigid top portion of a metal of different character, provided on its side edges with continuous deep vertical flanges to which the body portion is secured, and having outwardly projecting journal box lugs, *and braces extending from the side flanges to said lugs, said braces being provided with vertical slots or kerfs* for receiving the top edges of the sides of the body, *said body being provided with vertical corrugations or ribs extending upwardly above the lower edges of said flanges.*"

As a defense to the first patent, appellant cites the prior art evidenced by patents to Charles T. Schoen, No. 482,200, dated September 6, 1892, and to E. W. Hughes, No. 436,355, dated September 16, 1890, and to W. H. Shinn, No. 860,254, dated July 16, 1907, and to others, covering car journal boxes. Journal boxes were first made of cast iron; later malleable iron was used. Nearly all journal boxes first used were cast in a single, integral piece, with the walls of sufficient thickness to withstand the strain to which the box was subjected.

The boxes under consideration are composite, the top being separate from the body or cellar, and made of cast steel, that material being well suited to resist the heavy loads and the wear due to the friction of the bearing parts. The body, generally known as the cellar, and made of wrought iron, are of high tensile strength. A composite box has its advantages when the double purpose of holding bearings and withstanding strains is considered. A decrease in weight is also obtainable without corresponding loss of strength.

Schoen produced a composite box as early as 1892, which he covered by patent. He says in his description:

"I do not limit my invention to these details, inasmuch as my invention consists broadly in a journal box having its body of pressed steel or like wrought metal and a *separate top.*"

Two of his claims read as follows:

Claim 1: "A journal box comprising an independently constructed top of suitable material and formation, combined with a body of wrought metal, such as pressed steel, made separate from the top and composed of sides, bottom, and rear wall, and a front lip made integral and fitted and secured to such a top, substantially as described."

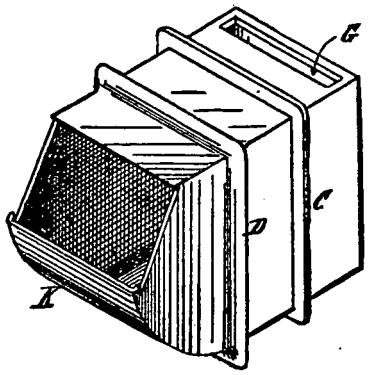
Claim 3: "In a journal box, a wrought metal body provided with lateral shoulders *O* and a bottom groove *P*, combined with a partition-plate *Q* fitted

therein, to separate off or form in the rear of the box a compartment for the reception of the dust-guard, substantially as described."

It is claimed the Schoen product was not a commercial success. Eight or ten boxes only were made. They were not provided with continuous corrugations, and it does not satisfactorily appear that the boxes built entirely responded to the description of the patent.

The claim of the Hughes patent did not cover the continuous corrugation specified in the Woods patent above set forth, but appellant claims that this element was disclosed in the drawings and description. In describing his product Hughes says: "The exterior flanges strengthen the box." Figure 3 is taken from the drawings in the Hughes patent, and letters, *C, D,* disclose the "exterior flanges" upon which appellant relies, as an anticipation of Wood's continuous corrugations.

FIG. 3.



Appellees well describe the distinguishing element in their patent, as follows:

"In this combination the use of the continuous corrugation down the sides and across the bottom is the new and essential feature in composite journal box construction. It is absolutely new in such a box. Defendant has scoured the art, and while it showed a paper patent with a cast top and the wrought metal body or cellar, it could not find the continuous corrugations in the body portion. * * * The paper art showed side corrugations and cross corrugations in the body, but *not in line and not connected,* and leaving *the corners entirely unbraced.* It is by making the corrugations continuous extending around the corners that the boxes were given their main capacity to withstand this tremendous strain."

An examination of the file wrapper in the Patent Office emphasizes this distinction. The original claims 5, 6, and 7 dealt with the corrugations; claim 7 being as follows:

Claim 7: "A journal box composed of a pressed plate body portion comprising sides and bottom, said sides being provided with a vertical corrugation or corrugations, and a rigid top portion of metal of a different character secured to the body portion."

All claims were rejected by the Patent Office and new ones substituted, No. 6 being as follows:

Claim 6. "A journal box composed of a pressed plate body portion comprising sides and bottom open at the inner end and provided *with corrugations extending continuously across the bottom and up the side portions,* a rigid top portion of metal of a different character secured to the body portion, and dust-guard picket spaced from the inner end of said body portion and secured thereto."

This claim was at first rejected, the Patent Office using the following language:

"Claims 6 and 7 are rejected on Schoèn above, there being no invention in corrugating the box wherever desired, this being an old expedient in the art."

Patentee then presented his argument in favor of continuous corrugations, using the following language:

"With reference to claims 5 and 6, *while it undoubtedly is not patentable to provide corrugations for strengthening*, we submit that this is only a general rule and does not preclude claims which specify particular manners or agreements of corrugations. Both claims 5 and 6 specify that the corrugations extend *continuously* across the bottom and up the sides, thereby not only stiffening and strengthening the bottom and sides but give strength *at the corner* where it is needed with this character of device and on account of strains to which the same is subject. These claims do not cover broadly the corrugations on either the bottom or the sides but only a *specific kind* of corrugation, one going *continuously around the corners and up the sides.*"

The claim, slightly modified, was thereafter allowed as claim No. 2 above quoted. The validity of this claim No. 2 is thus made to depend solely upon the *continuous* corrugations.

Appellees rely upon the decision in the case of Stillwell v. McPherson, 218 Fed. 839, 134 C. C. A. 611. They also cite the action of the Patent Office in recognizing particular corrugations as the essential and novel element in claims found in some 75 patent grants; they further urge that practically all of the journal boxes in use in the United States were of the integral cast type, prior to the appearance of the Kensington (appellees') box; that notwithstanding the insufficiency of the integral cast type was recognized, and efforts made to produce a successful composite box, none appeared until the appellees placed their product on the market; that appellants, although in control of the industry, were forced to produce a composite box similar to appellees' product; that neary 1,000,000 Kensington boxes were sold in the first seven years.

In reply appellant points to the fact that the Schoen patent expired in 1909 and that if an increase in the production of the composite box occurred shortly thereafter it was due to the expiration of the Schoen monopoly. Answering the argument that invention was disclosed by the fact that some 865,000 Kensington boxes were sold in the first seven years after the issue of the Woods patent, appellant showed that over 550,000 of these boxes were used by one railroad company; that the president of this railroad and the president of the appellant, the Union Spring & Manufacturing Company, were father and son; that a change in the presidency of the latter company was immediately followed by a termination of orders from the railroad company; that the total number of boxes sold after the termination of this contract was insignificant. Appellant also denies being forced to adopt appellees' type of journal box, but claims that its composite box is radically different from appellee's structure, being an integral composite style adapted for use on all types of railroad car trucks, which is not the case with the Kensington box.

The case of Stillwell v. McPherson, supra, furnishes some support for appellees' contention, but may be somewhat distinguished in point of fact because of the difference in the prior arts, and because of the difference in the action of the patentees before the Patent

Office, and because the particular location of the corrugation in reference to the culvert was an emphasized element in the Watson (culvert) patent.

The prior art in the instant case is not conclusive. The Hughes patent disclosed continuous exterior flanges as shown in the drawings represented by Figure 3 produced above. Symington patent, No. 794,259, and No. 855,361, discloses journal boxes with the strengthening means called ribs. The Cochran patent, No. 845,728, described the strengthening element therein referred to as a flange. In fact, the specifications of the master car builders' journal box provided for corrugation to strengthen.

In the nonanalogous art, the patent to Schoen for a "stake pocket" for cars, No. 381,174, dated April 17, 1888, disclosed corrugations that were continuous and appeared in parallel pairs.

It is obvious that strength was one of the prime essentials of a successfully constructed journal box. Not only was great tensile strength necessary in such a box, but the strengthening means used by appellee made possible a lighter box and lessened the cost of construction.

The difficulty in reaching a correct conclusion in this case has arisen over the question: In view of the prior art, was Woods' contribution merely an exercise of mechanical skill, or did it display inventive genius? This is a border line case. Measured by the usual tests, however, we conclude that Woods' improvement constituted an invention.

That something more than mere mechanical skill was required in the use of continuous corrugations in a composite journal box is suggested by the study and experience of Schoen, upon whose patents appellant relies. Schoen produced a composite journal box in 1892, for which he obtained a patent. He also invented the car "stake holder" with continuous parallel corrugations for strengthening purposes, for which he obtained a patent in 1838. Schoen was a man of acknowledged ability, both as a mechanic and as a manufacturer of car appliances, including journal boxes. He sought a successful composite journal box, and yet it did not occur to him to make use of the continuous corrugations to secure the necessary strength.

Likewise the experience of the appellant is instructive. For many years appellant manufactured a large percentage of all the journal boxes used in this country. For seven or eight years it admittedly endeavored to develop a successful composite journal box. During all of that period the patents now relied upon by it to prove anticipation were subject to the study of its mechanics and engineers. In face of the fact that it never occurred to the appellant to use the continuous corrugation in the composite box, we are not justified in concluding that the use of such means by Woods was an exercise of mechanical skill. This conclusion is strengthened by reason of the further fact that appellant, after Woods pointed the way, made use of the same means to strengthen its box.

Claim No. 3.—The italicized words appearing in this claim, quoted above, supply the additional element which distinguishes this from the last-considered claim. All journal boxes are provided with dust

pockets. Their purpose is obvious, being indicated by the name. They are invariably specified in the master car builders' journal boxes. A commonly accepted type is made by using a piece of board fitted with the pocket to prevent the entrance of dust into the rear end of the box. Fitted closely and supplemented by applications of oil, these boards are efficient in keeping out the dust.

Woods' pocket differed from other types, in that he provided a separate piece outside or beyond the rear wall of the box and riveted thereto. He added strength to the box by the stiffening effect of the dust guard. It was the dual purpose of a dust guard, which served not only to keep out the dust, but also to strengthen the box at the particular place where strength was required which constituted appellee's claim to invention. The expert testimony supports the claim that the reinforcement of the journal box by the dust guard at the place of attachment, provided for in Woods' patent, was of practical value and served to make a stronger and a better box.

We are of the opinion that the location of a dust guard at the place and fastened in the manner described in this claim is invention, and as such is entitled to protection.

Noninfringement of Claim No. 3.—Appellant, however, contends that its journal box does not infringe this claim. It must be conceded that its journal box is provided with a dust guard, which differs from the one described in the Woods patent, in that the former is an integral part of the journal box, and is spaced forward and inward, instead of outwardly from the inner end of said box.

Again, the file wrapper is important so far as it differentiates the Schoen patent from the Woods patent, and as thus differentiated it appears that no infringement is shown. Woods' claim, as first filed, described the dust guard element as follows:

"*And a pressed metal dust guard pocket*, said part being secured together."

This claim was rejected, and the following claim of a dust guard pocket was inserted:

"And a pressed metal dust guard pocket, *spaced from the inner end of the body and secured thereto.*"

Upon the Department's citing the Schoen patent, Woods distinguished his dust guard as follows:

"Schoen's box is shown as provided with *an inner end portion* M *integral with the body*, thus having the body in the form of a box closed at all sides except top and portion of the outer end. * * * In the patent to Schoen, the dust guard pocket is formed *by the rear wall of the box*, which extends from the bottom to the top and is integral with the bottom and side walls, *and a separate plate located inside of the end wall and spaced therefrom.* In applicant's box the inner end of the box is merely turned up slightly to form a shallow bottom flange, and the dust guard pocket is formed by a plate flanged on its bottom and the two sides fitting over the end of the box and secured thereto; *said plate being spaced from the end of the box.*"

Having secured this claim by distinguishing the Schoen box in the respects quoted above, patentee cannot now assert infringement by a structure substantially identical with the product thus distinguished.

If appellants' dust guard is the mechanical equivalent of the Woods dust guard, then it follows that claim No. 3 was anticipated by Schoen. We conclude, however, that the Patent Office properly differentiated the Woods patent from the Schoen product, and for the same reason the appellants' box must be distinguished from the Woods patent.

Claim No. 3 is valid, but not infringed.

[2] Patent No. 969,933.—The two claims of this patent have been quoted, and the italicized words emphasize the asserted novelty in each claim. The patent covered an improvement in the composite journal box of the type disclosed in the Woods first patent. Patentee's aim was to obtain greater strength, more resistance, at the points and places found weak in the boxes made pursuant to the prior patent, and this was accomplished by providing the rigid top portion and its side edges with—

"continuous deep vertical flanges to which the body portion is secured and braces extending from the side flange to said lugs, said braces being provided with vertical slots or kerfs for receiving the top edges for the sides of the body. * * *"

An examination of the file wrapper shows that it was a flange *with connected lugs and braces, the braces being provided kerfs,* that supplied the novel element in the new box. Claim 1 as originally filed describes the body as—

"provided on its side edges with continuous deep, vertical flanges to which the body is secured."

This claim was rejected in view of the patent to Schoen. Upon patentee's pressing his claim the examiner said:

"Claim 1 is again rejected on Schoen of record, it is not seen that the claim disclosed anything beyond what any mechanic has a right to do; i. e., make the attaching flange at the top of the box in one piece instead of several smaller lugs and make it somewhat longer (or deeper). This does not constitute patentable novelty."

Upon further amendments, the claims assumed the form above quoted, and were allowed. The description of the flange and lugs is instructive:

"* * * Along its side edges on its lower face it is provided with the continuous depending flanges *19* fitting inside the pressed body portion and serving as a means to secure the top and body portion together, such as by means of rivets driven through the flanges and the sides *2* of the body. These flanges are continuous for the length of the box and are of considerable depth, thus giving material strength, bracing the box and tending to keep it square. Midway of their lengths these flanges are extended to a considerable depth, always in contact with the sides of the body so as to brace the latter, and also forming shoulders *22* for holding the journal bearing. Near its forward end the top is provided with lugs *23* which act as stops for the journal box wedge."

"On its side edges the box is provided with the lugs *24*, which are provided with holes *25* for receiving the journal box bolts. These lugs *24* are stiffened by means of braces *26* connecting the same with the flanges *19*. These braces also strengthen the inside shoulders *22*. The sides *2* of the body are notched or cut away, as indicated at *27*, to fit around these braces. The braces *26* are recessed from below, so as to provide vertical kerfs or slots

28 into which the top edges of the body fit. The braces are preferably rounded off at their lower ends, as shown at 29, in order to assist the edges of the body to enter the slots when assembling. The plate sides of the body have a tight fit in said slots. The slots serve to prevent the sheets from bending or yielding when there is a tendency to force the box out of square. They also permit the braces 26 to be made deeper than would otherwise be the case. The deep braces and flanges support the sides of the body quite low down, and hence increase the strength and rigidity of these sides. The slots prevent movement of the box sides in either direction."

Appellant urges that the structure so described is anticipated by the Schoen patent, and the claims are void for the lack of patentable invention. While it might be admittted that the Schoen box has bolt lugs somewhat similar to those appearing on the Kensington box and these lugs necessarily support and strengthen the side walls of the box, and the extension of lugs into a continuous body flange may be but an exercise of mechanical skill, as suggested by the Patent Office, yet it is apparent that the Schoen box has no brace of the form and shape and location described in the Woods structure. It is this improvement upon which the Woods box asserts its claim to patentability.

The utilization of bolt lugs as a basis for the construction of braces attached to the continuous flange, which is in turn securely fastened to and braces the walls of the body, supports (in theory at least) the contention that greater strength is thereby obtained in a box that is peculiarly subject to strains and pressure. Appellee also urges that the uses of kerfs at the bottom of the brace as here shown extends the support below the flange, and is distinctive of the Woods patent, and is indicative of merit. The expert testimony of the witnesses supports this theory of the patentee.

In view of the advantages to the trade of a successful composite journal box, we are not inclined to lightly reject any advance in the art which gives strength to a box. We therefore hold that the claims are valid.

Noninfringement.—Appellant's box is of a composite type, the top being of a metal different from the body, and is provided with deep, continuous flanges extending down from the top on the inside and outside of the walls of the body. It is an integral composite box; the top being of a different metal from the bottom, but the two parts molded together. It is also provided with bolt lugs. Some of these elements, while common to both appellants' and Woods' box, alone or collectively, are old in the art. Unless the appellant's box is provided with braces extending from the inside flange to the lugs, and these braces in turn are made with vertical slots or kerfs to receive the top edges of the body, there is no infringement.

Appellant admits its box has some of the elements of the combination described in the claims above quoted. It has "a pressed plate body portion comprising sides and a bottom"; also "a rigid top portion of metal of a different character"; it also admits the top on its "side edges" is a "continuous deep circle flange to which the body portion is secured"; also it admits having "outwardly projecting journal box lugs." To constitute infringement, however, another element must

appear, and the dispute over the alleged infringement turns upon the presence or absence of this element. In claim No. 1 of Woods' patent, this element is described as "braces extending from the side flanges to said lugs, said braces being provided with vertical slots or kerfs for receiving the top edges of the sides and body."

That the portion of the continuous outer flange in appellant's box that leaves the walls of the body of the box and encircles the bolt, and is securely attached to the extending bolt lug, corresponds to the brace described in this claim is too apparent to require argument. But to constitute infringement this brace must extend from the inner side flange to the lug, and must also be provided with a kerf.

The testimony on this phase of the case shows clearly that appellant securely connected the brace to the lug on the one side and the inner flange on the other. This was done by drilling or punching holes through the walls of the body of the box at points opposite the center portion of the inner flange and above the bottom of the brace. In the casting operation, the molten metal used for forming the top ran through these holes and effectually connected the inner flange to the brace. Necessarily a slot or kerf from the bottom of these holes to the bottom of the brace resulted. We therefore find the corresponding brace serving a corresponding purpose in appellants' journal box, as is described in the Woods patent.

A separate consideration of claim No. 2 we deem unnecessary. It is valid and infringed.

While it may well be that appellant has made improvements on the Woods journal box, and it may also be true that not all of its boxes infringed the Woods second patent, these facts do not justify the court's refusing an injunction or in directing an accounting.

The decree entered by the court below is modified, in so far as it adjudges the appellant infringed claim No. 3 of patent No. 904,665, and, as so modified, is affirmed. Each party shall pay its or their costs in this court.

BONE v. COMMISSIONERS OF MARION COUNTY.

(Circuit Court of Appeals, Seventh Circuit. October 2, 1917. Rehearing Denied December 17, 1917.)

No. 2459.

PATENTS ⊂328—VALIDITY AND INFRINGEMENT—RETAINING WALL.

The Bone patent, No. 705,732, for a retaining wall of the cantilever type of reinforced concrete, conceding that it discloses invention, does so only by reason of the location of the reinforcement, and, as so construed, *held* not infringed.

Appeal from the District Court of the United States for the District of Indiana.

Suit in equity by Frank A. Bone against the Commissioners of Marion County. Decree for defendants dismissing the bill, and complainant appeals. Affirmed.

Certiorari granted by Supreme Court, 246 U. S. 660, 38 Sup. Ct. 333, 62 L. Ed. ——.

Clarence E. Mehlhope, of Chicago, Ill., and Arthur H. Ewald, of Cincinnati, Ohio, for appellant.

V. H. Lockwood, of Indianapolis, Ind., for appellees.

Before ALSCHULER and EVANS, Circuit Judges, and LANDIS, District Judge.

EVANS, Circuit Judge. Plaintiff sought damages and an injunction to prevent future infringement of patent No. 705,732, issued July 29, 1902, upon application filed April 21, 1899. The bill was dismissed upon a finding of no infringement.

The patent under consideration relates to a retaining wall of the cantilever type, and is described by the patentee as follows:

"My invention relates to improvements in retaining walls for abutments of bridges, seawalls, banks of streams, embankments, cuts, dams, dry docks, and such places as it is desired to retain earth or other matter permanently in place with its face at an angle nearer vertical than it would naturally repose when exposed to the action of the elements or gravity. * * * The said invention consists principally of introducing into masonry of concrete, stone, or brick a framework of steel or iron in such a way that the whole wall is so much strengthened thereby that the volume of the masonry may be greatly reduced, and yet the height, base, and strength against overturning, bulging, or settling will still be ample."

Again he says:

"I am aware that retaining walls have been constructed of concrete and steel, but none to my knowledge (1) have been supported on their own base as mine; (2) nor have any of them entirely inclosed the steel within the concrete; (3) nor have any of them used the weight of the material retained as a force to retain itself."

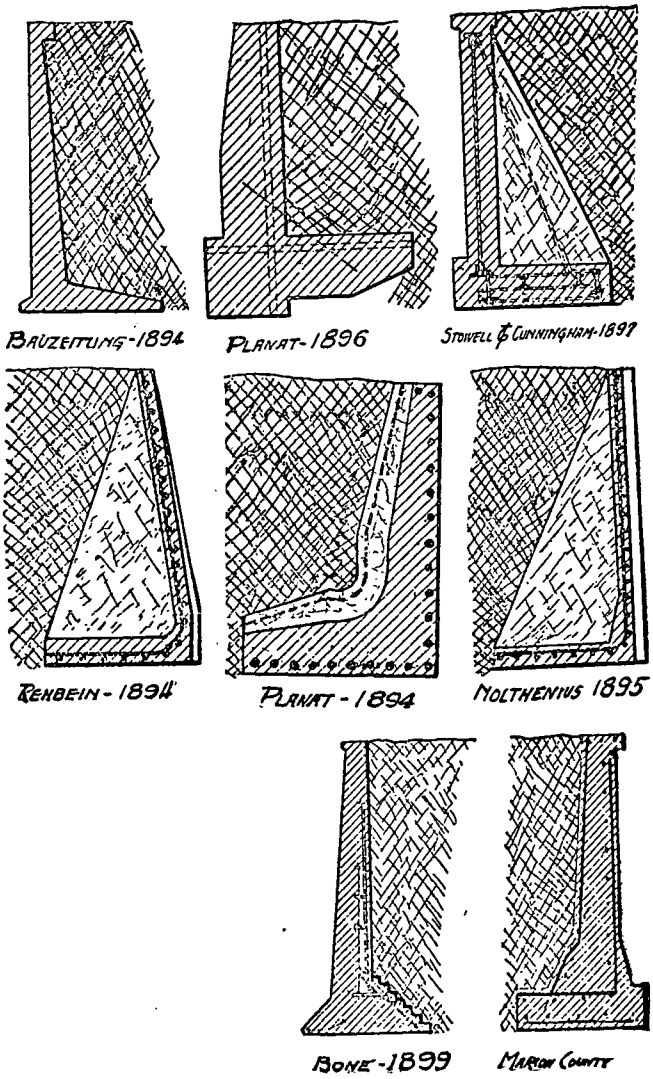
Claims 1, 3, 5, 16, and 17 are involved in the present suit. Claims 1 and 16, which are typical, read as follows:

"1. The combination, with a retaining wall having a heel, of a metal structure imbedded vertically in said wall and obliquely in said heel, so that the weight of the retained material upon the heel of the metal structure will operate to retain the wall in vertical position."

"16. The combination, with a retaining wall having a heel and a toe at opposite sides thereof, said toe having an independent metal structure imbedded therein, of a metal structure imbedded within said wall and heel, said structure consisting of upright bents at the back part of the vertical wall and continuing down along the upper part of the heel of said wall to the back part thereof, so that the weight of the retained material upon the heel of the metal structure will operate to maintain the wall in a vertical position."

Defendant maintains: (a) That the patent is anticipated by the prior art; (b) if not so anticipated, the claims must be so restricted and construed as to support the finding made by the trial judge that there was no infringement.

The following drawings represent the plaintiff's wall, defendant's wall, and the prior art:



These figures admirably picture the state of the prior art. As early as 1869, a patent was issued to Francois Coignet, No. 88,457, covering the principle of reinforced concrete, which was for the avowed purpose of "giving greater cohesive strength," so that "the walls or size of the articles may be considerably reduced." From that date to the date of the application for a patent by Bone, various retaining walls have been designed and constructed. The Bauzeitung wall, appearing in 1894, was of the cantilever type, with the heel and toe feature found in the Bone patent. Two articles written by Planat appeared in the scientific magazine "La Construction Moderne," a Paris publi-

cation, in 1894 and 1896. Both deal with retaining walls of reinforced concrete of the cantilever type. We quote from the article appearing in 1896:

"These computations suppose that one has effectively realized the fixing of the vertical wall to the horizontal slab at their junction. This fixing requires special precautions. The bars at the point of junction exert a pulling force, which tends to pull them out of the concrete. * * * But here we have only a half beam on a cantilever span. It is necessary that the extremities of the bars in the region of fixation should be held in a sufficient mass of concrete or maintained by some other means. One is able to reduce these projections in a very large measure, if one takes care to bind together the vertical bars and the horizontal bars at their point of intersection. In this way the pull of the bar is carried, not only on its prolongation, arranged for anchorage, but also on the bar which is perpendicular to it, and whose great length permits it to offer a large resistance to the force tending to pull it out transversely."

On July 25, 1899, upon application filed March 25, 1897, a patent, No. 629,477, was issued to Stowell & Cunningham, covering a retaining wall illustrated above. Further reference to the prior art seems hardly necessary. Planat, as well as Bauzeitung, and Stowell & Cunningham, each disclosed a wall with a heel in the base, while the toe appears in at least four previous types illustrated by the drawings. It likewise clearly appears that the entire inclosure of steel by the concrete was not original with Bone.

If there be any patentable novelty disclosed by Bone's wall, it is by reason of the location of the reinforcement. In fact, this seemed to be the patentee's own idea of the novelty, for he says:

"The said invention consists *principally* of introducing into masonry of concrete * * * a framework of steel or iron *in such a way that the whole wall* is so much strengthened thereby that the volume of the masonry may be greatly reduced, and yet the * * * strength * * * will still be ample."

It is not necessary to decide whether the location of the reinforcement in the concrete in order to give greater strength in 1899 evidenced patentable novelty when applied to retaining walls, for if the claims in this patent are so restricted and limited, it is obvious that defendant's wall did not infringe in this respect.

Our attention is called to the fact that this patent was sustained in the case of Bone v. City of Akron, 221 Fed. 944, 137 C. C. A. 514. An examination of the decision in that case shows that evidence of the prior art was not introduced; otherwise a different conclusion would have been reached. The court said:

"If the prior art had shown a structure intended for a retaining wall, and having a heel such that the weight of the earth thereon would tend to keep the wall erect, it might be difficult to find invention in merely adding the form of reinforcement most suitable to create the desired tensile strength; but we find no such earlier structures. Those which have that shape are sustaining walls only, and were so obviously unfit for use as retaining walls that no one seems to have seen the utility for that purpose, of which the form, when properly adapted and strengthened, was capable."

The learned District Judge who tried this case in the court below aptly distinguished the facts in the present case from those disclosed in the opinion above quoted. He said:

"So the court did not have before it the evidence, either on the petition for rehearing or on the original hearing, that this court has on the state of the prior art." "He [Bone] was not the first person to reinforce a retaining wall; he was not the first person to conceive the idea of reinforced retaining wall which was so shaped and constructed that the weight of the earth on the heel of the wall would withstand the pressure of the dirt or the earth on the wall. He was not the first to do it. * * * Now it may be that, on the record before Judge Day, Bone was the first person to do that. So far as the record in this case is concerned, the absolute converse of that proposition has been demonstrated."

With the claims restricted to a matter of location of the reinforcement (the validity of which we need not decide), there is no infringement.

The decree is affirmed.

P & M CO. v. AJAX RAIL ANCHOR CO.

(Circuit Court of Appeals, Seventh Circuit. April 10, 1917. On Petition for Rehearing, March 8, 1918.)

No. 2374.

PATENTS ⇐328—VALIDITY AND INFRINGEMENT—RAIL ANCHOR.

The Kramer patent, No. 1,014,155, for a rail anchor, while not a pioneer patent, and limited in scope, was not anticipated, but represents an advancement in the art, which involved invention; also *held* infringed.

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

Suit in equity by the P & M Company against the Ajax Rail Anchor Company. Decree for defendant, and complainant appeals. Reversed.

Edward Rector and Frank Parker Davis, both of Chicago, Ill., for appellant.

Thomas F. Sheridan and Walter A. Scott, both of Chicago, Ill., for appellee.

Before MACK, ALSCHULER, and EVANS, Circuit Judges.

MACK, Circuit Judge. This is an appeal from a decree of the District Court dismissing the complainant's bill for want of equity. The bill charged the infringement of the Kramer patent, No. 1,014,155, which was granted January 9, 1912, upon an application filed October 18, 1911, for a rail anchor. The claims alleged to be infringed by the defendants are claims 1 and 3, which read as follows:

1. In a device of the class described, the combination with a wedge having a base to extend wholly beneath the rail base and a lateral flange to engage one edge of the rail, of a supporting member having flanges to fit over a rib on said wedge and the other edge of the rail, respectively; said parts having co-operating wedging surfaces arranged for gripping the rail vertically and horizontally.

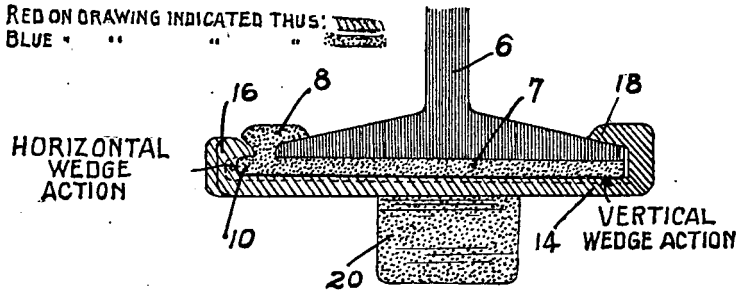
3. In a device of the class described, the combination with a wedge having a rail supporting base having an inclined surface, a flange to engage one end of the rail, a tie abutment, and a tapering rib inclined horizontally, of a supporting member having a co-operating inclined-surface, and flanges to engage

the other rail edge and said rib respectively, the parts being overlapped whereby when said parts are forced together with a rail between them a gripping force will be applied both vertically and horizontally.

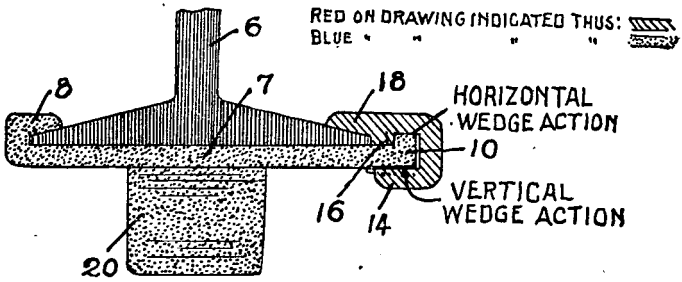
The following drawings, taken from appellant's brief, will make clearer the questions involved.

KRAMER'S CONSTRUCTION.

PATENT IN SUIT.



DEFENDANT'S COMMERCIAL FORM.



The function and development of the rail anchor art is fully considered in Track Specialties v. Barnett, 242 Fed. 633, 155 C. C. A. 323, decided this day. In most anchors in the prior art, the wedging or gripping action is only in one direction, usually horizontal, though in a few instances vertical. The distinctive feature of the patent in suit and of the defendant's structure is the double wedge action, gripping or squeezing the rail not only horizontally at its edges, but vertically on its upper surfaces. This double wedge action, however, is novel neither with the plaintiff's nor with the defendant's assignor, but is first disclosed in the Porterfield patent, No. 968,797. Kramer's claim to invention, therefore, lies, not in the double grip conception but in his specific mode and means of utilizing it.

Kramer's stated objects were "to produce a simple efficient fastener which is easily applied to the rail, and which will act to grip the rail both at its lateral edges in a horizontal direction, and in a vertical

direction, and at the same time maintain an even bearing against the base of the rail," and "to provide a device of the character referred to which will automatically tighten its grip upon the rail as the rail contracts, instead of loosening its grip as in devices of this character heretofore employed."

The patented device consists of the wedge member colored blue, and a co-operating supporting member colored red, in the drawings. The wedge member has a base portion *7*, extending beneath the rail base *6* for the entire width thereof, and is provided with an upwardly and inwardly extending rail engaging flange *8*. Its base portion *7* is inclined longitudinally, so as to afford means of vertical wedging. The extension of this base portion slightly beyond flange *8* and its termination in a rounded rib *10*, which is laterally tapered, make the horizontal gripping possible. The front of the base has a downwardly extending abutment which bears against the tie. The supporting member takes the form of a clamping member or yoke. On one side it has a jaw or flange *18* extending over the opposite edge of the rail from flange *8*. On the other side it has another flange *16*, which is horizontally inclined to coact with rib *10* to produce the horizontal wedge action. Its middle or base portion *14* runs under the wedge member and has an upper surface inclined so as to co-operate with the under surface of the base of the wedge member for vertical wedging action. "In order to assemble the parts of the anticreeper," following the language of the specifications, "the flange *8* of the wedge member is hooked over one side of a rail base and the abutment *20* positioned against the face of tie *21*. The supporting member is then slid in position along the rail with its flange *18* over the opposite edge of the rail base, and until the groove inside the flange *16* passes over the rib *10*, said rib and groove co-operating to draw tightly together the (wedge and supporting) members in a lateral direction and thereby, through flanges *8* and *18*, and wall *17*, gripping the side edges of the rail base between them. By the same operation the relative longitudinal movement of the inclined contacting surfaces on the bases *7* and *14* will effect a vertical wedging action on the edge of the rail base, so that a double wedge is formed, pressing on the edge of the rail and on the bottom of the rail. When the parts have been driven together in position on the rail, any tendency of the rail to 'creep' or move on its bed will tend to increase the tightness of the grip on the rail, and thus effectually prevent its longitudinal movement." An additional vertical wedging action is secured by virtue of the transverse inclination of the coacting surfaces of the base portions of the wedge and supporting members. An automatic adjustment or tightening of the grip upon the rail as it contracts is provided by a locking pin. These two features, however, are immaterial so far as the present infringement suit is concerned.

The defendant's device, which is based upon the Elfborg patents, No. 1,088,976 and 1,083,603, is also composed of two members capable of mutual coaction, whereby the gripping of the rail base both horizontally and vertically is secured. One of the members (that colored blue) has a base portion extending beneath the rail base, the

under surface of which portion is longitudinally inclined to afford a wedge whereby the vertical gripping of the rail may be effected; a flange *8* running along the upper side of one edge and engaging the edge of the rail; on the other edge, a rib *10*, extending along the upper surface and horizontally inclined to the axis of the rail; and a depending abutment which bears against the tie. The other member is composed of a flange *18* which hooks over the edge of the rail base opposite the edge engaged by the flange *8*; a base portion which extends transversely beneath the member colored blue just far enough to permit a vertical wedging action to be effected by the coaction of its longitudinally inclined upper surface and the similarly inclined under surface of the base member; and a wedge *16* which fits between the rail base and rib *10*, the outer vertical edge of which tapers laterally engaging the inner vertical edge of rib *10*, so that a horizontal gripping or wedging results as the member colored red is slipped over the other member.

The validity of the patent in suit, unless the claims thereof are very narrowly construed, is attacked on the ground of anticipation, based primarily upon Porterfield, No. 968,797. This is the only earlier double wedge anchor, but in Porterfield both flanges that engage the opposite edges of the rail are on the outer member. The location of one of these flanges *8* and *18* upon each of the anchor members permitting a transverse movement of the flanges relative to each other, not only makes possible a firmer gripping of the rails, but makes the outer member both much better able to resist the downward force exerted against it by the inner member when the abutting foot of the latter is driven against the tie by the creeping action of the rail and less liable to break under this strain. In Porterfield, the inner member, having no flange over an edge of the rail base, derives no direct support therefrom. This very distinction was pointed out by defendant's assignor during the prosecution of Elfborg patent, 1,083,603, in differentiating it from Porterfield. Moreover, in Kramer and in Ajax, the extension of the inner member beneath and in contact with the entire width of the rail base affords a desirable viselike grip not found in Porterfield.

While Wolfe, No. 982,337, locates one flange on each of the two members, neither from his claims nor from his specifications is any double grip conception or action discoverable. And the defendant's assignor successfully argued to this effect in answer to the examiner's reference to Wolfe during the prosecution of the Elfborg patent. To accept the view now urged that one of Wolfe's drawings, being isometric rather than a perspective view, discloses a horizontal wedge, would lead to the absurd conclusion that the rail itself tapers. Wolfe's descriptions and drawings are entirely lacking, in that "substantial representation of the patented improvement in such full, clear, and exact terms as to enable any person, skilled in the art or science to which it pertains, to make, construct, and practice the invention" covered by Kramer; it does not anticipate.

As to infringement, the plaintiff maintains, not only that the basic idea of the patent in suit is found in the Ajax anchor, but that, element

for element, claims 1 and 3 can be read upon the latter device. The defendant denies that the several elements of the claims in suit are responded to in any fair sense in its device; it contends that the function of the two members and in the two devices is radically different, and that therefore, even if its device falls within the letter of the claims, it is in spirit and essence so substantially different as to escape the charge of infringement. In the Kramer device, the wedge member acts as the intermediate part or wedge for both the vertical and the horizontal gripping action, while in the Ajax the member colored blue acts as the intermediate part or wedge for the vertical gripping action only, and the wedge *16* of the member colored red, which in Elfborg's specifications is termed the wedge member, performs that function in the horizontal gripping movement.

Many other, though less significant, differences are pointed out by the defendant. These result primarily from the differences just noted, or from modifications in form resorted to in order to save metal, and thus to produce a less costly and more available commercial device. The base of the member colored red of the Ajax is very short, and does not extend transversely beneath the entire length of the base of the other member. In the Kramer construction, flange *8* is caused to grip the rail base by a pushing or compressive force; in the Ajax, it is pulled over the edge of the rail base. The means by which the two members are mutually supported differ somewhat. Part *16* of the Ajax structure is a wedge and not simply, as in Kramer, a flange; Kramer's rib *10* is a wedge or part of a wedge, while defendant's is a flange. But this distinction is of no importance here for, whether a true wedge or not, each of these parts in both devices has a wedging surface and these surfaces in both devices co-operate in like manner to perform the same wedging function. Defendant's contention that the parts of the Ajax numbered *16* and *18* cannot be fairly assimilated to the correspondingly numbered flanges of the patent in suit, is not sustainable; the hook is duplex in form and clearly performs the double function of gripping the rail base and assisting in the horizontal wedging.

It is urged that these differences are vital when, because the advance in the art is gradual, proceeding step by step, each inventor is entitled at best only to the device which embodies his forward step and every inventor is entitled to his own specific structure, as long as it differs from and does not include that of his competitors. Railway Co. v. Sayles, 97 U. S. 554, 556, 24 L. Ed. 1053. Concededly, Kramer is not a pioneer; his invention is narrow and his patent is limited in scope; his is not the first double wedge rail anchor; but while single grip anchors had the two flanges, which engage the opposite edges of the rail base, on separate members, this improvement is not to be found in the prior double grip anchor.

Despite the differences noted, the Ajax anchor, in our judgment, not only responds to the claims in suit, but it embodies the basic conception which was Kramer's contribution to the art. The essence of his invention is a double grip anchor of two members—the one with a rail edge engaging flange, a base extending transversely beneath the

rail base for its entire width, and a tapering rib inclined horizontally; the other with a flange engaging the other edge of the rail and a flange engaging the inclined rib, thus affording the means by which the two members are drawn together. The function of his improvement over the prior art was to insure, not simply a firm and secure gripping of the edges of the rail, but a direct and effective support of the inner member on one side of the rail base, so as to enable that member to resist the strain of the downward pressure imposed upon it when its depending tie abutment is forced against the tie by the creeping of the rail.

The fundamental features of the Kramer patent are employed in the Ajax structure in order to secure the same objects. The latter not only responds literally to the Kramer claims, but it operates on the same general principles and is essentially similar in form, so far as form is material to obtain the results sought by Kramer. Transposition of parts without change of operation or function is of no importance. That the Ajax, by decreasing very considerably the amount of metal required without in any way altering the method of operation or the objects to be attained, represents a valuable improvement over Kramer, does not save it from the charge of infringement inasmuch as, despite the changes in form thereby secured, the structure is built upon and embodies Kramer's conception and contribution to the art.

The decree must be reversed, and the cause remanded for further proceedings in accordance with the views herein expressed.

On Petition for Rehearing.

In a petition for rehearing, appellee again emphasizes the Wolfe patent and presents a new theory to demonstrate anticipation of the patent in suit and a new wooden model in support thereof. It is urged that, as the coacting surfaces of flanges A^3 and B^5, whose lengthwise tapering produces the vertical wedge action, also incline upwardly and inwardly conformably to the rail base, the wedge members, after being driven in far enough to grip vertically, on further pressure will move laterally along the rail base, thus producing a horizontal wedging action and averting the destruction of the anchor.

But, as Wolfe states in his specifications, when the wedge-shaped member is driven in so that the two members are firmly wedged together, "then the pin is inserted." In other words, further pressure, with the resulting transverse movement that could produce a horizontal grip, is not contemplated; it is to be avoided. And clearly, neither in his specifications nor in his drawings does Wolfe in any way allude to or disclose the possibility or desirability of such double wedge action. On the contrary, when he speaks of wedge shape or wedge action, he immediately defines it, and limits it to a longitudinal tapering or vertical wedging action. Figure 1 of his drawings, unlike the model offered, shows no clearance between the inner vertical edge of the base A^1 of member A, and the bottom of the inclined shoulder at the middle of the base of member B; as there shown, with the two members fitted on the rail base, any relative movement of them, transversely thereof, is blocked.

The successful argument of appellee's present solicitors in distinguishing Wolfe, when cited during the prosecution of the Elfborg patent, is persuasive against their present contentions. Moreover, neither claim 1 nor 3 of the patent in suit responds to the Wolfe patent; claim 3 specifies that each wedging action is produced by a different pair of wedging surfaces; claim 1 requires the base member to extend wholly beneath the rail base. Moore, No. 1,008,183, though later than the patent in suit, was applied for three months earlier. If it were the prior invention, claim 1 would be anticipated. We are satisfied, however, from the evidence, none of which was taken in open court, that priority of invention must be awarded to Kramer.

Sponenberg, No. 1,001,177, is a three, not a two, piece anchor; the wedging effect is differently produced. Moreover, neither he nor Player, No. 974,821, suggests the wedging action here in question. Neither of these patents is referred to in appellee's original brief.

The petition for rehearing will be denied.

WEST COAST ROOFING & MFG. CO. et al. v. ELABORATED READY ROOFING CO. et al.

(Circuit Court of Appeals, Seventh Circuit. October 3, 1917. Rehearing Denied December 20, 1917.)

No. 2420.

1. PATENTS ⊂=328—VALIDITY—ORNAMENTAL PREPARED ROOFING.
   The Becker patents, No. 1,024,549 and No. 1,024,550, for a process for making ornamental prepared roofing and for the product of such process, are void for anticipation by the Bird patent, No. 1,181,827, which was first applied for.
2. PATENTS ⊂=91(1)—SUIT FOR INFRINGEMENT—BURDEN AND SUFFICIENCY OF PROOF.
   The burden rests on complainant in an infringement suit to prove an allegation that the patentee was the original and first inventor of the thing patented, and where in interference proceedings in the Patent Office, after the patent had been inadvertently issued, priority of invention was awarded to another, whose application was earlier, and to whom a patent was subsequently issued, which decision was affirmed by the Court of Appeals of the District of Columbia, the mere priority in date of the patent in suit is not sufficient to sustain such burden.
3. PATENTS ⊂=328—VALIDITY AND INFRINGEMENT—ORNAMENTAL PREPARED ROOFING.
   The Becker patents, No. 1,157,664 and No. 1,157,665, for a process for making ornamental prepared roofing and the resulting product, *held* void for lack of invention as to the first patent and claims 2, 3, 4, 6, and 7 of the second. Claims 1, 5, 6, and 8 of the latter *held* not infringed.
4. PATENTS ⊂=328—INFRINGEMENT—ORNAMENTAL PREPARED ROOFING.
   The Goldberg patent, No. 1,113,116, for a process of making ornamental prepared roofing and the resulting product, *held* not infringed.

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

Suit in equity by the Elaborated Ready Roofing Company and Mathias B. Becker against the West Coast Roofing & Manufacturing Com-

pany and J. H. Hurd. Decree for complainants, and defendants appeal. Reversed.

Suit by the West Coast Roofing & Manufacturing Company and J. H. Hurd against the Elaborated Ready Roofing Company and Mathias B. Becker. Decree for defendants, and complainants appeal. Affirmed.

Charles C. Bulkley, of Chicago, Ill., for appellants.

Rudolph Wm. Lotz and George L. Wilkinson, both of Chicago, Ill., for appellees.

Before KOHLSAAT, ALSCHULER, and EVANS, Circuit Judges.

EVANS, Circuit Judge. Two pending actions were consolidated in the District Court. In the one appellants were plaintiffs, and appellees were defendants; in the other appellants were defendants and appellees were plaintiffs. The District Court sustained all claims of four patents to Mathias H. Becker, the first two being Nos. 1,024,549 and 1,024,550, both granted April 30, 1912, and the other two being Nos. 1,157,664 and 1,157,665, both granted October 26, 1915; found appellants to have infringed each claim of all four patents; enjoined further infringement; and ordered an accounting. In the other suit, appellants' bill, involving the alleged infringement of patent No. 1,113,116, granted October 6, 1914, to S. H. Goldberg, was dismissed for want of equity.

[1] Appellee's first two patents are a process and a product patent pertaining to ornamented prepared roofing, which is also the subject-matter of the last two numbered patents, also a process and a product patent. Appellants' patent No. 1,113,116 is a combined process and product patent, pertaining to "waterproof roofing material." Still another patent to one Charles S. Bird, No. 1,181,827, is of utmost importance.

The dates are significant, though somewhat confusing. The order in which the applications were filed does not correspond with the order in which the patents were granted. Goldberg's application was filed first, July 11, 1910, Bird was second, August 21, 1911, Becker was third, February 1, 1912, for his first two patents, while applications for his second two patents were filed September 4, 1912, and May 3, 1913, respectively. Becker's first two patents were granted April 30, 1912, Goldberg's patent was granted October 6, 1914, and Bird's patent was granted May 2, 1916.

The constantly increasing demand for prepared roofing has spurred manufacturers of this product to produce, not only the most serviceable, but the most attractive, roofing. Prepared roofing of monotonous color and design is acceptable upon many buildings, but for dwellings and buildings of a higher class ornamentation is desirable. To meet this requirement, manufacturers have produced a myriad of designs and products, some of which have marked a distinct advance in the trade and have been the subject of patent grants. As in most products of commercial value, the element of economy in cost of construction has played its important part.

All the patents under consideration pertain to a roofing material

which gives a shinglelike appearance to the finished product. After the first two patents to Becker had been granted, the Patent Office discovered that an interference should have been ordered as to Bird's prior and pending application; and it so declared. In this interference proceeding the Patent Office decided in favor of Bird, and Becker appealed to the Court of Appeals of the District of Columbia, where he again lost. Appellees upon the trial of this suit claimed that they were able to prove, by evidence discovered since the above hearing, that Bird was not the first inventor of the product covered by the single claim of the Becker product patent.

All the patents under consideration have for their admitted object the giving of a varicolor shinglelike appearance to the finished product. Becker, Bird, and Goldberg used an asphalt base impregnated and coated with waterproof material, with a surface coat of granular grit or gravel. The particular novelty or asserted improvement consisted of applying to this preparation a coloring material which, viewed from a distance, produced the desired effect. Becker contends that his coloring material, a black asphalt paint, furnished an element supplied neither by Bird nor Goldberg. He claimed the asphalt paint acted as a solvent upon the asphalt base and mingled with it, and as a result the product wore much longer. The Goldberg patent (at least prior to the insertion of claim No. 2) merely called for a waterproof coloring material (ink was at first used) applied to the surface of the roofing material, and it did not become amalgamated with the asphalt base.

Prepared roofing material with an asphalt base was old in the art. The material, as well as the combination for making this waterproof roofing product, had been long known to, and extensively used by, the trade. Ornamentations and color effects, as such, were also old. As early as January 31, 1893, George S. Lee secured a patent, No. 490,668, for roofing material which provided for colored stripes; the specifications stating:

"This surface may be embossed or otherwise finished by painting in ornamental designs, the exterior surface to produce the effect of tiles, shingles, or other roofs. * * *"

A comparison of the language of the patents is instructive. Goldberg's first claim reads:

"The process of preparing ornamental roofing, consisting in coating the surface of a flexible absorbent material with a hot bituminous binder, while said binder is heated applying a layer of granular material, and before said binder is cool applying a layer of paint in designs."

In his description he says:

"The nature of the facing is such that it can be more accurately and effectively tinted or colored while in a heated condition, and the tinting or coloring matter also more effectively unites and mixes with the asphaltic solution with which the facing is mixed. * * * The coated web is then run through suitable pressing rolls. While still in its heated condition the web of roofing is run through a pair of rollers, one of which is provided with tinting or printing forms. The paint or tint applying form is provided with raised designs. The construction is such that the various designs are applied to the facing of the roofing symetrically and accurately and while the roofing is still in its heated condition."

Becker in his description says:

"This invention relates to improvements in what is known as prepared roofing, and has for its object to provide material of this character having on its exposed side a design in different colors in imitation of a shingle or tile roof. * * * This coating is of such a character as to cut into the asphaltum coating of the wool felt by partially dissolving the same, so that the second coating will become amalgamated with the first."

His claim reads as follows:

"Prepared roofing, comprising a sheet of fibrous material, impregnated and coated with a waterproof material, said coating being varied in thickness in various fields, a coating of granular grit, partially imbedded in said coating in the fields of least thickness, and a similar coating completely imbedded in the fields of greater thickness."

While Goldberg first made application for a patent, we conclude that with claim No. 2 eliminated (later herein discussed) he did not anticipate Becker's patent. The latter's use of an asphaltum paint or other coloring material, which acted as a solvent upon the asphalt base, was not anticipated by the application "of a layer of paint in designs," as described in claim 1 of Goldberg's patent. Evidence of actual practice by Goldberg strongly supports this conclusion. Instead of a solvent being actually used, appellant, though a manufacturer of asphalt paint, used ink for his coloring material, until after appellee's product was placed on the market.

But Bird's patent, the application for which was filed before Becker's application, was not so restricted. In his description Bird says:

"The object of the invention is so to construct building materials and particularly roofing paper having a layer of asphaltic or similar waterproof material provided with a coating of comparatively fine mineral particles that said surface may, in appearance, simulate a series of slates, and, in addition, to more securely fix certain areas of said particles in place. * * * In carrying this invention into practice it has been my main object to produce building material and particularly building paper having a more ornamental appearance than that heretofore constructed. * * *"

After describing the usual method of making the roofing material and efforts to relieve the monotony in appearance of such a production, he says:

"I now take fluid or semifluid material substantially of the nature of the material of the layer *6* and of a color contrasting with the general color effect of the combined particles *7*, *7*, and apply such material in areas, lines, or stripes *8*, *8*, of comparative thickness, in any predetermined pattern to the surface formed by the particles *7*, *7*, whereby said material of the areas *8*, *8*, forms a binder for the particles *7*, *7*, which it covers and, to some extent, unites with, the layer *6*, while the contrasting color of such material *8*, *8*, forms a design or pattern on the outer surface of the strip by covering certain of said particles, groups or areas of said particles."

The figures *6*, *6*, refer to the asphaltum base, and the figures *7*, *7*, to the gravel, and *8*, *8*, is the paint or coloring material. Since novelty in the Becker patent is dependent upon this factor here described as *8*, *8*, Bird's further description is most significant. He says:

"While I prefer to make use of asphaltic material for layer *6*, and for the overlay *8*, *8*, I do not limit myself to the use of such material. The particles *7*, *7*, may be grains of sand, soapstone, or any other natural or artificial particles adapted for the purpose herein described."

He then concludes:

"I prefer to apply the material forming the overlay pattern 8, 8, in such a manner, *of such consistency* and condition that it will be readily received between the particles 7, 7, *and to some extent will unite with material of the layer 6.*"

His claim 5 is as follows:

"Building material of the nature described comprising a base having an asphaltic layer furnished with a coating of fine mineral particles, and an overlay pattern of comparatively thick plastic material in which certain areas of said particles are embedded and covered, substantially as described."

Appellee's attorney describes the novel element in the Becker discovery as follows:

"The liquid is then applied upon the grit surface of the roofing, * * * to produce a design thereon in any desired configuration. The liquid thus applied, completely envelopes and covers the grit particles and flows through the interstices between the same into contact with the asphaltic coating of the web, which it attacks and dissolves, so that, when dry, the asphaltum of the liquid is homogeneous and amalgamated with the said coating, which holds the grit particles in place."

The excerpt is significant as an admission. Briefly it might be said that novelty in Becker's patent lay in the use of the asphaltum paint because of its color effect, *combined with* the effect produced on the asphalt base tending to greater endurance. The distinguishing fact being thus emphasized, and we believe, accurately stated, the conclusion necessarily follows that the Bird patent anticipated Becker's patents. Becker's product and process patents, Nos. 1,024,549 and 1,024,550, must be declared invalid, unless Bird was not in fact the first inventor.

[2] The facts in reference to the issue of priority of discovery between Becker and Bird are unusual. After meeting defeat in the Patent Office and in the Court of Appeals for the District of Columbia, the controversy between these two patentees (Becker and Bird) was renewed in the United States District Court for the Western District of New York, where it was undisposed of at the time this decree was entered. Appellees in that equitable action, brought under section 4918 R. S. (section 9463, Comp. Stat. 1916), assert that Becker was the first inventor of the subject-matter covered by Becker's patent, and that they have discovered new and persuasive evidence bearing upon this issue since the disposition of this controversy by the Court of Appeals of the District of Columbia. At the time of the trial of this suit, this "new and persuasive" evidence had not been submitted in the pending suit in New York, nor was any such evidence offered on the trial in the District Court in this suit.

But it is contended that until this equitable suit, brought under section 4918, in the United States District Court, is disposed of, we are required to give full force and effect to Becker's patent. We think otherwise. Appellees' right to recover must rest upon the strength of their own claim, and not on the weakness of the opponent's position. Both Bird and Becker could not have been "the first, original, and sole inventor of the subject-matter," covered by the common claim.

Bird's application antedated Becker's and in the interference proceedings both the Commissioner of Patents and the Court of Appeals for the District of Columbia decided Bird's discovery antedated Becker's discovery. It follows, therefore, that notwithstanding Becker's patent was first issued (through inadvertence of the Patent Office), Bird's subsequently issued patent was a full anticipation of Becker's discovery.

We then have a situation where the record fails to show any evidence tending to defeat or impair the effect of the adjudication of the Commissioner of Patents, affirmed by the Court of Appeals for the District of Columbia. Appellees are required to substantiate the allegations set forth in their bill, the first and material one of which was that they "were the first, original, and sole inventor of a certain new and useful improvement in the method of ornamenting and preparing roofing," described in the patent, and, having failed to sustain this material allegation, the suit must be dismissed. Of course, if appellees can prevail in their pending suit against Bird, brought under section 4918, R. S., a different situation will be presented. We are, however, required to determine this suit upon the evidence before us.

[3] Becker's two later patents deal with an improvement on the prior patents just considered. They are both dependent upon the use of sand or similar material upon the asphalt paint. In the later patents, patentee describes the manufacture of the prepared roofing, and closes the description in the following language:

"This is accomplished preferably in the manner and by the means fully described in letters patent Nos. 1,024,549 and 1,024,550, issued to me on April 30, 1912."

He further said:

"The particles (*F*) afford a protective coating for the pattern material and serve also to prevent the latter from adhering to the coat (*C*) when the roofing is rolled up for shipment."

In the process patent, issued on the same day, patentee says:

"The primary object of the invention is to provide means whereby such flow of the liquid after application to the roofing is prevented. To this end the present invention consists principally in thickening the liquid after application on the surface of the roof to prevent flow thereof, and thus to produce a well and sharply defined configuration on the roof."

Upon the oral argument, in support of these last two patents, appellees contended that the application of sand upon the asphalt paint resulted in ridges being formed, which in turn acted as a check to the flow of the water over the roof, and thus prevented the snow and ice from carrying off the grit. The testimony in the case, however, supports the conclusion here reached that these so-called dams or ridges were barren of practical value in the respects above asserted.

We deem an extended discussion of these patents unnecessary. In our opinion, the application of sand upon paint to prevent its spreading is not patentable invention. If doubt otherwise remained, it would disappear by reason of the issuance of patent No. 278,722 to Henry M. Miner, granted June 5, 1883, and covering "roofing fabric." In this patent the patentee says:

"The layer of sand is sufficient to act as a dryer and to cover the whole upper surface of the paper, so that the tar is not exposed at all, thus rendering the fabric easy to handle and preventing the liability of it sticking or adhering to other objects."

In view of this conclusion, it is unnecessary to consider appellants' further claim that they do not infringe either of these two patents.

In the consideration of all four patents to Becker, no claim has been made that, under the circumstances disclosed by the evidence, the process patents could stand in case the product patents were declared invalid. No separate consideration of the process patents is therefore necessary. It appears, moreover that numerous claims of the second process patent, particularly 1, 5, 6, and 8, are not infringed.

We conclude patent No. 1,157,664 is invalid, and claims 2, 3, 4, 6, and 7 of patent No. 1,157,665 are invalid, while claims 1, 5, 6, and 8 of said last-named patent are not infringed, and their validity is not decided.

[4] Appellants contend, in reference to the suit wherein they were plaintiffs in the court below, that the Goldberg patent, No. 1,113,116, contains two valid claims, which were infringed by appellees. As pointed out in the fore part of this opinion, claim No. 1 of this patent was not an anticipation of the first Becker product patent, and appellees did not infringe this claim. Claim 2 of the Goldberg patent reads:

"As a new article of manufacture, a flexible strip of roofing material, comprising a foundation of pliable absorbent fabric, a bituminous waterproof binder associated with the face of the fabric, a facing of granular material adhesively secured in place in the binder and having portions projecting above the surface thereof, and a waterproof coloring material applied *to a plurality of fields* or areas of the facing, contrasting with the interposed spaces and forming designs, said coloring material being *intimately associated* with the binder and *forming a covering* and an intimate union with the *surfaces* to which it is applied."

The italicized words render the construction of the claim difficult. Did the claimant refer to the asphaltum base or to the gravel thereon? Was patentee referring to the same material when he used the words "intimately associated" as when he used the words "forming a covering"? Would not the whole paragraph be more consistent and intelligent, if the words "forming a covering," appearing therein, limited and modified the words "being intimately associated with," appearing just above?

In view of the fact that the Bird application was then pending and the Becker patent had been recently granted, it is the most fair construction of the language of this claim to so restrict it as to exclude the product described in either Bird's or Becker's patent. This claim No. 2, as originally filed, never contemplated the use of a paint such as asphalt paint or any other coloring material that would act as a solvent for the asphaltum base. The file wrapper disclosed many modifications and amendments to this claim as originally filed. It appeared, clothed as above quoted, only after Becker's patent had been granted.

We conclude that this claim No. 2 of the Goldberg patent does not include a waterproof coloring material which is also a solvent for the asphaltum base. So construed, there was no infringement to be

enjoined, and its validity in view of the patent to Bird need not be considered.

The decree of the District Court in the suit wherein appellees are complainants and appellants are defendants, No. 396, is reversed, with directions to dismiss the bill. The decree in the suit wherein appellants are plaintiffs and appellees are defendants (No. 397) is affirmed. Appellants are to recover costs in this court.

SCHRAM GLASS MFG. CO. v. HOMER BROOKE GLASS CO.

(Circuit Court of Appeals, Seventh Circuit. January 25, 1918. Rehearing Denied April 5, 1918.)

No. 2435.

1. PATENTS ⟸328—VALIDITY AND INFRINGEMENT.
The Brooke patent, No. 723,983, for an apparatus for cutting and distributing molten materials, which automatically cuts an uninterrupted flow of molten glass into a mold when the mold is filled, and supports the severed stream until another mold is brought into place, was not anticipated, discloses patentable invention of a highly meritorious character, and is valid; also *held* infringed.

2. PATENTS ⟸157(1)—CONSTRUCTION OF CLAIMS—QUALIFYING CLAUSE.
A clause at the beginning of the claims of a mechanical patent, stating the purpose of the device, is not to be ignored as not describing any element, but is a modifying clause, to be read upon every element thereafter described.

3. PATENTS ⟸125—VALIDITY—ABANDONMENT OF APPLICATION.
The failure of an applicant for a patent to prosecute his application within two years after it was filed does not invalidate a patent afterward granted thereon; such allowance being within the jurisdiction given the Commissioner by Rev. St. § 4894 (Comp. St. 1916, § 9438).

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

Suit in equity by the Homer Brooke Glass Company against the Schram Glass Manufacturing Company. Decree for complainant, and defendant appeals. Affirmed.

Russell Wiles, of Chicago, Ill., for appellant.

Frederick P. Fish and Charles Neave, both of Boston, Mass., for appellee.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

EVANS, Circuit Judge. From a decree sustaining patent No. 723,983, granted to Homer Brooke, March 31, 1903, holding appellant had infringed it, and enjoining further infringement, this appeal is taken. The defenses are invalidity and noninfringement.

The patent to Brooke relates to an apparatus for cutting and distributing molten materials, particularly glass, and is of particular value to the manufacturer of fruit jars, bottles, and other similar glass objects used by the public in large quantities, the cost of which constitutes an important factor in their successful manufacture. While

the art of making glass articles is old, it was, prior to Brooke's device, deficient in a particular, an understanding of which is better obtained by a brief general description of the art to which it relates.

In making articles of molten glass prior to this discovery, a considerable quantity of the molten material was taken from a furnace to a mold by a workman, called a gatherer, who, by the use of a "punty" rod, injected into and twisted around in the molten mass in the furnace, first collected and then transferred it to a position over a mold of predetermined size into which the glass ran from the rod. Another workman stood by, and with shears cut this string or stream of flowing glass when directed. The gatherer then twisted his rod, so as temporarily to prevent glass falling off and until another empty mold was supplied, and then the operation was repeated. Machines for receiving this product, containing molds of predetermined capacity, were in common use, and, not infrequently, easy and ready method of substitution of one mold for another was provided. Some devices for receiving the molten mass in the mold, and for the prompt exchange of the molds, were patented, and at least one must be especially considered—the patent to Steimer, No. 549,404, issued November 5, 1895.

[1] Brooke's contribution to the art consisted in producing an apparatus that would better, more rapidly, and more economically convey the molten mass from the furnace to the mold. Instead of the interrupted flow of glass, and the delayed method of transferring with a punty rod this substance from the large reservoir to the mold, in use prior to this discovery, appellee's device permitted the glass to flow continuously from the furnace, and the severing knives were made to act automatically, and means for supporting the severed stream were provided; the accumulated flow being poured into the opening of the next presented mold. The characteristic claims are as follows:

Claim 1: "An automatic device for cutting or separating an unsupported freely flowing stream of molten material into unformed molten masses, the same comprising a cutting knife and means for moving the same and means for supporting the severed stream of continuously flowing material."

Claim 3: "An automatic device for cutting or separating a flowing stream of molten material into unformed molten masses, the same comprising a cutting knife and the means for moving the same, and means for discharging the said molten masses into suitable receptacles."

Claim 4: "An automatic device for cutting or separating a flowing stream of molten material into unformed molten masses of predetermined quantity, the same comprising a knife and means for moving the same, a plurality of receptacles, and means for discharging the said molten masses into said receptacles."

Claim 5: "An automatic device for cutting or separating a flowing stream of molten material into unformed molten masses, the same comprising a knife and means for moving the same, a plurality of receptacles, *means for discharging the said molten masses into said receptacles*, and means for intermittently moving said receptacles into position to receive cut-off masses."

Claim 6: "An automatic device for cutting or separating a flowing stream of molten material into unformed molten masses, the same comprising a knife and means for moving the same, and means for causing the said cutting device to temporarily support the molten stream."

The device is herewith shown in Fig. 1, the sequence of position of cutting knife and receptacles in the operation of severing the molten glass stream being illustrated.

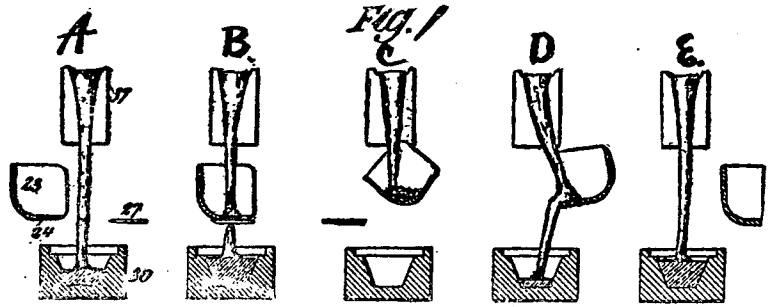


Fig. 1

37 is a conduit which aids in conducting the glass from the furnace to the receptacle *30*. The cutting knife *23* is cup-shaped, one side of which is provided with a cutting edge *24*. Another knife which moves in the opposite direction, consists of blade *27*, carried on the end of an arm, extending from the hub (the arm and hub not being shown in the figure), all working automatically. When the constantly flowing stream of glass has filled the mold, the two blades come together as shown in B, the stream is cut, and the knife passes to the position C. While the glass is momentarily supported in the cup-shaped receptacle, as shown in figure C, an empty mold is being brought into position underneath. In D, the tilting operation has been completed and the molten glass has been discharged from the receptacle into the mold underneath. The knife and the cup-shaped receptacle then resume their normal position by the action of gravity. The molten mass proceeds to flow into the mold next succeeding. While this is not all of the machine, it describes the mechanism of its more important parts.

The distinct contribution to the art was so obvious that appellant concedes patentability to Brooke's discovery, but claims that a process and not an apparatus discovery is disclosed. It contends that, an apparatus patent having been issued, it was invalid in view of the prior art, which contention calls for a consideration of the Steimer patent, designated by its patentee as a "glass measuring apparatus," but claimed by the appellant to be capable of being used so as to meet all of the specifications and claims found in the Brooke patent.

Figures 3 and 4 appearing below describe the material part of the Steimer apparatus, which, appellant claims, is capable of performing the same function described in Brooke's patent, and is anticipatory of the claims therein set forth.

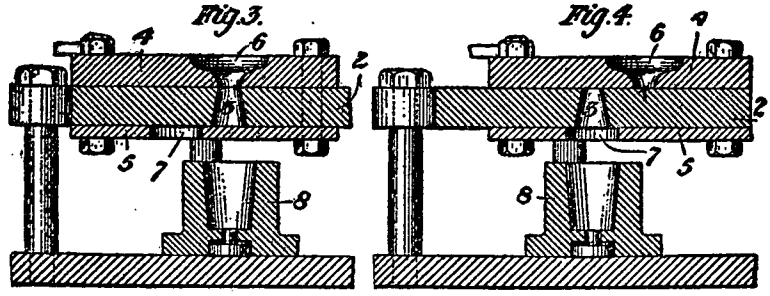


Fig. 3.

Fig. 4.

We employ language from appellant's brief to describe the Steimer apparatus:

"In the Steimer machine there is a plate 2, with a central measuring opening 3 precisely like the corresponding opening in defendant's liner machine. In the normal position of the parts shown in Fig. 3, of the Steimer patent a plate 5 lies beneath the hole 3 in the plate 2 and a funnel or cup-shaped opening 6 in an upper plate 4 registers with the opening 3. Glass is flowed into the measuring receptacle 3 with the parts as shown in Fig. 3. The upper and lower plates are then moved by the operator to sever the glass in the measuring opening 3 from the stream above it, and immediately thereafter the hole 7 in the lower plate 5 registers with the measuring opening 3, so that the cut-off mass falls into the mold beneath (Fig. 4). This is precisely what happens in the defendant's liner machine. Now it is quite true that Steimer contemplated completely filling the opening 3, while defendant does not do so, and it is quite true that Steimer contemplated an intermittent stream from a punty rod instead of the continuous stream; but it is equally true that if a continuous stream were supplied to the Steimer machine, it would do exactly what defendant's liner machine does. *If a continuous stream were fed into the cup-shaped receptacle* 6 *in the upper plate* 4 *of Steimer, it would flow into the measuring receptacle when the parts were in the position shown in Fig. 3, and immediately they move to the position shown in Fig. 4 the stream would be cut off and husbanded on the upper surface of the plate* 2 *precisely as in defendant's liner machine,* and on the return of the parts to the position shown in Fig. 3 the accumulated gob would drop into the measuring opening 3."

Whether Brooke's apparatus patent is valid, in view of the prior art as disclosed in the Steimer patent, is the chief question for consideration on this appeal. Appellant rests its case on these two propositions: (a) If the prior art disclosed a device of like construction, capable of performing the same function as the patent in suit, even though the inventor had no idea of making use of his apparatus for such a purpose, the patent is anticipated. Carnegie v. Cambria, 185 U. S. 403, 22 Sup. Ct. 698, 46 L. Ed. 968. (b) Steimer's device will do the very things claimed for Brooke's apparatus. In other words, appellant admits that Steimer's "orifice" was for a measuring device, and admits that Steimer had no idea of using a "continuous flowing stream of glass, cutting and temporarily supporting it," but that, because Steimer's machine was capable of being so used, it anticipated Brooke's structure, and the latter's patent cannot be saved by reason of the fact that a process was disclosed which was patentable.

Would Steimer's apparatus do the things which can be done by a device embodying the claims of the Brooke apparatus? The pith of appellant's contention lies in the italicized portion of the foregoing quotation. Unfortunately for appellant, Steimer described the operation of his machine (and we believe the only possible operation) specifically in the specifications to his patent. He said:

"The operation is as follows: The mold 8 to be charged with glass is placed under the plate 2, beneath the position of the hole 3, and the plates 4, 5, are moved, so as to bring the holes 6, 3, into register. The gathering boy then introduces into the hole 6 with his punty enough molten glass to fill the cavity 3, and by means of the operating lever 6 the plates 4, 5, are moved so as to bring the holes 3, 7, into register and to move the hole 6 away from the hole 3. The movement of the hole 6 away from register with the hole 3 shears off the glass in hole 3 from the glass on the workman's punty, leaving in the hole 3, enough glass to fill the same accurately, and the movement of the hole 7 into register with the hole 3 causes the glass to drop from the latter into the mold 8 below."

Describing his drawings he said:

"In the drawings, 2 represents a plate having formed there through a measuring cavity 3, downwardly flaring in form. 4 and 5 are two plates, mounted, respectively, on the top and bottom of the plate 2, and connected so that they may be moved simultaneously back and forth in contact with the plate 2. The top plate is formed with a hole 6 and the bottom plate with a hole 7, said holes being situate so that they shall register with the hole 3 at respectively opposite ends of the travel of the plates 4 and 5—i. e., when the hole 6 is in register with the hole 3, Fig. 3, the hole 7 shall be out of register, and that when the holes 7 and 3 are in register the hole 6 shall be out of register, Fig. 4. The hole 3 is made of proper size to contain the amount of glass required to be delivered to the mold."

This construction renders impossible the operation described by appellant in case a continuous stream were fed into the cup-shaped receptacle 6. The cup-shaped receptacle 6 is not stationary, and the successful operation of this glass measuring apparatus is made to depend upon the movability of plates 4 and 5. Under such a structure a continuous stream could be fed into the cup-shaped receptacle 6 only in case the stream itself moved similarly to plate 4, and even then it is doubtful whether the stream of molten glass would follow the movement of the receptacle 6 so as to prevent any portion of the glass falling on the surface of plate 4, instead of in the receptacle 6.

Appellant's expert witnesses have suggested, by drawing and otherwise, that the opening 6 in plate 4 might be so enlarged that, notwithstanding the movement of this plate 4, a portion of the opening 6 would be always under the continuously flowing stream. The suggestion comes as a result of the Brooke patent. The structure shown in Figs. 3 and 4 does not warrant any such suggestion. Referring to such drawings it will be observed that the opening 3 is under the flowing stream. When the opening 6 is moved to position shown in Fig. 4, the stream of molten material, if uninterrupted, would fall, not in opening 6, but upon the plate 4. Neither the drawings nor the method of operation described in the specifications of the Steimer patent, permit of, or suggest, a use of the opening 6 in plate 4 for receiving "an unsupported freely flowing stream of molten material."

We conclude the Steimer apparatus is not capable of being so used as to take care of a continuously flowing stream.

[2] It is further contended that Brooke's discovery, if patentable, was not covered by the claims in question. To reach this conclusion appellant asks us to ignore the first clause of the claim, which is as follows:

"An automatic device for cutting or separating an unsupported freely flowing stream of molten material into unformed molten mass."

Appellant contends that this is a mere statement of a process, and has no place in a mechanical apparatus, and should be entirely disregarded when appearing in a claim of an apparatus patent. With this conclusion we cannot agree. While it is true that this clause of itself does not describe an element in the combination, it should not for that reason be ignored. Each of the elements of the combination should be read in the light of this clause and should be modified by it. Such a clause of itself may entirely fail to supply a necessary element in a combination (American Envelope Co. v. A. W. P. Co., 152 U. S.

425, 14 Sup. Ct. 627, 38 L. Ed. 500) yet it may so affect the enumerated elements as to give life and meaning and vitality to them, as they appear in the combination. So, in this case, the legitimate and fair construction of the claims, particularly in view of the specifications and drawings, requires us to read on each element of this claim the clause which appellant insists is a superfluity. In so doing we are not substituting an operation for an element, nor including as an element the particular article upon which the apparatus is to work. We are merely giving to the modifying clause the same effect that would be given to an adjective or adverb that limits, enlarges, or qualifies the word it modifies.

Whether Brooke, at the time he made his discovery, was not also entitled to a process patent, we need not consider, for it is not before us. Nor are we required to devote time to the question of the patentability of Brooke's discovery, for in appellant's brief we find the following language:

"This use of the knife blades for the dual purpose of severing the stream and husbanding it while the molds are changed was new with Brooke, or at least Brooke increased the husbanding to a very material extent; that is, from the slight husbanding of Picard, Schulze-Berge, to a substantial amount—great enough to absorb all glass flowing during the relatively long period of mold shift."

Such a concession (justified by the record) clearly and justly credits to Brooke the discovery of an apparatus that would take care of "an unsupported freely flowing stream of molten material," which is the essence of the value of this discovery.

[3] Appellant further urges that the application for a patent was abandoned in the Patent Office, and this contention is based on plaintiff's failure to prosecute his application within the period fixed in the statute. This contention must be rejected in view of the decision in Western Glass Co. v. Schmertz Glass Co., 185 Fed. 791, 109 C. C. A. 1. Appellant cites Steward v. American Lava Co., 215 U. S. 162, 30 Sup. Ct. 46, 54 L. Ed. 139, to the contrary, but the cases are distinguishable and are not in conflict. Section 4892, R. S. (section 9436, Comp. Stat. 1916), under consideration in Steward v. American Lava Co., supra, requires an amended application for the patent to be verified, and makes no exception, and grants to the Commissioner no discretion. The Commissioner of Patents in the present case was not outside of his jurisdiction when he acted on appellee's application, filed more than two years prior thereto, for section 4894, R. S. (section 9438, Comp. Stat. 1916), expressly reserves to the commissioner the right to issue patents after such period.

Claims 3, 4, and 5 are especially attacked, because no basis for them is disclosed in the specifications or drawings. It would serve no useful purpose to reproduce here the drawings or to quote at length from the specifications. We have carefully read the specifications and examined the drawings with the criticism in mind, and find ample support for the claims in both the drawings and specifications.

Appellant's device so clearly infringes appellee's patent that no discussion of this phase of the case will be indulged in.

The decree is affirmed.

AMERICAN VALVE & METER CO. et al. v. FAIRBANKS, MORSE & CO. et al.

(Circuit Court of Appeals, Seventh Circuit. August 10, 1917. Rehearing Denied December 18, 1917.)

No. 2423.

1. PATENTS ⊜328—VALIDITY AND INFRINGEMENT—RAILWAY WATER COLUMN. The Johnson patent, No. 818,968, for a railway water column, was not anticipated, and discloses invention of a meritorious character. Claims 1, 21, and 38 also *held* infringed.
2. PATENTS ⊜328—VALIDITY AND INFRINGEMENT—RAILWAY WATER COLUMN. The Foster patent, No. 798,406, for a railway water column, while for an improvement only on that of Johnson, first applied for, discloses patentable invention; also *held* infringed.

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

Suit in equity by the American Valve & Meter Company and Edward E. Johnson against Fairbanks, Morse & Co. and the Sheffield Car Company. Decree for defendants, and complainants appeal. Reversed.

Appellants failed in their suit to enjoin the alleged infringement of claims 1, 11, 21, and 38 of patent No. 818,968, issued April 24, 1906, to Johnson, and claim 1 of patent No. 798,406, issued August 29, 1905, to Foster, both for improvements in railway water columns.

Johnson's general statement of his invention to obviate defects in prior water columns, and the claims in suit, read as follows:

"This invention relates to improvements in railway water columns or devices of that class which are more particularly intended for supplying water to locomotive tenders and which comprise a stand pipe located alongside of a railway track, or between two such tracks, and a laterally extended spout on the standpipe to be turned either at right angles to the tracks to supply water to locomotive tenders or parallel to the track to avoid the passing trains when not in use, and also adapted to be swung vertically throughout a considerable range of movement for the purpose of bringing the mouth of the spout into immediate proximity to the tank openings of tenders of various heights and of avoiding the coal which is piled on the tenders above the water tank.

"The present improvements have relation particularly to the most desirable type of this class of apparatus—namely, the type in which the spout is pivoted to the standpipe at a point below the end thereof and telescopes at its inner end lopsely over the downward turned end or nozzle portion of the standpipe.

"One of the defects of railway water columns of this kind, as heretofore constructed, has been that the end of the spout in moving downwardly swings to one side of a vertical line of descent to such an extent as to carry it laterally beyond the tank opening or water hole of the tender, either at the upper or lower, or at both, limits of its movement; and a principal object of the present invention is to avoid this difficulty by mounting the spout in such manner that the arc of movement described by the end of the spout, even when the range of movement provided is unusually great—six feet, or more—will so closely approach a direct vertical line as to keep the spout at all times in proximity to the tank opening, whatever the height of the tender.

"A further object of the invention is to provide water courses free from obstruction and abrupt changes of direction, and a spout draining quickly away from the standpipe, and not liable to be inoperative from freezing."

"1. A water column, comprising a standpipe terminating at its upper end in a nozzle, a spout swinging loosely over the nozzle and draining away from the standpipe, and a support for the spout pivoted to the standpipe, at a point

approximately opposite the middle point of the arc, the delivery end of the spout is usually required to describe in being adjusted to tanks of the average height and below the uppermost level of the outlet of the spout, substantially as described."

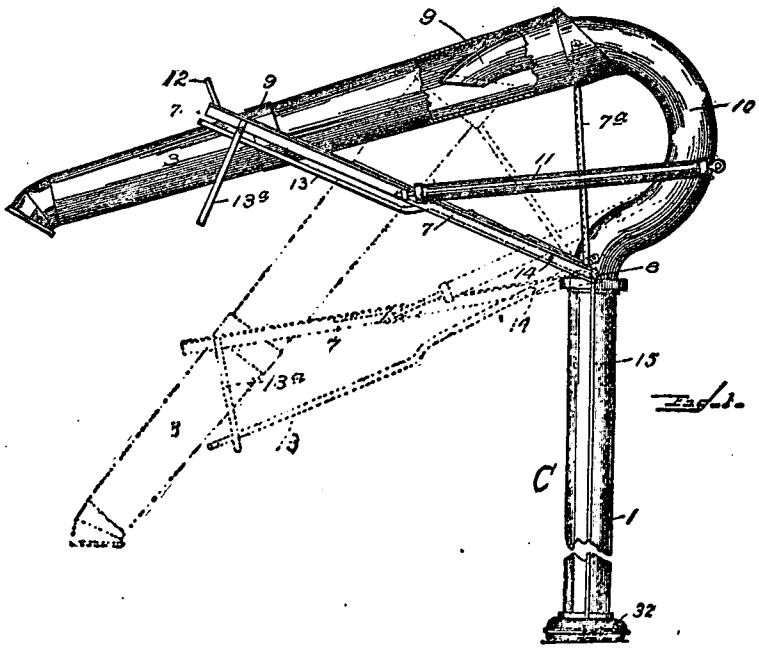
"11. A water column, comprising a standpipe, terminating at its upper end in a reversely curved gooseneck, as shown, a swinging spout fitting loosely over the nozzle of the gooseneck and a support for the spout pivoted to the standpipe, substantially as described."

"21. In a water column, of the character described, the combination with a standpipe having an extended discharge nozzle secured at the head thereof, a discharge pipe whose inner end telescopes with said discharge nozzle so as to be moved freely thereon, and which inclines downwardly away from said nozzle in all its positions, a connection uniting said discharge pipe with the standpipe of the water column and pivoted to said standpipe in a horizontal plane below the horizontal plane of the outlet of the discharge pipe when in its fully elevated position at a point approximately opposite the middle point of the arc the delivery end of the spout is usually required to describe in being adjusted to tanks of the average height, and means for counterbalancing the discharge pipe, whereby the range of movement of said outlet is in a substantially vertical plane."

"38. In a water column, of the character described, the combination with a standpipe of an extended discharge nozzle secured at the head thereof, a discharge pipe whose inner end telescopes with said discharge nozzle so as to be moved freely thereon, a connection uniting said discharge pipe with the standpipe of the water column and pivoted to said standpipe in a horizontal plane below the horizontal plane of the outlet of the discharge pipe when in its fully elevated position, and means for counterbalancing the discharge pipe, whereby the range of movement of said outlet is in a substantially vertical plane."

Figure 1 of Johnson is a general illustration of the features here involved:

FIG. 1.

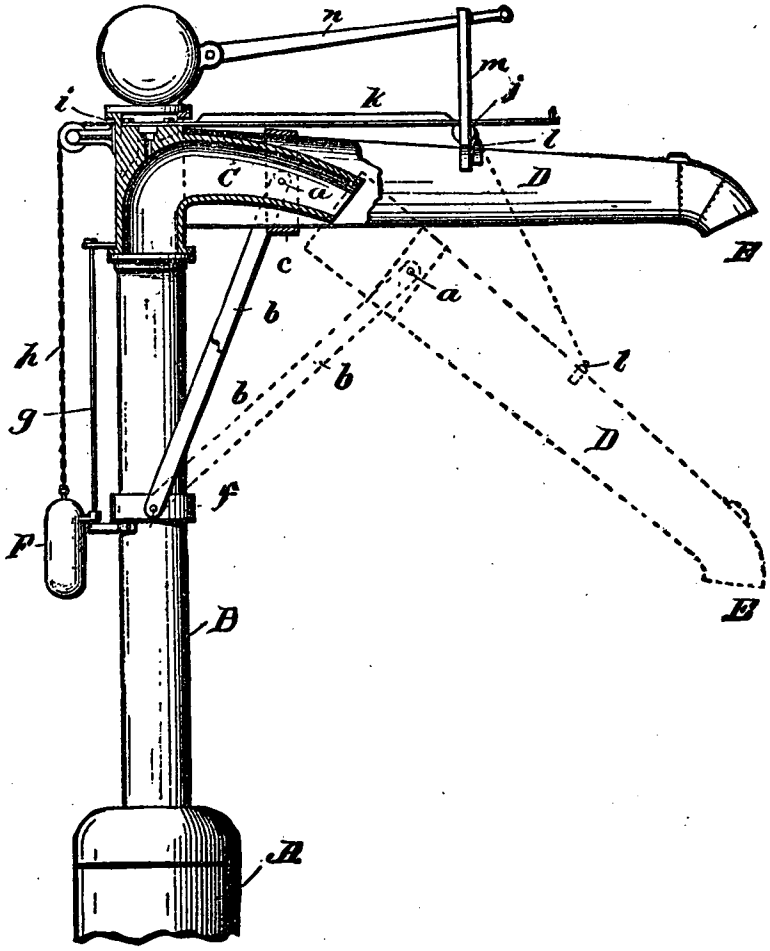


Foster's patent was issued ahead of Johnson's, but Johnson's application was filed more than a year before Foster's. And proceedings in the Patent Office on the copending applications were such that Foster's patent must stand or fall as an improvement of Johnson's device only in the means by which the loose spout is carried and swung.

Foster's claim is this:

1. "In a water column of the character described, the combination of a revoluble standpipe, an extended discharge nozzle secured at the head thereof, a discharge pipe whose inner end is united loosely and telescopically with said discharge nozzle, so as to be moved freely thereon, a pivoted link connection uniting said discharge pipe near its inner end with the standpipe of the water column, and means for counterbalancing the discharge pipe, whereby said discharge pipe may be raised or lowered always in a vertical plane, no matter at what angle it may occupy to the track, substantially as described."

In Foster's drawing, inserted below, the links *b*, pivoted to each side of the column at *f* and also to each side of the spout at *a*, together with the chain *h* attached to the spout at *l* and the counterweight *F*, constitute the improved means for carrying and swinging the spout.



In support of the ruling that Johnson's patent is void for lack of invention the strongest reference to the prior art is patent No. 648,346, April 24, 1900, to Poage, for a water column, and a modification thereof in practice.

Poage's Figures 1 and 5 are here reproduced:

FIG. 1.

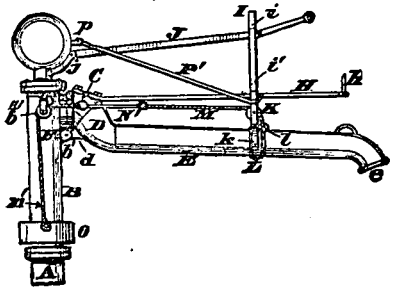
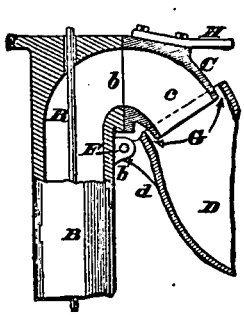


FIG. 5.



Of the coupling between column and spout Poage says:

"*C* is a downwardly inclined male coupling rigidly fastened to the pipe *B* and having a bore *c* of the same diameter as said outlet *b* and communicating directly therewith. Fitting loosely around the lower end of this male coupling is a female coupling *D* of a discharge spout *E*, having a nozzle *e*. Again, this female coupling has a lug *d*, pivoted to a lug *b'*, projecting laterally from the pipe *B*, the pivot *F* being so located as to afford an annular space *G* between said male and female members."

Frank A. Whiteley, of Minneapolis, Minn., for appellants.

Fred L. Chappell, of Kalamazoo, Mich., for appellees.

Before BAKER, MACK, and ALSCHULER, Circuit Judges.

BAKER, Circuit Judge (after stating the facts as above). In single main track days tenders were supplied with water from tanks at the side of the right of way. A pipe projected horizontally from the tank near the bottom. Over the pipe was hinged a spout which normally stood upright. This spout could be pulled down and a valve operated to discharge water into the hole of a properly placed tender.

When double main tracks became common, inconvenience and delay resulted from taking water from the tank at one side of the tracks; and soon came the "railway water column." In this a water main led to a standpipe or column which was erected between the tracks; from the top of the column, at right angles, extended a rigid discharge spout which normally was parallel to the tracks; and the column could be rotated to swing the spout over either track.

Locomotives were being built larger and larger; on the same railway, tenders of various heights were in contemporaneous use; and for some years before Johnson devised his water column the variation amounted to five or six feet.

One condition of meeting perfectly the known situation was that the outer end of the spout should be movable up and down in a substantially vertical line above the water holes of tenders of varying heights. Other concurrent conditions were that the spout in its most elevated position should drain, when the valve in the column was

shut off, into the water hole of the tender, so as to avoid in winter the formation of ice heaps about the column between the tracks; and that the working relation between the column's nozzle and the discharge spout should be such that during the coldest weather the device would not be put out of commission by freezing.

Efforts, prior to Johnson's were along the following lines: One type had a ball and socket joint between the column nozzle and the spout. By providing a continuous waterway, the spout, inasmuch as its outer end in its normal position was above the head of the column, would drain back into the column. Thus the danger of ice heaps was avoided. But manifestly the outer end of the spout could move only in the arc of the circle of which the spout was the radius; and the overlapping parts of the ball and socket joint would become fast from freezing in very cold weather, putting the apparatus temporarily out of service, or causing it to be broken by forcible attempts at operation. In another form of the continuous waterway species the connection between the column nozzle and the spout was a flexible rubber tube, whose extensible accordion plaits permitted the outer end of the spout to be placed over the holes in tenders of varying height. Though this form prevented ice heaps about the base, the pockets in the plaits detained considerable water which when frozen rendered the device inoperable or caused the tube to be ruptured by impatient hands. In the Poage structure, pictured in the statement, we find that fewer of the difficulties were overcome than in the kinds in which there was a fixed and completely watertight connection between the column nozzle and the spout. Poage's is a modified form of the continuous waterway type. For, though Poage's specification speaks of a "loose" connection between the male and female members, the "annular space *G*" is slight in radial distance and limited in circumferential movement. It seems clear to us that "loosely" was used in the sense that the members were not affixed to each other and not completely watertight as in the ball and socket and accordion plait connections, and not in the sense in which a straight-sided funnel may be held "loosely" about the curved discharge end of a faucet. In operation, the annular space frequently became fast with ice; back pressure caused water to overflow through the annular space and form ice heaps about the base; the stop at bar *H* (Figure 5) prevented the outer end of the spout from being raised to the level of the hinge *F*, which forms the center of the arc described by the outer end of the spout; and all movement of the outer end of the spout was down and away from the vertical plane in the center of the track. In Poage's modified form C, the male and female members were somewhat longer, but the principle of operation remained unchanged.

These prior art structures, in our judgment, emphasized the difficulties rather than indicated the solution. In Johnson's structure the co-operation of two new features is essential. One is the connection between the column nozzle and the spout. He made his nozzle in the form of an extended gooseneck, with a relatively flat downward curve. Over this he placed a spout whose rear portion, straight-lined, was of such diameter as to permit movement of the spout not directed or con-

trolled by the gooseneck nozzle. In this connective feature Johnson rejected ball and socket joints and accordion plaits, and likewise departed radically from the concentric and arc-ed movement of Poage's male and female members. The other feature is the extended arm, pivoted at one end to the column at a point approximately opposite the middle point of the range of movement of the end of the spout, and rigidly affixed at the other end to the sides of the spout. (In the prior art structures, from the earliest watertank to the latest water column, the spout itself was virtually the radius of the arc described by the end of the spout.) The first feature provides the capacity, and this second feature furnishes the means, of swinging the end of the spout in a substantially vertical line above the holes of tenders of varying height. This combination, resulting in a structure that substantially met all the difficulties, was novel. Each element, as such, was to be found somewhere or other in the mechanical world. And of course, in the light of the patent, other water columns may be, and for use in this case have been, altered and reconstructed to resemble the Johnson; but even with the aid of hindsight we fail to see in the patent anything other than a meritorious invention.

A large part of the record and briefs is taken up with matters which we have carefully examined, but which, we think, need no more than passing mention.

Appellees' insistence that the "vertical plane" of the claims is one that extends through the column and spout, and not the one that is drawn in the center of the track, results from a misreading of the patent.

Prolonged discussion of numerous photographs and measurements by opposing witnesses is presented concerning the character and dimensions of a water column erected by Johnson at Hayfield, Minn., about a year before he applied for his patent. Appellees' contention is that the Hayfield structure has a limit of accommodation of only a few inches, and not the "six feet or more" specified in the patent. Whether the Hayfield structure was a reduction to practice or an experimental use; whether its range of accommodation was less than that subsequently stated in the application for the patent; whether other water columns, also erected by Johnson prior to his application, as at Oelwein, Iowa, were perfect exemplifications of the patent; and what may be the truth respecting the methods of taking photographs and measurements —are questions we deem irrelevant. For this suit is based, not on Johnson's practices, but on his patent.

It is also claimed that the patent drawings, if scaled, do not exactly accord with the written description and the claims. But drawings are to be taken as illustrative of the idea of the patent, not as working plans. Western Telephone Co. v. American Electric Telephone Co., 131 Fed. 77, 65 C. C. A. 313.

[2] Regarding Foster's patent, appellees present the question of invention as though it would be obvious to a mechanic to change the rigidly attached ends of the Johnson arms into pivoted ends. Of course a mechanic could do that; but, if he did, the obvious result would be the inoperativeness of the Johnson structure. Johnson must have seen that obvious result, and therefore used the more expensive rigid

attachment; but neither to Johnson nor to others skilled in the art was it then obvious that all the aims and results of Johnson could be attained in a better way by pivoting the outer ends of the supporting arms. For that better way is impossible unless, as shown by Foster, the arms be pivoted near the inner end of the spout and between that point and the outer end of the spout additional supporting means be provided. After the desirability of the improvement and the means of accomplishing it were first perceived in the creative imagination, it was doubtlessly easy enough for Foster or any mechanic to go to the general art of pulleys, chains, counterweights, and arms or levers pivoted at both ends in various places, and gather the elements of the new combination. Though Foster's improvement is slight compared to Johnson's, we cannot find that the Patent Office was inadvertent in making the grant.

Appellees for a time manufactured and sold the Johnson water column under license. After paying something over $12,000 in royalties, they abrogated the contract. Their present manufacture is substantially the Johnson column, plus the Foster improvement, plus an improvement of their own.

We find the record sufficient to hold both appellees in this jurisdiction.

From an extended examination of the file wrappers we find nothing that detracts from the face value of either patent as issued.

Claim 11 of Johnson should not be included in the decree. Appellants, in response to interrogatories filed with appellees' answer, stated that they would rely at the trial only upon claims 1, 21, and 38. Without other notice, they included claim 11 in their evidence at the trial.

The decree is reversed, with direction to enter a decree for an injunction and an accounting.

AMERICAN GOGGLE CO. et al. v. MALCOM.

(Circuit Court of Appeals, Seventh Circuit. January 2, 1918.)

No. 2497.

1. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—EYE SHIELDS.
In the Malcom patent, No. 1,182,398, for an eye shield of transparent flexible material, having two colors extending horizontally, the darker color above to shade the eyes, claims 5, 6, 7, 8, and 9, which claim the two-color feature broadly, are void for anticipation in the prior art. Claims 1, 2, 3, 4, and 10 *held* valid and infringed.

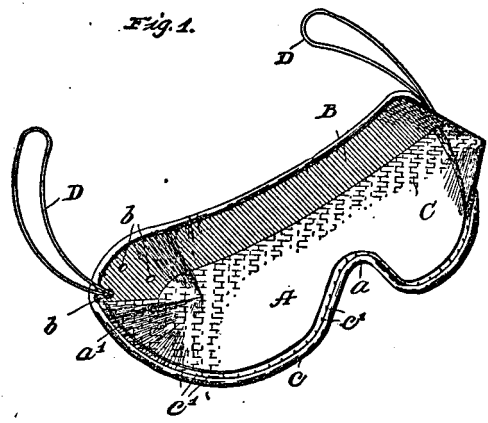
2. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—EYE SHIELDS.
In the Rextrew patent, No. 1,123,376, for an eye shield, claim 4, which is for an elastic cord and hook for holding the shades in place, is void for lack of invention. Claims 1, 2, 3, 5, and 6 *held* not infringed.

Appeal from the District Court of the United States for the District of Indiana.

Suit in equity by Robert Malcom against the American Goggle Company, Roy E. Green, and William Zimmerman. Decree for complainant, and defendants appeal. Modified and affirmed.

The action was on appellee Malcom's patent, No. 1,182,398, May 9, 1916, and on Rextrew's patent, No. 1,123,376, January 5, 1915, assigned to Malcom, both for improvements in eye shields or goggles. The Malcom patent was applied for September 21, 1914, and the Rextrew patent July 13, 1914. It may be inferred from what little thereon the transcript shows—and both sides seem to take it for granted—that after the grant of the Rextrew patent the Patent Office declared interference between Malcom's claims 5 to 10 and Rextrew's claims 7 to 12, which resulted in priority of invention being awarded to Malcom.

Malcom's shield shows a combination of elements—mostly old. It is of transparent flexible material, such as celluloid or pyrolin, having two colors extending longitudinally, the darker color above to shade the eyes, and so adjusted that the user may, by slightly lowering his head or raising his eyes, place the darker color in the line of vision between him and a bright light he is facing—such as sunlight or the strong light of an approaching automobile. The shield is formed by notching the ends and overlapping them, so as to form side walls which extend forward from the face and at right angles to the front or body portion of the shield, which extends straight across between the most forwardly projecting points of the side walls, and forming a somewhat rigid housing over the eyes, straight across the face. The resiliency of the rim is secured by extending the edge of the transparent material into a rubber tubing forming a rim for the shield conformable to the contour of the wearer's face. Fig. 1, following, of the patent drawings shows the shield:



The main body of the shield is thus spaced a considerable distance from the eyes, affording means for ventilation, and, as stated in the specification, space for the user to wear his ordinary glasses, if desired, without interference by the shield.

The main feature of the Rextrew patent different from Malcom is in the forming of the sides or end walls. Instead of notching the ends of the blank transparent sheet, Rextrew folds them together, and thus fastens them so as to produce about the same shaped shield as Malcom's. There are other features which will be stated as they are considered in the opinion.

The usual defenses are made, of anticipation, aggregation, and noninfringement. The decree finds both patents valid, and all the claims infringed.

Henry M. Dowling, of Indianapolis, Ind., for appellants.
Florence King, of Chicago, Ill., for appellee.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

ALSCHULER, Circuit Judge (after stating the facts as above). [1] In the prior art appear patent grants which greatly limit the scope of what appellee may rightfully claim. Alt, No. 183,443, 1876, shows the form of ordinary spectacles wherein the lenses or glasses are in part colored or tinted, so that the wearer may by looking through the colored parts protect his eyes from strong lights. Warren, No. 492,125, 1893, shows an eye shade made of transparent mica dyed

or coated to a desired shade, laid on a cushioned frame of "felt, rubber, or any suitable material." Alles, No. 950,255, 1910, employs ordinary spectacles suited to the eyes of the wearer, to the glasses of which there is removably attached by holding clips, glass, celluloid, or other transparent material, of darker shade, whereby any desired part of the glasses may be shaded, leaving the rest clear. Barr, No. 1,067,793, 1911, equips ordinary goggle frames, with tinted glass, part of the glass being ground materially thinner than the remaining part, so as to afford clearer vision through the thin than through the thicker portions. Harris, No. 1,060,083, 1913, shows goggles which have eye tubes each with a two-colored lens mounted in a separate revoluble frame in order that they may be set to accommodate them to the direction from which the strong light comes, and thus adjust them to the convenience of the wearer. Sheldon, No. 611,396, 1898, is, barring the two colors, which are not there present, more nearly anticipatory than any of the others. It shows an eye shield of celluloid or other flexible material made from a single piece notched at the ends and the parts brought together, so that the shield when in position will at the ends project somewhat from the face and not interfere with the eyelashes; the rim being composed of flexible material such as cloth or felt.

We thus find in the prior art goggles or eye shields of celluloid or other flexible material, and those with the transparent seeing parts made of two shades of material. While Sheldon does not mention two colors, and it does not appear that he employed more than one color, yet in view of the prior art it would not involve invention in Malcom over Sheldon, and would therefore not be patentable in Malcom, to employ two colors in Sheldon's shield. But we are convinced from the record here that, wholly aside from the two colors, the Sheldon shield is not the shield of the patents in issue, which we find to embody a patentably different concept from that of Sheldon. Sheldon evidently contemplated a shield which at its ends or sides extended somewhat outwardly, but otherwise lay flat against the face; the front of the shield conforming to the face contour. The concept of the Malcom and Rextrew patents appears to be substantially different. They show a sort of outwardly sloping roof extending forwardly from above the eyes, and straight across between the outward points of the side walls; the entire horizontal line across the face at the most forward part of the shield being substantially at right angles with the plane of the side walls. The evidence shows that this conception, when embodied in the commercial structure, found prompt and substantial recognition by the public in the very considerable trade which the new article immediately commanded, a fact which must be accorded due weight in determining whether or not the new article possesses the merit of novelty and involves invention in its conception.

Malcom's claims 1, 2, 3, and 4, viewed in the light of what he shows and of the prior art, secured to him the advance he thus made in the construction of the shield. His claim 5 is predicated simply upon the employment of an eye shield of two colors, extending from end to end of the shield; one of the colors affording greater light obstruction than the other. This claim would give to Malcom any shield which

employed the two colors, extending across the front. As has been seen, he is not entitled to claim thus broadly, and claim 5 is therefore void. Claims 6, 7, 8, and 9 fall within the same category as claim 5, and they also are void. Claim 10 describes a structure wherein the darker or greater light-obstructing material is not in the front or seeing part of the shield, but in its side or end walls, whereby the eyes are shaded from light which comes from the sides through the end walls. While from the evidence the utility of such a device is not so plainly apparent as might be desired, it is not controverted, and the prior art shows no structure similar in this respect. The presumptive validity of the claim as granted will therefore prevail.

[2] Respecting the Rextrew patent, claims 7 to 12, having on the interference been awarded to Malcom, need not be further considered. Claim 4 is for elastic loops at the ends of the shield, and a hook at the end of one of the loops adapted to hook upon the other loop, holding the shield in place by the elastic fastening about the head. Flexible eye shields, such as Sheldon's, could not be held to the face by bows, as in ordinary spectacles of rigid construction, nor by springs as in nose glasses, but manifestly only by strings or tape, elastic or otherwise, tied or otherwise held about the head. Whether such fastening member is of one or two pieces, or, if two, whether tied together, or held by a hook, involves expedients altogether too old and common to be in this generation the subject of a patent. Harris, 1913, makes mention of the goggles held in operative relation "through the medium of a band in the usual and well known manner." Warren, 1893, describes an elastic cord about the head to hold the eye shield in place. The claim is clearly invalid. The other claims of this patent are considered in dealing with the question of infringement.

Appellee's claim of novelty in the employment of the rubber rim is clearly overcome by the revelations of the prior art. Genese, No. 295,242, 1884, Mirovitch, No. 807,844, 1905, and Stevens, No. 599,289, 1898, show cushioned rims for goggles. Sheldon describes a rim of felt surrounding his mica shield. We do not find patentable invention in the patents in issue in the employment of the rubber tube for the rim.

It is insisted for appellants that their device is made under the teachings of Rextrew's junior patent, No. 1,186,943, June 13, 1916, assigned to appellant Green, and that it therefore does not infringe. This patent purports to be on its face an improvement on the first named Rextrew patent, the difference claimed to be material to the issues here being the employment in the transparent part of the shield of two pieces of differently colored materials extending longitudinally across the face; the two pieces slightly overlapping and secured together in the various ways described. It seems plain enough that the employment of two pieces of material, instead of one, would not avoid Malcom or the first Rextrew patent. If merit and patentable novelty reside in the employment of two pieces, where Malcom used but one, this would constitute only what Rextrew's last patent claims to be—an improvement on his first. But one may not, in using, this improvement, appropriate with impunity the structure upon which

it has improved. The alleged infringing articles appear in all essential respects to be like those made in accordance with the patents sued on, and infringe them in the manner pointed out, and are not less infringing because of the feature of the two pieces joined together by cement or in some other manner.

As to the Malcom patent, we conclude that claims 1, 2, 3, and 4 are valid and infringed; claims 5, 6, 7, 8, and 9 are invalid; and claim 10 is valid and infringed, in so far as the evidence shows the end walls of appellants' device to be substantially darker than the rest of the shield.

As to the Rextrew patent in issue, we find that claims 1, 2, and 3, comprising as they do the folded ends to form the side walls, without making any cut or notch in the ends of the blank, are not infringed by appellants' device, which does not have its ends folded. Claim 4, securing to the patentee the feature of the elastic cord and hook for holding the shades in place, is invalid. Claims 5 and 6 include as an element a hook or pin device for holding the shield to the faces of women by hooking into their hair. No such element is shown in appellants' device, and claims 5 and 6 are thus not infringed. Claims 7 to 12, inclusive, are those which were awarded to Malcom on the interference, and are thus disposed of.

The decree of the District Court will be modified in accordance with these views, and, as modified, affirmed; each side to pay one-half the costs of this court.

STURM v. WM. E. DEE CO.

(District Court, N. D. Illinois, E. D. March 12, 1918.)

No. 695.

1. PATENTS ⟸99—CLAIMS—SPECIFICATIONS.
An element of an invention omitted from claims may be supplied from the specifications, which describe it.

2. PATENTS ⟸328—VALIDITY—INVENTION.
The Sturm patent, No. 1,153,269, for brick-handling tongs, *held*, in view of the prior art, not to show invention; this being particularly true as the patent, which, if valid, was a very narrow one, was not commercially successful.

In Equity. Suit by William Sturm, Sr., against the William E. Dee Company. Bill dismissed.

Brown, Hanson & Boettcher, of Chicago, Ill., for plaintiff.

John B. Macauley and George T. May, Jr., both of Chicago, Ill., for defendant.

SANBORN, District Judge. Infringement suit on patent No. 1,153,269, issued to plaintiff September 14, 1915, for brick-handling tongs. The device in question is like the ordinary ice tongs, except that one of the jaws is adjustable, so as to enable the workman to

grasp a certain number of brick. The objects of the invention are thus stated in the specification:

"Prominent objects of the invention are to provide a simple and practical construction of brick handling tongs, to arrange for the easy adjustment of the same to handle a greater or less number of bricks or similar articles, to prevent pinching or otherwise injuring the fingers of the party handling the device, and to secure the foregoing and other desirable results in a simple and expeditious manner."

The two claims read:

"1. A device of the class specified comprising a tubular member having a longitudinal slot, a bar or rod arranged within said tubular member and having a laterally extending grasping portion, and a ring arranged to slide upon said tubular member and having a handle provided with a shank adapted to extend through the slot in said tubular member and engage said rod or bar.

"2. A device of the class specified comprising in combination, a tubular member having a longitudinal slot, a rod or bar arranged within said tubular member and having a projecting end provided with a laterally extending grasping portion, and means for engaging said rod or bar extending through said slot, said means having a handle and a threaded shank connected with said handle and extending through said slot."

[1] The claims omit one of the elements of the invention, the operating or lifting handle; but this element may be supplied from the specification, in which it is described as a handling member *11* Westinghouse v. Boyden Power Brake Co., 170 U. S. 537, 18 Sup. Ct. 707, 42 L. Ed. 1136; Duncan v. Stockham, 204 Fed. 781, 123 C. C. A. 133; Jones v. Evans, 215 Fed. 586, 131 C. C. A. 654.

[2] The invention is a very narrow one at best. It has had very little, if any, commercial success. All the elements of the combination are found in Zirckel, No. 673,937, and Hansen, No. 468,872. While there is improvement in making the device more accurately adjustable, there seems to be nothing which would not readily occur to a brick handler. Had the device supplanted others and supplied an operative demand, it might be sustained, but both these conditions are absent.

There should be a decree dismissing the bill, with costs.

UNITED STATES SLICING MACH. CO. v. WOLF, SAYER & HELLER, Inc.

(District Court, N. D. Illinois, E. D. March 4, 1918. Rehearing Denied May 29, 1918.)

No. 507.

1. PATENTS ⇐328—VALIDITY—INFRINGEMENT.
The Van Berkel patents, No. 806,603 and No. 895,213, for meat-slicing machines with removable meat plates, *held* valid and infringed, as to claim 2 of the earlier patent and claims 8, 9, and 10 of the later.

2. PATENTS ⇐237—CONSTRUCTION—EQUIVALENTS.
Any patent, however narrow, has some range of equivalents, unless form is made the indispensable thing, and this rule is particularly applicable when the infringer takes the whole gist of the invention, though not all the mechanical details; this being so, though all the combination elements are old.

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3. PATENTS ⟸289—ACTIONS FOR INFRINGEMENT—LACHES.

Complainant's failure to sue for infringement of its patents for some years after it was begun does not amount to laches, barring recovery, where it appears that an officer of complainant notified defendant that it was infringing and threatened suit, and defendant made no outlay and did not change its position in reliance on any act of complainant.

In Equity. Bill by the United States Slicing Machine Company against Wolf, Sayer & Heller, Incorporated. Decree for complainant. See, also, 243 Fed. 412.

Brown & Nissen and A. J. Crane, all of Chicago, Ill., for plaintiff.

Max W. Zabel and Sidney Stein, both of Chicago, Ill., for defendant.

SANBORN, District Judge. Final hearing on three patents on meat-slicing machines—No. 806,603, of December 5, 1905, to W. A. Van Berkel, No. 895,213, August 4, 1908, to Van Berkel, and No. 1,039,210, September 24, 1912, to Hendrick Stukart. The last patent has been already disposed of by a decree dismissing the bill as to that cause of action. This was done because plaintiff at first failed to prove title to the Van Berkel patents, and time was given to supply the evidence. This has been done, and the question now is whether the patents are valid, and, if so, whether plaintiff is chargeable with laches. Defendant also denies infringement. The decree disposing of only part of the cause was entered without objection by plaintiff, upon a decision that title was not proved as to the Van Berkel patents and that the bill should be dismissed as to the Stukart patent.

[1, 2] The meat-slicing machines made under the three patents are in common use in meat markets in cities, and are exceedingly useful as well as of attractive design. The gist of the invention lies in the fact that the meat plate, and the material thereon, are readily taken off and another plate with other material substituted. This feature is combined with a reciprocating table, an adjustable screw-feeding device to advance the plate to the knife, and a circular, revolving knife. The benefit of having the plate removable is that different kinds of meat may be fastened to different plates, and removed from time to time without disturbing the meat. This accommodates the trade, saves time, and gets better results, by securing uniform slicing. All the elements of the combination are old. They are seen in claim 2 of No. 806,603: (1) A meat-slicing machine, embodying a reciprocatory table provided with vertical guide bars extending in the direction of the length of the table; each of said bars having its inner face extending in a vertical plane; (2) a removable meat plate, mounted upon said table between said bars and having the side edges thereof corresponding in contour to the inner faces of said bars; said plate reciprocating with said table and capable of being shifted on the table in the direction of the length thereof; (3) means engaging with the plate for shifting it; (4) and means for disconnecting said shifting means from the plate to permit of the lifting of the plate directly off the table when occasion requires.

Two more elements are added by patent No. 895,213, as follows: A supporting slide having means for clamping the material thereto moving in vertical guides above the meat plate; a spring-held member pressing laterally against the slide to take up loose play and wear.

Stated in less technical language, plaintiff's machine comprises a circular rotating cutting knife, a table moving back and forth along the plane of rotation, a meat plate on the table, moving upon and at right angles to the table, a screw for advancing the plate up to the edge of the knife, an arm connecting the screw and plate to secure such advance, a rack above the plate to hold the material to the plate, the plate moving in vertical guides, so that it may be detached and lifted off the table for the substitution of another plate with different material, with some means for pressing the moving plate against one of the guides, so as to take up lateral play and wear of the plate against the guide. This is a practical machine, in common use in meat markets, almost indispensable in city markets, where the element of time is important, and neat and effective work desirable.

The vertical guides for the plate are found in Chadborn, No. 170,053, so that his plate can be vertically removed from the table; but Chadborn had no conception of the modern slicing machine, or of Van Berkel's contribution to the art. The gist of the Van Berkel idea was partly anticipated by Chadborn, so as to narrow the patents in suit, but is by no means enough to deprive them of novelty or patentability. They should be held valid.

As to infringement, defendant's machine is substantially the same as plaintiff's, and answers the patent claims, except one element of the first claim of No. 806,603, which includes "a swinging member carried by the plate." This refers to the connection between plate and screw, which must be in registry when the machine is operating and the plate advancing towards the knife, and must be detached when the plate with its clamped material is lifted off to substitute another with different material. Defendant's engaging and detaching device is not carried by the plate, but only engages with it, by which the same result is obtained in practically the same way. Form is not the essence of the Van Berkel invention, but plate detachability. It is unimportant just how he secures the forward movement towards the knife. Any patent, however narrow, has some range of equivalents, unless form is made the indispensable thing. Paper Bag Patent Case, 210 U. S. 405, 28 Sup. Ct. 748, 52 L. Ed. 1122. And this rule is especially applicable when an infringer takes the whole gist of the invention, but not all the mechanical details, even where all the combination elements are old.

[3] Another defense is laches. The argument is that plaintiff knew as early as 1905 that defendant was making machines containing removable plates in the form of the Peerless slicer, and offering them for sale as early as 1906. The trouble with this defense is that it does not appear that the Peerless had vertical guides, so as to admit of the plate being vertically lifted from the table. The witness Modjeska admits that the Peerless guides were V-shaped, and the circulars G 1 and G 4 show them to be so. While some of the testimony tends to

show that machines like the patents might possibly have been made by defendant about the time the first patent issued, it is not sufficient to prove the fact. It also appears that in 1909 an officer of the plaintiff told Mr. Sayer that he was infringing its patents on certain improvements, including the sharpener, and threatened an infringement suit if Sayer should copy any of plaintiff's improvements. Whether these improvements are covered by the patents in suit is not clear. On the whole, it is not shown that defendant, to its damage, relied on plaintiff's failure to sue, or that it was actually infringing a sufficient length of time before this suit was brought to constitute laches; no outlay or reliance on any act of the plaintiff; no encouraging a sense of security. There is simply a suggestion of facts showing laches; no real proof.

There should be a decree for plaintiff, declaring the Van Berkel patents valid, that claim 2 of the earlier one, and claims 8, 9, and 10 of the later one, are infringed, and for an injunction and accounting. Since the bill was dismissed as to the Stukart patent, neither party will recover costs.

On motion for rehearing a more careful examination of the circulars referred to, and others in evidence, seems to show that the Peerless machine was built with vertical guides. But the evidence as to the date of these circulars is not satisfactory. The motion for rehearing was denied.

McDONOUGH v. INTERNATIONAL NAV. CO., Limited, et al.

(District Court, D. Maine. December 15, 1917.)

No. 433.

1. SHIPPING ⟸84(2)—INJURIES TO STEVEDORES—VESSELS—DUTIES.

Where a ship contracted with a coal company to replenish her coal bunkers, and pursuant thereto the coal company was loading bunker coal into the vessel from its lighter, and while so engaged there was no other way for stevedores to pass from the lighter to the wharf, except over the ship, and a ladder was essential to enable them to reach the ship, the vessel owed the same duty to a stevedore, on the lighter in the course of his employment, to exercise reasonable care to provide a sure and safe means of passage over it, and to such parts of it as he must necessarily go, because such stevedore was rendering a service to the vessel, that it owed to his employer, the coal company.

2. SHIPPING ⟸86(2)—INJURIES TO STEVEDORES—NEGLIGENCE—EVIDENCE—SUFFICIENCY.

On a libel by a stevedore, hurt by a fall to a lighter used in coaling the vessel, when a ladder furnished by the ship to afford stevedores passage over the vessel from the lighter to the wharf broke, evidence *held* to establish the negligence of the vessel.

3. SHIPPING ⟸84(3)—INJURIES TO STEVEDORES—NEGLIGENCE.

A coal company, the owner of a lighter and employer of stevedores, which was engaged in coaling a vessel, made no practice of furnishing ladders to afford its stevedores passage from the lighter to the vessel, and thence onto the wharf, as their duties or necessities might lead them. The ladder first furnished by a ship's petty officer was defective, and the employé of the coal company in charge of the lighters secured a sound ladder, informing the officer the first one was unsafe. Thereafter

It was removed, and libelant, a stevedore, attempted to use the ladder first furnished by the vessel, and was injured. *Held* that, as his employer made no attempt to furnish him with a ladder, the employer was not guilty of negligence; the employé in charge of the lighter not being bound, when the ladder he had procured was removed by the ship's petty officer, to warn the stevedores not to use the ladder furnished.

4. SHIPPING ⊂⊃84(5)—INJURIES TO STEVEDORES—NEGLIGENCE—CARE.
It is impossible to absolve landsmen, accustomed to work upon vessels in port, from the duty to use reasonable care and attention to their movements, and a stevedore, employed on a lighter engaged in coaling a vessel, who, when it became necessary for him to proceed over the vessel to the wharf, attempted to use a defective ladder furnishd by the ship, must be deemed guilty of contributory negligence; several of the rungs being missing, and other defects in the ladder being apparent on inspection.

5. SHIPPING ⊂⊃84(5)—STEVEDORES—ASSUMPTION OF RISK—WHAT CONSTITUTES.
The stevedore, it not appearing that his negligence was the immediate and proximate cause of the injury, cannot be held to have assumed the risk; such risk not being one with which he was familiar.

6. DAMAGES ⊂⊃132(6)—PERSONAL INJURIES—MEASURE.
Where a longshoreman, 52 years old, who had been working for 33 years at that occupation, suffered injuries resulting in a broken leg, and which shortened the leg about an inch and a half, and limited the motion of the thigh, an award of $4,800 damages is warranted; medical testimony on his lessened capacity to do manual labor being conflicting.

7. SHIPPING ⊂⊃85—INJURIES TO STEVEDORES—DAMAGES—MEASURE.
Where the contributory negligence of a longshoreman and the negligence of a vessel both contributed to an injury, damages should be divided, and the longshoreman is entitled to recover only one-half of the amount which should have been awarded for his injury.

In Admiralty. Libel by William McDonough against the International Navigation Company, Limited, and another. Decree against the named respondent, and in favor of the other respondent.

Henry Cleaves Sullivan, Max L. Pinansky, Nathan W. Thompson, and Benjamin Thompson, all of Portland, Me., for libelant.

Symonds, Snow, Cook & Hutchinson, of Portland, Me., for respondent International Nav. Co.

Symonds, Snow, Cook & Hutchinson, of Portland, Me., amicus curiæ, for White Star Dominion Line.

Verrill, Hale, Booth & Ives, of Portland, Me., for respondent Randall & McAllister.

HALE, District Judge. The libelant was one of a crew of stevedores in the employ of Randall & McAllister, a corporation dealing in coal and engaged in loading bunker coal from its lighter, or scow, known as lighter No. 1, into the Northland, a steamship owned by, and in the service of, the International Navigation Company, Limited. The steamship was a vessel of about 5,000 tons burden, docked at one of the Grand Trunk Railway Company's wharves, for the purpose of loading merchandise to be carried to some foreign port. The lighter had a carrying capacity of about 250 tons, a length of about 85 feet, a

beam of 25 feet, and decks at each end of about 16 feet in length. It was also decked over on each side; the rest of the lighter was open and called the "hold." On the bow of the lighter was a house called the engine room.

Some time during the morning of April 14, 1917, the libelant and eight others of his gang went down over the side of the steamship on a rope ladder, to the deck of the lighter, and began the work of loading coal into tubs in the hold of the lighter. He continued at work for an hour or more, when he had occasion to go down to the lower end of the wharf at which the steamer was lying, to one of the toilets located there. He started up over the side of the ship, upon the ladder, then placed abreast the engine room of the lighter, and near the location of the ladder on which he had come down earlier in the morning. When he had gone 10 or 15 feet up the ladder, one of its rungs broke, causing him to fall upon the lighter, abreast of the engine room, and causing the fracture of the right thigh bone, from which there resulted a shortening of about an inch and a half of his right leg.

The libel is against the Navigation Company and Randall & McAllister.

In behalf of the libelant it is contended that the Navigation Company failed in its duty of furnishing a reasonably safe and suitable ladder for him, and for his coemployés, to go to and from the lighter to the wharf, that the ladder furnished was unsafe and unsuitable, and that another ladder, which had been selected and put over the side of the steamship by the man in charge of the lighter, had been taken away by the steamship's crew, leaving a weak, unsafe, defective ladder for use, and giving no warning to the libelant or his coemployés. The libelant says, also, that Randall & McAllister failed in its duty, in that the person in charge of its lighter had knowledge that the ladder placed over the side of the Northland by the crew of the steamer was unsafe, that this unsafe ladder had been allowed to remain there, and that a safe and suitable ladder which the man in charge of the lighter had previously placed over the side of the steamship had been carried away by the crew of the steamship, and that, with this knowledge, the lighter had failed to take any measures to see that a suitable ladder was provided for the use of the libelant, and had failed to give proper notice to the libelant and his coemployés of the unsafe condition of the ladder which had been allowed to remain, and upon which the libelant met with his injury.

The libelant further says that he was without knowledge of the defective condition of the ladder upon which he was injured, that he knew of no danger and assumed no risk, that he was guilty of no negligence or fault, that he had gone down over the safe ladder, and was without knowledge or warning that such ladder had been taken away by the crew of the steamer, and that an unsafe ladder had been allowed to remain in its place.

Each respondent says it was guilty of no negligence and no fault. Both respondents contend that the libelant was solely at fault, because he had a clear view of the ladder, and must have known its condition before he set foot upon it, and must have assumed the risk of attempting to use an unsafe ladder, and because, in any event, he did not ex-

ercise reasonable care and caution in using the ladder, and was guilty of contributory negligence.

On the part of the ship it is contended that it was under no duty to furnish a ladder to this libelant, who had no invitation at law or in fact to cross the steamer in the course of his employment; that the steamship was well equipped with ladders, and was ready to furnish such ladders upon request of any person entitled to use them; but that in this case a member of the stevedore's gang, without making request of any officer of the ship, and without the knowledge of the ship, took an emergency ladder from one of the boats and put it over the side of the steamer for the stevedore's use; that this ladder, while in such use, was in some way damaged; that the libelant attempted to use it in its damaged condition and was injured; that, having so attempted to use it, the stevedore cannot recover of the ship for injuries received by him while using a ladder selected and put in place by the man in control of his gang.

[1] The evidence shows that the ship had contracted with the coal company to replenish her bunker supply of coal, and that, pursuant to this contract, on April 14, 1917, the coal company was loading bunker coal into the steamship from its lighter; that while engaged in this work there was no other way for the stevedores to pass from the lighter to the wharf, except over the ship; that a ladder was essential to them in order to reach the ship. Under the familiar principles of maritime law there can be no question but that a ship owes a duty to a stevedore, who is there in the course of his lawful employment, in loading or discharging such ship; he is rendering a service to the ship, and, while rendering such service, he may look to the ship to exercise reasonable care in providing a safe and secure means of passage over it, and to such parts of it as he must necessarily go, in the performance of his duty. The ship owes the same duty to the stevedore, not to expose him to unnecessary danger, which it owes to his employer. What would be negligence toward one would be negligence toward the other. Pioneer Steamship Co. v. McCann, 170 Fed. 873, 876, 96 C. C. A. 49; The Rheola (C. C.) 19 Fed. 926; Gerrity v. The Kate Cann (D. C.) 2 Fed. 241.

[2] 1. The evidence in behalf of the libelant shows that a ladder was essential for the use of the stevedores in passing to and from the wharf, and that the custom had been for the ship to furnish ladders; that the lighter had no ladders, and the libelant did not look to it for them. James A. Bogan testifies that he had been in the employ of Randall & McAllister for many years; on the morning in question he had charge of the lighter, and of getting the coal off, and the men on and off; he was the only one in charge of the lighter and cargo for his corporation; there was no way for men working on the lighter to get to the wharf from the lighter, except by a ladder; that it had always been the custom for the ship to furnish ladder accommodations for getting aboard the ship when the ship was bunkering coal, and the coal company had never furnished any ladder while he had been in its employ; when he reached the ship, on the morning of the injury, there was no ladder over the side of the steamer; he called to the men on the Northland, who took the lighter's lines, to get a ladder;

a petty officer of the steamer threw a ladder down over the side of the ship; this ladder was made of rope and wooden steps, and was clearly unsafe; it "wasn't any good"; it wasn't safe for nobody"; he hollered for another ladder; the officer on the steamer said the ladder was good enough for anybody to go up and down. Bogan testified that later he went in through the bunkers on the ship and found a ladder, and put it down over the side, and that this ladder was a new boat's ladder, made of rope and with wooden steps; the difference between the ladder he had put over and the one which the ship had passed to him was that this was a new one, while the other was old; he asked nobody's permission to take the ladder from the ship, but helped himself; the ladder that he put over was the same kind of a ladder which the petty officer had furnished earlier, only that it was a new ladder, and a good, strong ladder; he himself went down the ladder which he put over; the other one was still hanging down over the side of the steamer; he put the ladder down so that he could go over it, back and forth to his meals, and for the benefit of the other men, who were going back and forth; as he knew "they wouldn't go down over the old ladder, no more than I would"; that a short time after he put the ladder over the nine men came down upon the lighter over the ladder which he had put abreast of the engine room; and these men got their shovels and went into the hold of the lighter to work. Bogan further testified that, after the work of discharging the lighter had begun, he saw some of the steamer's crew put ladders down from the saloon deck and go down over the side, on the ladders; he also noticed that the petty officer, who put the old ladder down in the first place, took away the ladder which he (Bogan) had put over the side of the steamer. When he saw the officer do this, he asked him what he was going to do with it, and what the lighter's crew were going to have for a ladder. After that he began hoisting, and did not get any other ladder. After the injury he noticed that the ladder which McDonough attempted to use was nearly in the same place where he (Bogan) had put the good ladder.

The libelant testifies that he went onto the Northland about half past 9 in the morning; the lighter was on the offshore side; he went down a ladder to the lighter; eight others of his gang went down this ladder; the ladder he went down was a good ladder; there were no rungs broken in it; as soon as he went down, he went to loading the tubs with coal in the hold of the lighter; he worked something over an hour; he then wanted to go to the toilet down on the end of the wharf; in order to do this, he had to go aboard the ship, and from there to the wharf; he found the ladder alongside the house; when he got to the ladder, there were two rungs broken on the lower end; he reached up with his hands as far as he could above the rungs. He says:

"I hove my knee up, and put my other foot on where my knee was. I thought it was a good ladder, only the rungs that was broke down below. I looked up and I thought it was a good one until I went up."

He testifies that nobody had said anything to him about the ladder, and there was no other way to get aboard the ship, except to go up that ladder; he went up 15 feet and stepped on a rung:

"The rung went away from my foot. I had hold with my left hand, and I thought I reached with my right and both sides of the ladder. I hadn't time enough to get hold with my right hand, and my left hand gave way, and I went down on Randall's scow."

The whole testimony on this subject induces the belief that, in the morning, a good ladder had been put over the side of the steamer leading to the lighter; afterwards this ladder was taken away, and an unsafe ladder was put in its place; and, when the injury occurred, this ladder was in a position near the place where, earlier in the morning, the good ladder had been, upon which the men had safely come down to the scow. It is urged by the learned proctor for the ship that there is convincing evidence tending to show that the ladder on which the injury occurred was the same ladder which Bogan had put in place in the morning, and that it had been injured by being crushed between the barge and the ship's side. The testimony does not lead me to this conclusion. The testimony of Bogan, in connection with all the other evidence, satisfies me that the injury was not upon the ladder which he had placed there in the morning, but on the ladder which the officer of the ship had earlier thrown over the side of the vessel, and which Bogan declared to be unsafe. The owners of the ship had a contract with the libelant's employer to render it a service in supplying it with coal. They owed the same duty to the libelant, in respect to care, which they owed to his employer. There can be no question but that the libelant, when injured, was making such use of the ladder as was to be expected, in the course of the duties of his employment. By the whole evidence I am led to the conclusion that the ship was guilty of negligence, in that it failed to exercise reasonable care in furnishing a safe and suitable ladder for the use of the libelant while employed in a service in which the ship had an interest, and that such negligence contributed substantially to the libelant's injury.

[3] 2. The libelant contends that the coal company, the owner of the lighter and employer of the stevedores, was also negligent, and that the injury to the libelant was due to its negligence, as well as to the negligence of the navigation company; that the fact that the navigation company was negligent does not, in any way, relieve the coal company of liability.

It was clearly the duty of those in charge of the lighter to exercise reasonable care in furnishing a safe place for its men to work in rendering their service of supplying the ship with coal. The somewhat difficult question now arises whether, upon the facts shown, this duty made it incumbent upon the lighter, as well as upon the ship, to furnish suitable ladders over the ship's side, or, in case the ship did not furnish such ladders, to seasonably warn the stevedores. The evidence shows that the ship was well equipped with ladders. These ladders formed a part of its tackle, apparel, and furniture. Those upon the lighter knew that the ship was so equipped, and that it was not only the duty, but the custom, of the ship to furnish ladders to the stevedores engaged in rendering a service for it. The custom had never been for the lighter to furnish ladders to its stevedores to go from the lighter to the ship; it had no ladders; it relied

upon the ship to furnish such ladders for men rendering it a service. The libelant, too, knew that the ship always furnished the ladders over its side, and as a part of its equipment, and that the lighter never did; this is shown clearly by his testimony. On the morning of the injury Bogan, who must be held to have had charge of the lighter at the time, found that an unsuitable ladder had been put down over the side of the ship. He volunteered to go upon the ship to procure a safe ladder, and put it over the side of the ship, for his use and for the benefit of the stevedores. I cannot hold that he was under any duty to do this, or that he was under any duty of watchfulness to see whether the ship did its duty. Upon the facts shown, I think the law does not charge him with such duty. Having put a safe ladder in place, he finds afterwards that such ladder has been taken away, and that an unsuitable ladder had been put down in another place, over the side of the ship. He had already indicated to an officer of the ship that he regarded such ladder as unsafe and had asked for another; not being furnished with it, he had gone to the ship and got it; after the men had been at work for some time he saw the petty officer—who had put the old ladder down, earlier in the morning—take away the ladder which he (Bogan) had put over the side of the steamer. He asked the officer what they were going to do for a ladder. The officer apparently made no reply. It appears that then Bogan did not proceed further with the inquiry, and did not volunteer to go upon the ship again and try to find a safe ladder, and that he gave no warning. The only warning he could have given would have been to tell the men that at that moment there was no suitable ladder in place; that the safe ladder which he had put there, and upon which the men had come down, had been taken away; and that he did not know when it would be put back. Upon all the facts shown, I think he was not charged with the duty of warning the men in case the ship failed in its duty. He had already advised the ship that the old ladder was not safe. I think he was under no duty to again volunteer to go aboard the ship and procure another ladder, or to assume to notify the stevedores that, at that time, there was no suitable ladder over the side of the ship. For it must be remembered that the lighter had never furnished ladders, and had never assumed any duty with reference to ladders; that the libelant knew this, and must be held to have relied upon the ship. I think there is nothing in the case to charge Bogan, acting for the lighter, with the duty of furnishing another ladder, or of calling the attention of the men to the fact that a ladder had been taken away. No case has been brought to my attention which, under such facts, holds this to be the law. The learned counsel for the ship has cited Imbrovek v. Hamburg, etc., Co. (D. C.) 190 Fed. 229, affirmed 193 Fed. 1019, 113 C. C. A. 398, and 234 U. S. 52, 34 Sup. Ct. 733, 58 L. Ed. 1208, 51 L. R. A. (N. S.) 1157. That case is not in point; there the stevedores themselves had acquitted the ship of any fault.

Under all the evidence I find that Randall & McAllister failed in no duty in reference to the furnishing of ladders to the stevedores, and was guilty of no fault which contributed to the injury of the libelant.

[4, 5] 3. Was the libelant at fault?

It appears that when the libelant got to the ladder he found there were two rungs broken on its lower end; that he looked up and came to the conclusion that the ladder was good, except that "the rungs were broken below." The evidence shows that the seizings which held the rungs in place were worn and ragged, and that this might have been seen by a reasonable examination, especially by any one at the bottom of the ladder, looking up, and having the ladder clearly before him. I cannot escape the conclusion that the libelant did not use the care of a reasonably prudent man, under all the circumstances of the case. It was clearly his duty, especially after finding that the lower rungs of the ladder were broken, to look carefully at the ladder, before he set foot upon it. It has often been said by the courts that it is impossible to absolve landsmen, accustomed to work upon vessels in port, from reasonable care and attention to their movements. The Max Morris (D. C.) 24 Fed. 860, 862. By exercising such care, the libelant would have seen that the rungs above him were not safely secured. I think he must be held to have been at fault.

I think, however, that the libelant cannot be held to have assumed the risk. The testimony does not justify me in finding that his negligence was anything more than contributory. The testimony falls short of showing that such negligence was the immediate and approximate cause of the injury, as it was in the case of The Carl (D. C.) 18 Fed. 655, 656, and in The Saratoga, 94 Fed. 221, 224, 36 C. C. A. 208. In the latter case the libelant fell down an open and unlighted hatchway, towards which he had started to make his exit by a ladder leading from it to the upper deck. The testimony showed that he had worked in that place a long time, and knew all the conditions, and must have assumed the risk of proceeding as he did. In the case at bar the testimony does not warrant such finding. The libelant had not seen the ladder before; its unsafe condition was not so well known to him as to justify me in finding that he assumed a risk which he knew and appreciated. The evidence, however, leads me to the conclusion that he did not exercise the care and caution of a reasonably prudent man in the premises, and that his injury resulted in part through his own fault, as in The Max Morris, supra.

The result is that I must hold the International Navigation Company, Limited, and the libelant, each in substantial fault contributing to the injury.

[6, 7] 4. A sharp contention arises on the question of damages. At the time of his injury the libelant was 52 years old and had been working as longshoreman for 33 years. He had been a healthy man. He sustained an oblique fracture in the large part of his thigh bone, near the upper end. His leg was shortened about an inch and a half, and a limitation of the motion of the thigh resulted. Several of our most eminent doctors have testified in the case. They do not agree. Dr. Tobie says the man's earning capacity is reduced about two-thirds, and his ability to labor has been lessened about one-half. Dr. Abbott is of the opinion that the shortening of the leg would not impair the ability of a man to shovel coal; he has known a man with a shortened leg to do manual labor; he thinks this injury will not tend to make the man's life shorter, or to impair his usefulness in the

future, or, indeed, to prevent him from some present labor. He suggested that an operation might be performed, but he does not advise such operation. Dr. Thayer testified that there was nothing which indicated the probability of any future suffering. The contentions of the doctors are not controlling in the case. It cannot be denied that the man has a materially shortened leg, and that he has been deprived of considerable earning capacity for some years. He should have substantial damages. On the whole, at his age, I think I ought not to allow the full amount for which his learned counsel has contended. But, in consideration of the serious character of his injury, his loss of time and of earning capacity, and his expenses, I think the sum of $4,800 is not too much.

I have found that the Randall & McAllister corporation was not at fault. The libel may therefore be dismissed as to it. Under all the circumstances of the case, however, I order that the corporation does not recover costs.

I have found the International Navigation Company, Limited, and the libelant, each in substantial fault contributing to the injury. It is my duty to divide the damages. A decree may be entered in favor of the libelant and against the International Navigation Company, Limited, for the sum of $2,400, with full costs.

In re AMSTER.

(District Court, N. D. Ohio, E. D. March 26, 1918.)

No. 6124.

1. EVIDENCE ⟸68—INTENT—PRESUMPTIONS.
   Every person must be held to intend the natural and necessary consequences of his acts.
2. BANKRUPTCY ⟸409(1)—DISCHARGE—FAILURE TO KEEP BOOKS.
   Under Bankruptcy Act July 1, 1898, c. 541, § 14, 30 Stat. 550, as amended in 1903 (Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 [Comp. St. 1916, § 9598]), providing that a discharge shall be denied where the applicant, with the intent to conceal his financial condition, destroyed, concealed, or failed to keep books of account, or records from which such condition might be ascertained, a bankrupt, who conducted an extensive boot and shoe business, and whose stock in trade exceeded $10,000, must, where he failed to keep books of account, or records showing the amount of stock, liabilities, and assets, be deemed to have intended to conceal his financial condition, and so a discharge will be denied.
3. BANKRUPTCY ⟸415(3)—MASTER—FINDINGS—REVIEW.
   The findings of a special master, to whom proceedings in opposition to discharge of bankrupt were referred, should be sustained, unless clearly improper, or without evidence to support them, as the master, having seen the witnesses, was qualified to pass on their credibility.

In Bankruptcy. In the matter of the bankruptcy of Sidney A. Amster. On exceptions to the special master's report. Exceptions overruled.

A. F. Ingersoll, of Cleveland, Ohio, for trustee.
A. D. Metz, of Wooster, Ohio, for bankrupt.

WESTENHAVER, District Judge. In this matter the trustee opposed bankrupt's discharge on two grounds, of which the first seems to have been abandoned, and the second is that the bankrupt, with intent to conceal his financial condition, either destroyed, concealed, or failed to keep books of account or records from which his financial condition might be ascertained. The special master, to whom these specifications were referred, reports that the second specification is sustained by the evidence, and recommends that the discharge be not granted. The bankrupt excepts to this report, as not sustained by the evidence and as being contrary to law.

The bankrupt and a man named Power early in 1914 engaged as partners in business in the city of Wooster. The bankrupt contributed $1,000 and Power $225 as the firm's capital. In the autumn of 1915 Power retired from the firm, the bankrupt acquiring his interest therein, claiming to have paid therefor $500 in cash, although no evidence supporting this payment appears in the record, other than the bankrupt's statement, nor indicating from what source said money was derived. On October 27, 1916, the bankrupt made an assignment for the benefit of creditors, and shortly thereafter an involuntary petition in bankruptcy was filed in this court by creditors, and an adjudication of bankruptcy was made.

The business was a general boot and shoe store. The only evidence of the volume of business done is the statements of bankrupt's assets and liabilities. Prior to his assignment the bankrupt gave a statement in writing of his financial condition, showing stock in trade of $10,000; machinery and tools, $250; accounts receivable, $462.14; accounts payable, $16,357.56; bills payable, which should be paid by persons other than the bankrupt, $3,017.80; taxes and wages, $26.04. His schedules in bankruptcy contain precisely the same items, except indebtedness for wages and taxes, which is eliminated.

The bankrupt kept no books of any kind, except, perhaps, a ledger showing cash received. He produced on his examination, check stubs, and canceled checks; but these do not appear to have been complete, and many stubs did not have any corresponding checks or entry. The special master finds that they were so detached, so broken and irregular, a part lost and destroyed, that no system of accounting could be established therefrom. A cash register was used, which printed automatically on slips the money received and placed therein; but these slips, the bankrupt testified, were destroyed at the end of each day, and such money as had not been taken from the till by the partners for their own personal use, clerks' wages, or other debts, was deposited in the bank.

The bank deposit book, produced at bankrupt's first examination, was either lost or destroyed before his final examination; the contention being that the examination was completed, and there was no longer any necessity for preserving this deposit book, or the check stubs and canceled checks, and on behalf of the trustee that the examination had been adjourned from time to time without a discharge of the bankrupt as a witness, and that the destruction thereof was intentional.

Counsel for bankrupt earnestly urge that, while it is true no books were kept, the evidence fails to show that such failure to keep books was with intent to conceal the bankrupt's financial condition, and that, the burden of proof being on the trustee to prove this intent to the satisfaction of the court, the master's finding is without evidence to support it, and is contrary to law.

[1, 2] Section 14b of the Bankruptcy Act provides that the applicant shall be discharged unless he has "with intent to conceal his financial condition destroyed, concealed or failed to keep books of account or records from which such condition might be ascertained." Prior to the amendment of 1903 this section contained, before the word "intent," the word "fraudulent"; before the words "financial condition" the word "true"; before the word "destroyed" the words "and in contemplation of bankruptcy"; and in place of the word "such," before the words "condition might be ascertained," the words "his true."

Obviously, the meaning of the original act has been much limited by these amendments. It is no longer necessary to prove intentional fraud, or that the concealment was in contemplation of bankruptcy. It is, of course, necessary to prove that the bankrupt shall fail to keep books of account or records, and that this failure must have been with intent to conceal his financial condition. In this case, failure to keep books of account or records being admitted, the controversy comes down to the bankrupt's intent.

Many cases have been cited by counsel for bankrupt, the purport of which is that the Bankruptcy Act does not establish any standard of bookkeeping, nor require books to be kept according to any system. It is also claimed for these cases that the intent to conceal cannot in any case, as a matter of law or of evidence, be inferred merely from the failure to keep books of account or records, but that evidence of some kind showing an intent to conceal is required before the burden of proof on those opposing the discharge can be said to be maintained by a preponderance even of the evidence.

An examination of these cases, however, shows that the holdings thereof are not so broad as is contended. Some of them are cases in which the master had found in favor of the bankrupt, and the presumption in favor of the master's finding is such that the court was obliged to sustain it unless manifestly against the evidence. In other cases the business conducted by the bankrupt was of such a character that books are not ordinarily kept, or the failure to keep books was not such an unusual circumstance as to warrant any inference, one way or the other, respecting the intent of such failure. In still others, explanations of the failure to keep books of account or records, or of the omission therefrom of some part of the bankrupt's transactions, were offered, which seemed consistent with his entire good faith.

In the present case the business conducted by the bankrupt was such as to require the keeping of books of account or records. The volume of this business was such that neither the bankrupt nor any one else could know his financial condition, unless some system of books or records was kept. The absence of books of account or records

in the conduct of a mercantile business of this character and magnitude is of such significance that an inference may properly be drawn therefrom adverse to the bankrupt respecting his intention. No explanation is offered by the bankrupt as to why such books were not kept. He did not even urge that he kept a file of his bills payable, or of receipts for bills paid, a complete account of cash received or disbursed, from which, together with his bank deposit book, he was enabled, or even tried, to keep in touch with his financial condition. The reckless manner in which he bought goods on credit during the time while thus greatly in debt, and while his cash receipts were being dissipated in living or personal expenditures, is also a circumstance entitled to weight in characterizing his conduct or inferring intent.

The situation here calls for the application of the rule that every person must be held to intend the natural and necessary consequences of his acts. The necessary consequence of the bankrupt's conduct was to conceal his financial condition, both from his creditors and himself. The character and volume of his business repels the inference that he regarded the keeping of books or records as an unnecessary labor. The most inexperienced boot and shoe merchant cannot but know that a mercantile business cannot be conducted as a cobbler's or a bicycle repair shop. The failure to do that which all such merchants customarily do calls for explanation, and none is offered. The legitimate inference is that the necessary consequence was intended; that is, the suppression or concealment of the financial condition that such books and records are ordinarily intended to disclose.

Many referees and courts have held that an intent to conceal a bankrupt's financial condition could and should be drawn from like facts, especially in the case of merchants or persons other than mere laborers, mechanics, farmers, and others engaged in occupations in which books are not ordinarily or customarily kept. Collier on Bankruptcy (11th Ed.) pp. 381–383; In re Alvord (D. C.) 135 Fed. 236, 14 Am. Bankr. Rep. 264; In re Graves (D. C.) 189 Fed. 847, 26 Am. Bankr. Rep. 633; In re Hodge (D. C.) 205 Fed. 824, 30 Am. Bankr. Rep. 522; In re Newbury & Dunham, 209 Fed. 195, 126 C. C. A. 207, 31 Am. Bankr. Rep. 365; In re Linker (D. C.) 222 Fed. 173, 33 Am. Bankr. Rep. 709; In re Janavitz, 219 Fed. 876, 135 C. C. A. 546, 34 Am. Bankr. Rep. 105; In re Chass (D. C.) 238 Fed. 573, 37 Am. Bankr. Rep. 734.

[3] Furthermore, the special master saw the bankrupt and heard him and the other witnesses testify. He was therefore better qualified to pass upon the credibility of witnesses and draw inferences from the testimony than is a reviewing court. The law is well settled that in this situation the master's findings should be sustained, unless clearly improper or without evidence to support them. It may be conceded that, had the master found in favor of the bankrupt, this court would not disturb his finding; but it is equally true that his finding should not be disturbed when it is in favor of the trustee. The authorities in this respect are uniform and numerous, of which the following are cited: Callaghan v. Myers, 128 U. S. 617, 666, 9 Sup. Ct. 177, 32 L. Ed. 547; Kimberly v. Arms, 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764; Davis v. Schwartz, 155 U. S. 631, 636, 15 Sup. Ct.

237, 39 L. Ed. 289; In re Simon & Sternberg (D. C.) 18 Am. Bankr. Rep. 204, 151 Fed. 507; In re Wheeler, 165 Fed. 188, 91 C. C. A. 222 (7 C. C. A.) 21 Am. Bankr. Rep. 262; Collier on Bankruptcy (10th Ed.) p. 333.

The exceptions to the master's report will be overruled, and his recommendation against the discharge is approved.

In re RUSSELL FALLS CO.

In re WORCESTER TRUST CO.

(District Court, D. Massachusetts. March 23, 1918.)

No. 25278.

1. BANKRUPTCY ⇐143(5)—TRUSTEE—RIGHTS OF.
Relative to whether real estate mortgage covered machines on the mortgaged premises, trustee of the bankrupt mortgagor stands in no better position than the mortgagor.

2. FIXTURES ⇐18(1)—MORTGAGOR AND MORTGAGEE—POLICY OF LAW.
As between mortgagor and mortgagee, the law favors the mortgagee, when the latter claims that personal property on the mortgaged premises has become a fixture, so as to pass with the land.

3. CORPORATIONS ⇐478—CONVEYANCES—MORTGAGES—EFFECT.
Where, when a corporation executed a mortgage to secure its bonds, it did not own a factory site, but the site was thereafter conveyed to it, and by it conveyed to the mortgagee, the conveyances must be deemed to have included whatever had been and was subsequently annexed to the realty.

4. FIXTURES ⇐1—PERSONALTY—"INTENT."
Whether personal property, such as machinery, has become part of the realty depends, first, upon whether it has been annexed thereto, and, secondly, on the intent with which it was attached; intent in such cases being the intention manifested by all the facts and circumstances which tend to show the purpose, whether temporary or permanent, of the annexation.

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

5. FIXTURES ⇐35(2)—EVIDENCE—ADMISSIBILITY.
Provision in a real estate mortgage that after-acquired property, real and personal, should be subject to it is evidence of intention of the parties, and admissible to rebut the contention of the mortgagor that machinery annexed to the mortgaged premises did not pass as part of the land.

6. FIXTURES ⇐18(5)—EVIDENCE.
That machinery annexed to land by mortgagor was bought on conditional sales, and that for a portion of the time the mortgagor had only a leasehold interest in the land, is not conclusive against the contention of the mortgagee, the mortgagor later having acquired the fee, that such machinery passed as part of the land, being a fixture.

7. CHATTEL MORTGAGES ⇐17—TITLE OF MORTGAGOR—CONDITIONAL SALES.
A purchaser of machinery on conditional sale acquires an interest, which he can mortgage, regardless of the effect as between him and the seller, or as between the seller and a mortgagee with notice, of restrictions against incumbrances.

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8. FIXTURES ⟸1—REMOVABILITY—INJURY.
While the fact that machinery annexed to the freehold could not be removed without great injury to itself, or to the property, would go far to show that it had become a fixture, the fact that it could be removed without material injury to itself or the property has little tendency to show that it had not become part of the land.

9. FIXTURES ⟸18(5)—ANNEXATION—UNCOMPLETED MACHINES PARTLY ANNEXED.
Where a mortgagor engaged in the paper-making business installed large and heavy machinery in its plant, and part of such machinery was placed on specially prepared foundations, and other portions securely bolted to the floors, the machinery must be deemed to have become part of the land, even though it was purchased under conditional contracts, and the mortgagor did not, at the time of the installation of the machinery, have more than a leasehold interest in the land; it later having acquired the fee.

10. BANKRUPTCY ⟸143(5)—MORTGAGED PROPERTY — MACHINERY — ANNEXATION.
Where a large, heavy paper-making machine was partially installed, being placed on specially prepared foundations and securely bolted and fastened thereto, and the remaining parts were in the mill, the entire machine, though installation was stopped by the bankruptcy of the owner, should be deemed affixed to the land, so as to pass under a real estate mortgage as fixture; this being particularly true, as the machine itself, though complete to begin with, had been changed to suit the location.

11. BANKRUPTCY ⟸474—CHARGES—PERSONS LIABLE.
Bankruptcy Act July 1, 1898, c. 541, § 48, 30 Stat. 557 (Comp. St. 1916, § 9632), relating to the compensation of trustees, receivers, and marshals, furnishes no ground for holding mortgagee liable for any portion of the fees, charges of the bankruptcy court, though the mortgagee asserted in that tribunal its right to property covered by the mortgage, which was also claimed by the trustees.

In Bankruptcy. In the matter of the Russell Falls Company, bankrupt. Certain property and the proceeds thereof was claimed by the Worcester Trust Company, which claim was opposed by the trustee. On certificate of the referee. Judgment for claimant.

Arthur T. Johnson, of Boston, Mass., for trustee.

Peabody, Arnold, Batchelder & Luther, of Boston, Mass. (Edmund K. Arnold, of Boston, Mass., of counsel), for Worcester Trust Co.

MORTON, District Judge. This case comes here on a certificate from Referee Darling. Accompanying the certificate is a report of the evidence with the exhibits that were introduced. The parties are the trustee in bankruptcy and the Worcester Trust Company, trustee under a mortgage executed to it November 1, 1907, by the Russell Falls Paper Company, the predecessor of the bankrupt corporation, to secure bonds issued by the paper company to the amount of $250,000. The Russell Falls Paper Company, hereinafter called the old company, was organized September 27, 1907, by one Maynard and others under the laws of Maine, for the purpose of engaging in the business of manufacturing paper. The business proved unprofitable, and as a result there was, in 1913, a large indebtedness in addition to the bonded indebtedness. Early in 1915, the Russell Falls Company,

the bankrupt corporation, hereinafter called the new company, was organized under the laws of Massachusetts, for the purpose of taking over the property, assets, obligations, and business of the old company. It was thought, or hoped, that the difficulties in which the old company found itself involved might be met by the sale of stock in the new company. An agreement was entered into between the two companies which provided that the property transferred from the old to the new should be "subject to all claims, liens, or incumbrances upon the property transferred, assigned, or conveyed, * * * and to a certain mortgage of property of the Russell Falls Paper Company executed for the protection of bondholders to the Worcester Trust Company on November 1, 1907, * * * and to such pledges, contracts, and obligations as are now outstanding whether herein enumerated and specifically referred to or not." The new company, though an independent organization, appears to have been, in substance and effect, a continuation of the old company. So far as the evidence goes, there does not seem to have been any formal transfer or conveyance by the old company to the new; there is no such deed among the exhibits. In August, 1915, the directors of the new company voted that it was inexpedient to put up the $35,500 required to keep the mill going, and arranged for the filing by certain creditors of a petition in bankruptcy against the company, which was done, and the company was duly adjudicated bankrupt.

The principal question is whether certain machinery in the mill and on the premises at the time of the filing of the petition in bankruptcy was subject to the mortgage. There is a subsidiary question as to whether the trust company is liable for the fees, cost, and charges of this court, or any part thereof. Under an order of this court, the machinery has been sold free from all liens, and the proceeds, amounting to $70,000, paid into court to await the determination of the matters at issue. The parties came to what was, in effect, an understanding as to the values to be placed on the various items, or units, of which the machinery was composed, and the referee has found the values, substantially, if not entirely, in accordance therewith, item by item. The question of values, which otherwise might have been a troublesome one, has thus been eliminated. No question is or has been raised as to the validity of the mortgage. The case was heard at length by the referee, and in addition he took a view.

The referee has divided the property as to which there is or might be controversy into three groups. As a matter of classification, the parties are content with the grouping, though the trust company objects to the conclusion to which the referee has come in regard to the item contained in the second group, and the trustee in bankruptcy to the conclusions to which he has come in regard to items contained in the first group. The third group consists of articles which the referee has classed as personal property, and which he finds the trustee in bankruptcy is entitled to. The trust company makes no claim to any of these articles, and they need not, therefore, be further considered. The first group consists of machinery to which the referee has found the trust company entitled under its mortgage. The second

group consists of what is called the second paper machine, to which the referee has found the trust company is not entitled, and the trustee in bankruptcy is entitled.

[1-3] The case is one wholly between the mortgagor (represented by the trustee in bankruptcy, who, I think, stands in no better position than the mortgagor) and the mortgagee, the Worcester Trust Company; and as between mortgagor and mortgagee, for reasons stated by Shaw, C. J., in Winslow v. Insurance Co., 4 Metc. 306, 38 Am. Dec. 368, the law favors the mortgagee. See, also, Bartholomew v. Hamilton et al., 105 Mass. 239; Southbridge Savings Bank v. Mason, 147 Mass. 500, 18 N. E. 406, 1 L. R. A. 350. When the mortgage was executed, the old company did not own the factory site, nor, with perhaps some trifling exceptions, the machinery. The land belonged to the Boston & Albany Railroad Company, subject to a lease for 21 years held by the Otis Fiber Board Company, with a provision in it that buildings and structures could be removed by the lessee before the end of the term. This leasehold interest, with other property, had been bid off in the interest of the old company, at a foreclosure sale of the property of the fiber company, and was later conveyed to the old company, and by that company to the trust company. Subsequently the railroad company deeded the land in fee to the old company, which conveyed it to the trust company. The conveyance was in 1911 or 1912, and must be held as matter of law, it seems to me, to have included whatever had been and was subsequently annexed to the realty, so as to constitute a part thereof, whether specifically enumerated in the instruments of conveyance or not, unless expressly excepted, which was not done.

The machinery was bought largely on conditional sales, which provided that no title should pass until it was paid for, and, in some cases, that it should not be transferred or mortgaged. The referee has found that the machinery had been paid for, and that the title had vested before the petition in bankruptcy was filed. This finding is not controverted. It is urged that some of the payments were made by the new company, and some of the machinery was put in by it. There is no finding in regard to these matters. But, even if it was as urged, the title of the mortgagee would not be affected thereby. It is immaterial, so far as the trust company is concerned, whether the old company put in all of the machinery or not, if by whomsoever put in it was annexed to and constituted a part of the realty. It is also immaterial, for the same reason, who paid for it. Such matters might have some bearing on the question of the intent with which the machinery was annexed to the freehold, but that would be all.

[4] Whether property which would otherwise be personalty (in this case the machinery in question) has become a part of the realty, depends, first, upon whether it has been attached or annexed to the realty, and, secondly, on the intent with which it was so attached or annexed. The intent in cases like this is the controlling factor. By intent is meant not the secret and undisclosed intent of the actor (Hopewell Mills v. Taunton Savings Bank, 150 Mass. 519, 522, 23 N. E. 327, 6 L. R. A. 249, 15 Am. St. Rep. 235), but the intention as

manifested by all the facts and circumstances which tend to show the purpose, whether temporary or permanent, of annexation, the object to be accomplished, the adaptation to such object, the degree and mode of annexation, and whatever else may tend to show what the party or parties annexing the machinery had in mind in regard to its relation to the realty. In the present case the referee has found, in effect, as I construe his finding, that it was the intention of the mortgagor, the old company (meaning, as I understand him, intention in the above sense), which intention he imputes, and I think rightly, to the new company, in placing the machinery in position, that it should be annexed to and constitute a part of the realty.

[5-9] There was abundant evidence, I think, to warrant this finding. In addition to the nature of the business, which manifestly contemplated the permanent annexation of the machinery to the land and buildings, the mortgage provides that after-acquired property, real and personal, should be subject to it, and also contains covenants for the future conveyance of the same to the trust company. This provision and these covenants did not, of themselves, as both parties agree, subject the after-acquired property to the mortgage; but they were evidence of a general purpose on the part of the mortgagor, with which the claim that is now made, that the machinery should be regarded as personal property, would be inconsistent. The fact that a large portion of the machinery was bought on conditional sales, of which the mortgagee had or may have had notice, and that the old company had for a portion of the time only a leasehold interest in the land, were circumstances to be taken into account, but were not decisive as matter of law on the question of intent. A purchaser of machinery on conditional sale may well believe that he will be able to pay for it and treat it as if he were in fact the owner. It is plain that he has an interest that he can mortgage, whatever the effect of that may be as between him and the vendor, or between the vendor and a mortgagee with notice. Dame v. Hanson, 212 Mass. 124, 98 N. E. 589, 40 L. R. A. (N. S.) 873, Ann. Cas. 1913C, 329.

This case, as already observed, is wholly one between the mortgagor and the mortgagee. It would be giving too narrow a construction to the conveyances that were made by the old company to the trust company to say that because they did not specifically mention the machinery, an intention was thereby manifested to except the machinery and to treat it as personal property. The conveyances included, as already observed, whatever had been annexed to and constituted a part of the realty, unless expressly excepted, and operated to give title to the trust company to whatever thereafter was annexed to and became a part of the realty. Bills of sale of the machinery to the trust company might have been given, as it was voted to do, for the purposes of security; but they became unnecessary by reason of the annexation of the machinery to the realty with the intention thereby to subject it to the mortgage. The same object which would have been accomplished by the bills of sale was effected by annexing the machinery to the realty, with the intention of thereby subjecting it to the mortgage.

No rule has been or can be laid down as to the degree or mode of annexation required, or the sufficiency of that which exists in any given case. Each case depends on its own facts. The certificate contains no findings as to the degree or mode of annexation of the different machines, or their adaptation to the end to be accomplished, or the use for which they were intended, except so far as may be inferred from the names given to them. The referee has rested the case on his finding in regard to the matter of intention. But, as already observed, the evidence and exhibits are before the court, and the character, use, adaptation, and mode and degree of annexation appear therefrom. I do not think it necessary to take up the machines one by one and go into them in detail. The machinery was bought for the mill which Maynard and his associates were constructing, and was intended for permanent use as a part thereof in the process of paper making. It was such machinery as was required for the equipment of the mill. Much of it was large and heavy. Some of the machines were upwards of 125 tons in weight and 100 feet in length, and were placed upon foundations specially prepared for them from plans furnished by the vendors, and were secured by bolts bedded in concrete. Such of the machines as did not rest upon foundations specially prepared were fastened by bolts, or in some other manner, to the wooden flooring, or to the beams and timbers of the mill. The various machines were placed in the positions designed for them in the construction of the mill, and were not intended for removal. They were connected by pipes, belts, wiring, and gearing with the motive power, whether steam, water, or electricity.

The whole arrangement contemplated a permanent addition to the property for use in the business that was to be carried on there. The referee has found that the identity was not lost by reason of annexation to the realty, and that the machinery could be removed, as was being done with some of it, without material injury to itself or the buildings. But while the fact, if it had been the fact, that the machinery had lost its identity, or could not be removed without great or irreparable injury to itself or the property, would go far to show almost, if not quite, conclusively that it had become a part of the realty, the contrary fact, which is strongly relied on by the trustee in bankruptcy, that it could be removed without material injury to itself or the property has very little, if any, tendency to show that it was not so annexed to the realty, and with such intention, as to constitute it a part thereof. It seems to me that the conclusion to which the learned referee has come in regard to the machinery which constitutes the first group is correct and should be sustained. Perhaps as open to question as any of the items in this group are the electric motors, which are compact, self-contained pieces of mechanism, readily removable. Considering, however, their intimate connection with the machinery which clearly passed to the mortgagee, they seem to me to go with it is a necessary part thereof, just as the shafting and belts transmitting power from a central steam plant to a machine, which passed, would also pass.

[10] There is more doubt, I think, concerning the correctness of the referee's conclusion in regard to the second paper machine, which

constitutes the second group. He finds that it was never more than half installed, "that no driving mechanism has been provided, it being the purpose to supply it with the mechanism of the first paper machine," "that it never became a part of the paper-making process of the mill," and that "the wet end of the machine" (which it should be remarked was an important part of it) "was never set up in any of its parts." He also finds that it was bought by the old company on conditional sales, that "it was in a measure rebuilt for this mill, and the foundation for it was prepared from plans furnished by the vendor," and that the final payment was made by the bankrupt company. This is the substance of his findings. It appears from the evidence that the machine weighed from 125 to 150 tons and was of great length. It was not completed, but all the parts necessary for its completion had been delivered at the factory and were in the mill near at hand. Men were at work setting it up on the foundations prepared for it when the petition in bankruptcy was filed. As far as it was set up, it was permanently bolted and secured to the foundation, and at the wet end of the machine in the floor was a vat with a drainage pipe to receive and carry off the water from the machine.

So far as the reported evidence shows, the only persons who testified in regard to the condition of the machine were Mr. Barton, Mr. Eastman, Mr. Maynard, and Mr. Mills. There were also exhibits. It is not quite clear whether Mr. Barton was testifying in regard to the wet end of the machine, or to the machine as a whole. What he said was as follows:

"Q. That (referring to the second machine as compared to the first machine) is a wider machine? A. Yes. Q. But that machine has the wetting end, the same as the other machine? A. I assume so; it wasn't set up. Q. That is, not as yet set up? A. No sir. Q. No part of it? A. Part of it is set up; the greater part not."

It would seem that what the witness was referring to here was the wet end, and that a part of that had been set up, notwithstanding the referee's finding to the contrary. Later, in speaking of some changes which they (his firm) were making for the Westfield River Paper Company, he said that they would amount to about half of the machine; but that had no reference to the condition of the machine at the time to which he was testifying in the evidence already quoted. Mr. Eastman testified on direct examination as follows:

"Q. Mr. Eastman, how much of the second machine is set up, or was set up prior to the time of the Westfield River Paper Company's removal? A. All the machine proper was set up, with the exception of the flow box, the apron, and the wire, with the roll which runs the wire. Q. That is, there are a large number of rolls, as I understand it, in the wet part? A. Yes. Q. That were not in place? A. The wire I should have left out, because the wire is a part of the machine proper. Q. The wire and the flow boxes were in there? A. Yes, sir. Q. Then what was set up was the frame of the wet part? A. Yes, sir; and some of the rolls. Q. And some of the rolls? A. Yes, sir. Q. And what else was set up? A. All of the press rolls, all of the drying rolls, the calenders. There was lacking in the drying system four or five wooden rolls for the felts. Q. There was testimony by Mr. Barton about table rolls. Is that it? A. Yes; table rolls or tube rolls. Q. Where were they? A. They were in the mill. Q. Whereabouts? A. In a box about five feet from the end of the machine."

On cross-examination, his testimony was to the same effect.

Mr. Maynard testified, on direct examination, that "the entire machine was completed from the wet end to the winding part" when it was shipped to them (the old company); "the whole of it was complete, but we decided to throw out certain things and make certain changes," and it was "not completely set up." On cross-examination he said that the machine, as far as it went, was completely installed and attached to the foundation in the same way it would be if the entire machine had been installed; that it lacked "the drive, the wet end and the winding end." In answer to the question, "The substantial part of the machine is there, as shown by the picture?" (referring to one of the exhibits), he said, "The heaviest part of the machine is installed," by which I understand him to have meant the largest part. The testimony of Mr. Mills was that his firm sold the machine to the company, that it was complete when sold to them, that they had it changed over, that it had never been erected, that part of it, the driers, nothing but the driers as he noticed, were standing on the foundation, and that those were the only thing that attracted his attention, "because I [he] wasn't really interested in it." The exhibits show a large and heavy machine, several feet wide and high, and many feet long, with rolls of wood and iron and numerous other parts. It stands on steel or iron plates fastened to the foundation. It is built, in part at least, in sections; each section consisting of two heavy upright frames on opposite sides, bolted together at the top across the machine, and fastened on each side at their bases through the steel plates to the concrete foundation. The machine can be taken down section by section, but the sections are of no use independently of each other, and when the machine is completed it is run as a unit.

The result of this examination is, briefly, to show, I think, that a substantial part, if not the larger part, of the machine had been set permanently in position on foundations especially prepared for it, and securely bolted and fastened thereto; that the remaining parts were in the mill and near at hand, and the work of setting up and completing the machine was in progress; that the machine itself, though complete to begin with, had been changed over by throwing out some parts and putting in others, so as to conform to what was wanted at that particular mill, and that the part annexed would be useless without the rest of the machine.

As already observed, no rule has been or can be laid down as to the degree or mode of annexation required or the sufficiency of the annexation in any particular case. Something in the nature of attachment or annexation there must be. Mere intention that a machine shall be considered a part of the realty is not enough. I doubt whether the mere fact that a foundation has been prepared for a machine is sufficient in and of itself to constitute the machine a part of the freehold, although it seems to have been so held in McFadden v. Crawford, 36 W. Va. 671, 15 S. E. 408, 32 Am. St. Rep. 894. But where, as here, a substantial part, if not the larger part of the machine, has been permanently set up, on foundations specially pre-

pared for it from plans by the vendors, in the place in the mill intended for it, and firmly fastened to such foundations with the intent that it shall remain where it is placed as a part of the equipment of the mill, and where the work of completing the setting up of the machine is going on at the time of the filing of the petition in bankruptcy and has not been abandoned, and the parts necessary to complete the machine are at hand, and the machine is, for manufacturing purposes, a unit, and the parts set up and annexed will be of no use without the other parts, it seems to me that the more reasonable view is that the machine should be regarded as having been so far annexed to the realty as to constitute a part thereof. Certainly nothing more could have been done than was done to annex to and make a part of the realty so much of the machine as had been set up, and that would have to be taken down and disconnected in order to restore it completely to its former condition as personalty. I do not think that it is necessary that a machine should be put into operation before it can be considered a part of the realty, and I know of no such rule. If the machine is a unit, it would seem as though the annexation of a substantial part of it should be sufficient. It is not necessary that all the parts of a machine should be connected to it in order to pass with it is a fixture. In Hopewell Mills v. Taunton Savings Bank, supra, the loom beams were not fastened to the looms, but were held to be "no less real estate than those parts of the looms which were annexed to the realty." So shutters and blinds and keys, and presumably screens and storm doors and windows, pass as a part of the realty, though disconnected at the time of the conveyance. In the analogous case of materials which are on the premises to be used in the construction of an unfinished building, it has been held that they pass under a deed conveying the land and buildings. Rahm v. Domayer, 137 Iowa, 18, 114 N. W. 546, 15 L. R. A. (N. S.) 727. See, also, Dudley v. Hurst, 67 Md. 44, 8 Atl. 901, 1 Am. St. Rep. 368; Byrne v. Werner, 138 Mich. 328, 101 N. W. 555, 69 L. R. A. 900, 110 Am. St. Rep. 315; Hackett v. Amsden, 57 Vt. 432; McLaughlin v. Johnson, 46 Ill. 163.

In view of these decisions, it must be held, it seems to me, that as between mortgagor and mortgagee, if a substantial and unseparable part of a machine in process of erection has been permanently annexed to the freehold, with the intention of making the machine a part of the realty, then the machine, taken as a whole, must be regarded as a fixture, and work done upon it in completing it must be regarded as work done upon it as a part of the realty. Though the question is not free from doubt, I incline to the view that the second paper machine was so far annexed to the realty as to come under the mortgage as a fixture.

[11] As to the remaining question, concerning the trust company's liability for the fees, costs, and charges of this court, I think the ruling of the referee was correct. The trust company had a choice of remedies. It elected, and very properly, I think, to present its case as a part of the proceedings in the bankruptcy court. It should not be compelled to pay a part of the fees, costs, and charges of that court, unless clearly required to do so. I do not think that section 48 of

the Bankruptcy Act, relied on by the trustee, imposes such a liability. And in Re Williams' Estate, 156 Fed. 934, 84 C. C. A. 434, it was held that the mortgagee was not liable to such fees, costs and charges.

The result is that of the $70,000 the trust company is entitled to the sum of the values of the items contained in the first and second groups in the referee's certificate, amounting in the aggregate to $65,300, with interest on the same at the rate, if any, received while the fund has been in the possession of the court.

So ordered.

In re BOSTON OPERA CO.

In re SMITH.

(District Court, D. Massachusetts. January 26, 1918.)

No. 22206.

CONTRACTS ⇐258—CLAIM FOR SALARY—CANCELLATION OF CONTRACT—"PUBLIC CALAMITY OR CASUALTY"—EUROPEAN WAR.

In the spring of 1914 bankrupt, an opera company, contracted for the services of claimant as a musician for the ensuing opera season in Boston, commencing in the following December. The contract contained a provision that "in case of riot, fire, railroad accident, public calamity, or other casualties, over which the party of the first part has no control, this contract may be canceled at the option of the party of the first part." In November bankrupt notified claimant of the cancellation of the contract, on the ground that the general state of war existing in Europe made it impossible to maintain opera in Boston during the season. *Held*, that such war, although the United States was not then a party to it, was a public calamity and casualty over which bankrupt had no control, within the meaning of the contract, and so affected the performance of opera in Boston as to justify its abandonment and the cancellation of the contract.

In Bankruptcy. In the matter of the Boston Opera Company, bankrupt. On review of order of referee disallowing claim of Walter M. Smith. Affirmed.

Swift, Friedman & Atherton, of Boston, Mass. (Lee M. Friedman, of Boston, Mass., of counsel), for claimant creditor.

Goodwin, Proctor & Ballantine, of Boston, Mass. (Herbert L. Barrett, of Boston, Mass., of counsel), for estate of Eben D. Jordan and others, creditors.

HALE, District Judge. This case is before me on a petition to review the order of the referee disallowing the claim of Walter M. Smith for services as a musician, under a contract dated April 14, 1914, between him and the Boston Opera Company, in which the Opera Company is named as party of the first part, and Mr. Smith is party of the second part. By this contract Mr. Smith is employed as a "third trumpet," to perform, if required, at all operas, etc., during the opera season commencing in Boston in December, 1914.

Clause 11 of the contract is as follows:

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

"(11) In case of riot, fire, railroad accident, public calamity, or any other casualties over which the party of the first part has no control, this contract may be canceled at the option of the party of the first part."

The European war broke out August 1, 1914. On November 9, 1914, the Boston Opera Company sent to Mr. Smith a notice terminating the contract, calling attention to the general state of war existing in Europe, and the consequent inability and impossibility of the management to maintain opera in Boston under these conditions. By an agreed statement of facts the court is permitted to "take judicial notice of any and all events of public notoriety connected with the European war and its effect upon the United States and other nations of the world." The referee held that the European war, practically a world war, was such a public calamity and casualty over which the party of the first part had no control as justified the management, under the eleventh clause, in terminating the contract.

The learned counsel for Mr. Smith contends that the contract did not contemplate a war in which the United States was not a party as being such a public calamity and casualty as justified the Opera Company in terminating the contract.

In Richards v. Wreschner, 156 N. Y. Supp. 1054, 1056, 1057, the court had before it a contract wherein a German firm, in January, 1914, agreed to sell Belgian antimony, to be shipped at the rate of 15 tons per month up to September, 1914, inclusive. As a reason for failure to make deliveries after July 31, 1914, the defendant alleged that the production of antimony at a particular factory in Belgium ceased because of the war; that all exports of antimony over the German frontier had been forbidden; and that the seller became an enemy of the kingdom of Belgium, commercial intercourse being forbidden between Belgium and Germany, so that performance of the contract was impossible. But it did not appear that the defendants could not have provided themselves with a sufficient supply to make all deliveries from some European port, or that they could not have procured the antimony from a warehouse in a neutral country of Europe. The court said it was obvious that the defendant was improvident in entering into a contract of this kind without inserting a condition covering the interference of war, strikes, or other causes beyond their control. It held that impossibility due to a foreign war is no excuse for nonperformance of a contract. Ashmore v. Cox [1899] 1 Q. B. 436; Tweedie, etc., Co. v. McDonald Co. (D. C.) 114 Fed. 985; Beebe v. Johnson, 19 Wend. (N. Y.) 500, 32 Am. Dec. 518; Avery v. Bowden, 5 Ellis & Blackburn (Q. B.) 714; Standard Silk Dyeing Co. v. Roessler, etc., Chemical Co. (D. C.) 244 Fed. 250.

In the case before me, the contract contained a condition covering causes beyond the control of the contracting parties. It seems clear to me that the intention of the parties was that the Opera Company should have the right to terminate its contract whenever any public calamity or other casualty should occur, over which it had no control, and which prevented the giving of opera under the conditions prevailing when the contract was made, and which put a substantial

burden on the Opera Company greater than the parties contemplated. Thaddeus Davids Co. v. Hoffman-La Roche Chemical Works, 97 Misc. Rep. 33, 160 N. Y. Supp. 973; Davis v. Columbia Coal Mining Co., 170 Mass. 391, 49 N. E. 629. I think it would be too narrow a construction of the contract to say that no war should be held to be a "public calamity or casualty over which the parties had no control," unless it be a war in which the United States itself is engaged. At the time this contract was to be carried out, the European war had become a great world war. It had changed the Opera Company's position in reference to performing the contract relating to the maintaining of opera in Boston. It is clear that the existence of such war affected the performance of opera in Boston. I think it must be held to have been, in Boston, in the opera season of 1914 and 1915, a public calamity and casualty over which the Opera Company had no control, and which affected its rights under the contract in question. I think the referee was right in disallowing the claim.

The order of the referee is affirmed. The claim of Walter M. Smith is disallowed.

In re BOSTON OPERA CO.

In re FERRARI-FONTANA.

(District Court, D. Massachusetts. January 26, 1918.)

No. 22206.

CONTRACTS ⊂=258—CLAIM FOR SALARY—RIGHT TO CANCEL CONTRACT "IN CASE OF WAR."

Bankrupt, an opera company, contracted with claimant, an Italian singer, to sing in its opera in Boston during the season of 1914–15, reserving the right, inter alia, to terminate the contract "in case of war." *Held*, that the existence of the general war in Europe and its undoubted effect on the opera season justified the abandonment of the enterprise and the cancellation of the contract, although neither Italy nor the United States was at that time engaged in the war.

In Bankruptcy. In the matter of Boston Opera Company, bankrupt. On review of referee's order disallowing claim of Edwardo Ferrari-Fontana. Affirmed.

Swift, Friedman & Atherton, of Boston, Mass. (Lee M. Friedman, of Boston, Mass., of counsel), for claimant creditor.

Goodwin, Proctor & Ballantine, of Boston, Mass. (Herbert L. Barrett, of Boston, Mass., of counsel), for estate of Eben D. Jordan and others, creditors.

HALE, District Judge. This case comes before the court on the decision of the referee, disallowing the claim of Edwardo Ferrari-Fontana. This creditor was an Italian singer, who made a contract with the Boston Opera Company to sing for the season of 1914–15. His contract with that company contains this clause:

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

"XV. It is agreed that, in case the theater should be destroyed by the elements, the company shall not be held to give the performances. The artist, in this case, is not entitled to any salary nor indemnity. The company will take steps to have the performances resumed as soon as possible. Moreover, the company has the right to terminate the contract in case of fire or the destruction of the theater, in case of war, in case of epidemics, or the closing of the theater by the authorities. But such a step can only be taken in regard to the entire personnel."

Under this clause the Opera Company could terminate its contract "in case of war." The learned counsel for the claimant contends, however, that the contract could not be canceled in case of a war in which Italy was not engaged and in which America was not engaged. The same line of reasoning is applied as in the Smith Case (D. C.) 249 Fed. 269, just decided. I think this case, now before me, presents even a stronger case of justification on the part of the Opera Company to terminate its contract. I must hold, as I did in the Smith Case, that the great world war affected the opera season, and was a contingency beyond the control of the contracting parties; that it changed the Opera Company's position in reference to the performance of its contract, and put a burden on it greater than the parties contemplated when the contract was made. Thaddeus Davids Co. v. Hoffman-La Roche Chemical Works, 97 Misc. Rep. 33, 160 N. Y. Supp. 973, Davis v. Columbia Coal Mining Co., 170 Mass. 391, 49 N. E. 629.

Order of the referee affirmed; claim of Edwardo Ferrari-Fontana disallowed.

SMITH v. GOVERNMENT OF CANAL ZONE et al.

SAME v. CORRIGAN et al.

(Circuit Court of Appeals, Fifth Circuit. March 20, 1918.)

Nos. 3209, 3150.

1. PROCESS ⊜119—SERVICE—WITNESSES.
Where a litigant came from Panama into the Canal Zone for the sole purpose of being present in court at the hearing of a motion made in a case brought there against him, and to testify in that hearing if an occasion for his doing so arose, such litigant was exempt from service of Canal Zone process while in attendance upon court and during a reasonable time in coming and going, though his attendance was not in obedience to process commanding it.

2. APPEARANCE ⊜9(2)—JURISDICTION—ADMISSION OF.
That defendant's counsel moved to set aside service on the ground that the court was without jurisdiction of the subject-matter of the suit is not an admission of the court's jurisdiction over defendant's person or a consent to the exercise of it.

3. EXTRADITION ⊜19—PERSONS EXTRADITED—EFFECT.
In view of Rev. St. § 5275 (Comp. St. 1916, § 10121), extradition should not be used as a means for obtaining jurisdiction of the person of the accused for civil proceedings, where defendant was extradited from Panama into the Canal Zone on a criminal charge, service on him of an order commanding him to appear and show cause why he should not be attached for contempt, made while he was in jail, held as an extradited prisoner, furnishes no basis for an adjudication in contempt.

4. APPEAL AND ERROR ⊜485(2)—SUPERSEDEAS—CONTEMPT PROCEEDINGS.
Where, under Rev. St. §§ 1000, 1007 (Comp. St. 1916, §§ 1660, 1666), a bond superseding a decree appealed from had been given, the trial court is without jurisdiction to enforce obedience to the decree by contempt proceedings.

5. APPEAL AND ERROR ⊜492—REVIEW—WRIT OF ERROR.
Where, in violation of the stay or supersedeas of a decree from which an appeal had been previously taken, the trial court attempted to enforce it by contempt proceedings, and the record and the parties were before the appellate court, it may set aside the judgment or order in the contempt proceedings as an attempt to enforce a decree suspended, though such judgment or order might not be subject to review on writ of error as attempted.

Appeal from and in Error to the District Court of the United States for the Canal Zone; William H. Jackson, Judge.

Suit by J. A. Corrigan and others against J. Budd Smith. From a decree for complainants, defendant appeals. Reversed, and suit dismissed. Proceeding by the Government of the Canal Zone, on rule of J. A. Corrigan and others, on J. Budd Smith, for contempt. There was a judgment punishing defendant for contempt, and he brings error. Reversed.

Felix E. Porter, of Ancon, C. Z., and Edwin T. Merrick, Philip Gensler, Jr., and Ralph J. Schwarz, all of New Orleans, La., for appellant and plaintiff in error.

Theodore C. Hinckley and Stevens Ganson, both of Panama, R. P., for appellees and defendants in error.

Before PARDEE, WALKER, and BATTS, Circuit Judges.

WALKER, Circuit Judge. By an appeal and by a writ of error J. Budd Smith (who will be referred to as the appellant) presents for review two judgments or decrees, one rendered in a suit brought against him by J. A. Corrigan and others (who will be referred to as the appellees), and the other in proceedings following a motion made by the appellees that the appellant be required to show cause why he should not be committed for contempt for an alleged violation by him of a temporary writ of injunction issued in the first-mentioned suit at the time it was brought. If it is to be regarded that there were two cases, instead of one, they are so related as to make it convenient, if not necessary, to consider them together. The following is a summary of so much of what is disclosed as needs to be set out:

The appellant was a citizen of New Jersey and had his domicile there, but for the greater part of the time during several months prior to April 9, 1917, he was a temporary resident of the republic of Panama, being there as the business representative of the Beneficial Loan Society, which had its principal place of business at Newark, N. J., and had business dealings with the Continental Banking & Trust Company; the latter being located and engaged in business in the city of Panama. Early in February, 1917, the Continental Banking & Trust Company was adjudged bankrupt by a Panama court, which appointed a temporary receiver of its property and assets; that court assuming custody and jurisdiction of the bankrupt's estate. The appellant did not at any time live in the Canal Zone, or engage in business or own property there. Some time prior to April 9, 1917, while he was temporarily in the Canal Zone, he was served there with process in a suit brought by one Cornet against him in the district court of the Canal Zone. Some question is made as to the validity of that service, but that question is not a material one in this case. At the request or direction of his counsel in that case the appellant on April 9, 1917, went from Panama into the Canal Zone to be present in the district court to give testimony, if necessary, on the hearing of a motion proposed to be made by his counsel for such an allowance of time for taking depositions as was required to secure the testimony of witnesses living in the United States. While the appellant was in the office of the clerk of the district court, awaiting the convening of the court, the marshal came in and handed to him the summons, complaint, and a restraining order or temporary injunction in a suit brought in the district court on that day by the appellees against him. That suit was brought by the appellees in behalf of themselves and all other creditors and persons interested in the liquidation of the affairs of the Continental Banking & Trust Company who may wish to come in and be parties to the suit, the complaint alleging that the appellees were creditors of that company, and praying the setting aside of described deeds to lands in Panama made to appellant by that company shortly before its bankruptcy, and that the appellant be restrained and enjoined from selling, conveying, or incumbering the lands so deeded to him. The temporary injunction or restraining order mentioned enjoined the appellant from selling,

conveying, transferring, or in any wise incumbering the property mentioned in the deeds described in the complaint.

Following the happening of the incident just mentioned the appellant was in the district court room when his counsel made the contemplated motion, but was not examined as a witness, the motion being granted by the court, without the occasion arising for adducing testimony of the appellant. On April 18th the appellant by his attorney filed a motion to dissolve the restraining order. The motion stated that the attorney appeared in appellant's behalf for the purpose of denying the jurisdiction of the court, and the grounds stated raised only the question of the right or jurisdiction of the court to make or enforce the order sought to be dissolved, and submitted no question going to the merits of the suit. On April 30th following the appellant by the same attorney moved the court to set aside the above-mentioned service of the summons, complaint, and restraining order, on the ground that it was made while appellant was attending court in connection with the case of Cornet against him. The introductory words of that motion were:

"Comes now the above-named defendant by Felix E. Porter, his attorney, and, without in any manner waiving the jurisdiction of this court, moves the court," etc.

After hearing evidence on the motions they were overruled on May 10th. The evidence adduced proved the truth of the ground stated in support of the motion to set aside the service. That the court did not find otherwise is shown by the following statement made by the trial judge:

"Mr. Smith came into court on a certain matter in connection with the Cornet case. He came voluntarily, thinking that he might be needed, according to the testimony of his counsel, Mr. Porter, for the purpose of asking for a continuance for the purpose of taking depositions. I cannot say that he was here under any compulsion or restraint or here by reason of his appearing as a party litigant."

On May 21st the same attorney filed an answer for the appellant, the answer expressly stating that the attorney came—

"without in any manner waiving the jurisdiction and the validity of service in this cause, heretofore denied."

On May 23d the court, on motion of appellees, made an order that appellant on May 26th appear and show cause why he should not be attached for contempt for an alleged violation by him of the above-mentioned temporary writ of injunction. On May 26th the marshal returned this order "not served"; the return stating that:

"The defendant J. Budd Smith cannot be located in the Canal Zone."

On May 29th the case against the appellant was called for trial in the district court, and the appellant's attorney then stated that the appellant was a resident of the republic of Panama and moved the court—

"to issue an order of exemption of the said Smith from the service of any process or from arrest while coming to, departing from, or in attendance upon this court for the purpose of the trial herein."

This motion was denied, an exception being reserved. What the court did immediately following the action just mentioned is shown by the following statement in its minutes for the same day:

"And on motion of the counsel for the plaintiffs herein the case is set for trial at 2 o'clock this afternoon, whether the defendant is in attendance or not. And the defendant's attorney consents under protest to go to trial without the presence of the defendant Smith."

At the time appointed and without the appellant being present, the trial of the case was entered upon, resulting in the rendition, on May 29th, of a decree perpetuating the preliminary injunction issued when the suit was brought, ordering the appellant to execute to the receiver appointed by the court of Panama in the above-mentioned bankruptcy proceeding conveyances to the lands described in the deeds which the complaint prayed to have annulled, and ordering the appellant to account to such receiver for all rents, issues and profits of the properties described in those deeds. On July 31, 1917, the appeal by appellant from that decree was allowed upon his giving bond, approved on the same day by the judge of the district court, with the condition:

"That if the said J. Budd Smith shall prosecute his said appeal to effect, and shall answer all damages and costs that may be awarded against him, if he fails to make his plea good, then the above obligation to be void; otherwise, to remain in full force and virtue."

On June 21, 1917, J. A. Corrigan, one of the appellees, made an affidavit charging the commission by the appellant of a "misdemeanor of contempt of court as defined and made punishable by the terms and provisions of section 131, paragraph 2, of the Penal Code of the Canal Zone," the affidavit showing that the charge made was based upon appellant's alleged disobedience of the above-mentioned temporary injunction by conveying and transferring to one Wallace, on May 11, 1917, all the property covered by the deeds mentioned in the complaint in that suit. On the same day the court issued its bench warrant for the arrest of the appellant and that he be brought before the district court to answer the charge made by the affidavit. On June 23d this warrant was returned not served. On the same day an alias bench warrant was issued. On the application made to public authorities of the republic of Panama for the extradition of the appellant to answer the above-mentioned criminal charge made against him in the Canal Zone his extradition was ordered by a Panama court. On September 4, 1917, while, as a result of the extradition proceedings, the appellant was in jail at Ancon, Canal Zone, he was for the first time served with a citation to show cause why he should not be attached for the above alleged civil contempt. He was brought before the court on September 7th. His counsel duly made the objections that the court was without jurisdiction to try the appellant on the charge of alleged criminal contempt because the offense charged was a misdemeanor, the exclusive original jurisdiction of which was in the magistrate court, and that the court was without jurisdiction to proceed in the civil contempt case, because the only service on the appellant of the citation therein was made while he was an extradited

prisoner in custody of the Canal Zone police, in a Canal Zone jail, under color of extradition from the republic of Panama. The district attorney, who was present, made it known to the court that a trial of the appellant for the criminal offense for which he was extradited was not insisted upon, and suggested that:

"The prosecution of the government case must wait upon your honor's action upon the civil case."

Thereupon the court overruled the objections made to the trial of the civil contempt proceedings, and entered upon a hearing, which resulted in the making on September 12, 1917, of an order which, after setting out findings made by the court, one to the effect that the appellant did, under date of May 11, 1917, transfer and convey to one Theodore Wallace the specific properties that the court's restraining order had directed him not to convey, sell, or incumber, and another that the instrument of transfer showed that the consideration therefor was the sum of $30,050, adjudged the appellant to be guilty of a contempt of the court, and ordered that he—

"be committed to a jail in the division of Balboa, Canal Zone, there to remain charged with said contempt of this court until he pay the said sum of $30,050 into this court for the use of the plaintiffs, and others lawfully entitled thereto, or until released by due process of law, and that a warrant for said commitment issue directed to the marshal of the Canal Zone or to any of his deputies or to any police officer of the Canal Zone to execute."

It was disclosed that the appellant claimed that the attacked deeds to lands in Panama were not made to him for his own use, but for the benefit of the corporation he represented, which, long before the Continental Banking & Trust Company was adjudged bankrupt, had made large loans to that company, which, at the time such loans were made, ineffectually undertook to secure them by depositing with another bank in Panama, for the lender's benefit, the deeds to the borrower conveying the lands which, shortly prior to the bankruptcy, were conveyed by the borrower to the appellant.

[1, 2] That the appellant, unless he had in some way waived or lost that right, was entitled to have set aside the service upon him of process in the suit brought against him by the appellees, made under the circumstances above narrated, is a proposition which the authorities do not leave open to doubt. On the advice of his counsel he came from Panama, where he resided, into the Canal Zone, for the sole purpose of being present in court at the hearing of a motion made in a case brought there against him, and to testify in that hearing if an occasion for his doing so arose. It fairly appears that his counsel anticipated, and not without reason, that, to support the motion proposed to be made, it might be required to adduce testimony which the appellant could give. The appellant as a witness coming from another jurisdiction was exempt from the service of Canal Zone process while in attendance upon court, and during a reasonable time in coming and going, though his attendance on the occasion in question was not in obedience to process commanding it. The reasons supporting the rule stated are sufficiently disclosed in the opinions rendered in the following cases: Stewart v. Ramsay, 242 U. S. 128, 37 Sup.

Ct. 44, 61 L. Ed. 192; Feister v. Hulick (D. C.) 228 Fed. 821; Central Ry. Signal Co. v. Jackson (D. C.) 238 Fed. 625; Stratton v. Hughes (D. C.) 211 Fed. 557; Kinne v. Lant (C. C.) 68 Fed. 436.

The case before us aptly illustrates how a nonobservance of the rule may lead to the result of a contested claim being tried in the absence of the party against whom it was made, when possibly that party might reasonably have anticipated being successful in the suit if present in person at the trial of it, but was kept away by the refusal of the court which was to pass on his rights to prevent his attendance subjecting him to more expense and hardship than the loss of the suit would entail. The action taken in the case by appellant's counsel in his behalf before the making of the motion to set aside the service raised only questions as to the court having jurisdiction of the subject-matter of the suit. No decision by the court of any question going to the merits of the suit was sought. The appellant's admission of the court's jurisdiction, or consent to the exercise of it, is not to be inferred or implied from a previous explicit denial of its jurisdiction, though such denial was based upon grounds other than the one stated in the motion to set aside the service of the process. A denial of jurisdiction is not to be given effect as an admission of it. Big Vein Coal Co. v. Read, 229 U. S. 31, 33 Sup. Ct. 694, 57 L. Ed. 1053; Pugh v. Loisel, 219 Fed. 417, 135 C. C. A. 221.

The court erred in overruling the motion to set aside the service of process upon the appellant. It did not acquire jurisdiction of the appellant's person as a result of his counsel, in his absence and under protest, taking part in the subsequent proceedings for the purpose of preventing the rendition of a judgment which the court was without jurisdiction to render. As that judgment must be reversed because of the court's lack of jurisdiction of the person against whom it was rendered, it is not necessary to decide whether, if the process had not been subject to be set aside, the court would have had jurisdiction of the subject-matter of the suit, the object of which was to subject land in Panama, held by a resident of Panama, to the payment of debts, alleged to be owing to the appellees and others by a corporation located in Panama, which, prior to the institution of the suit, had been adjudged bankrupt by a court of Panama, which had assumed control of the bankrupt's estate and was engaged in the administration of it.

[3] The judgment rendered in the contempt proceeding is not sustainable, even if the appellant was subject to be punished for disobeying an order which was never made effective by a valid service of process. The only service upon him of the order commanding him to appear and show cause why he should not be attached for contempt was made while he was in jail, held as an extradited prisoner. It seems that this was not permissible because of the court's lack of right to exercise jurisdiction of the appellant for any purpose other than the one for which he was delivered by the Panama authorities, unless the exercise of jurisdiction is based upon something happening after the extradition. United States v. Rauscher, 119 U. S. 407, 422, 7 Sup. Ct. 234, 30 L. Ed. 425; In re Reinitz (C. C.) 39 Fed. 204, 4 L. R. A. 236; In re Baruch (C. C.) 41 Fed. 472; Collins v.

Johnston, 237 U. S. 502, 35 Sup. Ct. 649, 59 L. Ed. 1071; U. S. R. S. § 5275 (Comp. St. 1916, § 10121).

However this may be, certainly a court should not allow itself to be made the instrument of perverting the process of extradition to serve the purposes of a private litigant who was instrumental in having that process resorted to with the object of having the extradited person subjected to a civil liability, instead of being tried for the crime with which he was charged. It is fairly to be inferred from circumstances disclosed that, if the procuring of the extradition was accompanied by a purpose to try the appellant on the criminal charge on which he was extradited, that purpose was a very secondary one and was subordinated to the controlling one of getting the appellant into the Canal Zone, so that civil process for an alleged contempt of court might be served upon him and a hearing on that charge had. It was not until after it had become apparent that service could not be made of the court's order to show cause that one of the appellees, at whose instance that order was procured, made the affidavit which was the beginning of the criminal proceeding against the appellant. That criminal charge was made the means of effecting the appellant's extradition. When, as a result of the extradition, the opportunity was afforded of trying the appellant on that charge, the public official whose duty it was to prosecute it, instead of manifesting a desire to avail himself of that opportunity, actively co-operated with the counsel for the appellees in the effort to have the court give precedence to a civil case brought against the appellant before the criminal proceeding was instituted—service of process in the civil case having been made while appellant was held in custody to answer the criminal charge—and volunteered the suggestion to the court that the criminal case must wait upon the court's action in the civil one. To say the least, there was the appearance of the process of extradition being permitted to be made use of, not for the ostensible public purpose which could justify the resort to it, but to afford to private litigants the opportunity of securing the enforcement against the appellant of an asserted civil liability.

[4] The judgment rendered in the contempt proceeding was, in necessary effect, an attempt to coerce the appellant to do what he was commanded to do by a judgment or decree which had been superseded, and was not then subject to be enforced by the trial court. The bond given and approved on the allowance of the appellant's appeal from the decree rendered on May 29th was made and approved within such time and was so conditioned as to effect a stay or supersedeas of that decree, service of the citation on that appeal having been made on the day the appeal was allowed. R. S. U. S. §§ 1000, 1007 (Comp. St. 1916, §§ 1660, 1666). By the terms of that superseded decree it perpetuated the preliminary injunction issued when the suit was brought, ordered the appellant to convey the lands described in the deeds which the complaint in the case prayed to be annulled, and ordered him to account for all rents, issues and profits of the properties described in those deeds. By the decree rendered in the contempt proceedings there was what amounted to an ascertainment by the court

that the sum of $30,050 was what the appellant was chargeable with because of his conveying the lands in question, and what he was required to pay to satisfy the superseded decree, and it was ordered that the appellant be committed to jail, there to remain until he pay the said sum as he was ordered to do. We are of opinion that the court was without power so to coerce obedience to a decree which had ceased to be enforceable by it.

[5] As above indicated, the record before us discloses that at the instance of the appellees the court in the contempt proceedings made an order having the effect of a violation of the stay or supersedeas of a decree previously appealed to this court and undisposed of by it at the time such order was made. Though that order or judgment, considered as one made in an independent suit or proceeding, may not be subject to be reviewed on a writ of error (In re Chetwood, 165 U. S. 443, 462, 17 Sup. Ct. 385, 41 L. Ed. 782), yet, the record and the parties being before us, it is subject to be set aside by this court because of its having the effect of an attempted enforcement of a decree not subject to be enforced by the trial court while the case in which it was rendered was pending in this court on a suspensive appeal. Stockton v. Bishop, 2 How. 74, 11 L. Ed. 184.

In view of conclusions above stated, it is not necessary to pass on the suggestion that if, in the circumstances existing when the contempt proceeding was heard, the appellant had been subject to be punished for a contempt of court, it was only in the criminal case which was not prosecuted. See Gompers v. Bucks Stove & Range Co., 221 U. S. 418, 449, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874.

Because of errors pointed out, each of the judgments presented for review is reversed, and the suit and the proceeding in which, respectively, those judgments were rendered are dismissed.

Reversed.

CHICAGO & A. R. CO. v. ALLEN.

(Circuit Court of Appeals, Seventh Circuit. November 26, 1917. Rehearing Denied January 22, 1918.)

No. 2535.

1. COURTS ⇐37—JURISDICTION OF FEDERAL COURTS—ACTION UNDER EMPLOYERS' LIABILITY ACT.

Whether a federal court has jurisdiction of an action by a railroad employé for an injury received in the course of his employment, as one arising under Employers' Liability Act April 22, 1908, c. 149, 35 Stat. 65 (Comp. St. 1916, §§ 8657–8665), depends upon whether the employé at the time of his injury was engaged in interstate transportation, or in work so closely related to it as to be practically a part of it, and this is a question of fact. Jurisdiction cannot be conferred on the court by a stipulation or admission by defendant that plaintiff was so engaged, irrespective of the facts.

2. APPEAL AND ERROR ⇐1178(6)—CIRCUIT COURT OF APPEALS—REVIEW—JURISDICTION.

A general verdict, returned on trial of an action which was without reversible error, may be permitted to stand pending an inquiry and determination by the trial court on the question of its jurisdiction.

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

Action at law by James Allen against the Chicago & Alton Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed, with directions.

Edward W. Everett, of Chicago, Ill., for plaintiff in error.

George C. Otto, of Chicago, Ill., for defendant in error.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

EVANS, Circuit Judge. Plaintiff in error, herein called the defendant, attacks the jurisdiction of the federal court. It asserts that defendant in error, herein called the plaintiff, was not engaged in interstate commerce at the time he received his injury, and, no other ground of federal court jurisdiction appearing, the action should have been dismissed. The facts in respect to the character of plaintiff's employment are disclosed, in part, by a stipulation, which is as follows:

"It is stipulated by and between the parties to the above-entitled cause * * * that prior to and on the 25th day of September, A. D. 1912, and at the time plaintiff claims to have been injured, the defendant owned, was possessed of, and was operating a railroad and railroad shops, railroad cars, locomotive engines, and rolling stock, tools, appliances, machinery, and conveniences, and in connection therewith was during all said time engaged in intrastate and interstate commerce, and that said plaintiff was, at the time he claims to have been injured, in the employ of said defendant, and as such employé at the time he claims to have been injured was engaged in working on or about and repairing an engine which belonged to defendant, which engine prior to the time plaintiff claims to have been injured had for a long time been used by it indiscriminately in both interstate and intrastate commerce, and which engine was at the time plaintiff claims to have been injured intended by said defendant to be used thereafter in interstate and intrastate commerce as occasion might require, and which engine was shortly after the time plaintiff claims to have been injured used by said defendant in both interstate and intrastate commerce."

Defendant also showed that the engine was taken to the shops on the 8th day of July, and was removed on the 28th day of September; that the repairs consisted of a general overhauling of the engine. Defendant offered to show that the engine was hauled from Springfield to Bloomington as a dead engine on July 2, 1912; that it lay in the yards at Bloomington for six days, when it was taken to the shops for general and extended repairs, and remained in the shops until September 28th, when it was ready for use; that prior to June 23, 1912, it had been used in drawing a local passenger train within the state of Illinois and not beyond; that after September 28th, and on October 2d, it was put in use at Taluca drawing a local passenger train, which did not originate in or go beyond the state of Illinois. The court refused to receive such testimony, on the ground that defendant was bound by a letter corroborating a statement made, in open court, prior to the date of the stipulation, the contents of which letter were:

"Pursuant to conversation had before Judge Carpenter recently, we agree that when this case is tried we will admit in open court that Allen, when injured, was engaged in interstate commerce, and that his rights to recover against the defendant and its liabilities to him are controlled exclusively by

the federal Employers' Liability Act. In other words, we will make no contention that, when injured, he was engaged in merely intrastate commerce employment."

Plaintiff early sought a bill of discovery, and the statement in open court and the letter referred to came as a result of plaintiff's endeavors to obtain such discovery.

[1] Upon this record, we are confronted by the question: Did the court have jurisdiction of the case? It is elementary that the facts showing the jurisdiction of the federal court must affirmatively appear. The party who attacks the court's jurisdiction is not required to establish the negative. If the record fails to show the necessary jurisdictional facts, the action must be dismissed. It is also elementary that a federal court does not acquire jurisdiction by consent of parties. Nor will a stipulation as to facts, which are not "the facts in the case," control. True, these facts may be established by stipulation, as well as by admissions, or by any other competent testimony. But it is the facts, and not conclusions, upon which jurisdiction must depend.

The offer of the letter written prior to the stipulation was not accepted by the plaintiff, but was rejected by him, with a full appreciation of the applicability of these rules. While we might well conclude that the offer of the letter had no bearing in the present case, because never accepted, and because the agreement of the parties was immediately thereafter merged into the written stipulation, we are also required to reject it, if the record shows the plaintiff was in fact not engaged in interstate commerce at the time he received his injuries. Ignoring the significance of the rejected testimony offered by the defendant, and confining our attention entirely to the stipulation, we find therefrom that defendant was a carrier engaged in interstate commerce, and plaintiff was its employé at the time he received the injury. The controverted issue for determination then is: Does the testimony show plaintiff to have been engaged in interstate commerce at the time he was repairing the engine and was hurt?

The true test of employment in such commerce in the sense intended is: Was the employé at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it? Shanks v. Del., L. & W. R. R. Co., 239 U. S. 556, 558, 36 Sup. Ct. 188, 60 L. Ed. 436, L. R. A. 1915C, 797; C., B. & Q. R. R. v. Harrington, 241 U. S. 177, 36 Sup. Ct. 517, 60 L. Ed. 941. What is "interstate transportation or work so closely related to it as to be practically a part of it," has been the subject of inquiry in many cases. See Pederson v. Del., L. & W. R. R., 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153; Ill. Cent. R. R. v. Behrens, 233 U. S. 473, 34 Sup. Ct. 646, 58 L. Ed. 1051, Ann. Cas. 1914C, 163; Del., L. & W. R. R. v. Yurkonis, 238 U. S. 439, 35 Sup. Ct. 902, 59 L. Ed. 1397; Shanks v. Del., L. & W. R. R. Co., 239 U. S. 556, 36 Sup. Ct. 188, 60 L. Ed. 436, L. R. A. 1916C, 797; Seaboard Air Line Co. v. Koennecke, 239 U. S. 352, 36 Sup. Ct. 126, 60 L. Ed. 324; C., B. & Q. R. R. v. Harrington, 241 U. S. 177, 36 Sup. Ct. 517, 60 L. Ed. 941; L. & N. R. R. Co. v.

Parker, 242 U. S. 13, 37 Sup. Ct. 4, 61 L. Ed. 119; Ill. Cent. R. R. v. Peery, 242 U. S. 292, 37 Sup. Ct. 122, 61 L. Ed. 309; Erie R. R. v. Welsh, 242 U. S. 303, 37 Sup. Ct. 116, 61 L. Ed. 319; M. & St. L. R. R. v. Nash, 242 U. S. 619, 37 Sup. Ct. 239, 61 L. Ed. 531; M. & St. L. R. R. v. Winters, 242 U. S. 353, 37 Sup. Ct. 170, 61 L. Ed. 358; N. Y. Cent. R. R. v. White, 243 U. S. 188, 37 Sup. Ct. 247, 61 L. Ed. 667, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629; Raymond v. C., M. & St. P. R. R., 243 U. S. 43, 37 Sup. Ct. 268, 61 L. Ed. 583.

Defendant asserts confidently that the facts in this case are governed by the decision in the case of M. & St. L. R. R. v. Winters, 242 U. S. 353, 37 Sup. Ct. 170, 61 L. Ed. 358; while plaintiff, with equal confidence, relies upon Pedersen v. Del., L. & W. R. R., 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153. In the case of M. & St. L. R. R. v. Winters, supra, the court said:

"The plaintiff was making repairs upon an engine. This engine 'had been used in the hauling of freight trains over defendant's line, * * * which freight trains hauled both intrastate and interstate commerce, and * * * it was so used after the plaintiff's injury.' The last time before the injury on which the engine was used was on October 18th, when it pulled a freight train into Marshalltown, and it was used again on October 21st, after the accident, to pull a freight train out from the same place. That is all that we have, and is not sufficient to bring the case under the act. This is not like the matter of repairs upon a road permanently devoted to commerce among the states. An engine as such is not permanently devoted to any kind of traffic, and it does not appear that this engine was destined especially to anything more definite than such business as it might be needed for. It was not interrupted in an interstate haul to be repaired and go on. It simply had finished some interstate business and had not yet begun upon any other. Its next work, so far as appears, might be interstate or confined to Iowa, as it should happen. At the moment it was not engaged in either. Its character as an instrument of commerce depended on its employment at the time, not upon remote probabilities or upon accidental later events."

We see no escape from the language of this decision. It clearly fits the case in hand, irrespective of defendant's testimony supplementing the stipulation or defendant's offered but rejected testimony. We are convinced that the necessary jurisdictional facts not only do not appear, but a situation is disclosed showing affirmatively that plaintiff was not engaged in interstate commerce at the time of the injury. The rule may be, and doubtless is, hard to apply in all cases, and unfortunate results attend its misapplication; but we are not permitted to digress therefrom because of that fact. It must be obvious to all who have studied this question that the difficulty lies, not in the rule, but in the facts which in many cases make the solution of the question extremely difficult.

The case of Pedersen v. Del., L. & W. R. R., supra, is distinguished by the language of the foregoing opinion. In that case Pedersen, an ironworker, was employed by the carrier in "alteration and repair" of some of its bridges and tracks in New Jersey, and at the time of the injury was engaged with another employé in carrying, from a tool car to the bridge, some bolts which were to be used that night in repairing the bridge; the repair consisting of removing an existing girder and inserting a new one. While so carrying the bolts or rivets, plaintiff was injured by a passing interstate train. The bridge was

used in interstate and intrastate commerce. A bridge, unlike the engine in the instant case, is permanently devoted to interstate traffic, and, while used in connection with intrastate commerce, it does not thereby lose its character as an instrumentality of interstate commerce. An engine might be used as an instrumentality of intrastate commerce, or it might be used as an instrumentality of interstate commerce. The basic difference between the engine and the bridge as instruments of commerce lies in the fact that the bridge at all times is an instrument in interstate commerce, while the engine may not be an instrument of interstate commerce. In fact, we conclude from the record now before us that, at the time plaintiff received his injuries, the engine was not an instrument of interstate commerce.

It should be borne in mind that in all these cases the party claiming the federal court has jurisdiction carries the burden of proving the facts which alone confer jurisdiction. Unless the stipulation affirmatively discloses the existence of these facts, the action must be dismissed. If the testimony received on the trial in this case, supplementing the stipulation, and which showed the engine was taken to the shop for a general overhauling on July 8th, and there remained until September 28th, be considered, the conclusion we draw from the facts appearing in the stipulation is greatly strengthened.

We find nothing in the record to support plaintiff's claim that defendant should be estopped from questioning the court's jurisdiction. The letter and the offer made in open court before the stipulation was signed were rejected by plaintiff, who sought and secured the above-quoted stipulation. Moreover, this court cannot accept any offer, stipulation, or admission made to confer jurisdiction when the real facts dispute the offer, stipulation, or admission. Minnesota v. Northern Securities Co., 194 U. S. 62, 24 Sup. Ct. 598, 48 L. Ed. 870; Thomas v. Board of Trustees, 195 U. S. 207, 25 Sup. Ct. 24, 49 L. Ed. 160; United States Envelope Co. v. Trans. Co. (D. C.) 229 Fed. 579.

Plaintiff contends, however, that the evidence showing the date the engine went to and came from the shops, as well as the nature of the repair work done upon it, came from the lips of a witness who was not qualified to speak, and he further contends that he was misled by the letter and offer, heretofore referred to, and that, if given the opportunity, he will prove that the engine upon which plaintiff was working at the time he received his injuries was an instrument of interstate commerce. Under the circumstances of this case, and particularly in view of the claim, seriously and confidently made, by counsel for plaintiff, that, if given an opportunity to establish the facts necessary to confer jurisdiction upon the court, he will be able to do so, we feel justified in reversing the judgment, with directions to the trial court to permit both parties to offer all the competent evidence they may produce bearing upon this issue.

[2] It does not follow, however, that a new trial upon all issues should be granted. Whether the verdict will stand pending the inquiry by the trial court into the facts bearing upon this issue depends upon the absence of other reversible error on the trial of this case.

Grand Trunk Western R. R. v. Reddick, 160 Fed. 898, 88 C. C. A. 80; Parker-Washington Co. v. Cramer, 201 Fed. 878, 120 C. C. A. 216; Alexandria Paper Co. v. C., C., C. & St. L. R. R., 246 Fed. 122, —— C. C. A. ——, decided by this court in this term and session.

Did the court, assuming it had jurisdiction of the action, commit error on the trial? Defendant's counsel complains because of the instructions of the court, one of which reads as follows:

"The court instructs you that it was the duty of the defendant to provide for the plaintiff a safe place in which to work; *and the plaintiff did not assume the risk of some one on those premises, in the employ of the defendant, pushing a piece of metal weighing from 25 to 70 pounds over the side of the pit.*"

The criticism of the italicized words is based on the assumption that the court instructed the jury that:

"An employé is not held to assume the risk of a negligent act of a fellow servant."

The learned trial judge was, of course, speaking only in reference to the facts in the instant case. So limited and so restricted, we think the court was not in error in charging the jury as a matter of law that plaintiff did not assume the risk arising out of the particular negligence of defendant's employé, relied on in this case.

Other criticisms of the instructions are made, but for want of a proper exception they cannot be considered.

Complaint is also made because the verdict is excessive. The trial judge was in a far better position than are we to weigh the testimony in this regard and to pass upon the credibility of the witnesses. If plaintiff's injuries extended to the back and the spinal column, and he was totally incapacitated for the period testified to by him, we would not be justified in declaring the award excessive. The judge, who heard and saw the witnesses, reduced the verdict by a substantial sum. We cannot say that the verdict as reduced is excessive.

Judgment is reversed, with directions to the trial court to grant to the parties a trial by jury, unless the jury be waived, upon this single issue, Was plaintiff engaged in interstate commerce at the time he received his injuries? and to dismiss the action without prejudice, at plaintiff's costs, if it be found that plaintiff was not engaged in interstate commerce at the time he received his injuries, and to enter judgment upon the verdict in case this issue be determined in the affirmative.

COWEN CO. v. HOUCK MFG. CO., Inc.

(Circuit Court of Appeals, Second Circuit. January 16, 1918.)

No. 112.

1. EVIDENCE ⇐90—BURDEN OF PROOF.

The burden of proof in any proceeding lies on that party against whom judgment would be given if no evidence at all were produced on either side, and is determined by the pleadings.

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

2. PLEADING ⟸370—"ISSUES"—NATURE OF.
An issue is a single certain and material point arising out of the allegations of the parties, and should generally be made up of an affirmative and a negative.

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

3. EVIDENCE ⟸94—BURDEN OF PROOF—BURDEN OF EVIDENCE.
The burden of proof, as fixed by an examination of the pleadings, does not change, although during the progress of the trial the burden of going forward with the evidence to rebut a prima facie case may shift.

4. TRIAL ⟸146—WITHDRAWAL OF JUROR—AMENDMENT OF PLEADING.
Where defendant totally abandoned the answer served, and relied on an entirely different defense orally stated at trial, the court would have been justified in withdrawing a juror and compelling an amendment, in order that defendant might plead according to the statement orally made and in a manner technically justifying the proof offered.

5. EVIDENCE ⟸90—ORAL STATEMENT OF DEFENSE—BURDEN OF PROOF.
Where defendant abandoned the answer served, and relied on an entirely different defense orally stated, the case must be treated as if the defense relied on had been regularly pleaded, in determining which party had the burden of proof.

6. CONTRACTS ⟸247—MODIFICATION—BURDEN OF PROOF.
In an action on contract, where defendant at trial set up a new and separate agreement alleged to have been orally made, and to have modified the original contract, instead of the denial pleaded in the answer, the burden of proving the oral agreement was on defendant, and charges that such burden never shifted, and that the burden of proving the original contract was on plaintiff, were erroneous and misleading.

Ward, Circuit Judge, dissenting.

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

Action by the Cowen Company against the Houck Manufacturing Company, Incorporated. Plaintiff brought error to judgment on a verdict for much less than was sued for. Reversed, and new trial ordered.

Plaintiff here and below sued to recover the asserted cost and value of doing certain advertising for defendant. The complaint set forth what plaintiff had expended on said advertising, averred that defendant had agreed to pay the same, plus 15 per cent., and demanded judgment accordingly. The answer was a general denial, coupled with a separate defense (so called) that the amount agreed to be paid for "the alleged services and obligations" was some $2,000 less than the amount demanded in the complaint. A bill of particulars was furnished, by which it appeared that plaintiff's claim was made up of a number of separately rendered bills, each covering some definite and separable piece of advertising, and all prepared on the basis of cost plus 15 per cent.

At the trial plaintiff proved a written agreement, dated September 1, 1915, by which defendant employed plaintiff to do what advertising was ordered on the basis aforesaid, viz., cost, plus 15 per cent.; but nothing therein contained prevented a new or special contract being thereafter made for some particular job or jobs. Thereupon defendant admitted in open court liability on all the bills or statements aforesaid, except two, one of which plaintiff withdrew. As to the remaining and largest bill, covering more than one-half of the amount sued for, defendant offered to prove, was permitted so to do, and did prove (to the jury's satisfaction) a new and separate agreement, orally made in De-

cember, 1915, by which the particular job covered by the large bill was to be done at a fixed price, which was about $2,000 less than cost plus 15 per cent. This defense was not stated nor suggested in the answer. Before the case went to the jury plaintiff requested the following charge: "The burden of proving modification of the original contract is on the defendant"—and the court declined so to charge.

After some deliberation the jurors returned and asked further instructions as to the burden of proof, whereupon the court said: "The burden of proof is upon the plaintiff to establish its contract, and to establish further that this work was done pursuant to the contract of September 1st." Plaintiff then made the following request by its counsel: "I ask your honor to add to that charge that, if the defendant relies upon a separate contract, then the burden is upon the defendant to prove that separate contract"—to which the court replied: "The burden never shifts. The burden remains on the plaintiff through the case, because the plaintiff brings the lawsuit." To these refusals to charge, and to the charge as made, plaintiff duly excepted, and as the verdict proved that the jury had necessarily found that the separate and special December contract was made as sworn to by defendant (but not pleaded), this writ was taken by plaintiff to the resulting judgment. No alleged error other than that covered by the foregoing is thought to require mention.

S. Michael Cohen, of New York City, for plaintiff in error.

John T. Smith, of New York City (Henry F. Herbermann, of New York City, of counsel), for defendant in error.

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

HOUGH, Circuit Judge (after stating the facts as above). [1, 2] It cannot be doubted that what determines the position of the burden of proof is the answer to the question, "Who has the affirmative of the issue?" But to reconcile all the rulings made after admitting this principle would be quite impossible. An issue is "a single, certain, and material point, arising out of the allegations of the parties, and generally should be made up by an affirmative and negative." Simonton v. Winter, 5 Pet. 148, 8 L. Ed. 75. Allegations are usually made in written pleadings; therefore the affirmative of the issue is normally determined by inspection of the pleadings.

The rule (in language taken from Stephens' Digest of Evidence) is frequently stated thus:

"The burden of proof in any proceeding lies on that party against whom judgment would be given, if no evidence at all were produced on either side; regard being had to any presumption which may appear upon the pleadings." John Turl's Sons v. Williams, etc., Co., 136 App. Div. 710, 121 N. Y. Supp. 478.

It sometimes happens that a positive defense may properly be introduced under a general denial, in which case the burden of proof is still upon the plaintiff, because that burden is determined by the pleadings, and not the condition of the evidence. Adams v. Pease, 113 Ill. App. 361. An excellent statement of the general rule and its application is found in Small v. Clewley, 62 Me. 155, 16 Am. Rep. 410.

[3] Distinctions have been drawn between the burden of proof, and the burden of evidence—i. e., the duty of producing countervailing testimony (see Chamberlayne's Evidence, § 930 et seq.); but, when

the burden of proof is fixed by examination of the pleadings, it does not change, for, as was said in Heinemann v. Heard, 62 N. Y. 455:

"During the progress of the trial it often happens that a party gives evidence tending to establish his allegation, sufficient it may be to establish it prima facie, and it is sometimes said the burden of proof is then shifted. All that is meant by this is that there is a necessity of evidence to answer the prima facie case, or it will prevail; but the burden of maintaining the affirmative of the issue involved in the action is upon the party alleging the fact which constitutes the issue, and this burden remains throughout the trial."

It was this rule, or rather this familiar statement of it, which suggested the quoted remark of the lower court, though it was somewhat inaccurate to say that the burden of proof was upon the plaintiff because the plaintiff brought the suit. It is generally true that the pleadings leave the affirmative of the issue on the plaintiff, and that in the absence of any evidence the plaintiff must suffer defeat; but any plea of the nature of confession and avoidance as plainly puts the burden upon the defendant.

[4] The faulty statement of rule just mentioned would be a matter of no importance, but the difficulty with this case is that the pleadings of the parties are wholly irresponsive to the issues actually made. The case was not tried on the pleadings as written and served, but upon what amounted to oral pleadings made shortly after the trial began, and upon the very proper insistence of the trial court that the issue be simplified. Totally abandoning the answer served, the defendant confessed that it was liable, and liable upon the contract of September 1, 1915, for everything except one bill or item, and there was nothing in the nature of the charge set forth in that item, which in the nature of things took it out of the September contract; therefore defendant undertook to prove the December contract. The trial court would have been justified in withdrawing a juror, and compelling an amendment in order that defendant might plead according to its statement in open court, and in a manner technically justifying the proof it proceeded to offer.

[5, 6] The contract of September 1st in its language covered all advertising, and it was incumbent upon defendant to allege as well as prove that one particular bill had been contracted outside of that agreement. If the written pleading had justified the course of trial, the issue would have been plain; i. e., defendant admitted or confessed the force and effect of the contract of September 1st, but alleged an exception thereto. This was done by what we call an oral pleading, i. e., allegations by word of mouth, and such allegations framed the issue. Upon such an issue the affirmative, and therefore the burden of proof, was upon defendant; and this was the only issue that finally went to the jury.

Laxity of pleading and carelessness in detail cannot be used to either vary the rule or escape its operation. The case must be treated on this record as if the pleading had been regular. It is settled that the burden is on him who alleges any modification of the contract in suit. Denney v. Stout, 59 Neb. 731, 82 N. W. 18; Appeal of Kenney (Pa.) 12 Atl. 589; Anderson v. English, 121 Ala. 272, 25 South. 748. And see Banewur v. Levenson, 171 Mass. at page 12, 50 N. E. 10. In this case

defendant finally alleged, not a modification, but a new and separate agreement. The burden was plainly on defendant.

Judgment reversed, with costs, and new trial ordered.

WARD, Circuit Judge (dissenting). If the jury were mystified about the burden of proof, the plaintiff was the cause of it. It asked the court to charge that "the burden of proving the modification of the original contract is on the defendant; they alleged it; we do not." The defect of this request was that it assumed, as I think the court does, that the defendant offered to modify the contract sued on. Modification implies admission, with some change; but the defendant did not confess that the services were rendered under the September contract, and avoid that by new matter. It did not offer to modify that contract, but, on the contrary, denied that it applied to the services in question at all. The plaintiff sued upon what at common law were the common counts in general assumpsit; i. e., without specifying the special contract. Use of the common counts is quite consistent with the requirements of section 481, N. Y. Code of Civil Procedure. Moffet v. Sackett, 18 N. Y. 522; Fulton v. Ins. Co., 4 Misc. Rep. 76, 23 N. Y. Supp. 598. It had a right to proceed in general assumpsit, because the special contract had been fully performed by it and nothing remained to be done, except payment by the defendant. The special contract merely regulated the price. Dermott v. Jones, 2 Wall. 1, 17 L. Ed. 762; Dubois v. Canal Co., 4 Wend. (N. Y.) 285.

The answer contained a general denial, and also set up as a separate defense that the plaintiff was entitled to be paid for its services only the sum of $4,048.82, which the defendant tendered before suit brought and the plaintiff refused to receive. This was not a defense at all, and is to be entirely disregarded as such. It was an admission of liability and allegation of tender, affecting only the question of costs and interest (section 733, Code of Civil Procedure), if properly perfected (section 732). Therefore the cause was properly disposed of by the trial court upon the issue made by the defendant's general denial, which left the burden on the plaintiff to prove how much, if anything, the defendant owed. There was certainly no duty upon the defendant to prove this. The opinion of the court admits that the September contract did not prevent the parties from making other and different contracts. Therefore it was entirely competent for the defendant to show that those services were not rendered under the September contract, but under another and different contract.

Suppose that the plaintiff had sued to recover only the services rendered in connection with the December order; would the defendant have been obliged to plead as a defense that the services were rendered under a different contract or be remediless? And, if not pleaded as a defense, could the court have refused to let the defendant cross-examine the plaintiff's witnesses on this point in the plaintiff's case? I think the defendant could show under its general denial alone by cross-examination of the plaintiff's witnesses in the plaintiff's case, as well as by its own witnesses in its own case, that the services

were rendered under a different contract, without in any way relieving the plaintiff of the burden that lay upon it throughout of proving what amount, if any, it was entitled to recover.

AMERICAN DRUGGISTS' SYNDICATE v. CONTINENTAL SPECIALTY CO. OF BALTIMORE, MD., Inc.

(Circuit Court of Appeals, Second Circuit. January 16, 1918.)

No. 108.

SALES ⊂=24—CONSTRUCTION—OPTION.

A written contract, as modified by defendant's acceptance, relating to the sale by defendant of an ointment manufactured by plaintiff, *held* merely to give defendant an option for the purchase of the formula for the ointment, and not to constitute a binding agreement for its purchase.

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

Action by the Continental Specialty Company of Baltimore, Md., Incorporated, against the American Druggists' Syndicate. There was a judgment for plaintiff, and defendant brings error. Reversed, and new trial ordered.

Writ of error from a judgment for $45,056.17. The jurisdiction of the District Court depended upon diverse citizenship. The action was upon a contract alleged to have been entered into on the 1st day of April, 1913, by which the defendant agreed to purchase the plaintiff's formula for a certain product known as "the Continental Ointment," together with the right to use the plaintiff's name in connection therewith, for the sum of $50,000. The complaint further alleged that the contract also required the defendant to carry a stock of the products of the plaintiff at its various depots and to pay the defendant 20 cents a pound for the product; that the contract was to last for a period of two years, within which the defendant should have the right to discontinue the sale, and at the end of that two years was to declare its purpose to purchase the formula in question; that the plaintiff was ready and willing to perform the conditions on its part, but that the defendant neglected to push the sale of the products, to carry the stock as far as possible, and to pay the purchase price of $50,000, to the damage of the plaintiff of $50,000.

Upon the trial it appeared that the plaintiff, a Baltimore corporation, was the manufacturer of a certain ointment under a secret formula, which it made at Dayton, Ohio, and in advertising which it had spent approximately $50,000. In the early part of 1913, one Savage, representing the plaintiff, had an interview with one Goddard, representing the defendant, looking toward an agreement by which the defendant should become the selling agent of the plaintiff, and after which an extensive correspondence ensued between the parties. This correspondence is conceded by both sides to be the basis of the parties' rights, and upon its introduction the court dismissed the jury upon motion of both sides for a verdict, and eventually, after due consideration, directed a verdict for the plaintiff for $45,000, the difference between the purchase price of the formula, and what the plaintiff had been able to procure upon its sale, had with notice to the defendant. The correspondence begins on February 18, 1913, by a letter from the plaintiff to the defendant, making a proposal in many respects like that in the letter of April 1, 1913, upon which the plaintiff relies to establish the contract. The chief variation, for the pur-

poses of this case, between that letter and the letter of April 1, 1913, is in the following paragraph:

"It will be understood and agreed that at any time during the period of five years you are to have the sole and exclusive right to purchase the good will and business of this company, including its trade-mark and formula for preparing its products, and for which you are to pay the sum of fifty thousand ($50,000.00) dollars in cash within five years from the date of this agreement."

The defendant replied on February 21, 1913, saying that it would undertake no responsibility whatever so far as guaranteeing results were concerned. and on February 28, 1913, the plaintiff again replied, substantially restating the terms of its proposal. To this letter the defendant replied on March 4, 1913, that the arrangement outlined in that letter was satisfactory, and added: "You can either consider this letter a formal acceptance of your proposal as outlined in your communication of February 28, or you can prepare a contract embodying the provisions of that letter and send it on for signature." A delay ensued, owing to the necessity of the plaintiff's procuring the consent of its stockholders, and a notice was issued to the stockholders, calling a special meeting for March 27, to consider a proposal "to give an option" to the defendant for the sale of the corporate assets. After some more correspondence the plaintiff wrote to the defendant on April 1, 1913, a letter of which the following is a copy:

"April 1, 1913.

"Mr. C. H. Goddard, Secretary, American Druggists' Syndicate, Borden and Van Alst Aves., Long Island City, N. Y.—Dear Sir: As requested, we herewith submit for your consideration and acceptance a condensed agreement for the operations between this company and your syndicate.

"It is agreed: That the Continental Specialty Company, as also the American Druggists' Syndicate, shall each contribute, to be sold for their mutual benefit and profit, all stock either of them have on hand of the products of the Continental Specialty Company, including all such that may be in the hands of their distributing depots, or that may be now held on consignment by dealers, also including all printed matter consisting of circulars, posters, cut-outs, electrotypes, etc. That the said products so combined shall be sold by the American Druggists' Syndicate at the regular trade prices to be agreed upon, and the net amount received from such sales shall be equally divided between the syndicate and the company, the amounts to be paid to each the month following the sale thereof. That the Continental Specialty Company shall continue the manufacture of its products under its formula for the purpose of supplying the same to the American Druggists' Syndicate as and when required at twenty (20c) cents per pound net in bulk, payable the 5th of the month following the purchase.

"The American Druggists' Syndicate agrees: To carry a stock of the prepared products as manufactured by the Continental Specialty Company at its various distributing depots, and also as far as possible with the druggists connected with its syndicate. That it will use due diligence in pushing the sale of the said products to the trade generally by advertising, soliciting, and by their travelers and otherwise. That the prices which have been in vogue by the company to the wholesale trade for those products will not be reduced unless by mutual consent in writing. That the net amount paid by the syndicate to the company each month for the ointment furnished in bulk at twenty (20c) cents per pound (less fifteen [15%] per cent. to cover the expense and cost of manufacturing) shall be applied as a credit towards the payment of the fifty thousand ($50,000.00) dollars to be paid to the company, provided the same is paid within five years from this date. That upon the syndicate completing its payment of fifty thousand ($50,000.00) dollars to the company as above it shall at once obtain the trade-mark, formula for preparing the products, and the sole right to use the company's name.

"If at the expiration of two years from this date the syndicate should desire to discontinue this sales agreement, it can exercise that right by giving the company thirty days' previous written notice, and thereupon returning to the company or paying for any unsold products that they or their depots may then have on hand that were furnished by the company free of cost, and all

money that may have been credited the syndicate from the proceeds from material furnished in bulk, which would have been a credit had the syndicate exercised the right of purchase, shall be held by the company as compensating damages.

"If at the expiration of two years from April 1, 1913, the syndicate should desire to continue the agreement with the company, the syndicate agrees in that event to purchase from the company for the remaining three years Continental Ointment in amounts of not less than five thousand ($5,000.00) dollars annually, the amounts to be paid for the month following the purchase, and the amount so received by the company, less fifteen per cent. to cover expense and cost of manufacturing, shall be credited to the syndicate on account of the fifty thousand ($50,000.00) dollars purchase price as agreed, and to be paid within five years from April 1, 1913.

"Awaiting your confirmation of the above, and directions for shipping the stock and material we have on hand, we beg to officially confirm the above agreement.

"Yours very truly, Continental Specialty Company,
"Clarence Cottman, President.

"F. A. Savage, Treasurer."

To this the defendant answered by a letter of which the only material portion is as follows: "We have received your consolidated letter covering our proposal, and there is but one objection that we have to make to it, and that is the paragraph which stipulates that we shall buy at least $5,000 worth a year after the second year. We are willing, however, to waive even this, provided it is distinctly and positively understood with your people that we are not sanguine of making a success of the sale of the ointment." To which the plaintiff replied on April 14th, so far as is material, as follows: "We are prepared to withdraw the stipulation put forward, that you are to buy at least $5,000 worth per annum after the second year, leaving the amount that you are to purchase entirely with you to decide. We might suggest, however, that should, after two years, the sales prove such as we mutually hope and expect, you will then commence the payment to us of a substantial amount each year on account of the purchase price. We are perfectly willing to leave to your good judgment the amount you are to pay us annually on account of the $50,000.00 to be paid us within five years from April 1, 1913."

The defendant made some unsuccessful efforts, whose good faith the plaintiff challenges, to sell the ointment during the two succeeding years, and on April 1, 1913, wrote the plaintiff a letter notifying them that they desired to discontinue the sales agreement. This letter presumptively reached the plaintiff on April 2, 1915, and is the breach laid in the complaint. The court held that the notice of April 1st was not in season, as under the contract it should have been given thirty days before the expiration of two years, which would be on or before March 2, 1915. The defendant on this appeal contends that there was no absolute contract to purchase the formula for $50,000, but only an option; and, second, that within the terms of the contract a notice given at the expiration of the two years would be sufficient.

Tomlinson, Coxe & Tomlinson, of New York City (John C. Tomlinson, of New York City, of counsel), for plaintiff in error.

Miller & Auchincloss, of New York City (Albert C. Ritchie and Stuart S. Janney, both of Baltimore, Md., of counsel), for defendant in error.

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

LEARNED HAND, District Judge (after stating the facts as above). The letter of April 1, 1913, was written in response to the suggestion of the defendant in its letter of March 4th that the plain-

tiff might treat its own letter of February, 28th as the contract between the parties, or that it might prepare a contract embodying those provisions and send it for signature. The plaintiff adopted the second alternative, and the letter of April 1st begins with the statement that it is submitting "a condensed agreement." We therefore incline to hold that the parties intended the letter of April 1st to take up all the prior negotiations and to be the basis of their mutual rights. This is the position of the plaintiff itself, and since in our judgment the result is no different, whether or not we consider the earlier correspondence, we shall assume that the letter of April 1, 1913, was intended to be the final embodiment of the negotiations, without making any decision upon that question.

We cannot find in that letter any express undertaking to purchase the formula, and the first question resolves itself, therefore, into whether, from reading the document as a whole, it becomes apparent that the defendants agreed to purchase the formula if they did not repudiate the contract within two years, or whether the purpose was to give the defendant an option at any time within five years for that purchase at the price of $50,000. The contract starts with provisions for the sale of the stock of products which either party has on hand anywhere. These the defendant agrees to sell at regular trade prices to be agreed on, the amounts to be divided equally between the two parties. So far the contract cannot be held to be material to this controversy. For the future, the plaintiff was to continue to manufacture its product and supply it to the defendant at 20 cents a pound, which the defendant should pay on the 5th of the month following the purchase. The defendant agreed to carry a stock of these products at its various depots and elsewhere, and to use due diligence in pushing their sale at prices which had theretofore been made current by the plaintiff itself. These are the only express obligations which the defendant assumed in the contract. The rest is to be drawn from inference. Continuing, the contract then provided that the amount paid by the defendant each month, less 15 per cent. for manufacture, should be applied as a credit "towards the payment of the $50,000 to be paid to the company"—i. e., the plaintiff—"provided the same is paid within five years from this date," and that the defendant upon completing its payments should obtain the trade-mark, the formula, and right to use the plaintiff's name.

Here the engagements of the parties cease, for the remaining two paragraphs, about which much of the controversy has turned, relate only to provisions for its continuance or termination. Now it seems to us that the contract up to this point did no more than, in case the defendant chose, while the contract endured, to purchase the formula, to give it the privilege of crediting upon the purchase price 17 cents a pound for all the ointment which it had theretofore purchased, but that it did not commit the defendant to a purchase without an acceptance of the option. Indeed, we think that there can be no reasonable argument to the contrary, unless the remaining paragraphs are considered. Therefore the question turns upon the effect of the two subsequent paragraphs, which, though intended to fix the duration

of the "sales agreement," must necessarily be read with the contract as a whole, and are proper to throw light upon the intent of the earlier stipulations.

The first paragraph provides that the defendant may terminate at the end of two years by giving thirty days' previous written notice, that thereupon it shall return to the plaintiff all goods on hand or pay for them, and that all money which would have been credited to the defendant, "had it exercised the right of purchase," shall be held by the plaintiff. Every one likewise concedes that this paragraph contemplates that within the first two years the defendant shall not be bound to declare upon its option; but the plaintiff insists that the contract meant to limit the option to a period of two years, and that, if the defendant did not disavow the contract within two years, it necessarily agreed to take it up. It relies particularly for that construction upon the phrase, "had the syndicate exercised the right to purchase." There is force in this contention. The language seems to imply that all conditions upon the right of purchase would be terminated at the end of two years.

When we come, however, to the last paragraph, a different intent is manifested. Now it is quite true that this paragraph was declined by the defendant in its letter of April 10th, and its refusal was confirmed by the plaintiff's letter of April 14th, so that as a stipulation between the parties it does not exist. Still we may consider it in deciding what the meaning of the prior terms actually was, and from that consideration it seems to us clear that the option continued till the end of the contract. The proposed stipulation bound the defendant to buy at least $5,000 of ointment annually for the remaining three years at the old terms, with the same privilege of crediting all but the cost of it upon the purchase price. Now, if the defendant's continuance of the sales agreement effected an election to buy under the option, such a stipulation would have been wholly irrelevant to the consequent relations of the parties. By hypothesis the plaintiff was to get no profit from the sales, and could have had no motive of its own to continue the business. All it could be concerned with thereafter would be the terms of payment, and the stipulation was not intended merely to fix those terms: First, because it covered only a small part of the price at most; second, because the provision for credit upon the purchase price would be quite out of place; and, third, because it is too clearly an agreement to purchase goods in the future. If, on the other hand, the option still remained open, the purpose and the form of the stipulation both are apparent, and fit with the arrangement as a whole, because the plaintiff would become assured at the least of a substantial sale of its ointment at the profit originally contemplated and the agreement would continue.

The only possible explanation consistent with the plaintiff's position is that the paragraph was inserted to insure the defendant during the last three years of an adequate supply of the ointment; but this is impossible, because it contains a promise of the defendant, and the obligation to purchase a minimum is inconsistent with a bare intention to guarantee the obligor a supply of the goods. The mean-

ing of the agreement as originally proposed by the plaintiff does not, therefore, seem to us to admit of much doubt; but it must be conceded that, after the defendant had rejected the minimum purchases during the last three years, there was not much purpose in the division of the period into two parts. Moreover, it is true that the defendant in two years would have had an adequate opportunity to learn what the commercial future of the ointment would be, and ought to have been in a position to decide upon the option. Yet since the plaintiff drafted an original contract such as to show that the defendant was to retain its option for the whole period, we should be slow to impute to the defendant's rejection of the only rigid obligation which it contained a purpose to substitute a much more onerous undertaking, not proposed in the original form submitted by the opposite party. While that rejection did, it is true, somewhat mutilate the scheme as originally proposed, we will not say that the resulting obligations were more favorable to the plaintiff than those it first put forward; such an interpretation would too obviously violate what both sides had in mind.

In the face of such structural difficulties we should not be disposed to lay stress upon much stronger language than is to be found in the words "to be paid," which occur several times in the agreement, or upon the imperfect subjunctive already noticed in the first of the two paragraphs. Were we, however, to go over the language of the two paragraphs with verbal nicety, our conclusion would be here and there confirmed. For example, in the first paragraph occur the words, "discontinue this sales agreement"; in the second, "continue the agreement." Such language, unless controlled by its context, normally refers to the sales agreement earlier provided before, which only bound the defendant to "use due diligence in pushing the sale of the ointment." It seems to us pretty clear, therefore, that the original purpose of the plaintiff was to give the defendant two years generally "to push the sales," and at the end of three years to require it to buy at least $5,000 a year of the ointment. These things the defendant must do absolutely and at its own risk. If it chose at any time within five years to purchase the formula, it might do so by exercising its option, and in that case an account should be struck between the parties, in which the defendant should be allowed 17 cents for each pound that it has purchased theretofore. When the defendant refused the second paragraph, the contract remained for the rest of the term, what it had been before, an obligation to "use due diligence in pushing the sale," and the defendant, having never exercised its option, was under no obligation to pay the purchase price. At best we should feel that any other interpretation was too doubtful to survive the usual canon contra proferentem.

It is quite true that in the letter of April 14th the plaintiff used language indicating that it supposed the defendant would be under an absolute obligation before five years had expired; but this was only in the form of a suggestion to the defendant, and the last of those paragraphs from that letter quoted in the statement of fact puts the matter again in question. In any event, the defendant never made

answer to that letter, and no expressions in it can be taken as part of the contract between the parties, except in so far as it accepted the limitation imposed by the defendant in its letter of April 10th. It follows, therefore, that the defendant is not shown to have been under any absolute obligation to purchase the formula, and any consideration of the point upon which the case turned below becomes unnecessary. Upon that question we are not ourselves wholly in agreement. It may be that the plaintiff is right in maintaining that the notice of discontinuance must be served within 30 days before April 1, 1913, and that the defendant was guilty of a breach of the contract; but that breach was at most limited to a failure to push the sales with due diligence, which, as we view it, was the only obligation under which the defendant at any time came, unless it chose to accept the formula. No damages for such a breach were proven, and indeed none were asked upon the trial. If any such point is to be taken, the matter will have to be raised upon a new trial.

The judgment must be reversed, and a new trial ordered.

KEATLEY v. UNITED STATES TRUST CO. et al.

No. 73.

(Circuit Court of Appeals, Second Circuit. January 10, 1918.)

ACTION ⟸23—EQUITABLE RELIEF IN ACTION AT LAW—JUDICIAL CODE.

Judicial Code, § 274b, as added by Act March 3, 1915, c. 90, 38 Stat. 956 (Comp. St. 1916, § 1251b), 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"; also that, "in case affirmative relief is prayed in such answer or plea, the plaintiff shall file a replication." *Held*, that it was not the intention of Congress by such provisions to abolish all distinctions between actions at common law and suits in equity, and to establish one form of civil action for all cases; that the only case in which a plaintiff can obtain equitable relief in an action at law by replication is where a replication is required, because of a prayer for affirmative relief in the answer or plea; and that where an answer did not pray for such relief, but pleaded a release, which on its face was a complete legal defense to the action, plaintiff could not, by filing a replication, obtain a cancellation of the release, which could only be done by a bill in equity.

Learned Hand, District Judge, dissenting.

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

Action at law by Harry Wronkow Keatley against the United States Trust Company and Morgan J. O'Brien, as executors of the will of Herman Wronkow. Judgment for defendants, and plaintiff brings error. Affirmed.

John B. Johnston, of New York City (Vine H. Smith, of New York City, of counsel), for plaintiff in error.

Stewart & Shearer, of New York City, for defendant in error United States Trust Co.

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

A. B. Boardman, of New York City (Charles B. Fernald, of New York City, and George L. Shearer, of New York City, of counsel), for defendant in error O'Brien.

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

WARD, Circuit Judge. This is a suit by Harry Wronkow Keatley against the executors of the last will and testament of Herman Wronkow, deceased, to recover the sum of $10,000, with interest from November 30, 1911. November 30, 1910, Wronkow died, leaving a large estate. April 25, 1894, he executed the following instrument and delivered it to Lydia Keatley, the plaintiff's mother, on or about April 30:

"Whereas, Mrs. Lydia Keatley, the wife of John Keatley, of Marshaltown, Iowa, has been and is a friend to me, and has in many ways befriended me, for which I wish and hereby agree to repay her for such friendship by contributing to the support and education of her son, Harry Keatley, the sum of $500 per annum until the said Harry Keatley reaches the age of 21 years, and pay the same in quarterly payments, namely, on the first day of May, August, November, and February of each year from the first day of May, 1894. I further agree to bequeath to the said Harry Keatley and direct my executors to carry out my request to pay out of my estate after my death the sum of $10,000 to the said Harry Keatley in lieu of the stipulated yearly $500 as before said, which I agree to pay to him during my lifetime until the said Harry Keatley reaches the age of 21 years, which payment, however, of $500 yearly shall be discontinued and cease after my death. Should I survive the said Harry Keatley, then this foregoing stipulation shall cease and be null and void."

On the same day Mrs. Keatley executed and delivered to Wronkow the following instrument:

"Received from H. Wronkow the above stipulations and provisions, which I have voluntarily accepted for all claims I had, have, or may have, of all and whatever nature or action, for damages in courts of equity or United States."

This transaction followed Mrs. Keatley's employment of an attorney to enforce certain demands she was making against Wronkow. Wronkow made some or all of the annual payments up to the time of the plaintiff's coming of age, March 31, 1904, but died without making any provision for him in his will.

The executors set up in their answer in bar of the plaintiff's claim the following release:

"To All Whom These Presents shall Come or may Concern—Greeting: Know ye, that I, H. W. Keatley, of Washington, D. C., for and in consideration of the sum of six hundred ($600) dollars lawful money of the United States of America to me in hand paid by Herman Wronkow, the receipt whereof is hereby acknowledged, have remised, released, and forever discharged, and by these presents do for myself, my heirs, executors, and administrators, remise, release, and forever discharge the said Herman Wronkow, his heirs, executors, and administrators, of and from all and all manner of action and actions, cause and causes of action, suits, debts, dues, sums of money, accounts, reckoning, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims, and demands whatsoever, in law or in equity, which against him I have ever had, now have, or which against his heirs, executors, or administrators hereafter can, shall, or may have, for, upon, or by reason

of any matter, cause, or thing whatsoever from the beginning of the world to the day of the date of these presents.

"In witness whereof, I have hereunto set my hand and seal the 29th day of July in the year one thousand nine hundred and nine."

The plaintiff testified that he had known Wronkow from childhood, and had always been told that he was his guardian. Wronkow was a part of his Christian name, and Wronkow during his childhood gave him toys, took him to the theater, and treated him in a most intimate relation. July 29, 1909, the plaintiff came on from Washington, D. C., saw Wronkow in his office, and signed the release. He testified that when he did so he did not know of the existence of the instrument dated April 25, 1894, and his mother testified that she had never told him of it. The trial judge directed a verdict for the defendants on the ground that the release was a complete bar.

As the plaintiff executed the instrument, knowing that it was a release, it was at best voidable, and not void. Therefore, as the law stood until March 3, 1915, he could only have escaped from it by filing a bill in equity for cancellation, which he had not done. Standard Portland Cement Co. v. Evans, 205 Fed. 1, 125 C. C. A. 1; Hogg v. Maxwell, 218 Fed. 356, 134 C. C. A. 164. The act of March 3, 1915, added section 274b to the Judicial Code in the following words:

"Sec. 274b. That in all actions at law equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same rights in such case as if he had filed a bill embodying the defense of seeking the relief prayed for in such answer or plea. Equitable relief respecting the subject matter of the suit may thus be obtained by answer or plea. In case affirmative relief is prayed in such answer or plea, the plaintiff shall file a replication. Review of the judgment or decree entered in such case shall be regulated by rule of court. Whether such review be sought by writ of error or by appeal the appellate court shall have full power to render such judgment upon the records as law and justice shall require." Comp. St. 1916, § 1251b.

The distinction between legal and equitable procedure has been jealously preserved by the Supreme Court. Bennett v. Butterworth, 10 How. 669, 675, 13 L. Ed. 859; Scott v. Armstrong, 146 U. S. 499, 13 Sup. Ct. 148, 36 L. Ed. 1059. We think it quite clear that Congress did not intend by the above amendment to the Judicial Code to abolish all distinctions between actions at common law and suits in equity and to establish one form of civil action for all cases. The provisions of the section apply, with one exception, presently to be considered, to defendants only:

"The defendant shall have the same right * * * as if he had filed a bill embodying the defense or seeking the relief prayed for in such answer or plea. Equitable relief * * * may thus be obtained by answer or plea."

Two references to the plaintiff create some uncertainty:

"That in all actions at law equitable defenses may be interposed by answer, plea or replication. * * * In case affirmative relief is prayed in such answer or plea the plaintiff shall file a replication."

We should construe the word "replication" in the same sense in each case, if possible. The general replication, which is a mere denial intended to put the cause at issue, has been generally abandoned in the Code states and by the Supreme Court in admiralty rule 51 (29 Sup.

Ct. xliv) and the present equity rule 31 (198 Fed. xxvii, 115 C. C. A. xxvii). Full effect is given to the provision that an equitable defense may be interposed by replication, by construing "replication" as a special replication setting up a defense to an answer interposing an equitable defense and asking affirmative relief. Such an answer is what is known at law as a "counterclaim." The answer in the present case sets up a purely legal defense. It is not even a counterclaim. To such a defense the section as we construe it does not permit a replication interposing an equitable defense. The plaintiff should have applied by bill in equity for cancellation of the release.

Therefore we are compelled to affirm the judgment.

LEARNED HAND, District Judge (dissenting). It seems to me that we should not construe so narrowly section 274b. The phrase, "equitable defenses may be interposed by * * * replication without the necessity of filing a bill on the equity side of the court," can only mean, I think, this: That where the defendant interposes a bar valid at law, the plaintiff may set up in his next pleading facts avoiding the bar in equity. The suggestion is that it might give the plaintiff the right to plead to the defendant's "equitable defenses" set up in the answer, but that is independently provided for in the fourth sentence of the act. Besides, the defendant's answer to a suit in equity cannot properly be said to be interposed by "filing a bill on the equity side of the court," which is the language of the first sentence.

So far as we may look to the purpose of the section I cannot think there is any doubt. Congress can hardly be thought to have any predilection for plaintiffs' suits in equity rather than defendants', and we must leave a capricious exception in practice, if we do not include a case like this. I agree that the language of the section is not what a Mitford or a Langdell would have used; but the purpose seems to me perfectly plain, and we ought, I think, to try to effect it if we can.

Section 274a (as added by Act March 3, 1915 [Comp. St. 1916, § 1251a]), does not perhaps fit verbally, certainly not if I am wrong about section 274b, but it shows the purpose to avoid recourse to independent suits in equity with their attendant delays. Indeed, without section 274b I should have thought that a replication at law to avoid the release would fall under section 274a, as a "suit at law" which "should have been brought in equity," and that the plaintiff might have amended in the very action and proceeded. It can hardly be that section 274b takes away such a right.

The result here is extremely hard upon the plaintiff, because, so far as I can see, it will not do him any good after this judgment to avoid the release. His claim will be merged, which is all he can sue on. The defendant did not raise any such point, either in the District Court or here, and the only ground for our raising it nostra sponte that occurs to me is that it touches the District Court's jurisdiction over the subject-matter, which seems to me certainly untrue. The parties having tried out the issue, without objection, as they supposed they might under the state practice, the absence of any formal replication is not a defect which the defendant could have urged here for the first time—

Keator Lumber Co. v. Thompson, 144 U. S. 434, 12 Sup. Ct. 669, 36 L. Ed. 495 (replication by traverse), Comer & Co. v. Wade, 107 Ala. 300, 307, 19 South. 966, 54 Am. St. Rep. 93 (replication in confession and avoidance)—and in any event it did not raise it. Thus an affirmance will now deprive the plaintiff, even if I am wrong about section 274b, of his undoubted right, had the objection been raised at the trial, to ask for a stay of the action until he could file his bill in equity.

I dissent.

In re SALMON.

(Circuit Court of Appeals, Second Circuit. December 24, 1917.)

No. 69.

1. LIMITATION OF ACTIONS ⟸163(1)—PAYMENT ON BARRED DEBT—EFFECT.
   A payment made by one who knows he is insolvent, and which he directs to be applied to his credit, and which is made to one who has no knowledge of the insolvency of the payor, takes the debt out of the statute of limitations, so that on the bankruptcy of the payor it may come in and participate in the assets, for the statute does not extinguish the debt, but merely bars the remedy, and is a personal privilege, which the debtor may waive or assert at election.

2. LIMITATION OF ACTIONS ⟸158—PAYMENT ON BARRED DEBT—NOTE.
   Where there was only one debt due from the insolvent, his direction to put to his credit a note delivered to the creditor must be construed as a payment on the debt, and to have revived the same, although it had been barred by limitations.

3. BANKRUPTCY ⟸166(3)—PREFERENCES—KNOWLEDGE OF INSOLVENCY.
   To constitute a voidable preference under the Bankruptcy Act, the person receiving the payment or benefited by it must have reasonable cause to believe that the debtor was at the time insolvent, and the mere fact that claimant knew from the debtor's statement that he had previously been financially embarrassed and hard pressed by his creditors is not enough to show that a payment on the eve of bankruptcy was a preference, where the debtor had subsequently informed the claimant that he had financed his business and was all right.

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

In the matter of Charles Salmon, bankrupt. From an order (239 Fed. 413) sustaining an order of the referee, expunging the claim, the estate of Hamilton H. Salmon appeals. Reversed, with directions to reinstate the expunged claim.

This cause comes here on appeal from an order made by the District Court of the United States for the Southern District of New York. The facts are as follows:

The bankrupt, on January 27, 1916, made a payment on account by giving the note of one Bernstein to his order and indorsed by him to the estate of Hamilton H. Salmon, in the sum of $125.09, which note was renewed at maturity. The renewed note was duly paid. At the time the note was turned over to the estate the bankrupt was indebted to it in the sum of $60,067.54. Prior to this payment by the Bernstein note the last payment the bankrupt had made on the account had been made on June 3, 1896, so that the debt had become barred by the statute of limitations. At the time the bankrupt

turned over the Bernstein note, he directed one of the executors of his brother's estate to credit it to his account, and his account was accordingly so credited. About a week later Charles Salmon was adjudicated a bankrupt, and on April 7, 1917, the estate of Hamilton H. Salmon filed proof of claim. The trustee thereupon moved to expunge the claim on the ground that Charles Salmon was not indebted to the claimant in any sum, and that, if it were, the statute of limitations was a bar to the claim. At the hearing before the referee, one of the executors of the estate, being the executor to whom the bankrupt delivered the note, testified that the bankrupt said that he was having difficulty in business, and that that was all that he said. He was asked whether he said that he could not meet his obligations, and the witness replied, "No; he did not say anything of the kind." The witness was then asked whether he (the witness) inferred from what was said that his brother had difficulties in meeting his obligations; and he answered that he drew no such inference, and that his brother had made the same remark to him in the year preceding, "but he then told me that he was all right again." The witness also said that, every time he saw his brother, he had asked him for payments on the indebtedness due from him to the estate. He saw him very infrequently, and had not seen him in a year before he came to turn over the Bernstein note, and that he remained only about two minutes. "I had two gentlemen in my private office, and he wanted to see me for a moment, and he just left that note and said, 'Put it to my credit,' and he walked right out. He had an engagement, and I had two gentlemen in my private office at the time."

The referee held that the payment did not remove the bar of the statute of limitations from the bankrupt's indebtedness to the estate of Hamilton H. Salmon, and that there was nothing in the evidence sufficient to justify a finding that the turning over of the Bernstein note was an acknowledgment on the part of the bankrupt of the $59,000 indebtedness for which the estate proved its claim. He added that, "even if the claim were allowed, it would have to be on condition that the payment, which was clearly preferential, be paid back into the estate." He thereupon entered an order expunging that claim from the files in his office. An appeal was taken to the District Court, and the order of the referee was confirmed. The District Judge stated that he could not "agree that a bankrupt, finding himself in a desperate financial position, may revive an outlawed claim by a written acknowledgment or a part payment. * * * By it alone the assets of the bankruptcy are charged with an obligation which was either nonexistent before, or against which there was a valid defense, it makes no difference which."

Blau, Zalkin & Cohen, of New York City (Lewis H. Saper, of New York City, of counsel), for trustee.

Williams, Folsom & Strouse, of New York City (Lazarus Goldstone, of New York City, of counsel), for claimant.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). [1] The question presented is whether a payment, made by one who knows he is insolvent at the time, and which he directs to be applied to his credit, and which is made to one who has no knowledge of the insolvency of the payor, takes the debt out of the statute of limitations, so that it can come in and share in the assets in the bankruptcy court pari passu with the other claims. We are satisfied that the question must be answered in the affirmative.

A statute of limitations does not extinguish a debt. It goes to the remedy, and not to the cause of action. It is merely a personal privilege which the debtor may waive or assert at his election. The cases are so numerous to that effect that it is not necessary to cite them.

In Quantock v. England, 4 Burr. 2628 (1770), which was an action by the assignees of a bankrupt, Lord Mansfield said:

"It is settled 'that the statute of limitations does not destroy the debt'; it only takes away the remedy. The debtor may either take advantage of the statute of limitations, if the debt be older than the time limited for bringing the action; or he may waive this advantage, and, in honesty, he ought not to defend himself by such a plea. And the slightest word of acknowledgment will take it out of the statute. Here the debtor himself has not objected; he has submitted to the commission, and been examined under it. Therefore the objection does not now lie in the mouth of a third person."

The other three judges concurred with the Chief Justice. Such has been the law in England ever since.

In Campbell v. Holt, 115 U. S. 620, 6 Sup. Ct. 209, 29 L. Ed. 483 (1885), the Supreme Court held that the statute of limitations does not, after the prescribed period, destroy or discharge the debt. The debt and the obligation to pay it remains. The debtor is simply permitted, if he elects to do so, to plead the statute as a bar. The Legislature could repeal the statute after the period had run and the bar had been created, and then the creditor might sue and recover on his cause of action, and the constitutional rights of the debtor would not be violated by the legislation. The court, in its opinion written by Mr. Justice Miller, said:

"We certainly do not understand that a right to defeat a just debt by the statute of limitations is a vested right, so as to be beyond legislative power in a proper case. * * * We can understand a right to enforce the payment of a lawful debt. The Constitution says that no state shall pass any law impairing this obligation. But we do not understand the right to satisfy that obligation by a protracted failure to pay. We can see no right which the promisor has in the law which permits him to plead lapse of time, instead of payment, which shall prevent the Legislature from repealing that law, because its effect is to make him fulfill his honest obligation."

The court pointed out that a distinction in this respect exists between statutes of limitation which bar an action to recover real or personal property and those which bar the recovery of a debt. And in Hulbert v. Clark, 128 N. Y. 295, 28 N. E. 638, 14 L. R. A. 59 (1891) the New York Court of Appeals, through Judge Earl, asserts, although in a dictum, a like doctrine. A somewhat analogous question to that arising in the instant case arose in New York before the Supreme Court, General Term, Second Department, in Lawrence v. Harrington, 48 Hun, 618, 1 N. Y. Supp. 577 (1888). In that case, after a debtor had obtained his discharge in bankruptcy, he made a payment on certain promissory notes included in his discharge, and it was held that both as against the bankrupt's discharge and the statute of limitations the old debt was restored, and a judgment obtained thereon was affirmed.

[2] There can be no question, we think, but that the payment which the bankrupt made was intended to apply upon the debt. The District Judge, differing therein from the referee, thought that as there was no other debt between the parties, and as the bankrupt asked to have the note applied to his credit, there could be no possible question that he intended to make a part payment. That is the proper inference to be drawn under the circumstances.

[3] We also agree with the District Judge that the facts do not disclose a preference. To constitute a voidable preference under the Bankruptcy Act, the person receiving the payment, or to be benefited by it, must have had reasonable cause to believe that the debtor was at the time insolvent and that the payment would effect a preference; and insolvency under the act means something more than that the debtor was financially embarrassed and hard pressed by his creditors. This condition may exist, and the debtor still be solvent, so that if the executor, who received payment, simply knew that the debtor said that he was having difficulty in financing his firm, it would not taken alone be reasonable cause to believe him insolvent, especially in view of the fact that he had made the same remark a year before, and had thereafter told him that he had "financed" and was "all right again." The law is well established that, even if the creditor entertains doubts concerning the solvency of the debtor, it is not enough. He must have a knowledge of such facts as will carry him beyond this and furnish a reasonable ground to believe that the payment will give him preference over other creditors.

The fact that other creditors as a result must share with the estate of Hamilton H. Salmon in the assets of the bankrupt is no injustice to them. Their claims and the claim of the estate are alike the honest debts of the bankrupt, and the moral obligation is the same as respects each, and it is a maxim of equity that equality is equity.

The order is reversed, and the District Court is directed to reinstate the expunged claim.

KING et al. v. BARBARIN et al.

(Circuit Court of Appeals, Sixth Circuit. March 5, 1917.)

No. 3084.

1. CARRIERS ⟸177(3)—CARRIAGE OF GOODS—MISDELIVERY.
   Under the Carmack Amendment (Act June 29, 1906, c. 3591, § 7, pars. 11, 12, 34 Stat. 595 [Comp. St. 1916, §§ 8604a, 8604aa]), the initial carrier of an interstate shipment is liable for a misdelivery by the terminal carrier.

2. CARRIERS ⟸52(1)—NATURE OF BILL OF LADING.
   A bill of lading is both a receipt and a contract of carriage and delivery.

3. CARRIERS ⟸83—BILLS OF LADING—DELIVERY.
   A delivery by a carrier to the consignee is made at the carrier's peril, where the consignee does not surrender the bill of lading.

4. CARRIERS ⟸59—BILLS OF LADING—HOLDERS.
   A carrier, by delivering goods to the consignee without the production of the bill of lading, becomes liable to a bona fide holder of the bill for value, whether by way of purchase or as security for advances before the delivery of goods at destination.

5. CARRIERS ⟸83—BILLS OF LADING—DELIVERY OF GOODS.
   Provision in a bill of lading to notify one other than the consignee does not warrant the carrier in delivering the shipment, save by order of the lawful holder of the bill of lading.

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6. CARRIERS ⟸83—DELIVERY—BILLS OF LADING.
An actual indorsement by the consignee of a forged bill of lading affords a carrier no more protection than would be given by delivery directly to the consignee without production of any bill of lading.

7. CARRIERS ⟸82—BILLS OF LADING—CONSIGNEES—OWNERSHIP.
Though the consignees were also named in the bill of lading as consignors, yet, where the carrier acknowledged receipt of the shipment, not from the consignors, but from the owners, the consignees were only prima facie owners of the goods shipped.

8. CARRIERS ⟸94(3)—OWNERSHIP OF GOODS—PRESUMPTION.
The presumption of ownership arising from a bill of lading in which the consignee was named as consignor may be rebutted by other evidence showing the real ownership.

9. CARRIERS ⟸56—BILLS OF LADING—TRANSFER.
Transfer of a bill of lading, without indorsement and with intent to pass title, is a constructive delivery of the property which it represents.

10. CARRIERS ⟸83—BILLS OF LADING—DELIVERY OF PROPERTY—OWNERSHIP.
A bill of lading, instead of naming as consignors the sellers, who were the owners, named the consignee as consignor, and directed notice to a third person. The sellers attached to the bill of lading a draft drawn on the consignee, which was dishonored. The bill of lading recited receipt of the shipment, not from the consignors, but from the owners. *Held* that, as the presumption of ownership might be rebutted, and as the bill of lading represented the property, the carrier was not justified in conclusively presuming that the consignees were the owners, and in delivering the property without production of the original bill of lading, possession of which the consignees never secured, having dishonored the draft to which the bill of lading was attached.

11. CARRIERS ⟸83—CARRIAGE OF GOODS—ACTIONS—RECOVERY.
In such case, the sellers having taken back from the bank their dishonored draft, drawn on the consignees, are entitled to recover from the carrier, despite an asserted lack of privity between the sellers and the carrier.

In Error to the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge.

Petition by George F. Barbarin and O. A. Beach, doing business as Barbarin & Beach, against Paul H. King and Dudley E. Waters, receivers of the Pere Marquette Railroad Company. There was an order allowing petitioners' claim, and the receivers bring error. Affirmed.

Parker, Shields & Brown, of Detroit, Mich., for plaintiffs in error.
Thos. A. Conlon, of Detroit, Mich., for defendants in error.

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

KNAPPEN, Circuit Judge. Defendants in error, whom we shall call petitioners, were in the grain and elevator business at Freeland, Mich. They sold to Botsford & Barrett, of Detroit, Mich., a carload of beans. On December 5, 1911, petitioners, under the direction of Botsford & Barrett shipped the beans, delivering the car to the Pere Marquette Railroad Company at Freeland, taking from the railroad's agent a standard form original order bill of lading (the draft of which was sent by Botsford & Barrett to petitioners), acknowledging receipt of

the car from the "owners." The bill of lading showed that the car was "consigned to the order of Botsford & Barrett, designation Pittsburgh, etc. Notify Arbuckle & Co. at same." At the foot of the bill of lading appeared the names of Botsford & Barrett as shippers. The bill of lading contained this express stipulation:

"The surrender of the original order bill of lading properly indorsed shall be required before the delivery of the property."

Petitioners had not received any payment on account of the car of beans, and on the delivery to them by the railroad company of the bill of lading attached it to a draft drawn by them on Botsford & Barrett, and placed the same in bank to their credit; the draft was sent on for collection and returned unpaid. Botsford & Barrett never had personal possession of the bill of lading. They, however, received from their customer, Arbuckle & Co., payment for the beans. The beans were never recovered by petitioners, their draft was never paid, and they lost the purchase price of the shipment.

The master, to whom were referred the issues raised under the petition filed by Barbarin & Beach in the railroad receivership case for reimbursement of the loss, found that the shipment was delivered by a connecting carrier upon a forged bill of lading, and allowed petitioners' claim. The exceptions to the master's report were overruled, and petitioners' claim allowed by the District Court for the value of the shipment, with interest and costs. As argued here, the case presents but the single question whether, under the facts, the carrier became liable for the sale price of the beans, by reason of their delivery without the surrender of the original bill of lading and in violation of its express terms.

[1] The general rule governing the obligations of common carriers as to delivery of freight are well settled and require little citation of authority. The difficulty lies in their application to the specific facts before us. It should go without saying that under the Carmack Amendment to the Interstate Commerce Act the initial carrier is liable for a misdelivery by the terminal carrier.

[2-4] The bill of lading was both a receipt and a contract of carriage and delivery (Cunard S. S. Co. v. Kelley [C. C. A. 1] 115 Fed. 678, 53 C. C. A. 310); and by the contract, including the express provision that the surrender of the bill properly indorsed should be required before the delivery of the shipment, the carrier agreed to transport the shipment to Pittsburgh and there deliver it to the consignee, or (if the bill had been transferred) to whomsoever should be the lawful holder of the bill. The well-settled rule in such cases is that delivery by the carrier to the consignee is made at the carrier's peril, unless, when made, the consignee surrenders the bill of lading. Union Pacific R. Co. v. Johnson, 45 Neb. 57, 65, 63 N. W. 144, 50 Am. St. Rep. 540. And see Furman v. Union Pacific R. Co., 106 N. Y. 579, 585, 13 N. E. 587.

And a carrier, by delivering goods to the consignee without the production of the bill of lading, is liable to a bona fide holder of the bill for value—whether by way of purchase or as security for advances—before the delivery of the goods at destination. Peoria Bank

v. Northern R. R. Co., 58 N. H. 204; Ratzer v. Burlington, etc., R. Co., 64 Minn. 245, 247, 66 N. W. 988, 58 Am. St. Rep. 530.

[5, 6] The provision for notifying Arbuckle & Co. did not mean that the shipment was to be delivered without the order of the lawful holder of the bill of lading (North v. Merchants' Transportation Co., 146 Mass. 315, 319, 15 N. E. 779); and an actual indorsement by the consignee of a forged bill of lading afforded the carrier no more protection than would be given by a delivery directly to the consignee without the production of the original bill.

[7-10] The question thus is: Were petitioners, as between themselves and the carrier, the lawful holders of the bill of lading, entitling them to be recognized as such? It is beyond question that, had petitioners been named in the bill as shippers, a delivery to the consignees without the production and surrender of the bill of lading would have rendered the carrier liable. The carrier contends, however, that by the delivery of the shipment to it upon a bill of lading in which Botsford & Barrett were named both as shippers and consignees petitioners became strangers to the transaction, and relinquished thenceforth all right of control over the beans; that the carrier had neither notice nor knowledge that petitioners intended to retain any control over or ownership in the shipment, and were therefore entitled conclusively to treat Botsford & Barrett as the owners and to deliver the shipment to their order, without requiring the surrender of the bill of lading. This proposition presents the pivotal question in the case.

In our opinion this contention fails to give due weight to the considerations that by the bill of lading the carrier acknowledged receipt of the shipment, not from the "consignors" in terms, but from the "owners"; that the consignees were only prima facie the owners of the beans, notwithstanding the shipment had been consigned to their order (Turnbull v. Mich. Central R. R. Co., 183 Mich. 213, 219, 150 N. W. 132); that "the presumption as to ownership arising from the bill may be explained or rebutted by other evidence showing where the real ownership lies" (The Carlos F. Roses, 177 U. S. 655, 665, 20 Sup. Ct. 803, 807, 44 L. Ed. 929); and that the actual owner of the goods was entitled to the benefit of the express provision of the contract that the shipment should not be delivered without the surrender of the bill of lading.

Petitioners were in fact owners of the beans at the time of their delivery to the carrier. The latter delivered to them a bill of lading which was the symbol of the property named therein. Its transfer to them by the consignors, without indorsement and with intent to pass the title, would have deprived the latter of control of the goods and have constructively delivered them to the former. Merchants' Bank v. U. R. R. & T. Co., 69 N. Y. 373, 379; Bank v. Railroad, 58 N. H. 203, 204. Under such delivery, with the intent stated, it would not be necessary to the protection of petitioners' rights that they give notice thereof to the carrier who held the property. Forbes v. Boston & Lowell R. R. Co., 133 Mass. 154, 156; Union Pacific R. R. Co. v. Johnson, 45 Neb. 57, 63 N. W. 144, 50 Am. St. Rep. 540. By the transaction in question Botsford & Barrett presumably acquiesced, to say the least, in pe-

titioners' retention of the bill. The fact of such retention, under the circumstances shown, was, in our opinion, evidence of an intent on the part of petitioners to hold the title until the beans were paid for, so far as necessary to secure such payment, and of the consent of Botsford & Barrett thereto. Merchants' Bank v. U. R. R. & T. Co., supra, at page 380. Under these circumstances, and in view of the practice of grain dealers to ship goods and collect therefor on draft accompanied by bill of lading, we think the carrier was not entitled, from the mere fact that Botsford & Barrett were named as shippers, conclusively to presume that petitioners had received payment for the beans, but was fairly charged with notice, not only that petitioners might at least not have received their pay, but of whatever claim they might turn out to have, so far as evidenced by their possession of the bill of lading.

[11] Had petitioners not taken back from the bank their discredited draft on Botsford & Barrett, the bank, in our opinion, would clearly be entitled to recover. This proposition finds express support in Canandaigua Natl. Bank v. Cleveland, etc., Ry. Co., 155 App. Div. 53, 139 N. Y. Supp. 561, affirmed 214 N. Y. 694, 108 N. E. 1091. There, as here, the owner and seller of the goods shipped took from the carrier a bill of lading in which the consignee was named as consignor, and negotiated at a bank a draft on the consignee for the purchase price, accompanied by the bill of lading. The case differs from the instant case, so far as seems important, only in the fact that the sellers did not take up the draft from the bank, and the suit was by the latter; but the decision was not rested upon the existence of rights in the bank superior to those of the seller of the goods and pledgor of the bill, but upon the proposition that the seller held the title and had the right to sell the same to the bank. Indeed, by the commercial law, as declared by the decisions of the Supreme Court and by the courts of the majority of the states, a bill of lading, while negotiable, is not so in the same sense as a promissory note; and the transferee for value, however innocent, must trace his title back to the owner and transferrer. Friedlander v. T. & P. Ry. Co., 130 U. S. 416, 425, 9 Sup. Ct. 570, 32 L. Ed. 991; Atchison, etc., Ry. Co. v. Harold, 241 U. S. 371, 377, 36 Sup. Ct. 665, 60 L. Ed. 1050; Douglas v. Bank, 86 Ky. 176, 179, 5 S. W. 420, 9 Am. St. Rep. 276; Empire Transportation Co. v. Steele, 70 Pa. 188. The asserted lack of privity between the seller and the carrier would apply to the Canandaigua Case, if applicable here. But there was, in our opinion, no lack of privity in the instant case between the carrier and the actual owners of the goods, clothed with the possession of the bill of lading for the protection of their rights. In our opinion the rights of petitioners are not made less than those the bank would have had from the mere fact that their ownership antedated the shipment, and that the bill of lading was retained by them for the express protection of their antecedent ownership and right to receive pay before parting with title. The nature of the contract has not been changed, nor has the carrier been injured, by the fact that Botsford & Barrett were named in the bill of lading as consignors. Had they actually made the shipment, the rights of others would still be likely to intervene, as, for example, those of subsequent

pledgees, to secure advancements, or those of petitioners, under actual delivery of bill of lading by Botsford & Barrett, to secure payment of their draft for the price of the beans. We think it clear that in the latter case petitioners would have been protected. We are not impressed that the protection is lost because their ownership antedated the shipment, and because the bill of lading was retained by them, instead of being manually turned over to them by Botsford & Barrett. Petitioner's loss is due directly to the carrier's failure to observe its contract.

We have not overlooked the decisions cited by defendants as directly sustaining their contention, viz., St. Louis Southwestern Ry. Co. v. Gilbreath (Tex. Civ. App.) 144 S. W. 1051, and Nelson Grain Co. v. Ann Arbor R. R. Co., 174 Mich. 80, 140 N. W. 486. What we have said indicates that we do not find these cases persuasive. While the facts in the Nelson Grain Company Case were practically the same as here, not only was the decision by a divided court, but the force of the majority opinion is to our minds affected to some extent by the later unanimous decision in Turnbull v. Mich. Central R. R. Co., supra, although the two decisions are readily distinguished.

In our opinion, the order of the District Court, allowing plaintiffs' claim, should be affirmed.

ALABAMA & V. RY. CO. et al. v. AMERICAN COTTON OIL CO.

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

No. 3061.

1. CARRIERS ⟸121—LOSS OF GOODS—LIABILITY.
Where a consignee of cotton oil furnished its own tank cars for the shipment, and it was not apparent that the inner valve in the car had not been closed, the railroad company, though bound to exercise a high degree of care, cannot be held liable for loss of the oil resulting from failure to securely close the valve, notwithstanding the outer cap might have prevented the escape, had it not been defective; it appearing cars were often transported without fastening the outer cap.

2. CARRIERS ⟸136—LOSS OF GOODS—ACTION—JURY QUESTIONS.
In an action against a railroad company for loss of cotton oil shipped in a tank car furnished by the consignee, the question whether railroad company was negligent, or whether the loss resulted from failure of the shipper's servants to securely fasten the inside valve of the car, *held*, under the evidence, for the jury.

3. CARRIERS ⟸117—LOSS OF GOODS—LIABILITY—LEASE OF CAR.
Where a railroad company made an allowance of the freight because the consignee furnished its own tank car, the company, as it exercised no right over the car, except for the limited purpose of transporting the shipment, should not be treated as a lessee.

In Error to the District Court of the United States for the Southern District of Mississippi; Henry C. Niles, Judge.

Action by the American Cotton Oil Company against Alabama & Vicksburg Railway Company and another. There was a judgment for plaintiff, and defendants bring error. Reversed.

R. H. Thompson, of Jackson, Miss., T. C. Catchings, of Vicksburg, Miss., and J. Blanc Monroe and Monte M. Lemann, both of New Orleans, La. (J. H. Thompson, of Jackson, Miss., on the brief), for plaintiffs in error.

R. L. McLaurin, of Vicksburg, Miss. (McLaurin & Armistead, of Vicksburg, Miss., and Sullivan & Cromwell, of New York City, on the brief), for defendant in error.

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

BATTS, Circuit Judge. The American Cotton Oil Company, on March 16, 1914, contracted to purchase cotton seed oil from the Caldwell Cotton Oil Company of Vicksburg. It delivered to the latter company, on a spur of the Yazoo & Mississippi Valley Railroad, which connected with the plant of the Cotton Oil Company, one of its own oil tank cars, for the loading of the purchased oil. After loading, the car was delivered to the Alabama & Vicksburg Railway Company for shipment, and that company issued its bill of lading to the Caldwell Cotton Oil Company, "notify the American Oil Company at Cincinnati." The Caldwell Cotton Oil Company drew its draft upon the American Cotton Oil Company, with bill of lading attached, and the draft was duly paid. The tank car was received by the railway company and transported by it to Meridian, Miss., where it was delivered to the Alabama Great Southern Railroad Company. The car moved from Meridian on March 27, 1914, and when it reached McClures, Ala., 40 or 60 miles from Meridian, it was discovered that the tank was leaking. The train was stopped and efforts made to prevent the leakage, but all the oil escaped. Suit was by the American Cotton Oil Company to recover from the two railroads the amount paid for the oil. The Alabama Great Southern Railroad Company filed a plea of the general issue, and gave notice, in accordance with the Mississippi practice, of what it would undertake to prove, viz.: That by the terms of the bill of lading it was contracted by the Caldwell Cotton Oil Company and the railroad that neither the initial railroad nor any carrier in possession of the property should be liable for any loss thereto caused "by the act or default of the shipper or owner"; that the oil was loaded by the consignor, by its own employés and agents, and without any participation by the railroad company, into a car specially manufactured for receiving and transporting oil, which was the property of plaintiff, and furnished by it to the Caldwell Cotton Oil Company for the purpose of receiving the oil; that the tank was carelessly loaded by the agents and employés of the Caldwell Cotton Oil Company; that the inner valve was not closed; that the outer valve or discharge pipe beneath the car, through which the oil was intended to be drawn off, was closed by a cap screwed upon it, but that the threads were worn so that it was not tightly screwed on, by reason of which it fell off; that if the inner valve had been closed, the defect in the cap of the outer valve would have made no difference; that it had no means of knowing whether the inner valve had been closed or not; that the cap on the top of the car was screwed down

tight, and that whether the inner valve was closed could not have been ascertained, except by unscrewing the cap and making an examination from the top, which it was under no obligation to do; that outwardly the car was in good and safe condition; that the car was delivered to the Alabama Great Southern Railroad Company at Meridian, with its condition still apparently good, and that the receiving company did not know that the inner valve was not closed, or that the cap on the discharge pipe was not tightly screwed on; that, when the fact was discovered that the oil was leaking, it immediately endeavored to stop the leak; that at no time after the tank was placed in its possession was it roughly handled; and that there was no negligence on its part, and no want of care or foresight.

The allegations with reference to the sale of the oil, furnishing the car, delivery to the railroads, and the loss of the oil were proved. The tank car in which the oil was loaded was of steel. It was filled from the top and was designed to be emptied by a valve in the bottom. This valve was closed by a rod, which ran to the top of the car, held in place by a coilless spring. Underneath the valve was a cap that screwed from the bottom of the car. The cap was not designed to hold the contents of the car, but would have had that effect if the screw threads had not been defective. The unscrewing of this cap would not have the effect of emptying the car, the valve being in place.

The testimony indicates that the car was filled by two employés of the Caldwell Cotton Oil Company. One of these testified that, when they loaded the car, the first thing they did was to take the cap off. He then put the pipe in, and he states that he saw that the inner valve was in good condition. He said that he looked into the car with a light, but did not go down into it; that there was about an inch of something that looked like oil in the tank, and it apparently being clean cotton seed oil, he loaded on top of it. He said that to find out what was in the tank he raised the valve and let it fall back, and that it was left without any further examination.

The balance of the testimony is with reference to the investigations and examinations which were made and the testimony of persons who were familiar with cars of this character and the valves used in this car. This testimony all indicates that, if the valve had been put properly in place, it could not have gotten out of its gasket, even with rough handling by the railroad. The evidence strongly indicates that, when the valve was pulled up by the employé of the Caldwell Company before loading, it did not get back properly into place. The evidence also indicates that the cap underneath, while it might have held the oil, was not intended for that purpose, and that an inspection which would have disclosed a deficiency in this cap would not have suggested the necessity of making any change or repair in the car; it appearing that not infrequently these caps were unscrewed in transit.

[1, 2] The evidence is ample to justify the submission to the jury of the defense of the railroad companies, to the effect that the loss of the oil resulted from the negligence of the employés of the Caldwell Cotton Oil Company, provided such negligence could, under any circumstances, relieve the railroads accepting the car and issuing a bill

of lading therefor. The trial judge, at the instance of the plaintiff, American Cotton Oil Company, directed a verdict against the railroads.

If the defect in loading, or the defect in the car, had been apparent to the railroad company at the time of the acceptance of the car, the railroad company would doubtless be held responsible, notwithstanding the car had been chosen by the shipper and had been loaded by him. Even under such circumstances, to permit recovery by the shipper would involve a questionable policy. While there is every reason for holding the railroad companies to a very high degree of care in the exercise of their duties to the public, it can scarcely consist with public policy to encourage the furnishing by shippers of bad cars or bad containers of any kind, or defective loading, by excusing them from the results of their negligence. No such question, however, arises in this case. The evidence would justify a finding to the effect that the damage resulted from the negligence of the shipper in the loading, and that the negligence in the loading, whereby the valve was not properly seated in its gasket, could not have been ascertained by the railroad, except by unloading the car at a time when there was no apparent reason for unloading.

The following cases support the proposition that the carrier is not to be held responsible for loss occasioned by imperfect packing, or other carelessness on the part of the shipper: Carpenter v. Baltimore & Ohio Railroad Co., 6 Pennewill (Del.) 15, 64 Atl. 253; Pennsylvania Co. v. Kenwood Bridge Co., 170 Ill. 645, 49 N. E. 217; Klauber v. American Express Co., 21 Wis. 21, 91 Am. Dec. 452. The case of Gulf, Colorado & Santa Fé Ry. Co. v. Wittnebert, 101 Tex. 368, 108 S. W. 150, 14 L. R. A. (N. S.) 1227, 130 Am. St. Rep. 858, 16 Ann. Cas. 1153, involved a case of substantially the same character as this, and the ruling was in accord with the conclusion we have reached. There seems to be no adjudication by any federal court upon the subject, but we are entirely satisfied with the reasoning and conclusions of the state courts.

[3] The plaintiff undertakes to defend the action of the trial court upon the ground that the car became, by its acceptance by the railroad company and the circumstance that an allowance was made for its use, leased to the railroad; and insists that the rule should be the same as where the railroad company had furnished the car. In fixing the rate to be charged for the transportation of oil, a reduction is made on account of the fact that the car is furnished by the shipper. This is in no sense a lease to the railroad company. The railroad company exercises no right over it, except for the limited time and purpose for which it is tendered by the shipper.

The instructions asked by defendants cannot be regarded as a request for the court to determine the questions of fact. The issues tendered by the defendant railroad company should have been submitted to the jury.

The case will be reversed for proceedings in conformity herewith.

Reversed.

ALABAMA GREAT SOUTHERN R. CO. v. MORRIS & CO.

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

No. 3088.

1. TRIAL ⊂=143—CONFLICTING EVIDENCE—JURY QUESTION.
Where the evidence is conflicting, issues should be submitted to the jury.

2. CARRIERS ⊂=121—CARRIAGE OF GOODS—LIABILITY OF RAILROAD COMPANY.
Where a seller of cotton seed oil loaded same in its own tank car, buyer cannot, having paid bill of lading with draft attached, recover against railroad company for loss of oil resulting from defect in car not discoverable by reasonable inspection, even though railroad company made seller, who was required by contract to deliver oil, an allowance for use of car.

In Error to the District Court of the United States for the Southern District of Mississippi; Henry C. Niles, Judge.

Action by Morris & Co. against the Alabama Great Southern Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Albert S. Bozeman, of Meridian, Miss. (B. F. Cameron, Jr., of Meridian, Miss., on the brief), for plaintiff in error.

Geo. B. Neville, of Meridian, Miss. (Neville, Stone & Currie, of Meridian, Miss., and Borders, Walter & Burchmore, of Chicago, Ill., on the brief), for defendant in error.

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

BATTS, Circuit Judge. Morris & Co. instituted suit against the Alabama Great Southern Railroad Company in the circuit court of Lauderdale county, Miss., alleging that it had purchased from the Eagle Cotton Oil Company, of Meridian, a tank of cotton seed oil, which, under the terms of the purchase, was to be delivered by the seller to the plaintiff at Chicago; the plaintiff to pay the costs of freight and to pay the price to seller upon presentation of its draft with bill of lading. The railroad company received the oil from the oil company, and issued its bill of lading. Draft was drawn, with bill of lading attached, and paid. It is alleged that the oil was never delivered to plaintiff, and prayer is made for judgment for its value.

The case was removed to the District Court of the United States for the Southern District of Mississippi, where the defendant set up that the tank car in which the cotton seed oil was shipped was the car of the shipper; that it was not furnished by the defendant to the shipper or to the consignee, but was furnished and selected by the Eagle Cotton Oil Company; that the oil was loaded by the shipper at its plant at Meridian, Miss., in the car so owned and selected by it for that purpose; that when the oil was tendered for shipment it was already loaded in the car, to be carried and consigned to the order of the shipper at Chicago, Ill.; that the car was defective, in that it was

an old car, and that the tank had been worn through at a point where it rested on a support bracket; that the tank had been patched by riveting a thin metal patch over the worn place; that the metal body of the tank at that place was thin and worn and weak; that the patch had not been applied in a workmanlike manner, but so applied that the ordinary wear and tear incident to the careful hauling of the car when loaded caused the body of the tank to crack and break alongside the edge of the patch, whereby the contents was lost; that the defect was known to the shipper, but was not known to the defendant, although the defendant inspected the car with proper and reasonable care, both at the time and place of shipment and at other stations while the car was in transit; that the defect was concealed under the iron and wooden supports of the tank, and was not discoverable by reasonable inspection of the car; that the shipper, under whom the consignee claims, and who was the agent of the consignee in making the shipment, was negligent in furnishing and selecting a defective car and in loading oil therein; that the car and contents were handled by defendant and its connecting carrier with all reasonable care, and that the injury and damage suffered by the plaintiff is the fault of the shipper.

In answer to this, the plaintiff pleaded that the defendant had leased from the Cotton Oil Company the tank car, in which the cotton seed oil was loaded, and had agreed to pay the Oil Company 3¼ cents per mile for said car; that an agent of the defendant at Chattanooga, Tenn., inspected the tank car, and discovered that the oil was leaking therefrom, and placed on the car a bad-order card, calling attention to the leak; that thereafter the car was carried by the defendant to its shop at Chattanooga, but that defendant carelessly and negligently failed, either to stop the leak or to transfer the oil to another car; and that thereafter the oil was lost.

The demurrers to the answer and replication were overruled, and evidence presented to the jury. At the end of the introduction of testimony, the plaintiff filed a motion requesting the court to instruct a verdict for plaintiff for the amount sued for, assigning as reasons for the motion: (1) Because, under the law, it was the duty of the defendant to furnish a fit and suitable car in which to carry the oil in controversy from Meridian, Miss., to Chicago, Ill., and the defendant cannot escape this duty by showing that the car belonged to the consignor, and was defective when it was delivered to the defendant; (2) because the testimony of the defendant shows that a defect, which the defendant claims existed, was an open and patent defect; (3) because the evidence of defendant shows that an employé of the defendant at Chattanooga, Tenn., discovered a leak in the car, and the defendant did nothing to stop the leak or to transfer the oil to another tank; (4) because the evidence shows, without contradiction, under tariffs adopted by the defendant, defendant agreed to pay the consignor, the Eagle Cotton Oil Company, the owner of the car, three-fourths cents per mile loaded and empty for said car, and also agreed to make all necessary repairs on said car while in its possession at the cost of the owner of the car; (5) because the testimony does not warrant the jury in finding a verdict for the defendant against the plaintiff; (6) because the defendant has failed to prove that it made a careful in-

spection of the tank car in controversy by a competent inspector, to discover any defects in said tank car; (7) because the defendant has failed to prove that the loss of the oil resulted solely from a defect in the tank which was hidden and not discoverable upon a careful inspection by a competent inspector.

This motion was sustained by the court, who directed the jury to return a verdict against the defendant for the amount sued for. From the judgment rendered upon this verdict the proceedings in error have been taken.

Taking up the several grounds upon which the motion is based:

(1) The shipper did not call upon the defendant to furnish a fit and suitable car in which to carry the oil in controversy, but tendered to the company a car filled with oil and ready for transportation.

(2) The question as to whether or not the defect which the defendant claims existed was an open and patent defect was one which should have been submitted to the jury.

(3) The evidence shows that an employé of the defendant, or of one of its connecting lines, upon an inspection of the car, made a report as follows:

"Bad Order. Marked for Ld Shop 8–17, for the following repairs: 1 brake lever & 3 brake pins gone. Brake ratchet wheel loose brake—B—Oil leaking out A & B 12/37 p. m."

The car was put in the shop and repairs made, but the evidence indicates that no leak was found, and a subsequent inspection when the car left Chattanooga failed to disclose any defect or leak. The evidence with reference to the inspection and repair is of a character to be submitted to the jury.

(4) The evidence shows, without contradiction, that the Eagle Cotton Oil Company received a bill of lading for the car which was tendered, and that, in reaching the rate to be charged, a deduction is made by the applicable tariff on account of the furnishing of the car by the shipper. This did not constitute a lease of the car to the railroad company. During the time the car was in transit, the railroad company was under obligations to exercise reasonable care to make the necessary repairs at the cost of the owner. The issue as to whether or not this was done should have been submitted to the jury.

(5) The evidence in the case, with reference to all contested issues, was conflicting, and was such as would have warranted the jury in finding a verdict for either party.

(6) The issue as to whether defendant made careful inspection of the car by competent inspectors was one which should have been left to the jury.

(7) The question as to whether the loss of the oil resulted solely from a defect in the tank which was hidden and not discoverable upon a careful inspection by a competent inspector is one with reference to which any finding by the jury could properly be sustained.

[1, 2] The matters set up by the railroad company, if true, constituted a complete defense to plaintiff's cause of action. See Alabama & Vicksburg Ry. Co. v. American Cotton Oil Co., 249 Fed. 308, —— C. C. A. ——, this day decided. Upon all of these issues there was

conflicting testimony, and they should have been submitted to the jury under proper instructions.

The judgment is reversed, and the cause remanded for proceedings not inconsistent herewith.

Reversed and remanded.

SHEATZ v. MARKLEY et al.

(Circuit Court of Appeals, Third Circuit. January 30, 1918. Rehearing Denied March 12, 1918.)

No. 2304.

1. ASSIGNMENTS ⟸58—PARTIAL ASSIGNMENTS—EFFECT.
   It is the rule in the federal courts that, unless a debtor agrees to accept a partial assignment of a debt due by him, he is not bound thereby.
2. CORPORATIONS ⟸406(3)—SECRETARY—AUTHORITY OF.
   That the secretary and treasurer of a corporation was in charge of its office and accounts does not show that he was empowered to accept a partial assignment of a debt due by the corporation, in the absence of evidence that he was so held out.
3. CORPORATIONS ⟸426(2)—SECRETARY AND TREASURER—AUTHORITY—RATIFICATION.
   Where the secretary and treasurer of a corporation was not capable of binding the corporation by assenting to a partial assignment, he could not bind it by purporting to ratify his unauthorized act.
4. EVIDENCE ⟸155(8)—ASSIGNMENTS—PARTIAL ASSIGNMENTS.
   Where contractors sued a corporation to the use of plaintiff, to whom they had made a partial assignment of a debt due them, and an auxiliary ledger evidencing the assignment was introduced in evidence, other books of the corporation, showing transactions between the contractors and the corporation, were admissible.
5. EVIDENCE ⟸234—ADMISSIONS—ADMISSIBILITY.
   In an action against corporation by contractors, to the use of one to whom they had made a partial assignment of a debt due them, evidence of admissions made by the contractors that the contract on which the claim was based had not been performed by them though occurring after the alleged partial assignment, are admissible in evidence; the acceptance of the assignment having been denied, and the time that the admissions were made going only to their probative force.

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

Action by John R. Markley and Isaiah B. Miller, to the use of E. Kirby-Smith, against the International Lumber & Development Company, whose receiver, John O. Sheatz, was afterwards substituted as defendant. There was a judgment for plaintiffs, and defendant brings error. Reversed, and new trial awarded.

Owen J. Roberts, Olin Bryan, and Harry Reiss Axelroth, all of Philadelphia, Pa., for plaintiff in error.

Henry J. Scott, of Philadelphia, Pa., and Fred H. Atwood, of Chicago, Ill., for defendants in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

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

McPHERSON, Circuit Judge. In this action the use plaintiff, E. Kirby-Smith, sued the International Lumber & Development Company (whose receiver, John O. Sheatz, was afterward substituted as defendant), claiming to recover money due or to become due by the company to the legal plaintiffs, Markley & Miller.

He based his claim on Markley & Miller's assignment to him on August 28, 1911. Several years before that date they had contracted with the company to cultivate and develop a ranch in Mexico, and had employed Kirby-Smith as manager; his duties requiring him to live on the ranch and to look after the work on the ground. In 1911 he gave up his employment, and on August 28 he met Markley & Miller in Chicago, where his claim against them was compromised, and the sum of $105,000 was agreed upon as due. Thereupon they executed an assignment of that amount out of such money as might then be due or might become due thereafter, upon their contract with the company. They also signed notes aggregating $105,000, and drew drafts upon the company in the same amounts as the notes and falling due on the same dates. The plaintiff offered evidence to the effect that C. M. McMahon, the company's secretary and treasurer, was present at the settlement and agreed to the assignment on behalf of the company, and also offered evidence tending to show that Markley & Miller had performed the original contract. He asserted that during the year 1912 the company agreed with Markley & Miller that about $364,000 was due to them under the contract, and proved the payment of the first draft, for $4,000, and the refusal of the others.

The assignment was only partial, and the use plaintiff undertook the burden of showing the company's acceptance, as well as the fact that it owed to Markley & Miller, either on August 28 or thereafter, enough money to pay the amount assigned. In the effort to establish these facts, he offered evidence of McMahon's presence in Chicago, and his declaration at the conference there that the company owed or would owe Markley & Miller $400,000 under the contract, and would pay the drafts covering their assignment. This raised the question of McMahon's authority to bind the company, and to support his authority the plaintiff called the chief bookkeeper, who testified that McMahon conducted the company's correspondence, had full direction of its funds, and was in general charge of the office. The by-laws were not offered, nor was any resolution of the board of directors referring to McMahon's authority. It appeared that when he returned from Chicago he gave the bookkeeper a list of the drafts, so that a memorandum of their amounts and due dates might be made, and that he directed the payment of the first draft, and the dishonor of the others. The plaintiff also offered evidence that Markley & Miller had agreed to pledge certain collateral security with their notes, and he attempted to show that the company had taken part in carrying out this agreement. On this point the facts were these: The company's stock was to be paid for in installments; until all the installments were paid, the subscribers received, not the stock itself but a form of contract, and it was a definite amount of these stock contracts that Markley & Miller agreed in August to pledge as collateral.

In September, under some arrangement that was not fully explained, the company issued stock contracts in the name of Markley & Miller, who assigned them in blank and pledged them as security for the notes. On some of these contracts the stock was afterwards issued, apparently in the name of a dummy. It was not proved that the company issued the stock contracts for the purpose of carrying out Markley & Miller's assignment, or with knowledge thereof. This is an outline of the plaintiff's case on the subject of the company's acceptance of the assignment.

On the other question—whether Markley & Miller had performed their contract with the company, and, if so, how much was due thereon—the plaintiff offered the following evidence: He attempted to prove the company's declaration against interest, contained in an account with Markley & Miller, kept in a book that was produced at the trial and called an "auxiliary ledger." He called the bookkeeper to identify the volume as an official record of the company, but the witness testified that, although the book had been kept in the principal office, it was not one of the company's official records, and did not contain all the entries that were found in other books concerning Markley & Miller's debits and credits. This ledger, however, was admitted in evidence as a declaration against interest, and the account therein showed that the company, at and after August 28, owed the contractors much more money than the amount assigned. The receiver attempted to cross-examine the witness, in order to show what books of the company contained the complete transactions with Markley & Miller, and attempted later, as a part of his own case, to offer other books of the company to show the true state of their account. But the trial judge declined to allow the cross-examination, and declined also to admit the other books as part of the receiver's case, for the purpose of showing the account as a whole. The receiver then offered to prove that certain specific items, not contained in the "auxiliary ledger," were proper charges against Markley & Miller; but the offer was excluded, on the ground that these items had been charged against one or other of the contractors individually. Apparently neither Markley nor Miller had done any business with the company, except under the contract of October, 1904.

The court asked the jury to find (1) whether McMahon had actual authority to bind the company by his acceptance of the assignment, or whether he had been previously held out as having such authority; and (2) whether the auxiliary ledger showed a sufficient indebtedness to Markley & Miller at and after August 28. As part of the charge, the jury was instructed that sufficient facts (if believed) were in the case to establish McMahon's authority, but that the jury must determine from the evidence whether McMahon did accept the assignment for the company.

[1-3] We regret that another trial of this case must be had, but we see no way to avoid it. On the two fundamental questions in dispute erroneous decisions were made that cannot be disregarded. Whatever the rule may be in other tribunals, the rule in the federal courts is that, unless a debtor agrees to accept the partial assignment of a

debt due by him, he is not bound thereby. Mandeville v. Welch, 5 Wheat. 277, 5 L. Ed. 87, 1 Rose's Notes (Rev. Ed.) 1041; 2 Rul. Case Law, 618, § 26. This being so, the plaintiff was bound to prove that the company had accepted Markley & Miller's assignment, and this in turn depended essentially upon McMahon's authority. So far as appears, he was not expressy authorized to bind the company, and we cannot assent to the proposition that such authority may be implied from the fact that he was discharging the customary duties of secretary and of treasurer. And there was no evidence that he had been held out to any one as so empowered; nothing was proved, except that he was in charge of the company's office and accounts—as might be expected from a secretary and treasurer—attending to the correspondence, keeping the accounts, and receiving and paying out the money. If, with the company's knowledge and implied assent, he had been usurping the corporate powers, and had come to represent the company for most, if not for all, corporate purposes, this fact was not made to appear, and in the absence of evidence we must decline to accept the assertion of counsel on this subject. It is hardly necessary to add that, if he was not capable of binding the company by assenting to the assignment, he could not ratify his own unauthorized act, unless the company gave him power so to do. Woodruff v. Shimer (C. C. A. 3) 174 Fed. 584, 98 C. C. A. 430.

[4] Upon the other question, also, we cannot sustain the rulings at the trial. We do not pass upon the correctness of restricting the receiver's cross-examination of the bookkeeper. In any event, the ruling did no serious harm, for the receiver had a subsequent opportunity to go into the same subject when his turn came to be heard. But the opportunity was of no avail; the offers he made were excluded, and here we think a mistake was made. Assuming the "auxiliary ledger" to have been an official book of the company—and upon the evidence before us this seems to have been a fairly disputable point concerning which we think the jury should have received more definite instructions—it did not follow that the other books of the company might not throw important light upon the true state of the account, and if they did afford such help they should have been received and considered. The fact that some items sought to be proved may have been entered on what were formally the individual accounts of the contractors was not conclusive. On the record before us, the only transactions Markley & Miller had with the company grew out of their contract, and the appearance of some transactions in a seemingly individual account, while others appeared in a firm account, was open to explanation. In a word, the relations between the company and the contractors should have been thoroughly investigated, and for this purpose we think the books as a whole (speaking, of course, in general terms) were relevant.

[5] We are of opinion, also, that the court should have admitted the receiver's offer to prove admissions by Markley tending to show that the contract of October, 1904, had not been performed. The fact that these admissions were made in December, 1912, was not sufficient to exclude them. We are dealing, not with a situation where

the debtor had accepted the assignment, but with a situation where the acceptance itself was a matter of dispute, and where the performance of the contract, and therefore the existence of a fund, was also in controversy. It was essential to determine whether the company owed Markley & Miller anything, and, if so, how much—in other words, whether in August, 1911, Markley & Miller had any valuable right to assign. On this question the admission of Markley, that the original contract had not been performed, was evidence, and we do not see that its competency would be affected by the fact that it was made in 1912. Under the circumstances the right of the use plaintiff could not be greater than the right of the legal plaintiffs, although of course the probative value of the admissions might not be as great as if they had been made before the assignment was executed. The date of making them might be a reason for regarding them with caution, but it would not be sufficient to exclude them altogether. Certainly, if there was nothing of value to assign in August, 1911, the assignment had no effect, and upon this point Markley's admissions should have been received.

We need not take up the assignments of error in detail. We have said enough to indicate our opinion about the proper course of the trial, and enough, we hope, to be a sufficient guide when the controversy comes again before the District Court.

The judgment is reversed, and a new trial is awarded.

In re JARMULOWSKY et al. Petition of WILSON. Petition of BORTZ.

(Circuit Court of Appeals, Second Circuit. January 16, 1918.)

Nos. 114, 115.

1. COURTS ⊂=372(1)—FEDERAL COURTS—PRECEDENTS.
On questions of general commercial law, the decisions of the state courts are not controlling in the federal courts, but the rules enunciated by the various national courts should be applied.

2. BANKS AND BANKING ⊂=127—CHECKS—DEPOSITS.
In the absence of any special agreement between the depositors and a bank, title to checks deposited will pass to the bank, and it becomes merely a debtor for the amount thereof.

3. BANKS AND BANKING ⊂=159—DEPOSIT OF CHECKS—EFFECT.
Whether there was any special agreement taking a deposit of checks out of the general rule, under which title would have passed to a bank and it would have become a debtor to the depositors for the amount thereof, is a question of fact.

4. BILLS AND NOTES ⊂=188—INDORSEMENT—EFFECT.
Where checks deposited were indorsed in blank, any lawful direction might be written over the blank indorsement.

5. BANKS AND BANKING ⊂=165—COLLECTIONS—PROCEEDS.
When a bank, collecting checks as agent for a depositor, gets the money on the checks, the relation of debtor and creditor arises.

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6. BANKS AND BANKING ⊂=166(2)—DEPOSIT OF CHECKS—EFFECT.
Where their passbooks provided that deposits of checks should not be drawn upon until collected, the checks so deposited belonged to the depositors until collection, even though they were indorsed in blank and commercial depositors were allowed to draw on deposits of checks, for the banker might have written any lawful direction above the blank indorsement, and the privilege in favor of commercial depositors, which was without consideration, might have been withdrawn at any time; so, where the checks were not collected until after a receiver took charge of the affairs of the banker, the depositors were entitled to the proceeds as against the receiver.

Petitions to Revise Orders of the District Court of the United States for the Southern District of New York.

In the matter of the bankruptcy of Louis Jarmulowsky and Harry Jarmulowsky, doing business under the firm name and style of S. Jarmulowsky's Bank. The petitions of L. M. Wilson and Benjamin Bortz, which were opposed by Eugene Lamb Richards, as receiver in bankruptcy, were granted (243 Fed. 632), and the receiver petitions to revise. Affirmed.

The appellant in these causes, Mr. Richards, is at once superintendent of banks for the state of New York and receiver in bankruptcy of Jarmulowsky et al., who conducted business in New York City as bankers under the name of "S. Jarmulowsky's Bank." Pending these appeals adjudication has been entered, and for all practical purposes Mr. Richards may be regarded as the trustee in bankruptcy. On May 11, 1917, the superintendent of banks took possession of Jarmulowsky's Bank pursuant to the statutes of New York, because in his opinion there existed an impairment of capital and an insufficient reserve. On the same day a petition in bankruptcy was filed against the Jarmulowskys.

Quite as much from the admissions or statements of the parties as from a meager and ill-prepared record, we find that on May 10, 1917, Bortz deposited in the bank two checks, aggregating $304.90. One of these was plainly an out of town check; the other was apparently local—i. e., drawn against some bank in the city of New York. On the same May 10th Wilson similarly deposited two Philadelphia checks, aggregating $354. Both depositors indorsed their checks in blank and received credit (i. e., the checks were not entered "short") in their passbooks for the face of the checks, and both their passbooks contained the following notice: "Deposits of currency or coin may be drawn against after deposit, but deposits of checks shall not be drawn against until collected." The checks aforesaid, with many others, were by the Jarmulowskys redeposited to their own account in sundry chartered banks of this city, and all were in time duly collected; but (as is admitted) such collection had not been made when Mr. Richards, at the opening of business on May 11th, took possession of the bankrupts' bank.

The receiver introduced evidence to the effect that Bortz had a so-called "commercial" account with Jarmulowsky, and that as a depositor of that kind he had been permitted to draw against uncollected checks, notwithstanding the passbook notice aforesaid. As to Wilson, he introduced no such evidence. There is no other difference between the two causes; it being admitted that both as to Bortz and Wilson it was understood that the bank had perfect right to summarily charge back and against the depositor's account any check not collected on presentation, notwithstanding the apparent credit of the passbook or the privilege extended to commercial depositors like Bortz.

On these facts and admissions the District Court entered orders requiring Mr. Richards, as receiver, to pay over to the petitioners, respectively, what he had received out of the check collections above described, and thereupon the receiver took these appeals.

Koenig, Goldsmith & Sittenfield, of New York City (Milton M. Sittenfield and Solomon Selig, both of New York City, of counsel), for Richards as receiver.

Virginius Victor Zipris, of New York City (Norman M. Behr, of New York City, of counsel), for Bortz and Wilson.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [1] In this matter of general commercial law it is our duty to apply the rules enunciated by the Supreme and other courts of the United States; we are not controlled by state decisions. Railroad Co. v. National Bank, 102 U. S. 14, 26 L. Ed. 61, reaffirming Swift v. Tyson, 16 Pet. 1, 10 L. Ed. 865.

[2] In the absence of any special agreement between these depositors and their bank, the title to the checks would have passed to the bank, and the bank become merely a debtor to the depositor for the amount entered in the passbook. Burton v. United States, 196 U. S. 297, 25 Sup. Ct. 243, 49 L. Ed. 482, approving Cragie v. Hadley, 99 N. Y. 131, 1 N. E. 537, 52 Am. Rep. 9.

[3-6] Whether there was any other or special agreement made is a question of fact. St. Louis & San Francisco R. R. Co. v. Johnston, 133 U. S. 566, 10 Sup. Ct. 390, 33 L. Ed. 683. On the facts above stated the evidence making for an absolute ownership of the checks by the bankrupts is the entry of full credit in the passbook and the fact that the depositors indorsed in blank; but it is to be noted, as they did not indorse either, "For deposit" or "For collection," nor indorse specially, the Jarmulowskys might have written any lawful direction over the unrestricted signatures of the depositors. It is said, also, that in the case of Bortz the privilege of checking against such deposits as the one in question tends to show that the bankrupts became the absolute owners of the checks. On the other hand is the notice in the passbook which undoubtedly constituted part of the original contract between banker and depositor.

We regard the fact that the depositors' indorsements were in blank of no importance, since any indorsement (at least) consistent with the original intent of the parties might have been written thereover. Nor do we think the privilege said to have been extended to "commercial" depositors like Bortz affords any guide to decision. It was a privilege, a favor, without consideration; it could have been retracted at any time, and cannot, therefore, be held to show any change in the legal relation assumed by the parties when petitioners became depositors in bankrupts' institution.

Therefore both of these proceedings present the same question, which is whether a depositor who is credited with the face of checks, which he has agreed not to draw against until they shall have been collected, has by the act of deposit parted with the title to the checks in question or other such negotiable paper. It is obvious (and is indeed admitted) that unless there was such parting with title the relation of the bank to the depositor in respect of such collectible items is that of agent. Of course, if the agency had been fulfilled by collection of the checks be-

fore May 11th, no such question could be presented, for the moment the bank got money on the checks the relation of debtor and creditor arose. Goshorn v. Murray, 210 Fed. 880, 127 C. C. A. 464.

But here, when petition was filed and the bank superintendent took possession, the agency (if it existed) was terminated before collection effected, and the depositors can follow their own property or its proceeds wherever they can find it, in the absence of supervening superior rights. If these petitioners had indorsed their checks "For deposit" and received full credit therefor, the decision of Putnam, J., in Beal v. City of Somerville, 50 Fed. 647, 1 C. C. A. 598, 17 L. R. A. 291, would entirely cover the case. And it is our opinion that what the parties here meant was to create as to everything but cash the relation of principal and agent. This inference we draw from these undisputed facts: No depositor had any right (as distinct from an occasional and gratuitous privilege) to draw against anything but cash; this arrangement was advantageous to the bank; and the right to summarily charge back uncollected items, even after full apparent credit on deposit, is thought inconsistent with any intent on the bank's part to become the owner of such items as those under consideration.

We conclude, therefore, that the course of business shown herein is in effect the same as though the checks aforesaid had been specifically indorsed "For collection and deposit to the account of" the depositors. If this had been done, the situation would be too clear for argument. See Morse on Banking (5th Ed.) § 587.

The orders appealed from are therefore affirmed, with one bill of costs, to be taxed in the Case of Wilson.

BARTLETT & KLING et al. v. DINGS et al.

(Circuit Court of Appeals, Eighth Circuit. February 23, 1918. Rehearing Denied May 29, 1918.)

No. 4944.

1. UNITED STATES ⟸67(3)—CONTRACTORS' BONDS—LIMITATIONS.
The one-year limitations against actions on bonds required by Act Feb. 24, 1905, c. 778, 33 Stat. 811 (Comp. St. 1916, § 6923), of contractors performing work for the United States, begins to run from the time of settlement by the goverment with the contractors.

2. UNITED STATES ⟸67(1)—CONTRACTORS' BONDS—LIABILITY.
The bond required by Act Feb. 24, 1905, of contractors performing work for the United States being intended not only to secure the government, but to protect third persons who may furnish labor or materials, an agreement between the contractor and a subcontractor, freeing the former from liability to laborers employed by or to those furnishing materials to the latter, is unavailing against the claims of such persons.

3. UNITED STATES ⟸67(3)—CONTRACTORS' BONDS—ACTION BY ASSIGNEE.
The claims of laborers who performed services for a subcontractor on government work are assignable, and the assignee may recover therefor on the contractor's bond.

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

4. UNITED STATES ⊂=67(1)—CONTRACTORS' BONDS—LIMITATION OF LIABILITY.
A government contractor, required to give bond under Act Feb. 24, 1905, cannot escape liability to laborers employed by a subcontractor by posting notices that it would not be responsible to employés of the subcontractor.

5. UNITED STATES ⊂=67(2)—CONTRACTORS' BONDS—INTEREST—ALLOWANCE—TIME.
Interest on sums due laborers employed by a subcontractor on government work is properly allowed from the date the assignee of such claims intervened in the proceedings by other creditors against the contractor and the surety on its bond, required by Act Feb. 24, 1905.

Appeal from the District Court of the United States for the Southern District of Iowa; Martin J. Wade, Judge.

Intervention by J. F. Dings and another in a suit by the United States, for the use and benefit of the American Radiator Company, against Bartlett & Kling, a corporation, and the Fidelity & Deposit Company of Maryland, a corporation, wherein interveners set up claims against defendants. From a judgment for interveners, defendants appeal. Affirmed.

C. L. Bartlett, of Cedar Rapids, Iowa, for appellants.

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

TRIEBER, District Judge. The appellant Bartlett & Kling had entered into a contract with the United States for the erection of a public building, and executed the bond required by the act of Congress of February 24, 1905 (33 Stat. 811, c. 778 [Comp. St. 1916, § 6923]) with the Fidelity & Deposit Company as its surety. Creditors of the contractor instituted suit against it and its surety for moneys due them for materials furnished and used in the erection of the building. The contractor had sublet a part of the work on the building to J. E. Gunder & Co., who became indebted, in the course of their work, to certain laborers employed by them in the erection of the building, which claims were assigned to appellees, who filed interventions in the main proceeding, setting up these facts.

The appellant in its answer denies all the allegations of indebtedness to appellees' assignors, and if the amounts claimed to be due these workmen were due and had been assigned to appellees, they still would not be entitled to be subrogated to the rights of said laborers. For a further defense it set up that said Gunder & Co., when they became subcontractors, had executed a bond to the principal contractor, with the appellees as sureties, whereby they assumed all liability and risk up to the time of final acceptance for all work and materials furnished, and to at all times keep free and clear from all liens and claims for said work and materials. For another defense the appellant pleaded that before and during the time when these workmen were employed by Gunder & Co. and performed the labor and work, as alleged in the intervention, it had posted in conspicuous places in, on, and around said building notices that all persons working on said building must look wholly for their pay to the parties by whom they were em-

ployed, and that the employés of all subcontractors must look solely to said subcontractors for their pay, and that under no circumstances would Bartlett & Kling or any other parties be beholden to them for their pay. For further defense it set up that the work on the building had been completed prior to October, 1912, and that this intervention was not filed until October 17, 1913, more than one year after the completion of said work on the said contract.

By an amendment to the answer the appellant pleaded that the workmen, who assigned their claims to appellees, had all been paid by the subcontractors, and also pleads the fact that appellees were sureties on the bond of Gunder & Co. to hold the principal contractors harmless from all claims. There was a reply filed to these answers, in which it was alleged that the defendant Bartlett & Kling and J. E. Gunder & Co., through its receiver, had entered into a written stipulation, by which all claims of J. E. Gunder & Co., individually, against Bartlett & Kling, were compromised and settled, as well as all counterclaims of Bartlett & Kling against J. E. Gunder & Co. That among other stipulations was the following:

"'It is understood that this settlement is without prejudice to the claim of Frank L. Root and J. F. Dings on account of the wages claimed to have been paid as shown by their petition of intervention, and also without prejudice to the claim made in the petition of intervention filed in the federal court against the Bonding Company on account of the money said to have been paid on the receiver's certificates. As part consideration hereof, Bartlett & Kling agree that to the extent of any and all liability, if any, it may be held for in the United States District Court as to the American Radiator Company, and as to the alleged creditors of J. E. Gunder & Co. and of said receiver, and as to all of the interveners in said suit in the United States District Court, it shall not in any way or court or at any time look to or hold said J. E. Gunder & Co. or its said bond, or sureties on said bond, or the receiver, liable in any way for reimbursement or indemnity on account of Bartlett & Kling or the Bonding Company having to pay any or all of said intervenors or the plaintiff therein"

—which stipulation was approved by the court, which had appointed the receiver. Upon the hearing of the cause the court found the issues in favor of the interveners, and rendered judgment for the amount claimed, with interest from the date the intervention was filed.

[1] There is nothing in the record to show when the final settlement was made by the government for the building, nor when the original suit on the bond was instituted. The one-year statute of limitations begins to run from the time of settlement by the government with the contractors. This has been conclusively determined in Illinois Surety Co. v. Peeler, 240 U. S. 214, 218, 36 Sup. Ct. 321, 60 L. Ed. 609.

[2] The claim that by reason of the contract between appellant and Gunder & Co., the subcontractors, the appellant is not liable, is untenable, and cannot affect the materialmen and laborers. The act of Congress creates a direct liability on the surety to these persons. As was held by this court in United States v. National Surety Co., 92 Fed. 549, 34 C. C. A. 526, and followed in Equitable Surety Co. v. United States, 234 U. S. 448, 34 Sup. Ct. 803, 58 L. Ed. 1394:

"The bond which is provided for by the act was intended to perform a double function—in the first place, to secure to the government, as before, the faithful performance of all obligations which a contractor might assume towards

it; and, in the second place, to protect third persons from whom the contractor obtained materials or labor."

[3] The contention that the claims of laborers are not assignable is wholly untenable. United States Fidelity Co. v. Bartlett, 231 U. S. 237, 34 Sup. Ct. 88, 58 L. Ed. 200.

[4] The posting of notices by Bartlett & Kling that it would not be responsible to the employés for its subcontractors does not release it from liability. If that were permitted, the law would be a snare and a delusion, because every contractor would avail himself of it, and deprive the materialmen and laborers of the benefits of the act.

[5] The objection to the sufficiency of the evidence is without merit. The proof clearly established that these workmen performed the work, received their time checks or labor vouchers, and the evidence shows that the amounts were justly due them, and had not been paid.

There was no error in allowing interest from the date the intervention was filed. United States v. United States Fidelity Co., 236 U. S. 512, 35 Sup. Ct. 298, 59 L. Ed. 696; Illinois Surety Co. v. John Davis Co., 244 U. S. 376, 37 Sup. Ct. 614, 61 L. Ed. 1206.

Other alleged errors presented on behalf of appellant have received consideration and are without merit.

The court below committed no error, and its judgment is affirmed.

SOUTHWESTERN GAS & ELECTRIC CO. v. THOMAS et ux.

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

No. 3057.

1. LANDLORD AND TENANT ⟸167(2)—DEFECTS—LIABILITY.
   Where a street railway company conducted an amusement park for purpose of increasing its traffic, and as part of the park constructed a pool, it is liable for the death of one drowned as a result of structural defects in the pool, even though it leased the pool to one who for a small sum operated the same.

2. DEATH ⟸69—DEATH OF CHILD—MEASURE OF DAMAGES.
   A recovery by parents for the wrongful death of their child is entirely compensatory, but the jury is permitted to take into consideration the capacity, the age, and disposition of the child, as well as the ages of the parents, and their physical and financial condition; hence, where it appeared that parents were unable to educate all of their children, but had educated the child for whose death they sought recovery, under an agreement that he should repay such advances, evidence of that transaction is admissible, though the agreement between the parents and their child was unenforceable as a contract.

3. DEATH ⟸99(3)—MEASURE OF DAMAGES.
   An award of $5,000 in favor of parents for the wrongful death of their minor son 19 years of age, who had attended normal school, had almost finished the high school grades, and had been invited to teach one of the grades, at which occupation he would have earned from $85 to $90 per month, is not excessive; it appearing that the parents, though they had a number of children, were unable to educate them all, and had educated the deceased under an agreement that he should repay the advances.

In Error to the District Court of the United States for the Eastern District of Texas; Gordon Russell, Judge.

Action by Jake Thomas and wife against the Southwestern Gas & Electric Company. There was a judgment for plaintiffs, and defendant brings error. Affirmed.

John J. King, of Texarkana, Tex. (W. L. Estes, of Texarkana, Tex., on the brief), for plaintiff in error.

Hugh Carney, H. A. O'Neal, and E. A. Allday, all of Atlanta, Tex., for defendants in error.

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

BATTS, Circuit Judge. Suit was by Jake Thomas and wife, defendants in error, against the Southwestern Gas & Electric Company, for damages for negligence resulting in the death of their son. It was alleged that defendant was operating a street railway system in Texarkana, Tex., and that, in connection therewith, it conducted a park to which the public was invited, and for entrance to which and to the various amusements therein, charges were made; that within the park was a swimming pool, an artificial body of water, constructed by defendant; that the son of plaintiffs, Henry Thomas, 19 years of age, went on defendant's line of railway to the park, and, paying the charges, entered the swimming pool; that while wading in the water the son was drowned, having plunged into water over his head on account of a step-off or sudden depression in the bottom of the pool, from three feet in depth to about seven feet; that at the place there was nothing to indicate the depression, and no ropes or buoys or safety appliances by which a person stepping off could rescue himself; that there was only one attendant in charge and no boats at hand, and no appliances for resuscitating persons. By a second count it was alleged that C. W. Greenblatt was, as servant of defendant or acting with defendant as a partner, or under a lease, engaged in the operation of the park, and charges of negligence were made against him, as well as the company. Greenblatt was made a party to the suit more than two years after the accident, and a plea of limitation by him was sustained.

[1] By the charge of the court the consideration of the jury in determining negligence was confined to such defects as they might find in the construction and maintenance of the lake; the charges with reference to the operation of the swimming pool were withdrawn from their consideration. The structural defects submitted were the sudden step-off or depression, the absence of signs and markers, and the absence of ropes and buoys, or other safety appliances. If these alleged defects were structural defects, the issues with reference to them were properly submitted.

It is quite possible that the charge of the court was more favorable to the defendant than the law requires. Instead of operating the swimming pool directly, the company made a temporary arrangement with Greenblatt by which, for a small sum, he operated the pool for its receipts. The pool, and the other amusements of the park, were op-

erated for the purpose of increasing the revenues of the street railway company from fares, rather than from the profits of the park. It is to be doubted if, by the arrangement made with Greenblatt, the company in any way relieved itself of liability for negligence in operation.

However this may be, the leaving of a step-off or depression in the pool, without indicating its presence, and without providing a way by which persons whose lives became thereby endangered might secure safety, must be regarded a structural defect, for which the owner was responsible. The company continuously invited the public to use the park, and offered the pool as a proper place in which to bathe. While an issue of fact was made with reference to the existence of the deep place in the pool, this issue was determined adversely to the defendant. No reason appears why defendant is not liable to plaintiffs for such compensatory damages as resulted from this negligence.

[2, 3] The trial court permitted testimony to be introduced to the effect that the young man who was drowned had, during his minority, made an agreement with his father to the effect that, if the father would send him to school, he would, after he became of age, repay the amount expended therefor. The evidence indicates that the father was a farmer, with a number of children, and that he was not in a position financially to educate all of them, and that, by reason of the arangement mentioned, advances were made to the deceased in excess of those to the other children. This arrangement between the father and son had no force as a contract, nor would the parties be permitted to recover the amount expended under its terms. A recovery by parents for negligent injury to the son, resulting in death, is entirely compensatory; the determination of the amount to be recovered is essentially difficult; complete accuracy is impossible. The jury is permitted to take into consideration the capacity, the age, and the disposition of the child, and the ages of the parents and their physical and financial condition, and any other fact which might be of value in throwing light upon the probable contribution of the child to his parents after he shall have reached his majority. The circumstances that these extraordinary advances had been made to the son, that he was an exceptionally capable young man, and that he had promised to repay his parents the amount expended for his education, are proper to be considered in connection with other evidence. The charge of the court is not susceptible of the construction that the jury was directed to return a verdict for the amount of these advances; they were merely authorized to consider the agreement and the advances made under it, as they were the other facts throwing light on this essentially difficult matter.

It is contended that the amount awarded, $5,000, is grossly excessive. The evidence is to the effect that the father was 52 years of age; that his wife, the mother, was 48 years of age; that the deceased son was an exceedingly capable young man; that he was helpful on the farm; that he had attended the normal school at Texarkana, and had almost finished the high school course at Atlanta; that he had been

invited to teach one of the grades; that he was physically able to work, and knew how and showed a willingness to labor; that he was a boy of good character and devoted to his mother; that as a teacher in the schools he could have earned $85 or $90 per month; that he had looked forward to a professional career, for which he was apparently well adapted. The amount awarded seems large, as compared to judgments in a number of other cases called to our attention; but it is not so entirely excessive as to warrant us in substituting our judgment for that of the jury and the trial judge.

The judgment is affirmed.

PILSON v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. February 18, 1918.)

No. 155.

1. POST OFFICE ⊂⊃48(2)—UNMAILABLE MATTER—INDICTMENT.
An indictment, alleging that defendant, in violation of Criminal Code (Act March 4, 1909, c. 321) § 211, 35 Stat. 1129 (Comp. St. 1916, § 10381), deposited in the mails a letter and circular giving information where, how, and from whom and by what means contraconceptives might be obtained, which set forth the entire transaction in detail and the letter, but did not set forth the circular, with sufficient certainty advised defendant of the offense, and was not open to attack because not setting forth the circular in extenso, for defendant, if desirous, might have obtained a copy by application for bill of particulars.

2. CRIMINAL LAW ⊂⊃1043(2)—APPEAL—OBJECTIONS—SUFFICIENCY.
Though an indictment, charging that defendant deposited in the mails a letter and circular giving information as to the obtaining of contraconceptives, was attacked for lack of reasonable certainty, the objection that the circular was not set out in extenso was not raised, so as to justify review, since, if that was the basis of the objection, it should have been stated more definitely.

3. POST OFFICE ⊂⊃49—OFFENSES—EVIDENCE—SUFFICIENCY.
In a prosecution for violating Criminal Code, § 211, by depositing in the mails a letter and a circular giving information as to where, how, and from whom contraconceptives could be obtained, evidence *held* sufficient to warrant a conviction.

4. CRIMINAL LAW ⊂⊃402(2)—EVIDENCE—SECONDARY EVIDENCE.
Where defendant testified that in response to a subpœna duces tecum he had produced all correspondence before the grand jury and asserted that he did not receive decoy letters, in response to which it was contended he deposited in the mails nonmailable matter, secondary evidence of such decoy letters was properly received, though the government served no notice to produce.

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

Joseph H. Pilson was convicted of violation of Criminal Code, § 211, by depositing in the mails a letter and circular giving information where, how, and from whom, and by what means, might be obtained articles intended for the prevention of conception, and he brings error. Affirmed.

The indictment consisted of two counts, upon the first of which a verdict of not guilty was rendered, and the second of which alleged that the defendant upon a date stated unlawfully deposited, or caused to be deposited, nonmailable matter in a branch post office of the city of New York, the said matter consisting of a letter given in extenso and referring to a circular which gave information where, how, and from whom and by what means might be obtained articles intended for the prevention of conception and to produce abortion. Upon the trial it was proved that the defendant, a printer by trade, was the owner of 98 out of 100 shares of a New York corporation called "the Vital Fire Remedy Company." This corporation did business in the city of New York, and was under the general direction of the defendant, though the immediate charge of the business was under one Wright, who was employed by the defendant. Two decoy letters were sent to the Vital Fire Remedy Company by a post office inspector, requesting information concerning the sale of "Tansy Pills," which had been advertised by the corporation. The first letter stated that the subscriber was pregnant, could not afford any more children, and wished these pills to be relieved of her condition. Wright, in answer to this letter, signed and sent a letter, inclosing the circular for special treatment, and stating that it would explain what the writer asked. This circular did not directly refer to the prevention of conception, but stated that, if the Tansy Pills failed to establish normal conditions in the patient, a certain preparation of binoxide of manganese would prove effective where all remedies failed. In answer to this another decoy letter of similar import was written, inclosing $3.10 for a package of binoxide of manganese pills. This letter the defendant personally opened and cashed the money order. He also addressed a package of pills to the subscriber of the decoy letter.

The defendant in his defense swore that he had instructed Wright, in case of all correspondence of the sort in question, to refer the same to him and not to answer it; that he had never seen the letters, but had handed them over to Wright; that in the case of the second letter he had taken out the money order and cashed it without reading the letter; and that he had addressed the box of pills at the request of Wright, without knowing the purpose for which they were sent. The originals of the decoy letters were not produced upon the trial, but carbon copies were introduced in evidence in their stead. In order to lay a foundation for these, the government showed that a subpœna duces tecum had been served upon the corporation to produce before the grand jury all correspondence from persons asking for medicine, received at its office from January 1, 1913, until the day of the subpœna, on January 13, 1914, and that in response to such subpœna the defendant had appeared at the office of the district attorney and turned over some boxes of letters. The defendant's testimony upon this matter was as follows: "I produced all the letters that I had at that time. I brought them down to you" (the district attorney) "and gave them to you. I think you were at the grand jury room, which is upstairs." In an interview with a post office inspector the defendant denied ever having seen the originals of the carbon copies which were admitted in evidence.

The defendant's points are, first, that the second count was void for lack of reasonable certainty; second, that there was not sufficient evidence that the defendant had caused the letter to be sent; and, third, that the secondary evidence was improperly admitted.

Hyacinthe Ringrose, of New York City, for plaintiff in error.

Francis G. Caffey, U. S. Atty., of New York City (Julian Hartridge, Asst. U. S. Atty., of New York City, of counsel), for the United States.

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

LEARNED HAND, District Judge (after stating the facts as above). [1, 2] The crime laid in the second count was in mailing a

letter telling where, how, and from whom, and by what means, contraconceptives might be obtained. Criminal Code, § 211. The letter answering the first decoy was set forth ipsissimis verbis; so also was the signature at the end of the circular; but the circular itself was not. The circular stated that, if Tansy Pills were not efficacious, binoxide of manganese would serve, which the corporation would sell at $3.10. It was objected at the trial that "the indictment and its two counts fail to set forth with legal sufficiency and reasonable certainty any crime." The indictment surely set forth the crime with reasonable certainty; it advised the defendant of the place and time of mailing the letter; it set forth the letter in extenso and identified the circular beyond doubt. All the requirements of justice were answered; he knew what was the charge, and any judgment on the indictment would have been a good bar under the plea of autrefois acquit. Had he wished a copy of the circular, he might have applied for a bill of particulars; but the substance of the circular appears with sufficient clearness. The only objection was that the indictment was not legally sufficient, which raised no specific question, and did not advise the court of the particulars of the supposed insufficiency. We can see nothing in the indictment which could be challenged, except the failure to extend the circular upon the indictment itself. We do not find it necessary to pass upon that question, because, if that was in fact the basis of the objection, it should have been stated more definitely. No one from the objection could have known that the defendant complained of this omission; indeed, the precise point was not even taken in this court. We think that the objection was not sufficient to raise this question and that, as to the question it did raise, it was not well taken.

[3] There was ample ground to connect the defendant with Wright's act. He was in charge of the business; he opened the box in which the letters came and handed them over to Wright; he took the money order out of the second letter and cashed it, and wrote with his own hand the address to the pill box; and he swore that he had given Wright instructions not to answer any letters similar to the decoys. It was extremely unlikely that Wright, who had no motive to disobey such instructions, should have disregarded them, without bringing the decoy letters to him. It was most unlikely that the defendant should have cashed the money order, or addressed the pills, if he had not read the second letter, or, if he had read the second letter, that he had not authorized Wright to answer the first, on which the indictment was based. The jury was clearly entitled to infer from the character of the business and the nature of the circulars that it was a part of his plan to respond to requests of the sort contained in the decoy.

[4] The admission of secondary evidence of the decoys was justified. It is true that the government served no notice to produce; and, if there was reason to suppose that the letters were still in the possession of the defendant, this might be a valid objection to the admission of secondary evidence; but we have the defendant's own testimony that he had produced all the letters which corresponded

to the subpœna in January, 1914, and the subpœna covered the decoys. It makes no difference whether this subpœna was served in the preparation of an earlier indictment or not. Prima facie, the government was in possession of all the original letters which the defendant had. Furthermore, the defendant had told Noile (the post office inspector) before the trial that he had never seen the originals, and it must have been idle to give a notice to produce that which he had disclaimed ever receiving. The proper foundation for secondary evidence was therefore present. Briggs v. Hervey, 130 Mass. 186.

None of the exceptions seems to us valid, and the judgment is affirmed.

BILLINGSLEY et al. v. UNITED STATES (two cases).

BILLINGSLEY v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. March 5, 1918. Rehearing Denied May 13, 1918.)

Nos. 3022–3024.

1. CRIMINAL LAW ⟸274, 1149—PLEAS—WITHDRAWAL.
   Granting leave to withdraw pleas of guilty and enter pleas of not guilty to an indictment is discretionary with the trial court, and its discretion is not reviewable.
2. CONSPIRACY ⟸28—OFFENSE—OVERT ACT.
   The offense of conspiracy to commit a crime may be consummated by the doing of some overt act to effectuate the purpose, although the crime be not actually committed.
3. CRIMINAL LAW ⟸59(1)—"PRINCIPAL."
   In view of Pen. Code (Act March 4, 1909, c. 321) § 332, 35 Stat. 1152 (Comp. St. 1916, § 10506), declaring that any one who aids, abets, counsels, or procures the commission of an offense is a principal, defendants, where they conspired with agents of a common carrier to violate section 238 (Comp. St. 1916, § 10408), making it an offense to knowingly deliver certain interstate shipments of intoxicants to any one other than the consignee, are indictable as principals, though they were not agents or employés of any railroad or common carrier.

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

Logan Billingsley and Fred Billingsley pleaded guilty to an indictment charging conspiracy to violate Pen. Code, § 238 (Comp. St. 1916, § 10408), while Logan Billingsley, who, with others, was charged with conspiracy to violate Act Feb. 4, 1887, c. 104, 24 Stat. 379, entitled "An act to regulate commerce," pleaded guilty, as did both of the named defendants, to an indictment charging conspiracy to violate Pen. Code, § 238, and "An act to regulate commerce." Their motion for leave to withdraw their pleas of guilty and be permitted to enter pleas of not guilty having been denied (242 Fed. 330), the named defendants bring error. Affirmed.

Bell & Hodge, of Seattle, Wash., for plaintiffs in error.

Clay Allen, U. S. Atty., of Seattle, Wash., and Clarence L. Reames, U. S. Atty., of Portland, Or.

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

WOLVERTON, District Judge. The three above-entitled cases, in which the Billingsleys, one or both, were defendants below, may be considered together. In the first, Logan and Fred Billingsley were charged with conspiracy to violate section 238 of the Penal Code (Comp. St. 1916, § 10408). Both pleaded guilty. In the second, Logan Billingsley, with others, was charged in two counts with conspiracy to violate the act of Congress approved February 4, 1887 (24 Stat. 379, c. 104), entitled "An act to regulate commerce." Billingsley pleaded guilty to count 1 of the indictment. In the third, the Billingsleys were indicted by three counts. In two of the counts they were charged with conspiracy to violate section 238 of the Penal Code, and in the other count with conspiracy to violate the act to regulate commerce. Both these defendants pleaded guilty to all three of the counts. Subsequently the Billingsleys moved the court for leave to withdraw their pleas of guilty, and to be permitted to enter pleas of not guilty. The motion in each case was denied, and exceptions were saved. A writ of error in each case is now prosecuted to this court, on the grounds, first, that the court committed error in denying the motion for leave to withdraw the pleas of not guilty; and, second, that the indictment does not state facts sufficient to constitute an offense against the government.

[1] As to the first assignment of error, the law is settled in this court contrary to defendants' contention. Andrews v. United States, 224 Fed. 418, 139 C. C. A. 646. The matter of granting leave to withdraw the pleas of guilty was one discretionary with the trial court, and is not reviewable. It may be added here, however, that the record shows nothing but the bare motions for leave to withdraw the pleas of guilty. There were no affidavits filed, nor other showing made, in support of them, and there is absolutely nothing here to indicate in the smallest particular that the trial court abused its discretion in denying the motions. The assignment of error is therefore wholly without merit.

[2, 3] As it respects the sufficiency of the indictments, it is urged that they are defective, as related to the alleged conspiracy to violate section 238 of the Penal Code, because they do not show, nor attempt to show, that the defendants were, or at any time had been, officers, agents, or employés of any railroad company, or other common carrier, engaged in interstate commerce.

Section 238 denounces the act of any officer, agent, or employé of any railroad company, express company, or common carrier in doing the things there interdicted. The thought must not be lost sight of that the indictments are for conspiracy to commit an offense, not for committing the offense itself. We must look, therefore, to the statute defining conspiracy for the purpose of ascertaining whether the

indictments state facts essential to constitute that particular offense. It is unnecessary to state the elements essential to a conspiracy under the statute. They are so well known that it would be a work of supererogation to do so. Any person who aids, abets, counsels, commands, induces, or procures the commission of an offense against the United States is a principal, and may be so charged. Section 332, Penal Code (Comp. St. 1916, § 10506).

William H. Pielow and William Frazier are charged along with the Billingsleys as co-conspirators. Pielow was an officer, agent, and employé of a transfer company, or common carrier, and Frazier was also an employé of a transfer company, which companies had a part in the transportation of intoxicating liquors unlawfully brought into the state of Washington from the state of California. So it may be seen that the Billingsleys were at least aiding and abetting in the unlawful transportation of intoxicants into the state of Washington. While the Billingsleys were not officers or employés of a common carrier, they conspired with such officers to commit the offense denounced by the Penal Code. It makes no difference whether the offense was actually committed or not; the conspiracy may, nevertheless, have been committed by the doing of some overt act to effectuate its purpose. There is no reason why a person not an officer may not conspire with an officer to commit the offense, or even why two persons not officers may not conspire to cause the offense to be committed, by prevailing upon officers to do the acts constituting the offense. In this way the conspiracy statute would be transgressed, even if the offense designed to be committed were not actually accomplished. But, if it were accomplished, it would be by the connivance and inducement of the co-conspirators not officers or employés of the common carriers. Being principals, the Billingsleys were indictable along with the officers and employés engaged with them in the common purpose. We hold, therefore, that the indictments are sufficient. For cases of analogy, see United States v. Cohn et al. (C. C.) 142 Fed. 983, and Steigman v. United States, 220 Fed. 63, 135 C. C. A. 131.

Affirmed.

In re FRANKLIN BREWING CO.

Petitions of PEOPLE'S TRUST CO.

(Circuit Court of Appeals, Second Circuit. January 29, 1918.)

Nos. 68, 101.

1. BANKRUPTCY ⇐262(3)—POWERS OF COURT—SALE OF PROPERTY—LIENS.
A court of bankruptcy has power to order the sale of any property of a bankrupt free of liens, and to transfer the same to the proceeds; and while it is good practice, and usual, not to order such sales unless there is a fair prospect that the proceeds will at least discharge the lien, this is not a rule of law, and in special cases, as where the validity of

the lien itself is in litigation, and the property is wasting while waiting decision, it is a matter within the discretion of the court to sell it and save expense.

2. BANKRUPTCY ⟸262(3)—POWERS OF COURT—SALE OF PROPERTY.
A clause, in a mortgage securing bonds, giving the holders the right to bid on their bonds at any foreclosure sale, does not in any way limit the power of a court of bankruptcy to sell the property free from lien.

3. CONSTITUTIONAL LAW ⟸163—IMPAIRING OBLIGATION OF CONTRACTS—BANKRUPTCY ACT.
Congress, in the exercise of its constitutional power to establish systems of bankruptcy, may, and in fact always does, impair the obligation of contracts.

4. BANKRUPTCY ⟸262(1)—POWERS OF COURT—SALE OF PROPERTY.
Where the property of a bankrupt consisted of both personalty and realty, together constituting and operated as a brewery, and which had been mortgaged as such, it was error for the court to confirm a sale free of lien of the personalty only, leaving unsold the realty, which was also included in the order of sale, thus destroying the business entity of the mortgaged property.

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

In the matter of the Franklin Brewing Company, bankrupt. On petitions of the People's Trust Company to review two orders of the District Court. First order affirmed, and the second reversed.

The first order directed certain property of the bankrupt to be sold free and clear of the lien of a mortgage; the second confirmed a sale (pursuant to the first order) of the mortgaged personalty, separated and sundered from the realty, the attempted sale of which was set aside. The bankrupt corporation had made a mortgage to a trustee, creating a lien upon existing and after-acquired property, which property, taking realty and personalty together, constituted a brewery. The mortgage secured a considerable issue of bonds, and contained provisions specifically authorizing holders to bid on their bonds at any foreclosure sale. When bankruptcy arose, there had been no foreclosure, nor was any suit pending therefor, the mortgaged property came into the physical possession of the receiver and (afterwards) the trustees in bankruptcy, and so remained when the orders complained of were made.

The designed effect of the lower court's procedure was to prevent foreclosure, or the use of bonds in bidding in the manner provided in the mortgage. Bondholders were offered the right to use their bonds up to a large percentage of any bid, subject to subsequent ascertainment of their validity. This they declined. Before any order made, the trustee in bankruptcy had instituted plenary suit, alleging the invalidity of the mortgage, and of all the bonds issued thereunder, praying that their nullity be decreed and the mortgaged property declared part of the estate in bankruptcy, freed of the mortgaged lien. The sale produced, as was probably expected, much less than the face of the mortgage bond. The trustee under the mortgage took these petitions.

Henry F. Cochrane, of Brooklyn, N. Y., for petitioner.

Samuel E. Maires, of Brooklyn, N. Y., for trustee in bankruptcy.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [1] The questions raised as to the order for sale free and clear are suggested by the fact that when order made there was no reasonable likelihood that the mortgaged property would produce, or nearly so, the amount

of a lien whose validity and existence was denied. It is said that such an order was unlawful.

We have recognized the power of the court sitting in bankruptcy to sell free and clear of liens, and transfer the same to the proceeds of sale (Re Kohl-Hepp Brick Co., 176 Fed. 340, 100 C. C. A. 260; Re Haywood Wagon Co., 219 Fed. 655, 135 C. C. A. 391), agreeing with earlier considerations of the same question in the First Circuit (Re Union Trust Co., 122 Fed. 937, 59 C. C. A. 461; Re Shoe & Leather Reporter, 129 Fed. 588, 64 C. C. A. 156). It is good practice, and the usual procedure in this circuit, not to order such sales unless there is a fair prospect that the proceeds will at least discharge the lien. Cf. Re Fayetteville Wagon, etc., Co. (D. C.) 197 Fed. 180; Re Saxton Furnace Co. (D. C.) 136 Fed. 697; Re Pittelkow (D. C.) 92 Fed. 901; and (under an earlier Act) Re Taliaferro, Fed. Cas. No. 13,736.

[2] The reason, or one very good reason, for this forbearance, is that, unless more is produced by sale than the lien debt, there is nothing coming to the estate in bankruptcy; therefore the bankruptcy court does not meddle with what it can never administer. But this is not a rule of law, and where (for instance) the very existence of any lien is in litigation, and property is wasting while waiting decision, it must be matter of discretion whether or not to sell promptly and save expense. Nor does a mortgage clause giving the right to bid on bonds in any way limit the power of the court, however much it may influence its discretionary application.

[3] Congress, in the exercise of its constitutional right to establish systems of bankruptcy, may, and indeed always does, impair the obligation of contracts; a doctrine going much further than this point requires. Mitchell v. Clark, 110 U. S. at page 643, 4 Sup. Ct. 170, 312, 28 L. Ed. 279; Canada, etc., Ry. v. Gebhard, 109 U. S. at page 539, 3 Sup. Ct. 363, 27 L. Ed. 1020. Therefore we find in the order directing sale free of lien nothing unlawful, nor any abuse of discretion amounting to error of law, which is the only error available here upon a petition to revise. There was a drastic exercise of authority, but no intimation is intended that circumstances might not justify it as matter of discretion.

In Re Roger Brown & Co., 196 Fed. 758, 116 C. C. A. 386, it seems to be regarded as legal error to order sale, unless there is reasonable expectation of a surplus over lien, citing as authority the cases from the First circuit above given. No such limitation can be found in them; on the contrary, the same court held (In re Loveland, 155 Fed. 838, 84 C. C. A. 72) that bankruptcy had jurisdictional power to order such sale, without "first determining either the validity or amount of the lien." We agree with that ruling, which covers the present situation.

[4] But what was ordered to sale free of lien was what had been mortgaged, and that was a brewery, something made up of property both real and personal, and constituting a business entity, which in its entirety had been hypothecated by an agreement good until set aside by competent authority. The effect of confirming a sale of personalty and leaving the realty unsold was to destroy the brewery and (vary-

ing the expressed intent of the order of sale) substantially subtract from the mortgaged property a part only, and sell that alone. If such an order had been made in the first place, it would have been unlawful, because (if for no other reason) no conceivable discretion could have advised it under the circumstances admitted. We perceive no difference between ordering such a sale, and producing it by a partial confirmation.

The petition complaining of the order for sale is dismissed, and order approved; that assigning for error sale of personalty only is sustained, the sale set aside, and the matter remanded, with directions to proceed in any manner not inconsistent with this opinion. There will be no costs in this court.

HAMMER v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. March 13, 1918.)

No. 189.

1. SALES ⟸61—CONTRACTS—PASSAGE OF TITLE.
In case of a controversy as to whether an agreement was a sale, under which title passed, or whether it was only an executory contract, the question is one of intention, to be ascertained from the actions of the parties.

2. POISONS ⟸4—SALE OF NARCOTICS—CONSUMMATION—DELIVERY.
Where the parties had agreed on all the terms of a sale of narcotic drugs in violation of Harrison Act Dec. 17, 1914, c. 1, 38 Stat. 785 (Comp. St. 1916, §§ 6287g–6287q), and nothing remained to be done, except that at delivery payment should be made, the sale was completed, for, as at common law mutual assent of the parties was sufficient to validate a sale of personalty, title passes where nothing but payment by the buyer remains, though the seller retains possession until payment.

3. CRIMINAL LAW ⟸369(1)—EVIDENCE—OTHER OFFENSES.
In a prosecution for an unlawful sale of narcotics, in violation of the Harrison Act, which occurred at a point far distant from defendant's residence, evidence that defendant was engaged in the business of dispensing narcotics at his residence is admissible, and not subject to attack as disclosing other offenses; it appearing that defendant was a licensed dealer, and that other consignments of narcotics, save the one furnishing the basis for the prosecution, were lawfully ordered and delivered.

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

Riley C. Hammer was convicted under the Harrison Act of an illegal sale of narcotics, and he brings error. Affirmed.

The indictment was under the Harrison Act (Act Dec. 17, 1914, §§ 1, 2, and 9), and so far as here material charged that Hammer had, within the Southern district of New York, "sold, bartered, and given away" to one Fowle a quantity of the drugs forbidden by the statute; such sale, barter, and giving away having been made "not in pursuance to a written order of the persons to whom" the said drugs were sold, bartered, and given away.

It was shown that Hammer did business in Tampa, Fla., and there conducted a "Medical Institute" frequented by persons described as "dopers and patients that were sick," that he had registered in the proper internal revenue

collector's office in Florida as a dealer in narcotics, that one Rogers, under the name of Gray, was connected with Hammer's business and shipped narcotics, and especially the consignment thereof which gave rise to this indictment, and that one Peak, a drug addict, had, while at Tampa, come to know Hammer's "Institute" and had purchased drugs there.

Peak became an informer, and arranged with Fowle, a revenue agent, the following transaction: He (Peak) communicated with Hammer, asserting that he had a customer in New York for a quantity of drugs, and would act as agent for a commission. Hammer agreed, stating in substance that he could supply what was wanted up to almost any limit. Thereupon Rogers and Hammer, in Tampa, put drugs, of which the sale price was to be $1,750, in a package and sent it by express to Peak in New York C. O. D., and Hammer himself at once started for that city to oversee the matter.

Peak met him at the station, together they went to a hotel, and there Fowle was introduced as the buyer, and with him Hammer discussed drug sales and stated definitely the amount then in the express company's care. Fowle said he wanted that and more, and the three men arranged to meet the next morning, go to the express office, get the drugs, and pay the money. They met accordingly, Hammer and Peak identified themselves as shipper and consignee respectively, Hammer gave Peak a check for the latter's commission, the express clerk was in substance directed to deliver the drug package to Fowle on receiving the money, and Fowle began to count out money, when other agents in waiting stepped up, arrested Hammer, and seized the drugs.

Hammer was convicted, the trial court charging: "If the parties had agreed on all the terms, and nothing remained to be done, except that at delivery the payment should be made, at the time of the delivery, and all that they intended was that Hammer should have a right to withhold the goods until he got the money, if that was the sum and substance of the contract, then the sale was completed when that contract was made. But if you find that they intended, in addition to those terms, that Hammer should have the right, not only to retain possession until payment, but should retain title to the property, then there was no sale until the payment was made."

The assignments of error substantially assert (1) that no sale was made: and (2) it was error to permit the jury to learn of transactions in Tampa, and especially anything of the nature of defendant's business there.

Charles H. Griffiths and Raymond H. Sarfaty, both of New York City, for plaintiff in error.

Francis D. Caffey, U. S. Atty., and John C. Knox, Asst. U. S. Atty., both of New York City.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [1, 2] 1. The contention of plaintiff in error is that there was no actual sale, but merely an agreement to sell. Doubtless there is often difficulty in determining into which category the transaction falls, as was said in the Elgee Cotton Cases, 22 Wall. 187, 22 L. Ed. 863. But there is no doubt that at common law mutual assent of the parties was enough to validate a sale of personalty. If by the agreement the property passed, the "bargain and sale" was complete. It was and is only if the passage of the property (i. e., the title) is to occur in the future, or on conditions inconsistent with immediate transfer, that the contract is executory. Hatch v. Oil Co., 100 U. S. at page 130, 25 L. Ed. 554. And when controversy arises, as here, as to the true character of the agreement, the question is one of intention; the general rule being that the agreement is "just what the parties intended to make it." 100 U. S. 131, 25 L. Ed. 554.

But such intent is to be collected from what the parties did, and in this instance it is to be remembered that we are not concerned with the rights of creditors or other third parties; the inquiry is only whether as between Hammer and Fowle the sale was completed. It is contended that the method of shipment conclusively negatives the intent found by the jury under the instruction quoted above. But, as was held in Simmons v. Swift, 5 B. & C. 857, if the bargain is made, and nothing remains to be done to the goods, though the buyer cannot take them away without paying the price, "property passes immediately," and this was distinctly approved in the Hatch Case, supra, 100 U. S. at page 132, 25 L. Ed. 554.

As the jury were plainly told to decide whether it was intended that Hammer should withhold possession only, or withhold title also, until payment made, we think the instruction exactly right.

[3] 2. The plaintiff in error asserts that, by permitting the nature of Hammer's Tampa business to be shown, the rule laid down by this court in Marshall v. United States, 197 Fed. 513, 117 C. C. A. 65, was violated. The transaction which resulted in a sale in New York began in Tampa; it could not be understood, without a knowledge of what was done there in respect of this particular shipment, and of Peak's relations with the Institute. If such evidence of the whole transaction was injurious to the accused, it was the fault of relevant facts of his own making. The Marshall Case states the impropriety of proving "offenses" other than the one charged in the indictment, and confines the ruling to the "facts in the case in hand." We discover no proof of other offenses. Hammer was licensed, and Rogers was a doctor; non constat that what Rogers distributed (other than the present consignment) was lawfully ordered and delivered.

Judgment affirmed.

WEST INDIA S. S. CO. v. CHICAGO HOUSE WRECKING CO.

(Circuit Court of Appeals, Second Circuit. February 20, 1918.)

No. 64.

1. SHIPPING ⊂⊃104—CONTRACTS—REDUCTION TO WRITING.
Where the parties orally agreed upon a contract of affreightment by water, intending that a written contract should be drawn up, the oral contract was binding, the parties having acted upon it, and it appearing from the forms prepared by each party that there was a meeting of the minds on every material term; and neither party had the right, in preparing a written form, to introduce a new provision in the contract.

2. SHIPPING ⊂⊃153—FREIGHT—ACTIONS—EVIDENCE.
Evidence *held* to sustain libelant's contention that a shipment was transported pursuant to a contract of affreightment previously entered into between the parties, and not under an independent engagement.

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

Libel by the West India Steamship Company against the Chicago House Wrecking Company. From a decree for respondent, libelant appeals. Reversed, with directions.

R. J. M. Bullowa, of New York City (Ferdinand E. M. Bullowa, of New York City, of counsel), for appellant.

Henry J. Mayer, of New York City (Henry B. Gayley, of New York City, of counsel), for appellee.

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

WARD, Circuit Judge. The Chicago House Wrecking Company having about 18,450 tons of scrap iron to be shipped from Colon, Panama, to the United States, employed one Elliott, a ship broker, to engage freight room therefor. Elliott introduced Harris, president of the Chicago Company, to the libelant, the West India Steamship Company. August 26, 1914, a meeting was had at which terms were discussed, but no agreement arrived at. The scrap iron to be moved was specified, all being large pieces, easily handled, for which a rate of freight lower than that charged for small miscellaneous scrap would be reasonable. The principal difference between the parties was as to the amount of freight rate. August 29th they met again, when the rate of $3.15 a ton was agreed on, as were also the quantity and specific kind of scrap iron to be carried, the times of shipment from Colon, the rate of loading and discharging, the party to do the loading and discharging, the port or ports of discharge, and the demurrage. It was intended that a written contract should be drawn between the libelant and Elliott, who was to be named in it, instead of the Chicago Company, at the request of that company; but this was never done, because the Chicago Company refused to sign the form prepared by the libelant and the libelant refused to sign either of two successive forms prepared by the attorney for the Chicago Company. The reason why the libelant refused to sign the latter was that the Chicago Company wished to insert in the written contract, after the description of the 18,450 tons of scrap, a provision in one of the following forms: "And such other material as owned by the charterer," or with "option of shipping up to 1,000 tons of miscellaneous scrap iron," or "and such iron and steel owned by the charterer and not specifically mentioned." These were matters not agreed upon nor even mentioned at the meeting of August 29th.

[1] The District Judge held that the contract, if orally agreed upon, would be enforceable, notwithstanding it had not been put into writing as contemplated; but he held that the minds of the parties had not met, and for this reason dismissed the libel. We think they had met upon every material term. If the form prepared by the libelant be compared with the two forms prepared by the Chicago Company, it will be seen that there was no substantial difference whatever, except as to the provision above mentioned. Neither of the parties, after the meeting of August 29th, had a right to insert a new provision in the contract. Sanders v. P. B. F. Co., 144 N. Y. 209, 39 N. E. 75, 29 L. R. A. 431, 43 Am. St. Rep. 757.

[2] September 14th the libelant sent the steamer Meridian to Colon, where she loaded a cargo of small miscellaneous scrap known as "American scrap," and sailed to Philadelphia, arriving October 26th. There is a dispute between the parties whether this engagement was an independent one, as the Chicago Company claims, or whether it was carried under the contract of August 29th for 18,450 tons of what is known as "French scrap." The fact that the bill of lading stated the freight to be "according to contract with West India Steamship Company," and that the freight which both parties agreed was $3.15 a ton, the same as that called for in the case of the 18,450 tons, is some indication that the shipment was under that contract. On the other hand, the fact that the scrap was of a different character is an indication to the contrary. The libelant explains taking the same rate of freight for this small stuff by saying that it did not know what scrap was loaded on the Meridian until the arrival of the steamer at Philadelphia. This might well be, as it was only the time charterer of the steamer. However, the testimony of Elliott, the broker, that but one contract was made or talked about, and that was for 18,450 tons of French scrap, convinces us that the libelant's account is true. As we have found that to be an enforceable contract, the Chicago Company is not likely to complain because its liability would be increased by holding that the Meridian's cargo was carried under a different and independent contract.

The Chicago Company, finding that it could not load its steamers in the time originally agreed upon, wanted at the end of September to delay the shipments from Panama until early in 1918, and, this failing, because the libelant needed its steamers then for the sugar season, wanted to cancel the balance of the contract, negotiations which seem to us plainly to recognize the existence of the contract. October 1 the libelant advised Elliott that it had declared the steamer Argo for the next cargo to be ready to load at Colon October 12th. He replied that he thought the date was too early. Receiving no further instructions, the Argo went to Colon, whereupon the Chicago Company advised the libelant that other employment should be sought for the steamer, because it would not be able to load.

October 21st the libelant declared the steamer Evanger to load at Colon on or about November 2d, and following her the Guildhall, to load on or about November 15th, and following her the steamer Berlin. This brought about a telephone conversation with a new attorney for the Chicago Company, who told the libelant that his client would not load these steamers, and that it had better get the best employment for them possible with a view to reducing the loss, but at the same time saying that the Chicago Company did not admit that any contract had been entered into. This was the first repudiation of the contract by the Chicago Company. Down to that time there had been correspondence and negotiations between the parties consistent only with the existence of the contract.

The decree is reversed, and the court below directed to enter a decree in favor of the libelant, with the usual order of reference.

In re NEWMARK.

(Circuit Court of Appeals, Second Circuit. January 16, 1918.)

No. 117.

1. BANKRUPTCY ⟸414(3) — DISCHARGE — CONCEALMENT OF PROPERTY — EVIDENCE.

Evidence *held* insufficient to show that a bankrupt's wife held in trust for him a lease delivered to her by a corporation in which the bankrupt was a stockholder, and so a discharge could not be denied on the ground the bankrupt had concealed and failed to turn over to his trustee such lease.

2. BANKRUPTCY ⟸413(7)—DISCHARGE—DENIAL.

Discharge is a statutory matter, and the court, as well as an objecting creditor, is confined to the specifications of objection.

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

In the matter of the bankruptcy of Charles Newmark. From an order granting a discharge to the bankrupt, Anton Larson & Son, Incorporated, an objecting creditor, appeals. Affirmed.

Newmark was a large shareholder in Newmark & Davis, Incorporated, a corporation which owned a heavily mortgaged apartment house. In it one apartment was finished to the taste of Mrs. Newmark, and the corporation executed and delivered to her a lease of that apartment for three years at $1 a month, with the privilege of subletting. She never occupied the apartment, but sublet it at $137.50 per month. This occurred in 1914, and in the same year the rents of the apartment house were assigned to the holder of the first mortgage, who apparently took possession; but Newmark and his fellow shareholder, Davis, continued to act as agents in collecting rent and superintending the house until about September, 1915. Mrs. Newmark never gave any consideration for the lease, nor did she ever pay the $1 per month rent. Her subtenant paid his rent by checks to the order of Newmark & Davis, Incorporated. Such checks were received by Newmark, who cashed some of them, but, as he testified, turned the proceeds over to his wife, who declared that she got all her subtenant's rent and used it for various purposes, including the maintenance of a home where her husband lived with her.

In 1916 Newmark was adjudicated a bankrupt upon his own petition, and when he applied for discharge this appellant objected that he had "concealed" and "failed to turn over" to his trustee the above lease made to his wife; it being alleged that the same was "held in trust for him" by her. The District Court granted discharge, and the objecting creditor took this appeal.

Ferdinand E. M. Bullowa, of New York City (Lawrence E. Brown, of New York City, of counsel), for appellant.

Jacob R. Schiff, of New York City, for appellee.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [1] Mrs. Newmark's lease was created nearly two years before this bankruptcy. For all that this record shows, Newmark was solvent in 1914; and while we may be sure that Newmark & Davis, Incorporated, was not then prosperous, there is no evidence that the corporation was insolvent at the time. But let it be assumed that the gift of a three-year lease from the corporation to Mrs. Newmark was a fraud upon

its creditors, or upon the corporation itself, it is also true the persons injured are not before us. The single question in this case is whether the bankrupt, when he filed petition, individually owned the lease, and consequently concealed and kept from his individual creditors that piece of unscheduled property.

The position of objecting creditor would be much stronger if the wife had been the recipient of anything that ever belonged to her husband; but Newmark never owned this apartment house, and, however dishonorable was his conduct in procuring such a gift from a concern that had in effect mortgaged even the rents of the building, the very absence of morals revealed by the admitted transaction renders it unlikely that Mrs. Newmark was a trustee for him. The ordinary cunning of dishonesty would suggest that the husband have nothing to do with what (as she testified) his wife had asked for. It is not necessary for the bankrupt to insist that suspicion is not proof; we do not suspect him of owning it, nor even of wanting it, for all that he needed was to keep on good terms with his wife, so that she would permit him to live with her in, or on the proceeds of, the apartment she desired.

[2] Discharge is a statutory matter. The court, as well as the objecting creditors, is confined to the specifications of objection. Those specifications must be affirmatively proved, and the one before us contains nothing but the assertion that Newmark owns the lease. We think the proof is the other way, and that the case is even clearer than In re Dauchy, 130 Fed. 532, 65 C. C. A. 78, and In re Hammerstein, 189 Fed. 37, 110 C. C. A. 472, where we were compelled to grant discharges under circumstances not similar, but suggestive.

Order affirmed, without costs.

In re CHAVKIN et al.

(Circuit Court of Appeals, Second Circuit. January 16, 1918.)

No. 93.

1. BANKRUPTCY ⟸303(2)—PROCEEDING BY TRUSTEE TO REQUIRE SURRENDER OF PROPERTY—EVIDENCE—FINANCIAL STATEMENT.

On the hearing of the petition of a trustee to require bankrupts, who were partners, to turn over property not scheduled, a written financial statement, signed by one of the firm, made a short time before the bankruptcy to a creditor as a basis of credit, and purporting to show a surplus of assets over liabilities, is admissible in evidence, and, although not conclusive, may be persuasive.

2. BANKRUPTCY ⟸303(1)—PROCEEDING TO REQUIRE BANKRUPT TO TURN OVER PROPERTY—BURDEN OF PROOF.

When a trustee lays a foundation by any competent evidence, including the claims of bankrupts themselves, that they had unscheduled assets within a reasonable time before the filing of the petition, the bankrupts must then account for the property, or rebut the trustee's prima facie case by credible evidence.

3. BANKRUPTCY ⟸303(3)—ORDER REQUIRING BANKRUPTS TO TURN OVER PROPERTY—PETITION TO REVIEW.
An order requiring bankrupts to turn over property *held* supported by evidence, on a petition to revise such order in matter of law.

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

In the matter of Joseph Chavkin, Barnet Chavkin, Nathan Chavkin, David Chavkin, and Benjamin Chavkin, trading as the North Central Knitting Mills and as R. Chavkin & Sons, bankrupts. On petition of bankrupts to review an order of the District Court requiring them to turn over property. Affirmed.

The partners in the bankrupt firm were five brothers, and a sister was the bookkeeper. After an examination under section 21a of the Bankruptcy Act (Comp. St. 1916, § 9605), and at the first meeting of creditors, the trustee petitioned for an order against the bankrupts requiring them to pay over to him property, or the value thereof, neither scheduled nor surrendered. The evidence for the trustee in this proceeding consisted of (in part) a "financial statement," made March 25, 1916, signed by the bankrupt Joseph Chavkin, showing a net surplus of firm assets of over $60,000 and certified as "a true and correct showing of the present financial condition of" the bankrupts, made to a creditor "for the purpose of purchasing goods and for establishing a continuing line of credit" with said creditor. The trustee also introduced in evidence the examination, especially of Joseph Chavkin, under section 21a and at the first meeting of creditors. He also called said Joseph as a witness in this proceeding. The District Court entered an order requiring the bankrupt to surrender substantially what the financial statement aforesaid declared them to be worth, less what had been turned over to the trustee when petition was filed against them, about a month after the date of said statement. To this order the bankrupts filed this petition to revise.

Myers, Kutner & Schuhmann, of New York City (Maurice Lefkort, of New York City, of counsel), for bankrupt.

Samuel C. Duberstein, of New York City, for trustee.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). This cause having been brought before us by petition to revise, our duties are limited to inquiring whether any error of law was committed below. There are but two points to be considered, viz. petitioner's assertions (1) that it was error to admit in evidence the financial statement above referred to, and (2) that there was no evidence upon which the court could ground the order complained of.

[1] 1. That a statement of this kind is competent, and may be persuasive evidence, against a bankrupt in proceedings of this nature, was specifically held in Re Loeb, 232 Fed. 601, 146 C. C. A. 559. The use in what are commonly known as "turn-over proceedings" of these "financial statements" has long been common and well known. They are not conclusive, but it is difficult for us to understand how anything can be more persuasive, as against the person making it, than a solemn statement of financial worth made to induce credit.

[2] 2. It seems to be thought by the petitioners that, because all the bankrupts, except Joseph Chavkin, swore that their business duties

gave them no acquaintance whatever with the firm's financial condition, and Joseph himself, when called as a witness in this proceeding, refused to answer substantially every question put to him on the ground that such answer might incriminate or degrade him, therefore there was no evidence, other than said financial statement, upon which to ground the order complained of.

Without expressing any opinion on the probative value of the testimony or affidavits of a man who even declined to recognize his signature to the schedules in bankruptcy (on the ground above stated), we find in the record evidence obtained upon examination under section 21a and largely from the sister bookkeeper, of the substantial correctness of said financial statement. At all events there was certainly some evidence, and its comparative value is not for us to decide. There was jurisdiction in the court to make the order. In re Schlesinger, 102 Fed. 117, 42 C. C. A. 207. The trustee lays a foundation when he shows by any competent evidence, including the claims or assertions of the bankrupts themselves, that they had unscheduled property a reasonable time before petition filed; the bankrupt must then account for said property, or otherwise rebut the trustee's prima facie case by credible testimony. In re Weinreb, 146 Fed. 243, 76 C. C. A. 609; In re D. Levy & Co., 142 Fed. 442, 73 C. C. A. 558; In re Graning, 229 Fed. 370, 143 C. C. A. 490, Ann. Cas. 1917B, 1094.

[3] These bankrupts seem to have made no attempt to comply with this rule; but, assuming that there was conflicting evidence presented to the court, the question thereby presented was of fact, and not reviewable in a proceeding of this nature.

It may be added that petitioners seem to think that this is a contempt proceeding, because in the same order which directed the payment of money to the trustee the bankrupts were called on to show cause why they should not be punished for contempt, if they did not make the required payment. Such, however, is not the case. There has been no punishment for contempt, and no order adjudging contempt. We have nothing before us but the legal propriety of the "turn-over" order.

Order affirmed, with costs.

WILLIAMS v. CANARY.

(Circuit Court of Appeals, Eighth Circuit. March 2, 1918.)

No. 4934.

1. PARENT AND CHILD ⟸9—CONTRACTS—VALIDITY.

While equity will closely scan a contract between a parent and his child, entered into shortly after the child reached his majority, yet the contract is not prima facie void, and where not unconscionable, and made by the child with complete understanding, will not be stricken down.

2. GUARDIAN AND WARD ⟸131—CONTRACTS—VALIDITY.

Where a guardian, shortly after a ward reached his majority, or while any of the guardianship duties were yet to be performed, contracted with the ward, the guardian has the burden of showing that the transaction was fair and reasonable, and that no advantage was taken.

3. GUARDIAN AND WARD ⊂69—CONTRACTS—STATUTE—CONSTRUCTION.
The purpose of Rev. Laws Okl. 1910, §§ 3339–3341, providing that a guardian shall not be discharged until a year after his ward's majority, is to provide a period for the orderly review of the guardian's acts and the settlement of his accounts, and not to extend his authority over the ward's estate, or its accompanying disqualification; so a contract between a guardian and ward within the year period is not for that reason invalid.

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

Suit by Emma P. Williams, née Canary, against James D. Canary. From a decree dismissing the petition, plaintiff appeals. Affirmed.

Malcolm E. Rosser, of Muskogee, Okl. (George S. Ramsey, of Muskogee, Okl., and Edgar A. De Meules and Villard Martin, both of Tulsa, Okl., on the brief), for appellant.

Joseph B. Tomlinson, of Independence, Kan., for appellee.

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

HOOK, Circuit Judge. This is a suit by Emma P. Williams, formerly Canary, against James D. Canary, to cancel an oil and gas mining lease of a tract of land in Oklahoma patented to her as a Cherokee allottee, and also a working contract supplemental to the lease, upon the ground that he obtained them by fraud and undue influence. At the hearing on the merits the trial court held the instruments valid and dismissed the petition. The plaintiff appealed.

The defendant is plaintiff's father, and had been the guardian of her estate during her minority by appointment of the court having cognizance of such matters. A prior lease to an oil company, executed by him as her guardian, had just expired with her minority. There were at that time 10 producing oil wells on the property. The lease and the contract in controversy were executed the day after the plaintiff became of age, and that circumstance is now principally relied on to invalidate them. The trial court found from the evidence that plaintiff voluntarily executed the instruments and fully understood their terms; also that their provisions were more advantageous to her than she could at the time have obtained from others or by her own operation of the property. We concur in this conclusion, and if further assurance were needed it would appear from plaintiff's acquiescence in the transaction and the receipt of its substantial fruits for more than six years before this suit was brought, during the last four of which she was married and living apart from her father. The suit is quite without warrant or foundation in any fact aside from the time the lease and the contract were made.

[1] A child, upon attaining majority, becomes clothed with contractual capacity, and that necessarily implies the power to pick both subject-matter and parties and to bind himself equally with those with whom he deals. There is nothing in the law that fixes a further period of disqualification for the parent. A contract between parent and major child cannot be said to be prima facie void in law, or for

that reason to be so doubtful as to impose an affirmative burden of justification. Jenkins v. Pye, 12 Pet. 241, 9 L. Ed. 1070. It is common experience, however, that the influence, personal confidence, and trust incident to that relation do not ordinarily end with minority, but continue in varying degrees and afford favorable opportunities for imposition and abuse. Because of this, the transaction, when assailed in a court of equity, will be examined with a searching eye to discover whether in all the circumstances a fraudulent or unconscionable advantage has been taken, and in the inquiry its proximity to the time of majority will be regarded. But equity will not condemn in the face of perfect knowledge, understanding, free consent, and good faith by those concerned.

[2] In the case of a transaction between guardian and ward at or near the time of emancipation, and while any of the guardianship duties are yet to be performed, the rule is more strict. Equity casts upon the guardian the burden of showing that the transaction was understood, was fair and reasonable, and that no advantage was taken. Harper v. Taylor, 113 C. C. A. 572, 193 Fed. 944; 2 Pom. Eq. Juris. § 961. As we have seen, that burden was discharged in this case.

[3] There is a contention that, as a statute of Oklahoma provides that a guardian appointed by a court is not entitled to his discharge until a year after his ward's majority, the relation between plaintiff and defendant still existed at the time of the transaction, and therefore the latter was wholly disqualified to contract. But the statute was to provide a period for the orderly review of his acts during guardianship and the settlement of his accounts. It was not intended as an extension of his authority over the ward's estate or its accompanying disqualification. The same statute authorized the ward upon coming to majority to settle accounts with his guardian and give him a release which would be valid if obtained fairly and without undue influence. Rev. Laws Okl. 1910, §§ 3339, 3340, 3341.

The decree is affirmed.

NEW YORK CENT. R. CO. v. GAPINSKI.

(Circuit Court of Appeals, Second Circuit. January 16, 1918.)

No. 103.

MASTER AND SERVANT ⊂⊃285(7)—EVIDENCE—PRESUMPTIONS—JURY QUESTION.

Where railroad employé was injured, while bending over, inserting stuffing and grease in journal boxes of cars, and there was testimony that at the time of the injury cars were sent down the adjoining track with doors hanging or sticking out, the question whether he was struck by such an obstruction was properly submitted to the jury, and a verdict for plaintiff could not be attacked on the theory that presumption was built upon presumption.

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

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

Action by Alexander Gapinski against the New York Central Railroad Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Gapinski was a laborer in the employ of the railroad company and at the time of injury was engaged in examining and greasing the journal boxes of freight cars. His occupation required him to stoop over while removing and inserting the "stuffing" and grease in said journal boxes. He complained of having been struck and injured by some projecting object upon a car, one of several or many sent down upon the track on which, or alongside of which, he was working.

There was direct evidence that many of the cars lying at rest upon and sent down on said track were "crippled"; i. e. cars "with doors hanging out; * * * some were sticking out from cars that were broken." Gapinski testified that he did not know what hit him, because when he was struck he was "half stooping and * * * leaning over and working."

The testimony regarding crippled cars was denied, and the trial judge sent the case to the jury, to ascertain whether "there was any projection sufficient to hit a man who was at work" in the manner testified to by Gapinski himself. Plaintiff below had a verdict. The railroad company took this writ; the assignments of error substantially challenging the action of the trial court in refusing to dismiss or direct a verdict at the close of the whole case.

Alex. S. Lyman, of New York City (Robert A. Kutschbock and Martin Gilligan, both of New York City, of counsel), for plaintiff in error.

Charles P. Sullivan, of New York City (Lowen E. Ginn and Thomas F. O'Sullivan, both of New York City, of counsel), for defendant in error.

Before WARD, ROGERS and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). It is we think sufficient to dispose of this writ to refer to Smith v. Pennsylvania R. R. Co., 239 Fed. 103, 151 C. C. A. 277. We there pointed out that, where there was no proof that any definitely indicated thing wrought the injury complained of, nor "that the circumstances rendering it possible for the injuring thing suggested [by plaintiff] to reach or touch [plaintiff] existed at the time and place of damage," any verdict resting on such evidence, or lack of it, would be building one presumption upon another.

In that case the suggested instrument of injury was the swinging rake hook of a passing locomotive. In this case the suggested cause of plaintiff's hurt is a door hanging or projecting below the car body to which it belonged. But in the Smith Case there was no evidence whatever that any rake hook was projecting at the time when and place where plaintiff was injured. In this case there is direct evidence that not one, but several, if not many, cars having such unusual and dangerous projections were moving upon the track alongside of which the plaintiff here was required to work.

If the jury believed (as it did) this positive testimony of moving crippled cars, it was within their province to draw the inference that such proven projection did the hurt. In the Smith Case there was no proven projection. We think the case cited and the present one (considered together) perfectly illustrate the difference between a legiti-

mate presumption from proven facts, and an attempted and unlawful presumption from another presumption.

Judgment affirmed, with costs.

THE NIGRETIA.

(Circuit Court of Appeals, Second Circuit. February 9, 1918.)

COURTS ⟸356—TAKING APPEAL—FEES—PREPAYMENT.

Act June 12, 1917, c. 27, § 1, 40 Stat. 157, which, under the caption "United States Courts," makes an appropriation for fees of clerks, provided that courts of the United States shall be open to seamen without furnishing bond, or prepayment of or making deposit to secure fees or costs, does not apply to the prosecution of appeals in the Circuit Court of Appeals; the clerk of that tribunal having a stated salary, appropriation for which was made by Act March 3, 1917, c. 163, § 1, 39 Stat. 1119.

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

Libel by Hassan Abdu and others against the steamship Nigretia, her engines, etc., claimed by the Limerick Steamship Company. There was a decree for claimant, and libelants appeal. On motion by libelants for an order directing the clerk of the Circuit Court of Appeals to accept and file the transcript or apostles without the payment of, or security for, any fees whatever. Motion denied.

Silas B. Axtell, of New York City, for appellants.

Kirlin, Woolsey & Hickox, of New York City, for appellees.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

PER CURIAM. This motion is renewed because of the passage at the first session of the 65th Congress of the Act of June 12, 1917. This appropriation bill (at 40 Stat. 157), under the subheading or caption "United States Courts," allots:

"For fees of clerks $215,000: Provided, that courts of the United States shall be open to seamen, without furnishing bond or prepayment of or making deposit to secure fees or costs, for the purpose of entering and prosecuting suit or suits in their own name," etc.

It is urged that this statute applies to the prosecution of appeals in the Circuit Courts of Appeal; and it is apparently thought that the appropriation covers salary of the clerk of this court. This is a mistake. Clerks of Circuit Courts of Appeal have a stated salary, not dependent on fees, of $3,500 each, and for the fiscal year ending June 30, 1918, appropriation therefor was made by chapter 163 of 1917 (act signed March 3, 1917, and appropriation stated in 39 Stat. 1119).

The statute relied upon by the moving party can refer therefore only to courts other than Circuit Courts of Appeal, and certainly to District Courts, for the clerks of which no provision is made in chapter 163, supra.

It follows that the motion must be denied.

LEBERT v. PACIFIC MAIL S. S. CO.

(Circuit Court of Appeals, Fifth Circuit. March 21, 1918.)

No. 3106.

DEATH ⊂=31(3)—ACTIONS—RIGHT OF PERSONAL REPRESENTATIVE.
Where no provision of law of the Canal Zone gave a right of action to the personal representatives of a deceased person, the personal representative can maintain no action for wrongful death.

In Error to the District Court of the United States for the Canal Zone; Wm. H. Jackson, Judge.

Action by Ursulina Lebert against the Pacific Mail Steamship Company. There was a judgment for defendant, the action being dismissed, and plaintiff brings error. Affirmed.

Valentine E. Bruno, of Ancon, C. Z., and Donelson Caffery, Lamar C. Quintero, and J. M. Quintero, all of New Orleans, La., for plaintiff in error.

Stevens Ganson and Theodore C. Hinckley, both of Panama, R. P., for defendant in error.

Before PARDEE, WALKER, and BATTS, Circuit Judges.

WALKER, Circuit Judge. This writ of error presents for review a judgment dismissing a suit brought by the administratrix of the estate of Daniel Lebert, deceased, to recover damages for his death, alleged to have been caused in the Canal Zone by negligence attributable to the defendant in error. It is not necessary to decide whether the provisions of the Canal Zone law relied on in behalf of the plaintiff in error do or do not give a civil right of action for wrongfully causing the death of a human being. No provision of that law of which we are advised indicates that such a right of action is given to the personal representative of the deceased person.

The judgment is affirmed.

THE W. H. FLANNERY.

(Circuit Court of Appeals, Second Circuit. January 16, 1918.)

No. 56.

ADMIRALTY ⊂=118—REVIEW—FINDINGS OF FACT.
An appellate court is reluctant to disturb a finding of fact in an admiralty case by the trial judge, who had the advantage of seeing and hearing the witnesses.

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

Libel by William Beard and another against the steam tug W. H. Flannery and her engines, etc., claimed by James H. Flannery. From a decree for libelant, claimant appeals. Affirmed.

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

Ralph James M. Bullowa, of New York City, for appellees.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

PER CURIAM. The question which this case presents involves no question of law. The District Judge, who saw and heard the witnesses, has found as a fact that the collision was occasioned by the Flannery's failure to comply with the signal given by the Beard and which the Flannery had accepted. This court is reluctant to disturb a conclusion of fact reached by a trial judge, who had the advantage of seeing and hearing the witnesses.

Decree affirmed.

OMAHA GAS CO. v. CITY OF OMAHA.

(District Court, D. Nebraska, Omaha Division. October 13, 1914.)

(No. 103Z.)

1. MUNICIPAL CORPORATIONS ⟸232—CONTRACTS—PERIOD.

Where the charter of a city authorized the mayor and council to provide by ordinance or contract with any competent party for the supplying and furnishing of gas, a contract extending for reasonable period is valid, and the authority of the mayor and council is not impliedly limited to the official life of the council enacting the ordinance.

2. GAS ⟸14(2)—CONTRACTS—CHARTER.

Omaha City Charter (Comp. St. Neb. 1891, c. 12a) §§ 50, 61, declare that the mayor and council shall have power to provide for the lighting of streets, laying down of gas pipes, and to regulate the sale and use of gas and electric lights, and fix the price of gas, and that the mayor and council shall have power to erect, construct, and maintain waterworks, and to make all needful rules and regulations concerning the use for the water supply. By Laws Neb. 1893, c. 3, § 9, the latter section of the charter was amended, so as to authorize the mayor and city council to erect, construct, purchase, maintain, and operate subways or conduits, waterworks, gasworks, and electric light plants, and to provide by ordinance or contract with any competent party for the supplying and furnishing of water, gas, or electric light, and to fix the rates. *Held*, that section 61, as amended, though construed with section 50, did not limit the power of the mayor and council to grant a franchise for a fixed period and a contract with a gas company fixing rates for 25 years was valid, for, while the surrender of the public power to fix rates must clearly appear, the language should receive its ordinary construction.

3. STATUTES ⟸112—AMENDMENT—TITLE.

The title of Laws Neb. 1893, c. 3, purported to amend, among others, section 61 of the previous charter, which related only to the water supply for the city. Const. Neb. art. 3, § 11, declares that no bill shall contain more than one subject, and the same shall be clearly expressed in its title. *Held* that, as the supplying of water, gas, and electricity, all dealt with in the amendatory act, were germane to the thought of the original act, which was the supplying of the inhabitants of the city with a convenience of modern urban life, the title was broad enough to include the amendment.

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4. STATUTES ⟸112, 139, 141(1)—AMENDMENT—TITLE.
Laws Neb. 1893, c. 3, § 9, amending section 61 of the Omaha city charter, is not invalid as amending section 50, though expressing no such intention in the title, nor invalid as failing to set out section 50 as amended, and failing to repeal it; the amendatory act not encroaching on the powers of the city as expressed in section 50.

5. GAS ⟸12—SUPPLY TO MUNICIPALITY—CONTRACTS—VALIDITY.
Though the act under which a city contracted with complainant for the furnishing of gas for 25 years at a fixed rate was invalid, yet, where the validity of the contract was for many years recognized by municipal authorities after the enactment of a new charter, under which it would have been valid, the city cannot thereafter question the contract.

In Equity. Bill by the Omaha Gas Company against the City of Omaha. Decree for complainant.

Guernsey, Parker & Miller, of Des Moines, Iowa, and W. H. Herdman, of Omaha, Neb., for Omaha Gas Co.

W. C. Lambert, of Omaha, Neb., for City of Omaha.

MUNGER, District Judge. This suit was brought to enjoin the enforcement of an ordinance of the city of Omaha, which undertook to fix the price to be charged by defendant for gas at $1 per 1,000 cubic feet. The sole question presented is whether the city stripped itself of the power to make such reduction, by entering into a contract with the defendant's predecessor, whereby the city granted the right to it and its successors to charge at least $1.25 per 1,000 cubic feet for 25 years from December 20, 1893.

[1] It is admitted that this contract was made, and there is no dispute over its terms; but the claims of the city are: (1) That the mayor and council had no power to make such a contract as to future rates to be charged, because the source of power, the amendment of the act of the Legislature, commonly called the city charter, was not passed pursuant to the constitutional requirements; and (2) if constitutional, a proper construction of it did not confer authority to fix rates for 25 years. The section of the charter in question is as follows:

"Sec. 61. The mayor and council shall have power to erect, construct, purchase, maintain and operate subways or conduits, waterworks, gasworks and electric light plants, either within or without the corporate limits of the city, and shall have power to fix, charge and collect a rental or compensation for the use of subways or conduits and of water, gas or electric lights furnished consumers, and to make all needful rules and regulations concerning the use of such subways, conduits, water, gas or electric lights, and to do all acts necessary for the construction, completion, management and control of the same, including the appropriation of private property for the public use in the construction and operation of the same, compensation for such appropriation to be made as is provided by this act and the mayor and council of each city created or governed by this act shall have power to provide by ordinance or contract with any competent party for the supplying and furnishing of water, gas or electric light, or electric power, to the public or private consumers within such city, and the rates, terms and conditions upon which the same may and shall be supplied and furnished during the period named in the ordinance or contract."

See section 9, c. 3, General Laws of Nebraska 1893.

Prior to the amendment just quoted there existed two sections of this city charter, as follows:

"Sec. 50. The mayor and council shall have power to regulate and provide for the lighting of streets, laying down gas pipes, and erection of lamp posts, electric towers, or other apparatus, and to regulate the sale and use of gas and electric lights, and fix and determine the price of gas, the charge of electric light, and the rent of gas meters within the city, and regulate the inspection thereof, and to regulate telephone service and the use of telephones within the city, and to fix and determine the charges for telephones and telephone service connections, and to prohibit or regulate the erection of telegraph, telephone, or electric light poles, or other poles for whatsoever purpose desired or used in the public grounds, streets, or alleys, and the placing of wires thereon, and to require the removal from the public grounds, streets, or alleys, of any or all such poles, and to require the removal and placing underground of any or all telegraph, telephone, or electric wires."

"Sec. 61. The mayor and council shall have power to erect, construct, and maintain waterworks, either within or without the corporate limits of the city, and to make all needful rules and regulations concerning the use of the water supplied by such waterworks, and to do all acts necessary for the construction, completion, management, and control of the same, including the appropriation of private property for the public use in the construction and operation of such waterworks, compensation for such appropriation to be made as is provided by this act. And the mayor and council of such city created or governed by this act shall have power to construct and maintain waterworks on such terms and under such regulations as may be agreed on, or to provide by contract for the construction and maintenance or leasing of waterworks, or any main or line thereof, or settling basins therefor."

Sections 50 and 61, c. 12a, Comp. Statutes of Nebraska 1891.

As to the construction to be placed upon the language of the act, the city contends that, because no limit of time for the duration of the contract is fixed by section 61 of the charter, the implied limit is during the official life of the council that enacted the ordinance. No decision of the Supreme Court of Nebraska is cited to sustain this proposition, and the Supreme Court of the United States has held that, where the power exists to make a contract for the furnishing of such service, a contract extending for a reasonable period will be sustained. Detroit v. Detroit Citizens' Street Railway Co., 184 U. S. 368, 22 Sup. Ct. 410, 46 L. Ed. 592; Vicksburg v. Vicksburg Waterworks Co., 206 U. S. 496, 27 Sup. Ct. 762, 51 L. Ed. 1155.

[2] It is further contended by the city that the language of section 61 of the city charter, considered in connection with the language of section 50, does not grant the right to the mayor and council to fix rates for 25 years, but only to grant a franchise for a fixed period. It reaches this conclusion by transposing the clauses of the statute, so that the words "during the period named in the ordinance or contract" follow the words "supplying and furnishing" and by supplying the words "shall have power to fix" before the words "the rates, terms and conditions on which the same may and shall be supplied and furnished." This seems to be a violent change of the language of the act, and to express a different meaning from that which the Legislature intended. In the language of a grant of this nature, whereby the public surrender the power to fix rates, the surrender must clearly appear and any reasonable doubt must be solved in favor of the public; but the cases cited on behalf of the city to support its contention

as to the meaning of the language of section 61 present such differences in the language of the statutes referred to from the language of this grant as to throw no light upon its interpretation. The courts incline to the natural and usual construction of the words of a statute, and the ordinary construction of the language employed here would make the words "during the period named in the ordinance or contract" apply alike to the rates, the terms, and conditions, and thus give the mayor and council power to contract for the period as to rates, terms, or conditions on which water, gas, electric light, or power may be supplied.

[3] The city also contends that the Legislature exceeded its authority in the attempt to enact the amendatory statute, so that the act is invalid, and no law, and hence the mayor and council had no authority under it to make the contract fixing rates for twenty-five years. The Constitution of Nebraska provides (article 3, § 11):

> "No bill shall contain more than one subject, and the same shall be clearly expressed in its title. And no law shall be amended unless the new act contain the section or sections so amended, and the section or sections so amended shall be repealed."

The title of the amendatory act purported an amendment, among other sections, of section 61 of the previous charter, and it is said that this title did not clearly express the subject of the amendment, because the prior section 61 related only to a water supply for the city, and therefore an amendment relating to the supply of gas and electricity, was not germane to the subject of the amended section. It does not seem to be claimed that there is more than one subject in the amended section 61, although it relates to subways and conduits, to waterworks, gasworks, and electric light plants and to the erection, purchase, maintenance, and operation of them, as well as to the power to contract for the supplying of water, gas, electric light and power. It would be a needlessly rigid construction of the constitutional restriction to require a separate act, or even a separate section in each city charter, as the subject changes from conduits to subways, gas, water, electric light, or power, and no decisions are cited to support such a claim.

Indeed, such a construction would nullify section 50 of the charter, which counsel for the city claim is the only valid section relating to the subject of this suit, as that section relates to gas, electric lights, and telephones, to providing for a supply and the regulation of the price, and other topics. It has often been declared that this constitutional requirement is satisfied if there is one general object in an act (Kansas City & O. R. Co. v. Frey, 30 Neb. 790, 47 N. W. 87), and hence an entire Civil or Criminal Code, or an entire city charter, may be enacted under one title. If such varied interests may be within the sweep of one act, no reason is perceived why a section of a city charter may not relate to such cognate subjects as gas, electricity, and water, and to the procurement, regulation, and ownership thereof. The central thought of the original section 61 was the vesting of power in the city to supply the inhabitants with a convenience of modern urban life, and the addition by amendment of other sim-

ilar objects, such as gas, electricity, electric power, subways, and conduits, was not surreptitious legislation, but an appropriate enlargement of powers kindred to those already existing by virtue of the original section.

[4] It is further objected that this amendment, so far as it permitted the mayor and council to enter into a contract as to rates for gas or electric lights, was an amendment of section 50 of the charter, and therefore was invalid, because the title does not purport an amendment of that section, nor is that section set out as amended, nor is it repealed. By section 50 the mayor and council had power to provide for the lighting of streets and the laying down of gas pipes and to regulate the sale and use and to fix the price of gas. By the amendatory section 61 the council is not deprived of these powers, but is given additional power to erect or purchase, and to maintain and operate a gas plant, to fix and collect a compensation for the use of such plant, and to make a contract for the supply of gas and the rates for which it shall be supplied for a term of years. There is nothing inconsistent in the grant of these powers. The city's right to procure lights by allowing the use of the streets by a company is not invaded by a further grant of power to erect its own plant and to furnish illumination thereby. It may be doubted whether the right to regulate the rates for supplying gas is destroyed by a grant of the right to make a contract for a limited period at fixed terms. The city may exercise either power, and thus withhold its hand from any contract, if it so desires. Its entire freedom "to regulate the sale and use of gas" and to "fix and determine the price of gas" was left unimpaired by the Legislature, if it wished to exercise such right, and not to enter into any contract.

[5] Whether it be determined that the act of 1893, under which the mayor and council made this contract, was valid or otherwise, in 1897 the Legislature of Nebraska enacted a new city charter for the city of Omaha (chapter 10, Gen. Laws Neb. 1897), and section 135 of that act is a re-enactment of the terms of section 61 as it appears in the act of 1893. No question is made of the validity of that act, nor that the mayor and council had power after its passage, to make a contract, such as the one in question in this suit. In 1905 (Laws 1905, c. 14, § 103) the Legislature modified the statute by limiting the term of a contract that might be made by the city to a period of 10 years. For about 14 years after the enactment of the charter of 1897, both the city and the gas company acted under the terms of the ordinance treating it as valid; the company expending large sums of money in reliance upon the contract and the city receiving a royalty, as provided by this contract, of 5 cents per 1,000 cubic feet on the sale of gas, and paying for gas used by it but the sum of $1 per 1,000 cubic feet, as provided in the contract.

As the city had the power to make this contract after the enactment of the law of 1897, its conduct in treating it as a valid law for so long a period thereafter must be taken as estopping it from thereafter questioning it. The situation is essentially the same as in the case of City Railway Co. v. Citizens' Street Railroad Co., 166 U. S. 557,

569, 17 Sup. Ct. 653, 657 (41 L. Ed. 1114). The city of Indianapolis had granted to a street railway company the right to operate a street railway, using horses as a motive power, and subsequently, in 1889, an ordinance was passed allowing the company to use electricity as a propelling power. This ordinance was passed without legislative authority so to do, but in 1891 the Legislature conferred the right upon the council to authorize the use of electric power by street railway companies. It was held that this subsequent authority, and the conduct of the city in allowing the company to proceed thereunder placed the grant beyond attack. The court says:

"At this time there was no law of the state permitting electricity to be used, and it is now claimed that the common council exceeded its powers in authorizing this change to be made. But it seems that on March 3, 1891, a law was enacted by the General Assembly, declaring 'that any street or horse railroad heretofore or hereafter organized * * * may, with consent of the common council of the city, * * * use electricity for motive power.' Conceding, although not deciding, that the city might have exceeded its lawful power in authorizing the change from animal power to electricity, in the absence of legislative authority so to do, we think the act of 1891 should be construed, not only as conferring a new authority upon the city, but as a ratification of what the city had already done in that direction. In view of the large expenditures incurred by the company upon the faith of this ordinance, it is ill becoming the city to set up its own want of power to make it, when such power was directly and explicitly given a few months thereafter."

The principle announced in this case is decisive that the contract in this case made by the mayor and council and the plaintiff's assignor is not now open to attack by the city, and hence that the city may not enforce the provisions of the new ordinance fixing the price of gas until the terms of the first contract have expired.

A decree may be prepared accordingly.

In re HAWKINS et al.

In re VATTER-LYNN MILLINERY CO.

(District Court, N. D. Georgia. April 12, 1918.)

Nos. 855, 856.

BANKRUPTCY ⊂=311(4)—CLAIMS—INDIVIDUAL CREDITORS.

Where a creditor of a corporation knew of the insolvency of the corporation, as well as of the insolvency of its controlling stockholder, a note given such creditor by the stockholders for the amount of its claim against the corporation constituted a legal fraud against the individual creditors of the stockholders, and was not provable against them individually.

In Bankruptcy. In the matter of Misses M. E. Hawkins and Lucile Hawkins, bankrupts. The claim of the Vatter-Lynn Millinery Company was disallowed by the referee, and claimant petitions to review. Affirmed.

See, also, 243 Fed. 792.

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

Denny & Wright, of Rome, Ga., for claimant.
T. W. Lipscomb, of Rome, Ga., for trustee.

NEWMAN, District Judge. The Vatter-Lynn Millinery Company filed with the referee in this case proof of claim for $1,050.15, to the allowance of which the trustee filed objections. The referee, after hearing the matter, disallowed the claim, and the matter is now here on a petition to review his finding. The opinion filed by the referee in the case is as follows:

The Vatter-Lynn Millinery Company, of Louisville, Ky., filed with the referee in this case proof of claim for $1,050.15. To the allowance of the claim the trustee has filed objections, the chief ground of objection being that the note upon which the proof of claim is based was without a consideration, and that the giving of said note while the bankrupts were insolvent was a fraud on their creditors. The Vatter-Lynn Millinery Company originally had a debt against the Hawkins-King Millinery Company for $1,669.69. This debt was proved in the bankruptcy case of the Hawkins-King Millinery Company, and received its proportionate share on the composition carried through in that case. This reduced the debt to the sum of $1,050.15, which is now attempted to be proved against the Misses Hawkins, who also filed individual petitions in bankruptcy at the same time that the Hawkins-King Millinery Company went into bankruptcy. Originally, the Vatter-Lynn Millinery Company had a claim, as stated, against the Hawkins-King Millinery Company, of which the Misses Hawkins owned a controlling interest. In order to better secure the payment of this debt, the Misses Hawkins, on the 15th of September, 1916, gave a third security deed to the Vatter-Lynn Millinery Company upon real estate which they owned in Atlanta, and which was the only property that they owned. This note was attached to and was a part of the security deed. The security deed was held invalid by the bankruptcy court, and the Vatter-Lynn Millinery Company is now attempting to set up the note as an unsecured debt.

The consideration of said note was alleged by the payees to be extension of time and extension of credit. The note was made payable on demand, and any extension of time by the payees was entirely voluntary, as they could demand payment at any time. The extension of credit, under the evidence in this case, is not apparent. There is no evidence that the Vatter-Lynn Millinery Company ever shipped any goods to the Hawkins-King Millinery Company or the Misses Hawkins after this note was given. Miss M. E. Hawkins testified, on examination, as follows: "Q. On September 15, 1916, you recite that you made a deed to secure $1,669.69, on this same property, to the Vatter-Lynn Millinery Company of Louisville. You recite that it is a third security deed, or a lien secondary to the deed to Mrs. Young. At the time that you made that deed, did you get any cash from the Vatter-Lynn Millinery Company or anybody else? A. No, sir. Q. That was a debt that was due the Vatter-Lynn Millinery Company, a corporation, wasn't it? A. Yes, sir. Q. You got nothing for making either one of these last two deeds, then? A. Nothing at all."

On page 9 of Miss M. E. Hawkins' testimony, she testified in reference to this same transaction: "A. I believe I told him that the corporation was to have an extension of time. Q. And to get more goods? A. If I wanted them; yes, sir. Q. Did you get any more goods? A. I don't remember. Q. You don't owe him anything else but this, do you? A. No, I don't owe him anything else."

This testimony was in reference to whether the Vatter-Lynn Millinery Company shipped any more goods to the Misses Hawkins after they gave this note attached to the security deed. This seems to be the only direct testimony regarding the question of further extension of credit after the note was given by the Misses Hawkins to the Vatter-Lynn Millinery Company. It appears, then, that the consideration for this transaction is, to say the least, indefinite. The extension of time, if such it was, was entirely optional with the holders of the note. The extension of credit does not appear to have been

given; hence there seems to be no real consideration. The note given by the Misses Hawkins to the Vatter-Lynn Millinery Company was a necessary part of the security deed proceeding. There is no evidence that they would have given the note in any other way. It was given a little more than 30 days before the bankruptcy petitions were filed, and when it seems evident that both the Misses Hawkins were insolvent. I do not think the facts in the case in the 111th Georgia Reports, cited by attorneys for the claimants, fit this case.

In the opinion of the referee, if the lien given by the Misses Hawkins to secure this debt was void for lack of consideration, there was no debt, and consequently the note has no standing in court. It seems to me to be apparent that the bankrupts were insolvent at the time they gave this note and security deed, and that they were attempting to secure the debt of the corporation with their own property, although both they and the creditors they were attempting to secure were aware of this fact. I am not sure that this would be sufficient to prevent proving this claim as an unsecured debt, but I do feel sure that the evidence regarding consideration is sufficient to justify the conclusion that there was no actual consideration given for the note. It is therefore ordered that the claim of the Vatter-Lynn Millinery Company be disallowed."

After argument of counsel and consideration of this matter, I am thoroughly satisfied that the referee's finding is correct. The Hawkins-King Millinery Company and the Misses Hawkins individually were entirely distinct legal entities. The Hawkins-King Millinery Company was indebted to the Vatter-Lynn Millinery Company, without any obligation or any legal liability of any kind of the Misses Hawkins. The Misses Hawkins, on the 15th day of September, 1916, gave to Mr. William F. Vatter, trustee for Vatter-Lynn Millinery Company, their individual joint note. According to the findings of the referee, supported by the evidence, at the time the note was given both parties knew of the insolvent condition of the Hawkins-King Millinery Company and the Misses Hawkins individually. Such transaction constituted a legal fraud as against the creditors of the Misses Hawkins, and in consequence it is, as a claim, invalid and nonprovable in bankruptcy. It would be remarkable if one having knowledge of his insolvency could create a new debt, without consideration, especially when the party to whom the debt is made has every reason to know of the insolvent condition of the debtor. Such claim should not be allowed as against existing creditors.

The findings of the referee, disallowing the claim of the Vatter-Lynn Millinery Company, is approved and confirmed.

CRABB et al. v. WATTS et al.

(District Court, D. Oregon. March 25, 1918.)

No. 7340.

1. DEEDS ⟸76—VALIDITY—UNDUE INFLUENCE.
   Where deeds have been obtained through undue influence, the grantee is not entitled to derive advantage therefrom.
2. DEEDS ⟸72(1)—UNDUE INFLUENCE—VALIDITY.
   To have a deed vacated on the ground of undue influence, it is not necessary to show that the grantor was insane, or in a state of mental im-

becility; but it is sufficient to show that he was in condition of mental weakness and there was a gross inadequacy of consideration, from which circumstances imposition or undue influence will be inferred.

3. DEEDS ⊜196(3)—VALIDITY—FIDUCIARY RELATIONS.
The existence of a fiduciary relation between the grantor and those securing a benefit under a deed raises a presumption against validity, and casts the burden of proof on those asserting the regularity of the transaction.

4. DEEDS ⊜211(4)—UNDUE INFLUENCE—SECRECY.
Where a deed is attacked as having been obtained through undue influence, the secrecy with which the transaction is accomplished often furnishes a badge of fraud.

5. DEEDS ⊜196(4)—UNDUE INFLUENCE—BURDEN OF PROOF.
Where a grantor, who was a very aged man, a few days before his death conveyed all of his lands to the wife and daughter of one son, and such conveyance was contrary to his previous expressed desires, and was made a few days after he had of his own volition destroyed a will which gave the grantor's two sons a larger share than his other child, a daughter, those facts alone cast on the grantees the burden of proving that the deeds were the free and voluntary act of the grantor.

6. DEEDS ⊜211(4)—UNDUE INFLUENCE—EVIDENCE.
In a suit by a daughter of a grantor to set aside deeds executed only a few days before his death, whereby the grantor conveyed all his estate to the wife and daughter of one of his sons, evidence *held* to show that the deeds were the result of undue influence.

In Equity. Bill by Jerusha Crabb and John Crabb, wife and husband, against Homer I. Watts and others. Decree for complainants.

James A. Fee, of Pendleton, Or., and A. S. Bennett, of The Dalles, Or., for plaintiffs.

Will M. Peterson and Raley & Raley, all of Pendleton, Or., for defendants.

WOLVERTON, District Judge. On April 14, 1914, Thomas J. Watts signed two deeds by his mark, one purporting to convey to Jennie Anderson Watts 120 acres of land, and the other to convey to Vernita E. Watts 320 acres, all in Umatilla county, Or. The instruments were acknowledged before Homer I. Watts, notary public. The plaintiff Jerusha Crabb, who is a daughter of Thomas J. Watts, and her husband, John Crabb, feeling themselves aggrieved, are seeking by this controversy to have these deeds annulled, on the grounds: First, that the grantor was at the time incapacitated to make the deeds; and, second, that he was induced to make them through undue influence exerted by the defendants Homer I. Watts, Marvel Watts, Jennie Anderson Watts, and Vernita Watts. Homer and Marvel are the sons of Thomas J. Watts, and are his only children and heirs at law, except the plaintiff Jerusha Crabb. Jennie Anderson Watts is the wife of Marvel, and Vernita is their daughter.

Thomas J. Watts died intestate, on April 20th, six days after the deeds were executed. He was in his eighty-third year at the time of his death, and had grown very feeble, both physically and mentally. When in health and vigor, he was a man of positive habits, and asserted his own judgment in his dealings with others. The last few years

of his life, when his health had become somewhat impaired, he leased his lands to his sons Homer and Marvel on shares, and they accounted to him for his share in the crops. Marvel, perhaps generally, sold his grain, and either passed the proceeds to him or to the bank to his account. He also paid his taxes and transacted other business for him when he was away. There was therefore this fiduciary relation existing between Homer and Marvel Watts and the deceased.

Deceased was twice married. Jerusha Crabb is the daughter of the first wife, and Homer and Marvel are the sons of the second, making them half-brothers of Jerusha. When she was 6 years old, Jerusha went to live with her uncle, Marvel Watts, and shortly afterwards—within a year— the deceased married a second time. Jerusha continued to live with her uncle until she was married to Crabb. In the meantime she saw and visited with her father, and he with her, occasionally. When her uncle died, she shared in his estate, finally realizing therefrom $10,000, less a considerable expense in obtaining the money. The net amount that she finally received was around $9,000. After her marriage, she kept in touch with her father, through meeting him occasionally and correspondence, down to the time when the deceased and his second wife were divorced, which was in the year 1908. After that the deceased visited with Jerusha frequently, and at times he made his home with her, extending over periods of from a week to three months. In the latter 3 years of his life he wrote to her very frequently, and for some periods as often as once every week. Generally, however, after his divorce, he made his home with his son Marvel, in Athena, Or. Some of the time he was in Southern California, on account of his health. At other times he stopped in Spokane, and with Mr. Skelton, near Kennewick, Wash. In this way he went about as he desired, having practically retired from active business.

In the fall of 1913—late fall, perhaps—the deceased went to Santa Ana, Southern California, and remained there until the latter part of February, 1914. His health failing, so that he could not care for himself as he wished, he wrote to Jerusha, saying in effect that some of them would have to come after him. Mrs. Crabb wrote to her brother Marvel about it. About the same time Page, a friend of deceased, wired Marvel to come for him and bring him home. Marvel went for his father and brought him back. He thinks they returned the latter part of February or first of March; he was not able to fix the date. The deceased was taken to Marvel's home. Marvel is of the impression that some time later his father received a letter from Jerusha, but is not sure about it. At least, he did not read the letter, and did not know its contents. Mrs. Crabb makes no mention of having written such a letter. Marvel says that on March 16th or 17th he took "father up there [to Jerusha's] at my own father's request." Jerusha says it was the 17th that they came.

The Crabbs lived near St. John, Wash. When the deceased came there, he was quite feeble, and unable to move about without support. The next morning, or the day after he arrived at his daughter's home, in talking about his business and property, he told her that he had made a will, and requested her to send for it, giving as his reason

that he "didn't want it; it didn't suit him." The daughter had no previous knowledge of his having made a will. She declined to send for the will as requested. Deceased then asked her husband to send for it, and he also declined. He then requested W. D. Parker, a neighbor, to write for it. Parker wrote to Mr. Fay Le Grow, cashier of the First National Bank of Pendleton, who had the custody of the document, to send it up to the old gentleman. This was on the 24th of March. The will was forwarded, and was received by the deceased on the 27th. Watts signed a confirmatory letter of that date, and dated the same in his own hand. When the will was received, without opening the envelope in which it was sealed, he requested his daughter to put it away, which she did. Shortly afterwards—a few days—he asked her to get the will for him. He then opened it, and read it, and asked his daughter to burn it. This she declined to do; but at the suggestion of Viola Crabb (now Wheeler), a daughter of Mrs. Crabb, he put the will in the stove himself, and it was burned. Viola opened the stove for him, and helped him up, and he dropped the paper in.

Unknown to deceased, Mrs. Crabb read the will over his shoulder. It bore date October 25, 1910, and gave to Mrs. Crabb $200, and the remainder of the property to Homer and Marvel Watts, share and share alike. The record shows that deceased had executed two other wills prior to that one. One of them was executed in 1899. By this will he gave to his wife the place he had in Athena, and 160 acres of land besides, some money, perhaps $100, to Mrs. Crabb, and the remainder of his property to his three boys, to be divided equally among them. There were then three sons living. The other will was executed November 25, 1905. By that he gave to Jerusha $10, and the remainder of his property to his wife and his two sons, Marvel and Homer. The bequests in these several wills seemed to be in accord with declarations the testator had made from time to time to his friends and persons of his acquaintance, running down to near the time when he went to his daughter's. When the will was destroyed, deceased gave expression to his thought, "Now it is done, and they will all share equal." This is what Mrs. Wheeler understood him to say. Mrs. Crabb understood him to say, "Now it is done," with a laugh, "you shall have your share equal." These were the only two witnesses to the incident.

On the 3d of April, Mr. Watts was taken seriously ill, and Dr. McIntyre was called. His trouble was sciatica in the right leg and bladder affection. Dr. Mitchell was called into consultation, and an anæsthetic was administered before he was relieved. Dr. McIntyre is not certain as to the day the consultation took place and the relief had, but is of the impression that it was not long after he was first called. The deceased was left in a greatly weakened condition physically, and thereafter had to be taken from and put to bed; he was unable to feed himself, and, to a certain extent had lost the use of his hands.

Marvel, with his mother, wife, and daughter, went up from Athena to visit his father on the 3d of April. This was on Friday. The mother and daughter returned on Sunday, and Marvel and his wife remained until Monday. Considerable conversation was had among

them and with the old gentleman. This will be referred to later. Mrs. Crabb told Marvel, soon after his arrival, that the old gentleman had destroyed his will. Marvel is of the belief that she said it was destroyed that morning, the 3d; but Mrs. Crabb denies that she told him it was destroyed that morning, for, she says, it was destroyed some days before—Monday, Tuesday, or Wednesday before.

Marvel went back to the Crabbs' place on the Friday following, being the 10th of April, and brought his father down to Athena the next day, the 11th. The father was carried from his bed to an automobile, and taken to the railroad station, some 7 or 8 miles distant, where he was put on an improvised stretcher or cot, and carried in the baggage car of the train to Athena, a distance of some 140 miles. On his arrival at Athena, he was taken on a dray to Homer's home. Mrs. Carden was called the next day to nurse him. On Sunday his divorced wife came over from Walla Walla to see him.

Now we come to the incident of the execution of the deeds. Homer relates that he heard part of the conversation between his father and mother; that his father wanted to provide further for his mother, but that she finally said:

"Now, Tom, I don't know that I care about the property at all. The children that have made it are entitled to it, and I would just let it go that way."

Homer further relates that, on the evening his father came to his (Homer's) home, he had a talk with him, and, after alluding to the destroying of the will, his father said:

"I have made up my mind that I am going to do with my property as I suggested some time ago; that is, going to give a part of it to your mother, and I am going to provide for Vernita, because she is a cripple, and Marvel's wife, and the balance of it I am going to leave to pay up the debts, and I hope you children will all get good friends, because you all have enbugh property. Now, let property not divorce you children any longer."

Homer further relates that, on Sunday evening or Monday morning, his father directed him how to make the deeds, and then said to him:

"Now, Homer, Jerusha understands how the property is to go and why she is not getting any of it, because it has been a mutual understanding that she got her property from Uncle Marvel; and Marvel will have no objections at all, because it goes into the family. * * * I think you children can get along better than you have in the past."

Homer replied:

"You know I have made my way so far, and I am going to make it the rest of the way; but * * * I would prefer to have somebody else write the deed."

To this the father said:

"Now, Homer, you are the only one that is going to cause a lawsuit in this matter, and I want you to attend to it for me, and attend to it right."

And Homer said:

"I will not cause a lawsuit in this matter, if I don't get a pleasant look from this time out. * * * If you don't want any trouble, I will cause none."

Further on he quotes his father as saying:

"I have made up my mind what I am going to do with my property. * * * Now, Homer, I am not going to leave any of you anything, so you will have nothing to law about."

On Tuesday morning, about 11 o'clock, Homer took his father out in his automobile for a ride. They stopped at the drug store in the town to get some medicine, and then proceeded on to the town of Adams, about five miles distant. On returning to the house, Homer testifies that his father said:

"Do you care if you drive me out to the ranch?"

They started, but, having driven part way out, his father told him that he would not be able to stand the ride, and so they returned to the house again. He was taken in the house, given something to eat while sitting in a chair, and then put on the bed. Homer then went to his office and drew the deeds, and returned to the house with Guy Jonas. Mrs. Carden, the nurse, had, either at that time or previously, signified her intention of going to her own home on some errand, and Homer told his wife to take her home in the car. This she did, and then took a ride, returning in 45 minutes or an hour later. Shortly after they left the house, Homer says, his father asked to be taken up. He and Jonas took him out in the sitting room and set him in a chair. The deeds were then read to him, and he signed them by making his mark; the pen being in the hands of Homer, the old gentleman touching it as the mark was made. The three persons—Homer, his father, and Jonas—were all that were in the house at the time. The old gentleman died the Monday following, at the hour of about 8 o'clock in the morning, and the deeds were recorded at 11:20 and 11:25 o'clock of the same forenoon.

This is the story which terminated in the execution and recording of the deeds. Now, to return to the time that the deceased was at the home of the Crabbs, in order to ascertain his predisposition in disposing of his property after burning the will. He talked a great deal about his property before destroying the will, and was given to much repetition of what he had previously said on the subject, indicating that he wanted his daughter to share with the boys in what he had. At times he would shed tears, and was unable to control his feelings. After the will was destroyed, he seemed to be more resigned. When Marvel came to take him away, he at first did not want to go, but became reconciled to going. Mr. and Mrs. Crabb were also not willing that he should be taken away, but yielded, in consideration that it was thought that he would be better taken care of in Athena. The care that was taken of him while at the Crabbs' was not essentially different from that accorded to him at Homer's home, except that a nurse attended him at the latter place. The Crabbs, however, were willing to provide a nurse for him, and would have done so if he had not been taken away. Marvel went to the Crabbs' with the express purpose of taking him away, and dominated the situation. He was asked:

"Now, you insisted, then, on taking him away, did you?"

To which he answered:

"Why, I went up after him; yes. Q. What say? A. I went up after him. Q. Well, I say you insisted on taking him away? A. Well, I did take him away."

Dr. McIntyre thought it best that he be not removed, but yielded, as did Mr. and Mrs. Crabb, on the representation that he would be better taken care of in Athena. The deceased seemed to be apprehensive that Marvel had designs inimical to his (deceased's) wishes respecting his property. This appears from the conversations that took place between him and Marvel on the evening before and the morning on which they started for Athena. Two of these conversations were overheard by Mrs. Wheeler, and in the main by Mrs. Crabb, and the other by both, and by Mr. Crabb. In the first conversation he said, in effect, that he would not sign any papers; that, if Marvel was taking him away to sign any papers, he would not go; and that he wanted the property to be divided equally among them. To this Marvel answered:

"It will be as you want it."

Mrs. Crabb's rendition of the conversation is that her father said:

"Marvel, if you have come after me to take me down to make any papers, or sign any papers, I won't go e'er a step."

To this Marvel answered:

"Father, we have no such intention as that. It shall be divided equal. I won't influence you to sign anything," or words to that effect.

At another conversation, while Mrs. Crabb was in the kitchen, she and her daughter overheard her father ask Marvel if he would see that the property was divided equally between "us three, Marvel, Homer, and myself." And Marvel said he would see that it was done, and asked his father, "What makes you worry that way?" or "about it," or something that way. A little later Mr. Crabb was called in, and the old man took him by the hand, and said:

"John, you and Jerusha has been so kind to me, on my word and honor, I want Jerusha to have her one-third of the property, and I want it divided equal."

Then they took him out to the automobile, and he was taken to the station.

Marvel denies that these conversations took place, but I am impressed with the truth of the statements. Apart from the testimony above alluded to, Parker, a disinterested witness, relates that, at the time the deceased asked him to write for the will, he told him (Parker) that he was not satisfied with it (the will), and said that Jerusha was his child, the same as the boys were, and he wanted her to have part of his property.

Much has been said about the condition of deceased's mind from the time that he was taken ill until he was taken away from the home of the Crabbs. Dr. McIntyre's statement for this is as follows:

"I don't believe, if he had been left to his own initiative, that he could have very well planned out anything that was at all complicated, at any rate."

The doctor was of the opinion, from the time he first saw him, that he could not survive his illness. Dr. Sharp, who attended the deceased after he was taken to Homer's, says that he was very feeble, weak, and exhausted; that he seemed to have had a general breakdown, but seemed to be perfectly rational, and so continued up to about Thursday or Friday. From that time on he was delirious.

Dr. McIntyre, from the time he was called in to see deceased at the Crabbs', administered a strong stimulant, consisting of strychnine, under which he would revive and seem brighter until its effects were lost. The same stimulant was continued under Dr. Sharp's treatment. On Wednesday or Thursday the patient began to show symptoms of pneumonia, which continued to develop until the time of his death. For this trouble an expectorant was administered.

Mrs. Carden, the nurse, says the deceased was rational up to the day he took the automobile ride, and perhaps a day or two subsequently; that he seemed pretty bright on Sunday, but that she never talked much with him, and could not say whether he was in a condition to transact important business. Other witnesses, neighbors of his, seemed to think that his mind was not impaired.

Several witnesses have given evidence to the effect that Watts had from time to time given expression to his attitude respecting the final distribution of his property, and that, generally, his thought seemed to be that while his wife was alive she should be provided for, to the extent that she should have plenty to supply her wants; that, Jerusha having obtained from her uncle Marvel a considerable sum, she was provided for substantially in accord with what his sons would have by an equal division of the estate between them, and that he was solicitous that they should have the residue of his estate after his debts were paid. But, among all the witnesses produced, only two have given evidence of any expression of Watts that would seem in the least to indicate that it was his intention to give any of his property to Marvel's wife and daughter; that is, other than what Homer has to say about the subject. Marvel says that, along in the summer, before his father went to California, while they were out at the ranch, his father asked him what he thought about remembering his (Marvel's) wife, and that he replied:

"Well, daddy, it is just up to you. Do as you like."

And Taylor testified that the old gentleman indicated to him that he was not satisfied with his will (the one that was destroyed), and in that connection said that:

"Marvel's wife would crawl on her hands and knees up the stairs to wait on him."

There is some testimony to the effect that the deceased had gotten the idea that Homer was not treating him as he should; that he did not come to see him as he thought he ought. Taylor speaks of this, and Dr. Sharp gives expression to some such idea.

Another matter that should be mentioned: When Homer took his father out for the ride on the day the deeds were executed, the father

was averse to going, but consented finally. Homer himself testifies as to this as follows:

"I took him down town the one time. Q. Just the one time? A. Yes; against his wishes. Q. What say? A. Against his wishes. Q. You took him against his wishes, you say? A. Yes."

Dr. Sharp advised against it, and thought he ought not to go; that, in his weakened condition, he was not able to stand it.

[1, 2] The legal principles involved are not intricate, nor difficult of application. Where deeds are obtained by the exercise of undue influence over a man whose mind has ceased to be a safe guide to his actions, it is against conscience for him who has obtained them to derive any advantage therefrom. Harding v. Handy, 11 Wheat. 103, 125, 6 L. Ed. 429. But it is not necessary, in order to secure the aid of equity, to prove that the grantor was at the time insane, or in such a state of mental imbecility as to render him entirely incapable of executing a valid deed. It is sufficient to show that, from sickness and infirmity, he was at the time in a condition of mental weakness, and that there was gross inadequacy of consideration for the conveyance. From such circumstances, imposition or undue influence will be inferred. Allore v. Jewell, 94 U. S. 506, 510, 24 L. Ed. 260.

[3, 4] A fiduciary relation existing between the grantor and those concerned in securing a benefit under the terms of the grant raises a presumption against validity, and casts the burden of establishing good faith upon the person asserting the regularity of the transaction. Clough v. Dawson, 69 Or. 52, 60, 133 Pac. 345, 138 Pac. 233; Jenkins v. Jenkins, 66 Or. 12, 17, 132 Pac. 542. And the secrecy with which the transaction is accomplished often furnishes a badge of fraud. Wolf v. Harris, 57 Or. 276, 279, 106 Pac. 1016, 111 Pac. 54.

[5, 6] The deeds in question were in reality executed causa mortis. It is hardly probable that any one of the participants engaged in the consummation of their execution believed that the father could survive for more than a short time. The deeds purport to have been given for the consideration of love and affection, and $1. While it may be conceded that the deceased was possessed of sufficient mentality for the final disposition of his property among his kindred, yet it cannot be denied that he was in a greatly weakened and debilitated condition, both physically and mentally. Dr. Sharp, his old physician, says "he was very feeble, and weak, and exhausted," and had suffered a general breakdown. It is not doubted that a person in such a condition is readily susceptible to extraneous influences.

Now, we have the fact satisfactorily proven that he burned his will of his own volition, and that his declared purpose in doing so was that his children should share equally in his property, Jerusha included. This was manifestly the state of his mind when he left the home of the Crabbs. In three days thereafter, he deeded his property, not to his own sons or daughter, but to the wife and daughter of one of his sons—persons who had no direct claim upon his bounty. This was absolutely contrary to all his declarations during the latter years of his life; a thing wholly unexpected, and unnatural to contemplate from his standpoint. No statement was ever made by him to any

one, unless it was to Homer, that he intended to give all his property to Marvel's wife and daughter. These things are in themselves sufficient to cast the burden upon the beneficiaries under the deeds of establishing that the act of executing them was the free and voluntary act of the deceased, without instigation or direction of any other person. This the defendants have not done. But, beyond this, there are suspicious circumstances that lead to the inference that both Marvel and Homer, especially the latter, participated in a plan to extort the deeds from the father. Marvel brought his father from the Crabbs' home to the home of Homer against his wish, until persuaded that it would be better for him to make the move. Homer took his father for the ride against his positive wish and desire, and against the advice of his physician. Homer states that Marvel was present when he went for the drive, but he is not sure about that. When he returned from his office, where the deeds were drawn, Homer requested his wife to take Mrs. Carden to her home on an errand. She was not only taken there, but they went for a drive afterwards, which consumed from three-quarters of an hour to an hour. In the meantime the deeds were executed, with none present except the deceased, Homer, and Jonas. The deeds were first delivered by Homer to Marvel the next day. Marvel gave them back to Homer for recording. The latter says he neglected to do it. They were then handed to the bank, with the result that they were gotten into the recorder's hands about three hours after the death of the grantor.

The incidents are unsatisfactorily explained. Further than this, the reason given why he wanted Homer to transact the business puts into the mouth of the father language most unlikely to have been uttered by him, considering the condition of his mind and the circumstances leading up to and attending the transaction. When Homer, according to his testimony, suggested to his father that he preferred that some one else should write the deeds, he relates that his father said:

"Now, Homer, you are the only one that is going to cause a lawsuit in this matter, and I want you to attend to it."

A little later, when asked if he had related all that his father said about the destruction of the will, Homer replied:

"No; he said he made up his mind thoroughly that he had heard so much property talk since he had been up there that he knew there was going to be trouble if he tried to divide the property as he had expected to in life, and he thoroughly made up his mind that he would deed it all away, instead of deeding portions, as he had talked to me before. And another thing he said; 'Now, Homer, you are the most likely one to cause a lawsuit, and I am going to insist on you fixing the property—put you on your honor that you are not going to deal with the property or cause any lawsuits.'"

And Homer says further:

"I told him that I was a good loser."

The attempt of the witness manifestly is to impute to his father a reason for not deeding his property as he had talked of before, which was that, if he did so, there was going to be trouble; yet he did the very thing that would not only not avoid trouble from the source Homer alludes to, but was calculated to drive Homer to a contest. Then

the reasoning proceeds that, in order to prevent him from making trouble, the deceased insisted that he (Homer) draw the deeds, for thus he would be in honor bound not to attack them. Such reasoning was entirely too complex for the old gentleman's understanding at that time; it is delusive, and is really what, in the nature of things, would not have happened. The reference to previous trouble between the children has but a semblance of testimony in the record to support it.

After a very careful consideration of the entire controversy, I am irresistibly impelled to the conclusion that, while the deceased was probably possessed of a disposing mind, yet that it was very weak, as he was physically, and that, his mind being in such weakened condition, he was imposed upon and unduly influenced to execute the deeds in question. The decree will therefore be that the deeds in controversy be annulled and set aside, and that plaintiffs recover their costs and disbursements.

As to the accounting, it appears from the answers of the defendants and the testimony that all the lands covered by the deeds were rented to Homer and Marvel on shares, the rental being one-third of the crops produced; the lessees to pay the expenses of production. There was produced on the lands claimed to have been conveyed to Jennie Anderson Watts, in 1915, wheat amounting to 2,028 sacks, which was sold for $3,361.06. There was produced on the lands claimed by Vernita, in the year 1914, wheat amounting to 2,865 sacks, which was sold for $3,863.65, and in the year 1915, 1,085 sacks, sold for $1,912.50; making a total of receipts from crops during these years of $9,137.21. Jerusha Crabb's interest in this is $1,015.25. To this should be added one-ninth interest in the crops for 1917, respecting which no testimony has been adduced. From the sum of these amounts should be deducted one-third of the taxes on these lands, that have been paid by the defendants since the death of Thomas J. Watts. The balance would represent the amount of the rents and profits that the plaintiff Jerusha Crabb would be entitled to recover from defendants.

Let an order be entered at the foot of the decree, making a reference for ascertaining the further receipts of rents and profits, and the amount of taxes paid by defendants on the lands in question.

SEABOARD AIR LINE RY. CO. et al. v. UNITED STATES.

(District Court, E. D. Virginia. January 19, 1918.)

1. CARRIERS ⟸32(2)—TRANSPORTATION CHARGES—DISCRIMINATION.
At a point south of Richmond three railroad companies were competitors for traffic to and from that city. Each road had switching facilities at Richmond, connecting with each other, and each delivered traffic from competitive points to industries on its own tracks in Richmond at its tariff rate to that point, without extra charge for switching; also each road absorbed the switching charge of a competitor on freight to be hauled by it to industries on the competitors' tracks at Richmond. Other railroad companies, not competitors of those for the Southern business, entered Richmond and had switching facilities connecting with those of the competing roads. Such roads, however, did not absorb the switching charges on freight to be delivered to industries on the lines of the roads with which they were not in competition. Interstate Commerce Act Feb. 4, 1887, c. 104, § 2, 24 Stat. 379 (Comp. St. 1916, § 8564), declares that, if any common carrier subject to the provisions of the act shall directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered than it charges, demands, or receives from any other person, it shall be guilty of unjust discrimination. *Held*, that the industries located at Richmond on the several railroads should be considered a group of industries, and it was unjust and discriminatory for the competing railroad companies to make deliveries on their tracks without switching charges in case of competitive business, and to absorb same as to industries located on the competing lines, but to decline to furnish the same service with respect to industries located on noncompeting lines.

2. CARRIERS ⟸32(2)—DISCRIMINATION—DEFENSE.
In such case the competing carriers cannot escape the charge of discrimination because the delivery of the competitive shipments was wholly by rail connections.

3. CARRIERS ⟸32(1)—INTERSTATE COMMERCE COMMISSION—AUTHORITY.
The Interstate Commerce Act does not define the particular acts which constitute unlawful discrimination, and that question is left to the Interstate Commerce Commission.

4. COMMERCE ⟸95—INTERSTATE COMMERCE—AUTHORITY.
Findings of fact by the Interstate Commerce Commission in connection with unlawful discrimination are conclusive.

Woods, Circuit Judge, dissenting.

In Equity. Petition by the Seaboard Air Line Railway Company and others against the United States, to enjoin an order of the Interstate Commerce Commission. Denied and dismissed.

R. Walton Moore, Merrel P. Callaway, and Frank W. Gwathmey, all of Washington, D. C., for petitioners.

Joseph W. Folk, Chas. W. Needham, and Blackburn Esterline, Special Asst. Atty. Gen., all of Washington, D. C., and Richard H. Mann, U. S. Atty., of Petersburg, Va., for the United States.

William A. Glasgow, Jr., of Philadelphia, Pa., for Richmond Chamber of Commerce.

Before PRITCHARD and WOODS, Circuit Judges, and WADDILL, District Judge.

PRITCHARD, Circuit Judge. At certain points south of Richmond the Seaboard Air Line Railway Company, the Southern Railway Company, and the Atlantic Coast Line Railroad Company are competitors for traffic to and from that city. Each of these roads has switching facilities at Richmond connecting with the other. Each of them delivers traffic from competitive points to industries on its own tracks in Richmond at its tariff rate to Richmond, without extra charge for switching. Each of them charge, however, for carload freight received from a competitor from a competing point to be delivered to an industry on its own rails. To equalize the advantage which each has over the other as to industries on its own tracks, each of these roads absorbs the switching charge of its competitor on freight to be hauled by it to industries on its competitors' tracks.

Stating the matter more concretely, and taking Oxford, N. C., as a competitive point, the Seaboard Air Line delivers freight from that city to industries on its own rails without extra charge beyond its tariff to Richmond. For freight consigned over the Seaboard for industries located on the rails of the Southern or Coast Line, the Seaboard absorbs the switching charge of the Southern or Coast Line, so that the cost to the shipper is the same as if he had shipped over the Southern or Coast Line to the industry on that line. The same rules are applied to shipments from industries located on the several switches to competitive points.

The Chesapeake & Ohio Railroad Company and the Richmond, Fredericksburg & Potomac Railroad Company have switching facilities connecting with the other roads above named, but they are not competitors for the Southern business to and from Richmond. Basing the difference entirely on this absence of competition, the Seaboard, Southern, and Coast Line do not absorb the switching charges on any freight to be delivered to industries on the switches of the Chesapeake & Ohio and the Richmond, Fredericksburg & Potomac.

[1] Under a complaint of the Richmond Chamber of Commerce the Interstate Commerce Commission decided, three of the commissioners dissenting, that this method of business of the Seaboard, Southern, and Atlantic Coast Line was an unlawful discrimination against the industries on the Chesapeake & Ohio and the Richmond, Fredericksburg, & Potomac, under section 2 of the Interstate Commerce Act. The finding of the Commission is now before this court for review, under a petition filed by the Seaboard Air Line Railway Company, the Atlantic Coast Line Railroad Company, and the Southern Railway Company.

In addition to what we have said, the Commission, in pursuance of the principles underlying Wight v. United States, 167 U. S. 512, 17 Sup. Ct. 822, 42 L. Ed. 258, and I. C. C. v. Alabama Midland Ry. Co., 168 U. S. 144, 18 Sup. Ct. 45, 42 L. Ed. 414, found:

"That the practice of the Southern lines of absorbing switching charges only when the switching line actually competes with the line haul carrier on traffic to or from industries at Richmond under substantially similar circumstances and conditions as defined in section 2 is unlawful."

Section 2 of what is known as the Act to Regulate Commerce (24 Stat. 379) is in the following language:

"That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

The first question arising in this case is as to whether the industries situated on the following railroads: Richmond, Fredericksburg & Potomac, Seaboard Air Line, Atlantic Coast Line, Chesapeake & Ohio, and Southern—are to be treated as a unit; that is, a group of industries engaged in doing business at Richmond? If they are, then we think the solution of this problem becomes comparatively easy. All the shipments in question are billed to and received at Richmond, and are therefore similarly situated. It was obviously the intention of Congress, in the enactment of section 2, above quoted, to secure precisely the same kind of treatment for all industries that are similarly situated. We think that the cases of Wight v. United States, supra, and I. C. C. v. Alabama Midland Railroad Co., supra, are decisive of the points involved in this question. The Commission in reaching the conclusion that the defendant carriers were liable under section 2, and in discussing this phase of the question, among other things, said:

"If absorption practices are to be uniform, as defendants contend they should be, and if they are to be based upon a definite principle, there is no reason why that principle should not be uniformly applied. At Richmond a certain theory is employed because the Southern lines have agreed to employ it; at other cities an entirely different theory exists, not because of any difference in the matter of carriage, but because such different theory best suits the carriers serving those points. In other words, the Southern lines would apply the restricted theory wherever they can, and would conform to a different practice at places whose policy they cannot seriously influence. At Richmond, most of the competition experienced by the Southern lines is with each other, little coming from either the Chesapeake & Ohio or the Richmond, Fredericksburg & Potomac. If, therefore, they intentionally or accidentally agree upon a uniform absorption practice, there is no other carrier competition to prevent its execution.

"If it be true that absorption must be governed entirely by competitive influences, it may well be argued that only that competition which is compelling should be recognized. All of these defendants contend that absorption is compelled when there is competition with the switching lines, but the Southern carriers insist that this is the only competition which is compelling. If the shipment originate at a point common to all of the Southern lines, destined to an industry in Richmond on the tracks of the Chesapeake & Ohio, the traffic is certainly competitive to Richmond, but, because the Chesapeake & Ohio is not a competitor, the switching charge of that line is not absorbed. In other words, such traffic ceases to be competitive upon its arrival at Richmond. If the same car were destined to an industry on the rails of the Seaboard Air Line, the switching charge of that carrier would be absorbed by the Atlantic Coast Line or the Southern Railway, and such industry would have

an advantage over the Chesapeake & Ohio industry to the extent of the absorption. In the one case the shipper or consignee would pay only the Richmond rate; in the other, he would pay the Richmond rate plus the switching charge. The only justification offered for this advantage is that the Seaboard Air Line, Atlantic Coast Line, and Southern are rival roads, and that the transportation is therefore not performed under circumstances and conditions substantially similar to those attendant upon the transportation to the Chesapeake & Ohio industry. But the Supreme Court has said that 'the phrase under substantially similar circumstances and conditions, as used in the second section, refers to the matter of carriage and does not include competition between rival roads.' Wight v. U. S., 167 U. S. 512, 17 Sup. Ct. 822, 42 L. Ed. 258; I. C. C. v. Alabama Midland Ry. Co., 168 U. S. 144, 18 Sup. Ct. 45, 42 L. Ed. 414. In cases where the traffic moves from the same points of origin, and the switching charge is absorbed in the one case and not in the other, there is a violation of section 2, as the existence of competition in the one case and not in the other clearly does not constitute a substantial dissimilarity of circumstances and conditions. Even, however, in the case of traffic which moves from different points of origin, and where it may be that section 3 alone applies we do not think the competitive conditions relied upon are sufficient to constitute a substantial dissimilarity of circumstances and conditions within the meaning of that section. Traffic Bureau of Nashville v. L. & N. R. R. Co., 28 Interst. Com. Com'n R. 533. * * *

"We have found that the refusal of the defendants to absorb switching charges on some carload shipments at Richmond, while absorbing such charges on other carload shipments to and from that point, is unjust discrimination against the shippers who are required to pay such charges. * * * The defendants will be required to cease and desist from such discrimination in the future."

[2] It is strenuously insisted that in the case of Wight v. United States, supra, the transfers in question were made by drayage, and that, therefore, that case is easily distinguished from the case at bar. While it is true that the transfer in the Wight Case was not made by rail connection, nevertheless the result of what was done in that case, as respects discrimination, is precisely the same as in this case. The evil sought to be cured by the statute was discrimination in favor of one party as against another similarly situated, and we fail to understand upon what theory it may be said that the absorption or transfer charges which relieve the shipper from the payment of switching charges could be held to be different from a case where a railroad paid the drayage charges for one shipper and refused to pay the same for another.

Commissioner Harlan in his concurring opinion, referring to the Wight Case, among other things, said:

"As I have understood it, the court there lays down the broad general doctrine that, as between two shippers at the same rate point, competition between carriers does not excuse or justify a discrimination of the character condemned as unlawful under section 2 of the act. And a careful reading of the case seems not to permit of the suggestion that the court would have reached just the opposite conclusion if, instead of a horse and cart, the Baltimore & Ohio had hired a switching line to deliver the traffic to the industry on the rails of its competitor, and had thus accomplished, merely by the use of different facilities, precisely the same discrimination which, in the case under discussion, was declared to be unlawful."

The one was as much a discrimination as the other. Therefore we think that the Commission was correct in holding that the Wight Case

is determinative of the questions involved in those proceedings. To hold otherwise would simply result in the annulment of the plain provisions of the statute. It cannot be reasonably insisted that industries located on lines belonging to carriers other than the defendants, but receiving shipments at Richmond, do not constitute a part of the industries doing business at that place.

[3, 4] We are of opinion that the act in question confers upon the Interstate Commerce Commission the power of determining as to whether the services rendered are "like and contemporaneous"; also as to whether the respective traffic was "of a like kind." Further, as to whether the transportation was made under "substantially similar circumstances and conditions" (Texas & P. R. Co. v. I. C. C., 162 U. S. 197, 16 Sup. Ct. 666, 40 L. Ed. 940), while the act does not undertake to define the particular acts which constitute unlawful discrimination, it undoubtedly commits that to the Commission and its findings are conclusive. I. C. C. v. Ill. Cent. R. Co., 215 U. S. 452, 30 Sup. Ct. 155, 54 L. Ed. 280; I. C. C. v. D. L. & W., 220 U. S. 235, 31 Sup. Ct. 392, 55 L. Ed. 448; Pa. R. Co. v. International Coal Co., 230 U. S. 184, 33 Sup. Ct. 893, 57 L. Ed. 1446, Ann. Cas. 1915A, 315; United States v. L. & N. R. Co., 235 U. S. 314, 35 Sup. Ct. 113, 59 L. Ed. 245.

The findings of fact by the Commission are conclusive, and we concur with them in their conclusions of law. Therefore we are of opinion that the petitioners are not entitled to the relief for which they pray, and this being a case where only injunctive relief is sought the petition will be denied and the bill dismissed.

WOODS, Circuit Judge (dissenting). The facts are sufficiently stated in the majority opinion. The decision depends upon the application of the following sections of the Interstate Commerce Act:

"Sec. 2. That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

"Sec. 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

"Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be

construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business."

The controversy comes to this: If transportation to Richmond is to be regarded unitary, and the delivery to different industries on tracks of the different roads merely incidental to delivery in Richmond, and not a separate item of carriage, then all switching charges must be put on the same basis, under section 2. On the other hand, if the law contemplates that carriage to the depot of each railroad in Richmond, or to an industry on its own switch, is to be regarded as transportation to one destination, and transportation from the depot of each railroad to an industry on the switch of another railroad is to be regarded a separate act of transportation of another road to its ultimate destination, then the switching charges to industries on the different railroads may be charged differently under section 3 (Comp. St. 1916, § 8565) provided the difference is reasonable and founded on substantial difference in condition, and in determining whether there is a substantial difference in conditions the fact of competition may be taken into the estimate under that section.

Prior to its decision in this case, the Interstate Commerce Commission has always considered switching carriage as a separate service for which a separate tariff may be made. Leonard v. Chicago, etc., R. R. Co., 12 Interst. Com. Com'n R. 492; Curtis v. Southern Pacific R. R. Co., 23 Interst. Com. Com'n R. 372; Ohio, etc., Co. v. Chicago, etc., Co., 28 Interst. Com. Com'n R. 703. In the Curtis Case it is stated that this is the general practice of the railroads of the United States. The right of the carrier to treat the terminal charge as a different item of carriage and the different industries on the switch lines as different terminals is clearly recognized in Interstate Commerce Commission v. Stickney, 215 U. S. 98, 105, 30 Sup. Ct. 66, 67 (54 L. Ed. 112), in this language:

"By section 15 the Commission is authorized and required, upon a complaint, to inquire and determine what would be a just and reasonable rate or rates, charge or charges. This, of course, includes all charges, and the carrier is entitled to have a finding that any particular charge is unreasonable and unjust before it is required to change such charge. For services that it may render or procure to be rendered off its own line, or outside the mere matter of transportation over its line, it may charge and receive compensation. Southern Railway Co. v. St. Louis Hay & Grain Co., 214 U. S. 297 [29 Sup. Ct. 678, 53 L. Ed. 1004]."

Accordingly the United States Supreme Court has always considered the lawfulness and reasonableness of switching charges under section 3, and not under section 2. Pennsylvania Railroad Co. v. United States, 236 U. S. 351, 35 Sup. Ct. 370, 59 L. Ed. 616; Louisville & N. R. R. Co. v. United States, 238 U. S. 1, 35 Sup. Ct. 696, 59 L. Ed. 1177; Louisville & N. R. R. Co. v. United States, 242 U. S. 60, 37 Sup. Ct. 61, 61 L. Ed. 152.

Competition is a fact which both the carrier and the shipper have a right to have estimated in the decision whether terminal charges and differences in them are reasonable. Whether competition is a fact of

such practical importance in every instance as to justify terminal charges based on that alone is, of course, a question for the Interstate Commerce Commission. Interstate Commerce Commission v. Alabama, etc., R. R. Co., 168 U. S. 144, 166, 18 Sup. Ct. 45, 42 L. Ed. 414; Louisville & N. R. R. Co. v. United States, 238 U. S. 1, 35 Sup. Ct. 696, 59 L. Ed. 1177.

The view of the majority of the Commission is that to make a distinction in switching charges at Richmond or any other city based on competition between rival lines is to violate section 2 of the act. But that section was intended to enforce equality to shippers over the same line, and to prohibit any rebate or other device by which two shippers shipping over the same line, the same distance, and under the same conditions of carriage are compelled to pay different prices therefor. Interstate Commerce Commission v. Alabama, etc., Co., supra. Hence the conclusion of the majority of the Commission must necessarily rest on the proposition that a shipment over any road into Richmond has reached its railroad destination as soon as it reaches the railroad's terminal in Richmond, and that transportation by another road over its rails to the consignee is not a separate transportation on another line, but a mere incident of delivery, and that therefore all industries on any of the other roads must be put on a basis of equality without respect to competition. This conclusion was reached on the theory that the decision in the case of Wight v. United States, 167 U. S. 512, 17 Sup. Ct. 822, 42 L. Ed. 258, is inconsistent with the practice of the Interstate Commerce Commission, sanctioning the customs of railroads in making switching service a separate tariff item. I think it clear that this case has no such bearing.

The Wight Case relates entirely to an advantage given to one shipper, Bruening, over another, by a rebate of 3½ cents per 100 pounds, the cost of drayage from the railroad depot to his storehouse, in order to equalize his rate and to get his business from a competing road on which the industry was situated; whereas, Wolf, his competitor, whose storehouse was not situated on the competing road, had to pay his own drayage. In such case the court necessarily held that such a practice was not only in fact giving a rebate, in violation of section 2, but would open the door to the abuses which section 2 was obviously intended to prevent. The drayage there paid for by the railroad was not a part of railroad transportation. Switching by another road, after delivery to it, is a different act of railroad transportation on a separate line. In that case it was held that the railroad company could not, on the ground of competition, pay for a service entirely out of its line of business; but this decision gives no countenance to the idea that competition may not be taken into the account in fixing the tariff for railroad switching service.

Since transportation on a railroad switch to industries in a city located on other roads is carriage to a different destination, separate from the line haulage, and subject to a different tariff, it follows, under the decision above cited, that competition may be taken into consideration in fixing the charges, and that the petition should be granted.

The decision in which the majority of the Interstate Commerce Commission concurred was made on the ground that as a matter of law competition could not be taken into account in fixing switching charges in the circumstances stated. In this I think that there was error of law. Of course, I intimate no opinion as to whether competition in this particular instance furnished a reasonable basis for absorbing the charges for delivery on the switches of competing roads and not absorbing them on the switches on noncompeting roads. That is a question for the Commission, which this court has no power to anticipate.

I think the injunction should be granted.

In re NASH.

(District Court, S. D. West Virginia. March 20, 1918.)

No. 723.

1. BANKRUPTCY ⟸51—VACATION OF ADJUDICATION—MODE.
A motion, with notice, for the vacation of an order of adjudication on a voluntary petition in bankruptcy, is the proper procedure to raise the propriety of the adjudication.

2. BANKRUPTCY ⟸39—SUCCESSIVE VOLUNTARY PETITIONS—DISMISSAL OF PROCEEDINGS.
Under Bankruptcy Act July 1, 1898, c. 541, § 18g, 30 Stat. 551 (Comp. St. 1916, § 9602), providing that, upon the filing of a voluntary petition, the judge shall hear the petition and make adjudication or dismiss the same, a second voluntary petition in bankruptcy, by one who had within six years received a discharge on his first voluntary petition, should be dismissed, where the petitioner had no assets, and the only effect of the proceeding would be to hinder, delay, or defraud his creditors; and an adjudication already entered should, on such facts appearing, be set aside.

In Bankruptcy. In the matter of the bankruptcy of George L. Nash. On petition to dismiss the bankruptcy proceedings and revoke the adjudication. Adjudication of the bankrupt, and the bankruptcy proceedings, revoked, vacated, and set aside.

French & Easley, of Bluefield, W. Va., for petitioner.
Luther G. Scott, of Bluefield, W. Va., for bankrupt.

KELLER, District Judge. This case presents a question which so far as I have been able to discover, is a new one in some of its features. Section 18g of the Bankruptcy Act provides that:

"Upon the filing of a voluntary petition, the judge shall hear the petition and make the adjudication or dismiss the petition."

[1] In this case the petition itself presented grounds for the adjudication, and the adjudication went as a matter of course; but the petition did not show that the petitioner had in 1914 been adjudicated a bankrupt upon his voluntary petition and received a discharge from

his debts in August of that year. The present petition shows no assets, and the date of it shows that by no possibility, under the existing law, can the petitioner receive a discharge from the debts scheduled. Had these facts, namely, that the petitioner had received a discharge in August, 1914, together with the fact he had, at the time of filing his second petition, no assets, been disclosed by the petition, I think it would have been the duty of the judge, under the provisions of section 18g, to have dismissed the petition, because the only apparent object of such petition would have been to embarrass creditors in obtaining judgments and executions against the petitioner. The adjudication having been made, now comes a creditor, George E. Stupalsky, and files a motion, with notice, for the vacating of the order of adjudication and the setting aside of the said bankruptcy proceedings. This appears to be the proper proceeding upon a showing of sufficient grounds to justify action by the court. Collier on Bankruptcy (11th Ed.) p. 484.

[2] The petitioner, Stupalsky, strengthens the imputation as to the purpose of the bankrupt in filing his second petition by setting forth that he, having been indorser on a note for $25 made by Nash, and which he as such indorser had to pay, brought suit before a justice of the peace against Nash, and that Nash filed before the justice a copy of the order adjudicating him a bankrupt, and challenged the jurisdiction of the justice to award judgment. These facts appear to make a strong case for relief of the creditor, because the courts in bankruptcy were not instituted for the purpose of aiding men to delay or defraud their creditors, and in the present instance no purpose can be perceived in filing this petition in bankruptcy, except to hinder and delay, if not to defraud, creditors.

Two specific decisions have been cited by counsel for the bankrupt, but neither of them discloses facts similar to those arising in this case. In the case of In re Little, 137 Fed. 521, 70 C. C. A. 105, decided by Circuit Judge Jenkins, the facts were utterly dissimilar to those in the present case, because the six-year period would have expired before it became necessary for the bankrupt, under the law, to apply for his discharge, and in addition there were assets to be administered by the bankruptcy court. The latter case (In re Smith [D. C.] 155 Fed. 688) has no bearing, except upon the point decided in the Little Case, and with which decision I agree, that the question in relation to the provision of the Bankruptcy Act relating to a second discharge does not preclude a bankrupt from filing a second voluntary petition within six years from the date of his first petition. The present decision is based upon the ground that, there being no assets and no possibility of a discharge being granted, the petition necessarily has its inception in a fraudulent design to hinder and delay creditors, and is not a bona fide petition to the court, invoking its jurisdiction in the distribution of assets.

After a careful examination of the cases cited in support of bankrupt's position, and a study of other cases upon the subject, I am of opinion that those decisions are not in conflict with the relief sought

by petitioner, Stupalsky. In those cases the bankrupt surrendered assets and asked the bankruptcy court to equitably and ratably distribute same among his creditors. This is clearly in harmony with the spirit and purpose of the Bankruptcy Act, and I see no reason why such persons should not so invoke the aid of a court of bankruptcy, whether entitled to a discharge or not, which discharge, after all, is merely an incidental subsequent right or privilege, which may or may not be granted to the bankrupt, dependent upon conditions within which the bankrupt must place himself before securing same.

But the case at bar presents an entirely different situation. Here the bankrupt has apparently no property to be distributed. The only purpose or object, therefore, which could have actuated him to have filed his voluntary petition in bankruptcy, was to hinder and delay or defraud his creditors in the pursuit of their legal remedies against him. The Bankruptcy Act was enacted primarily for the benefit of unfortunate debtors, but the bankruptcy court at the same time is a court of equity, and the rights of creditors are entitled to consideration; and in this case to hold that Nash can, so often as he sees fit to do so, file a petition in bankruptcy and be adjudicated a bankrupt, surrendering no property for distribution, and well knowing that a discharge cannot be granted him, would, in my judgment, amount to a gross fraud and injustice upon his creditors, and arm him with means by which he could perpetually, by simply filing his petition in bankruptcy periodically, prevent his creditors from exercising their legal remedies against any property he might have or they might unearth. While the Bankruptcy Act was, as above stated, enacted primarily for the protection and benefit of embarrassed debtors, it was never intended to work hardships and possible injustices upon creditors.

For these reasons, the adjudication of the bankrupt, and the bankruptcy proceedings, are revoked, vacated, set aside, and annulled.

HASTINGS et al. v. DOUGLASS.

(District Court, N. D. West Virginia. March 15, 1918.)

1. MARRIAGE ⟸3—WHAT LAW GOVERNS.
The lex loci governs with respect to the matrimonial capacity of the parties, as well as with respect to the manner or form of solemnization or annulment of marriages.

2. COURTS ⟸260—FEDERAL COURTS—JURISDICTION.
Federal courts have no jurisdiction over the subjects of divorce and alimony.

3. COURTS ⟸260—FEDERAL COURT—JURISDICTION.
The federal courts have no probate jurisdiction and cannot undertake the administration of estates of decedents; that matter being vested in the state courts.

4. MARRIAGE ⟸60(1)—ANNULMENT—RIGHTS OF HEIRS.
Code Va. 1860, c. 109, § 1, in force at the time of the formation of West Virginia, declared that all marriages between a white person and a negro, and all marriages prohibited by law on account of either of the parties having a former wife or husband living, should be absolutely void without any decree of divorce, and that all other marriages prohibited on account of consanguinity or affinity, etc., should be void from the time they should be so declared by a decree of divorce or nullity. Code W. Va. 1868, c. 64, § 1, which has been continued in force, declares that all marriages prohibited by law or solemnized when either party was incapable, etc., shall be void from the time they shall be so declared by decree of divorce or nullity. Code W. Va. 1913, c. 64, § 4 (sec. 3639), declares that when a marriage is supposed to be void, or any doubt exists as to its validity, either party may institute suit for affirming or annulling the same, and the court shall render a decree affirming or annulling the marriage. *Held* that, after the death of a husband, his heirs at law could not, under the West Virginia laws, assail the marriage contract, so as to deprive the widow of her legal interest in his estate, on the ground that the husband was mentally incapable at the time he contracted the marriage.

5. COURTS ⟸307(1)—FEDERAL COURTS—WEST VIRGINIA.
Under Acts W. Va. 1915, c. 73, requiring plaintiff, assailing a marriage, to be a bona fide resident of the state, the federal District Court for West Virginia is without jurisdiction of a suit by the nonresident heirs of a West Virginia decedent, assailing his marriage with a resident of that state, for if they be treated as nonresidents, they do not fall within the terms of the statute, and if the heirs were treated as representatives of the decedent, so that his citizenship would control, there would be no diversity of citizenship.

6. COURTS ⟸262(3)—FEDERAL COURTS—JURISDICTION.
Where diversity of citizenship exists, the federal courts have jurisdiction to entertain suits for partition of the real estate of a decedent.

7. COURTS ⟸307(1)—FEDERAL COURTS—JURISDICTION.
Where nonresident heirs of a West Virginia decedent, all of whom were residents of the same state, sued in the federal District Court for West Virginia to annul his marriage with defendant, a resident of the state, and for partition of his real estate, the District Court cannot entertain jurisdiction of the proceedings, unless such heirs disclaim any right to assail the marriage, and acknowledge defendant's interest in the estate of the decedent, for, if her marital rights were destroyed, there would be no diversity of citizenship.

In Equity. Bill by Stephen B. Hastings and others against Daisy Grace Douglass. On motion to dismiss. Bill ordered dismissed, unless complainants file a disclaimer as to all right to assail defendant's marriage and acknowledge her interest in estate of her deceased husband.

H. H. Emmert, of Martinsburg, W. Va., and Nelson C. Hubbard, of Wheeling, W. Va., for plaintiffs.

Stuart W. Walker, of Martinsburg, W. Va., for defendant.

DAYTON, District Judge. S. P. Douglass died intestate in Berkeley county, this state, without issue. Shortly before his death he intermarried with the defendant, who survived him and has qualified as administratrix of his estate. He died seised of real and personal property estimated to be worth more than $40,000. The plaintiffs, his collateral heirs at law, all residents of the state of Pennsylvania, have instituted this suit in equity for two purposes: First, to have the marriage between decedent and the defendant, Daisy Grace Douglass, declared void because of mental incapacity on the part of decedent at the time of its consummation; and, second, to have the personal estate taken charge of by a receiver appointed by this court and the real estate partitioned among them, barring the defendant of any interest in either by reason of the invalidity of the marriage contract.

Upon this motion to dismiss counsel for defendant presents some very interesting questions of jurisdiction. He insists: (a) That the bill on its face shows its primary purpose to be to annul the marriage contract after the death of the husband, and that federal courts have no jurisdiction to entertain it for this purpose, because no diversity of citizenship existed between the husband and wife, and especially because the jurisdictional amount of $3,000 in monetary value cannot be shown to be in controversy. (b) That under the statutory law of West Virginia marriages solemnized in this state, when either of the parties was insane or physically incapacitated, are not void, but voidable—void only from and after the entry of a decree of a state circuit court, in a suit in equity, wherein it is shown that the parties, or one of them, have resided in the state for a year next preceding the institution of the suit, and that the county where it is brought is the one wherein the parties last cohabited, or (at the option of the plaintiff) the county in which the defendant resides, if a resident of the state, but, if not, the county in which the plaintiff resides, and that now, by reason of the amendatory act of the Legislature, passed in 1915, "in no case shall a suit for divorce be maintainable unless the plaintiff be an actual bona fide citizen of this state." He insists thereupon that (1) marriages are not, in this state, assailable at all after the death of a party thereto, or if so, (2) that these plaintiffs are debarred from assailing this marriage, because they are not and never have been residents of the state.

Again it is argued by counsel for defendant (c) that, if it be held that this suit can be maintained on the ground that it is a suit for partition of real estate, it, for this purpose, could only be so maintained after the court had first decided, adverse to the prayer of the

plaintiffs, that the marriage was valid, and that the widow was entitled as such to an interest in the estate; for, unless she be held to have such interest, the parties plaintiff would be the only ones having interest, and no diversity of citizenship, giving a federal court jurisdiction, would arise, it being shown by the allegations of the bill that all of these plaintiffs are citizens of the same state, Pennsylvania.

On the other hand, counsel for plaintiffs insist that jurisdiction in this court is secured by reason of the bill seeking partition of an estate in which the dower interest of the defendant assailed is largely in excess of the jurisdictional requirement, and diversity of citizenship, as between her and the plaintiffs, is admitted to exist; that the local law of the state regulating marriage and divorce is inapplicable, because, as affecting their property rights, the marriage contract, like any other contract, can be assailed and set aside by any court of competent jurisdiction at their instance.

[1, 2] To determine the right as to these conflicting contentions, so ably presented and argued by counsel, has been somewhat difficult, in view of the fact that a careful search of the precedents in West Virginia and Virginia (where the statutory provisions relating to the substantive law of marriage and divorce are practically the same) presents no case in point. This case, therefore, so far as such legislation is concerned, may be considered as one of first impression, and subject to original construction. The weight of authority establishes the rule that the lex loci governs with respect to the matrimonial capacity of the parties, as well as with respect to the manner or form of solemnization. See note to Hills v. State, 57 L. R. A. 155. The fact that no case is reported in either of the two states involving the questions here presented is significant, and to a certain extent indicates a general acquiescence in the construction I am herein led to place upon statutory provisions of this state.

Turning to the federal authorities, we find that the Supreme Court in Barber v. Barber, 21 How. 582, 16 L. Ed. 226, expressly "disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony, either as an original proceeding in chancery, or as an incident to a divorce a vinculo, or to one from bed and board." This disclaimer is approved in Simms v. Simms, 175 U. S. 162, 20 Sup. Ct. 58, 44 L. Ed. 115, but held not applicable to the jurisdiction of the territorial courts. The ruling in Re Burrus, 136 U. S. 586, 10 Sup. Ct. 850, 34 L. Ed. 500, is substantially to the effect that the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states. In De La Rama v. De La Rama, 201 U. S. 303, 26 Sup. Ct. 485, 50 L. Ed. 765, it is said:

"It has been a long-established rule that the courts of the United States have no jurisdiction upon the subject of divorce, or for the allowance of alimony, either as an original proceeding in chancery, or an incident of a divorce or separation, both by reason of the fact that the husband and wife cannot usually be citizens of different states, so long as the marriage relation continues (a rule which has been somewhat relaxed in recent cases), and for the further reason that a suit for divorce in itself involves no pecuniary value."

In Haddock v. Haddock, 201 U. S. 562, 26 Sup. Ct. 525, 50 L. Ed. 867, 5 Ann. Cas. 1, it is held:

"Questions concerning alleged fraud in contracting a marriage and laches on the part of one of the parties in bringing an action for divorce are matters solely of state cognizance, and may not even be allowed to indirectly influence this court in determining the federal question which is involved. The states, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce, and the Constitution delegated no authority to the central government in regard thereto, and the destruction of the power of the states over the dissolution of marriage as to their own citizens cannot be brought about by the operation of the full faith and credit clause of the Constitution of the United States."

The marriage contract is sui generis. It is the very foundation of society. In it, not alone the parties contracting are interested, but the state also. Under the laws of many states, both church and state must have part in its consummation. The consideration for it is the highest known to the law, and it is well settled that a man indebted to the extent of insolvency may enter into an antenuptial contract, conveying his property to the woman in consideration of her marriage to him, and that, under such contract, the wife will hold the property as against common creditors. Unlike most contracts, marriages can be assailed and avoided only upon such grounds as are specifically set forth in statute. These grounds are limited, and vary in different states. In South Carolina they cannot be annulled at all. The wisdom of the Supreme Court's disclaimer of jurisdiction over such contracts for these reasons becomes apparent. The surrender by the states of their powers through ratification of the federal Constitution was a limited one and did not include the right to regulate marriage and divorce. Each state, therefore, has the right to establish and maintain its own laws touching the subject, and every case must therefore be determined by the local law. For this reason, decisions of other states, having other and different regulations, are not generally pertinent. Therefore, although so far as available I have examined the cases from other states cited by counsel, I have been driven to the conclusion that the question of whether this marriage can be avoided after the death of the husband, to the extent of depriving the widow of her property rights, must be determined alone upon the construction to be given the West Virginia statutes.

[3] Before considering these, it seems pertinent to say that the prayer of the bill that a receiver be appointed to take charge of the personal property of the decedent can in no way aid the right of this court to take jurisdiction. It is admitted that the county court of Berkeley county, a court specially empowered by the laws of the state to administer the estates of deceased persons, has appointed the defendant administratrix of this estate; that she has given bond, qualified, and, under the supervision of that court, entered upon the discharge of her duties as such. That federal courts have no probate jurisdiction, and cannot undertake the administration of estates of decedents, has been decisively determined by the Supreme Court in such cases as Yonley v. Lavender, 21 Wall. 276, 22 L. Ed. 536, and Byers v. McAuley, 149 U. S. 608, 13 Sup. Ct. 906, 37 L. Ed. 867.

See, also, American Baptist Home Mission Society v. Stewart (C. C.) 192 Fed. 976, and Sutton v. English, 246 U. S. 199, 38 Sup. Ct. 254, 62 L. Ed. ——, decided by the Supreme Court on March 4, 1918, not yet officially reported.

[4] The statutory laws of West Virginia relating to marriage and divorce are contained in chapters 63 and 64 of the Code (Hogg's 1913), and the amendatory legislative act of 1915 (Acts 1915, c. 73). They substantially provide that no marriage shall be consummated in the state, except upon the license issued by the clerk of the county court, a bonded officer, who is required to ascertain the names, ages, and residence of the parties, and the consent of parent or guardian in case a party be under age. Marriages are required to be solemnized by a minister of the gospel, who is also required to execute bond before being qualified to solemnize them. The Code of Virginia of 1860, in force at the time of the formation of this state (chapter 109, § 1), provided:

"All marriages between a white person and a negro, and all marriages which are prohibited by law on account of either of the parties having a former wife or husband then living, shall be absolutely void, without any decree of divorce, or other legal process. All marriages which are prohibited by law on account of consanguinity or affinity between the parties, all marriages solemnized when either of the parties was insane, or incapable from physical causes of entering into the marriage state, shall, if solemnized within this state, be void from the time they shall be so declared by a decree of divorce or nullity, or from the time of the conviction of the parties under the third section of the one hundred and ninety-sixth chapter."

This provision was revised and amended by our first Code, that of 1868 (chapter 64, § 1), to read as follows:

"All marriages between a white person and a negro; all marriages which are prohibited by law on account of either of the parties having a former wife or husband then living; all marriages which are prohibited by law on account of consanguinity or affinity between the parties; all marriages solemnized when either of the parties was insane, or incapable from physical causes of entering into the marriage state, or under the age of consent, shall, if solemnized within this state, be void from the time they are so declared by a decree of divorce or nullity."

Without change, this provision, so revised, has remained the law of this state to the present day. It will at once be perceived that, under the provision of the Virginia Code, marriages between a white person and a negro and bigamous marriages were declared to be "absolutely void, without any decree of divorce, or other legal process," and the other classes enumerated should be "void from the time they shall be so declared by a decree of divorce or nullity, or from the time of the conviction of the parties under the third section of the one hundred and ninety-sixth chapter."

In our law, by this revision, marriages between whites and negroes, bigamous marriages, and all the other kinds enumerated in the section, are put upon the same basis—are made voidable—void only from the time they shall be so declared by a decree of divorce or nullity, and criminal conviction for the crime of contracting them no longer changes this status. See Stewart v. Vandervort, 34 W. Va. 524, 12

S. E. 736, 12 L. R. A. 50, and Martin v. Martin, 54 W. Va. 302, 46 S. E. 120, 1 Ann. Cas. 612.

To my mind these changes in the law are very significant. If the marriage contract could be only avoided by a divorce decree, then it is clear that no attack could be made upon it after death. But the statute says by a "decree of divorce or nullity." It is entirely conceivable that, without further limitation upon the words "or nullity" thus used in the statute, a marriage might, after death, by a decree, be declared to have been null, but there are further limitations upon these words in the statute. Section 4 of this chapter 64 provides:

"When a marriage is supposed to be void, or any doubt exists as to its validity, for any of the causes mentioned in the first section of this chapter, either party may institute a suit for affirming or annulling the same, and upon hearing the proofs and allegations of the parties, the court shall render a decree affirming or annulling the marriage, according to the right of the case. In every such case, and in every other case where the validity of a marriage is called in question, it shall be presumed that the marriage is valid, unless the contrary be clearly proven."

From this section, under the rule of exclusion, it would seem clear that only one of the parties to the marriage contract, during the time that it exists undissolved by death, can bring the suit to have it declared a nullity.

But it may be said that all this discussion has relation only to the rights and obligations of the marital couple while living; that, when death comes to one, the property rights of the survivor, as against heirs at law, at once changes, and the marriage contract is then to be judged by the general rules governing ordinary contracts.

I cannot think so. The right of a widow to maintain her social and legal position as widow is just as strong as was her right to maintain such position as wife. It would be grossly incongruous to allow heirs at law to assail marriages after death upon such grounds as fraud or misrepresentation in procurement, lack of consideration, or alleged failure on the part of the survivor in the performance of marital obligations to such extent as to constitute a breach of the contract. On the contrary, it seems clear to me that a number of reasons can be advanced to the effect that, if such contracts are allowed to be assailed at all after death, it must be only on such limited grounds as would denounce the contract as absolutely void ab initio.

I conclude, therefore, that under the laws of West Virginia heirs at law cannot, as attempted in this case, assail the marriage contract, after the death of the husband, so as to deprive the widow of her legal interests in his estate; that the right to assail the marriage contract is made by our law purely personal to the contracting parties, and survives to no one after the death of either.

[5] But, if this were not so, so far as this court's jurisdiction is concerned, if the provision of the act of 1915, requiring a plaintiff assailing the marriage to be a bona fide resident of the state, is applied, or if, to avoid this application, it be held that plaintiffs are representative of the decedent and that his citizenship is to control, the jurisdiction of this court is completely defeated. In the first

instance, the plaintiffs, as nonresidents of the state, would be barred by the express terms of the statute; in the second, no diversity of citizenship would exist.

[6, 7] But this bill is brought for a second purpose, to secure a partition of decedent's real estate. The jurisdiction of federal courts of equity to entertain suits for that purpose, where diversity of citizenship exists, seems to be established. Willard v. Willard, 145 U. S. 116, 12 Sup. Ct. 818, 36 L. Ed. 644; Daniels v. Benedict (C. C.) 50 Fed. 347; Aspen Mining & Smelting Co. v. Rucker (C. C.) 28 Fed. 220. The question at once arises: What relief can this court grant the plaintiffs in this regard? It is at once apparent that, if it allowed them to assail the marriage contract, and should, at their instance, decree it a nullity ab initio, then the dower interests of defendant would be nil, the land would belong to plaintiffs, all of whom are residents of the same state, Pennsylvania, and no diversity of citizenship would exist as a basis of jurisdiction, unless it should be under the rule that this court would, having assumed jurisdiction for the first purpose, retain it for the second.

The two remedies sought, however, seem to me to be so distinct in character and scope as to make the application of such rule improper. On the other hand, this court now holding that the marriage contract cannot be assailed and the dower interests of the defendant destroyed, or, if it could, that it, as a federal court, has no jurisdiction to take such action, it seems clear that jurisdiction to partition can only be assumed, in case plaintiffs disclaim all right to assail the marriage, acknowledge defendant's interests, dower and otherwise, in decedent's estate; and if they are not so prepared to do, the bill should be dismissed, as being multifarious, and for lack of jurisdiction. It is for plaintiffs to determine whether they will file such disclaimer within a reasonable time.

LOUISVILLE & N. R. CO. v. WESTERN UNION TELEGRAPH CO.

(Circuit Court of Appeals, Sixth Circuit. April 2, 1918.)

No. 2952.

1. EMINENT DOMAIN ⊂=47(3)—NECESSITY FOR APPROPRIATION.
Acts 1898, c. 49 (Ky. St. § 4679c), authorizing telegraph companies to condemn easements over the rights of way of railroad companies, allows judgment only for so much land as may be necessary; therefore, as necessity ordinarily underlies the exercise of such right, it must be assumed that some measure or degree of necessity shall be shown before the right of condemnation matures.

2. EMINENT DOMAIN ⊂=47(3)—NECESSITY OF TAKING—DETERMINATION.
The question of the necessity of a taking is a legislative one, and the necessity cannot be declared by telegraph companies, asserting the right to condemn an easement over a railroad right of way pursuant to the Kentucky statutes.

3. EMINENT DOMAIN ⊂=169—CONDEMNATION—CONDITIONS.
Acts 1898, c. 49, § 1 (Ky. St. § 4679c, subd. 1), after providing for condemnation by telegraph companies of easements for their lines along the right of way of any railroad, declares that the posts, arms, insulators, and other fixtures of such telegraph lines shall be erected and maintained in such a manner as not to interfere with the ordinary travel and traffic on such railroads, or with any other telegraph line already constructed on the right of way. *Held*, that the provision cannot be regarded as intending to formulate a hard and fast condition precedent, which might forbid any condemnation, but must be deemed intended to describe and characterize the nature of the right and easement which is to be condemned and to impose a continuing limitation on that right.

4. EMINENT DOMAIN ⊂=47(3)—CONDEMNATION—DEFENSES.
In view of Acts 1898, c. 49, §§ 4, 5 (Ky. St. § 4679c, subds. 4, 5), respectively providing that the jury shall assess the value of the land taken, and other incidental damages, and that testimony as to the value of the land taken and all actual damages that will accrue in the diminution of the value of the remainder of the right of way shall be admitted, the above provisions as to the construction of telegraph lines do not forbid a condemnation, though some interference with the railroad right of way will result.

5. EMINENT DOMAIN ⊂=138—DAMAGES—COMPUTATION.
Under the provisions requiring payment of damages for the land actually taken and occupied and for the diminution of the value of the remainder, while there is a taking of the pole-occupied area in the sense that compensation must be made, yet, as the easement is subject to be shifted, the value of the land taken should be computed in terms of damage to the remainder of the right of way.

6. EMINENT DOMAIN ⊂=321—CONDEMNATION—INTERESTS CONDEMNED.
Under Acts 1898, c. 49 (Ky. St. § 4679c), authorizing telegraph companies to condemn easements over the right of way of a railroad and providing that the line shall be constructed in such manner as not to interfere with the ordinary use of the railroad, a telegraph company, condemning a way, takes it subject to the duty of moving its line if necessary for the convenient operation of the railroad, and in case of necessity of removing the same from the railroad right of way entirely, for in view of the topography of Kentucky it must be assumed that the Legislature contemplated that there would be considerable railroad improvements in the future.

7. EMINENT DOMAIN ⊂=321—CONDEMNATION—REMOVAL OF EASEMENTS.
Under Acts 1898, c. 49 (Ky. St. § 4679c), the question whether a telegraph company should remove its line from the easement condemned over

a railroad right of way, on account of the interference with the operation of the railroad company, should be determined in good faith by the railroad company as if the telegraph line were its own.

8. EMINENT DOMAIN ⟸128(1)—DAMAGES—REDUCTION.
As a telegraph company, condemning an easement over a railroad right of way under Acts 1898, c. 49 (Ky. St. § 4679c), takes its easement subject to the duty of removing its line in case it is necessary to prevent interference with railroad operations, that fact should be taken into consideration in assessment of damages, and diminution of damages cannot be avoided on the ground that the offer of the telegraph company to so take its line was promissory only.

9. EMINENT DOMAIN ⟸120—RAILROAD RIGHT OF WAY—NEW USE—"RAILROAD PURPOSE."
The use by a railroad company of its right of way for construction and maintenance of its own telegraph, telephone, and electric signal lines is one for a railroad purpose, as modern railways cannot operate without such contrivances.

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

10. EMINENT DOMAIN ⟸108—CONDEMNATION—DAMAGES.
Where a telegraph company, under Acts 1898, c. 49 (Ky. St. § 4679c), condemns an easement over a railroad right of way for its telegraph line, the railroad company is entitled to damages for any interference with its own telegraph lines, as use of right of way for a railroad telegraph line is one for railroad purposes.

11. EMINENT DOMAIN ⟸108—CONDEMNATION—DAMAGES.
Where a telegraph company, which under a contract with a railroad company constructed a line on its right of way, abrogated the contract and secured an order restraining the railroad company from removing the telegraph line, the railroad company is, on condemnation proceedings under Acts 1898, c. 49 (Ky. St. § 4679c), entitled to compensation for additional expense, past and future, because it was forced to construct its own railroad telegraph line on a less advantageous part of the right of way.

12. EMINENT DOMAIN ⟸128(1)—CONDEMNATION—NOMINAL DAMAGES.
Where a telegraph company, condemning an easement over a railroad right of way under Acts 1898, c. 49 (Ky. St. § 4679c), obtained the most advantageous route for placing its line as a result of litigation following the termination of a contract between the companies, whereby the telegraph company had constructed a line on the right of way, the railroad company is not restricted to nominal damages, on the theory that the easement was ambulatory.

13. EMINENT DOMAIN ⟸108—CONDEMNATION—ELEMENTS.
In a proceeding by a telegraph company to condemn an easement for its line over a railroad right of way pursuant to Ky. St. § 4679c, the elements of damage, consisting of all the diminution in the value of the use of the remainder of the right of way and expenses to which the railroad company might be subjected, stated.

14. EMINENT DOMAIN ⟸207—DAMAGES—AWARDING.
On condemnation by a telegraph company under Ky. St. § 4679c, of an easement over a railroad right of way, the damages should be awarded as a unit.

15. EVIDENCE ⟸533—EXPERT OPINION—DAMAGES.
In a proceeding by a telegraph company to condemn an easement over a railroad right of way, where the question of damages depended on the diminution in value of the remainder of the right of way for railroad purposes, railroad men, familiar with the cost and effect of every operation which might be involved, are competent to testify to the damage, as

are telegraph men, familiar with construction and maintenance problems, so far as their knowledge extends; this being so, though such witnesses did not know the market value of the land occupied by the telegraph line.

16. EMINENT DOMAIN ⊂⊃232—STATUTES—CONSTRUCTION—VIEW.
Acts 1898, c. 49 (Ky. St. § 4679c), providing for condemnation by telegraph companies of easements over railroad rights of way, which declares that the jury shall not be required to go upon or view such right of way, is not open to attack on the ground that a view of the property was not permitted, but that question must be deemed to have been left to the discretion of the court.

17. STATUTES ⊂⊃112—TITLE—SUFFICIENCY.
Acts 1898, c. 49 (Ky. St. § 4679c), entitled "An act giving effect to so much of section one hundred and ninety-nine of the Constitution * * * as provides for the right to construct and maintain lines of telegraph within the state," and which authorizes telegraph companies to condemn rights of way, is not subject to attack on the ground that the condemnation provisions were not expressed in its title.

18. CONSTITUTIONAL LAW ⊂⊃42—OBJECTIONS—PERSONS ENTITLED TO URGE.
The contention that Acts 1898, c. 49 (Ky. St. § 4679c), authorizing condemnation by telegraph companies of easements over railroad rights of way, is invalid because of the provision that no notice need be given any mortgagee, cannot be urged by a railroad company, for one not injured cannot question the constitutionality of a law.

19. EMINENT DOMAIN ⊂⊃262(5)—REVIEW—HARMLESS ERROR.
Where it would have been the duty of the court to have directed a verdict on an issue in a condemnation proceeding, the refusal of the court to submit that issue to the jury was harmless, though erroneous.

20. JURY ⊂⊃19(11)—PROCEEDINGS—JURY TRIAL.
As it is evident, from a consideration of sections 4 and 6, prescribing forms for the oath and verdict, that Act Ky. 1898, c. 49 (Ky. St. § 4679c, subds. 4, 6), relating to condemnation by telegraph companies of easements for their lines along the right of way of any railroad, contemplates that the question of necessity and similar precedent conditions shall be decided by the court in advance, or separate from the jury trial concerning compensation, the fact that the proceeding is deemed an action at law, within Rev. St. U. S. § 566 (Comp. St. 1916, § 1583), for some purposes, does not, where condemnation proceedings under the statute are brought in the federal court, warrant jury trial on the question of necessity of the condemnation.

Knappen, Circuit Judge, dissenting in part.

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

Petition by the Western Union Telegraph Company against the Louisville & Nashville Railroad Company. There was a judgment of condemnation, assessing damages, and defendant brings error. Reversed and remanded.

Henry L. Stone, Edward S. Jouett, and Helm Bruce, all of Louisville, Ky., for plaintiff in error.

A. P. Humphrey and A. E. Richards, both of Louisville, Ky. (Rush Taggart and Albert T. Benedict, both of New York City, and Richards & Harris and Humphrey, Middleton & Humphrey, all of Louisville, Ky., of counsel), for defendant in error.

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

DENISON, Circuit Judge. The facts which led up to the present controversy are sufficiently detailed in our opinion in Louisville, etc., R. R. v. Western Union Co., 207 Fed. 1, 124 C. C. A. 573. Following out the theory upon which the telegraph company was there held entitled to a restraining order, it instituted, in the court below, a condemnation proceeding against the railroad company, for the purpose of acquiring the right to maintain its line in the position it was already occupying upon and along the railway grounds. The line along the right of way thus sought to be condemned, and lying in Kentucky, was about 1,000 miles long. There having been a preliminary determination by the court that the necessary precedent conditions existed, there was a trial before a jury as to the amount of damages, which resulted in a directed verdict for $5,000. Treating the whole proceeding as a trial at common law, the railroad company brings this writ of error. The assignments are ample to raise every existing question.

The disposition of many of the questions presented depends upon the construction and interpretation of the Kentucky statute (Acts 1898, c. 49 [Ky. St. § 4679c]), the pertinent parts of which we reproduce in the margin.[1] In that construction—so far as concerns most of the questions—we have no help from any decisions of the Kentucky Court

[1] An act giving effect to so much of section 199 of the Constitution as provides for the right to construct and maintain lines of telegraph within the state. (March 19, 1898.)

Sec. 4679c. 1. *Right of to Erect and Operate Lines.* That a telegraph company chartered or incorporated by the laws of this or any other state, shall, upon making just compensation, as hereafter provided, have the right to construct, maintain and operate telegraph lines through any public lands of this state, and on, across or along all highways and turnpikes, and across and under any navigable waters, and on, along and upon the right of way and structure of any railroad in this state: Provided, that the posts, arms, insulators, and other fixtures of such telegraph lines be erected and maintained in the usual manner of constructing, operating and maintaining telegraph lines on or along and upon the right of way of railroads, and on, across and along the highways, and across and under navigable waters, and in such manner as not to interfere with the ordinary use or the ordinary travel and traffic on such highways, railroads or waters, or that of any other telegraph line already constructed on the right of way of any railroad.

* * * * * * * * * *

3. *Petition for Condemnation Proceedings may be Filed.* That in case any telegraph company having the rights and privileges herein granted is unable to agree with such railroad or turnpike company for the exercise of such rights and privileges, such telegraph company may file its petition, sworn to by its agent, in the office of the clerk of the county court of any county in which any portion of such railroad or turnpike is situated or may run, and one proceeding shall be sufficient to condemn the right of way herein provided for of any railroad or turnpike in this state. Said petition shall designate the railroad or turnpike as the case may be, and the particular use, right, easement or privilege sought to be condemned, and shall state the name of the petitioner, where incorporated, how, and in what manner, and with what kind of material it proposes to construct its telegraph line, and that it has complied with the Constitution of this commonwealth in regard to such corporations seeking to exercise right of eminent domain.

* * * * * * * * * *

4. * * * A jury of twelve shall be impaneled, who shall be sworn by the clerk or judge of said court, as follows: "I do solemnly swear that as a mem-

of Appeals. The statute has been before the Kentucky court of last resort only twice, and then not upon matters of general construction. We therefore seek to ascertain the meaning, according to what seem to us the necessary inferences from the language used and from common knowledge of the situation involved, and from that viewpoint consider other decisions as far as they seem pertinent.

[1, 2] 1. This statute gives the right of eminent domain. A necessity for taking ordinarily underlies the exercise of such right, and statutes sometimes direct how that necessity shall be determined. See Lewis on Eminent Domain (3d Ed.) §§ 595–600. This statute contains no such direction, nor does it expressly require the judicial determination of any such general condition precedent. Clearly, however, there might be circumstances which would make the exercise of the right so unreasonable and arbitrary that we could hardly suppose the Legislature intended to permit it; and section 7 expressly contemplates that only so much shall be taken as is necessary. We think it safe to assume that some measure or degree of necessity must be shown or be presumed to exist before the right of condemnation matures. The telegraph company does not possess any fraction of the state's legislative power, and does not have power itself to declare a necessity, be-

ber of this jury, I will a true verdict render in this cause, assessing for the defendant the actual cash value of so much of its land as may be shown by the proof will be actually taken and occupied by the petitioner, and such other incidental damages, if any, as shown by the proof will accrue to the remainder of the right of way for the purpose for which it is held by the defendant, by reason of the construction of petitioner's telegraph line in the manner set out in the petition, so help me God."

5. *Evidence That may be Introduced—Measure of Damages.* That the court shall admit any relevant testimony either party may offer to prove the cash market value of the land that will be taken and occupied by the petitioner, and all actual damages that will accrue to the defendant in the diminution of the value of the remainder of its right of way for railroad or turnpike purposes, as the case may be, by reason of the construction of the telegraph line upon such right of way in the manner set out in the petition, and in considering incidental damages to the defendant, they may take into consideration any advantages that may accrue to the defendant as shown by the proof, by reason of the construction of such telegraph line.

6. *Verdict, Form of.* The jury shall not be required to go upon or view such right of way, and shall return their verdict on the form following: "We, the jury, assess the damages and just compensation to be paid ..... by the ..... to be dollars .....;" and the form of the verdict may be given the jury by the court.

7. *Judgment, Form of.* * * * "Now upon payment of said award either to the defendant or to the clerk of this court, and all costs in this behalf expended, said ..... telegraph company may enter upon said land and appropriate so much thereof as may be necessary, as prayed for in its petition."

* * * * * * * * * *

9. *Mortgagee need not be Notified—Proceeding if Mortgage on Land Condemned.* That no notice of the condemnation proceedings herein provided for, shall be given to any mortgagee of the defendant, but in the event there be any mortgage recorded in the county where such proceedings are had, upon the property condemned, then the damages and compensation awarded by the jury shall be paid to the clerk of said court, whose duty it shall be forthwith to mail written notice of such proceedings, and of said award, to the mortgagee or trustee named in said mortgage, who may contest with the said defendant for the same, if he sees fit to do so.

cause a legislative body may do so. See Sears v. Akron (March 4, 1918) 246 U. S. 242, 38 Sup. Ct. 245, 62 L. Ed. ——.

[3] 2. Embodied in the first section, and so perhaps to be considered as a condition of the grant, are these words (selecting only those now important):

"Provided, that the posts, arms, insulators, and other fixtures of such telegraph lines be erected and maintained in the usual manner of constructing, operating and maintaining telegraph lines on or along and upon the right of way of railroads * * * and in such manner as not to interfere with the ordinary use or the ordinary travel and traffic on such * * * railroads."

The telegraph line must be erected, operated, and maintained in the usual manner, and must not interfere with the ordinary use of, or traffic on, the railroad. We cannot regard this proviso as intending to formulate a hard and fast condition precedent which might prevent any condemnation, and this for three reasons: The first is that in the ordinary and typical case which the Legislature must have had in mind no such broad issue could arise. In almost any supposable situation (save in exceptional spots) a telegraph line could always be constructed and maintained in some suitable place along the railroad right of way, without constituting such an interference with the use of the property for railroad purposes as the Legislature could reasonably consider sufficient to prevent condemning at all. The second reason is that the provision as to maintenance cannot be a condition precedent to condemnation, and yet it is put precisely on a par with the condition as to construction, "be erected and maintained," and hence the provision as to the erection cannot be a general condition precedent. The third is that the language is not conditional in form. It is not "provided that the * * * lines" can be erected, etc.; it is an affirmative requirement that, if built, they "be erected and maintained," etc.

In our judgment the rare instances—if there are any—where interference with railroad use will be so inevitable, so extensive and so serious as to forbid condemnation at all only present a phase of "necessity"; and this proviso is intended to describe and characterize the nature of the right and easement which are to be condemned. The right to erect the poles and wires is given, but they must be so put up at the beginning, and always so maintained, as not to constitute the forbidden interference with ordinary use. The provision expresses, not a condition precedent, but a condition constant—a continuing limitation.

[4] 3. It is no part of the condition or limitation that the telegraph line shall not interfere at all with railroad uses and purposes; such a thought would be contrary to common knowledge and observation. No telegraph lines can be erected and maintained on a railroad right of way without interfering in some measure or degree with some of the uses to which the railroad may rightfully wish to put the occupied property.[2] To say that any such incomplete and partial in-

[2] Though a case may be conceived where the interference is so negligible as not to justify damages.

terference was contemplated by the proviso as a condition or limitation precedent would be to defeat the whole object of the statute, by providing that the condemnation and use should not occur except under conditions that never exist. Nor does the literalness of the language require any such sweeping view. It speaks of interference with "ordinary" use or traffic; it makes no reference to the supplementary uses which are rightful and sometimes necessary.

In this connection, it must be observed that section 4, with reference to the oath of the jury, and section 5, regulating the evidence, expressly provide that the railroad shall have, not only the value of the land to be taken and occupied, but such damages as "will accrue to the defendant in the diminution of the value of the remainder of its right of way for railroad * * * purposes." It is plainly inconsistent with this damage-defining provision to suppose that there can be no condemnation unless it has first been determined that there will be no impairment of the use of the remainder of the property for railroad purposes. We think the conclusion inevitable that the statute, taking its various parts together, has reference to two kinds or degrees of interference with such use of the property, and that only when the interference is so inevitable and so extreme as to seriously hamper ordinary use and traffic on the railroad is it intended that the condemnation proceedings should be dismissed, in whole or in part, for that reason.

It is well recognized that this "interference" may be insufficient to forbid condemnation and yet sufficient to justify damages. In Louisville Co. v. Western Union Co., 184 Ind. 531, 534, 111 N. E. 802, 803, Ann. Cas. 1917C, 628, the Supreme Court of Indiana considered—

"when such interference passes the stage where it may be compensated in damages and becomes so substantial and material as to preclude the right of * * * appropriation."

In applying a generally similar statute,[3] the Supreme Court of Tennessee, in Western Union Co. v. Railroad Co., 133 Tenn. 69, 714, 182 S. W. 254, 260, said:

"We deem the true rule to be that property already dedicated to a public use is in this respect on the same plane as other property, provided there does not exist a condition that would prevent condemnation—an interference with the first public use by the second so material as to 'obstruct' or seriously and extraordinarily impair the use for ordinary railway purposes, including telegraphic communication by means of the railway's own line of wires.

"If the interference goes to the extent of so obstructing the earlier use, the power to condemn is lacking; but the theory underlying our statute is that when the interference does not go that far, the inconvenience and impairment may be compensated for in damages and the taking for the second use permitted."

[5] 4. The damages to be recovered are for the land actually taken and occupied, and for the diminution of the value of the remainder. In the ordinary sense of most condemnations, no land is here "actual-

[3] The Tennessee statute uses the word "obstruct"; but "interfere with" and "obstruct" are in this situation essentially synonymous.

ly taken and occupied"; but the language is adopted from the familiar situation where it is more accurate. The total area upon which the poles and guy wire posts stand is negligible—perhaps two acres for the thousand miles—and the strip of land overhung by the cross-arms and wires is not appropriated in any exclusive way. "Taking" doubtless there is of this pole-occupied area and of this strip, in the sense that compensation must be made pursuant to the constitutional mandate; but when we find that even this "taking" is not specifically permanent, but is subject to be shifted to other positions (as we hereafter point out), we are unable to see any substantial distinction, as to compensation basis, between the land "actually taken" and the diminution of the remainder. It is impossible to know the value of what is "taken" in this qualified sense, except by measuring that value in terms of damage to the remainder. In its entirety, there is disclosed only the imposition of a shifting easement (in gross) upon a servient estate, involving the exclusive and permanent appropriation of no substantial body of property, but only lessening the value of the servient estate to its owner; and a distinction, created prima facie by the statute, between the taking of the one and the diminution of the other, is an artificial and unsatisfactory basis for assessing compensation.

Postal Co. v. Patton, 153 Ky. 187, 154 S. W. 1073, is not inconsistent with this conclusion. The Kentucky Court of Appeals had there a case where the facts permitted the full application of the statutory theory that there is a real taking of part of the property, and where, therefore, it was necessary to describe with certainty the property to be taken. That was the case of a telephone line constructed across farm lands, and the owner of the farm was deprived of his ordinary use of the entire width of the strip, which must be subject to travel and use for repair and maintenance. Upon this strip he could not safely plant crops in the ordinary way. The differences are obvious between that situation and one where the telegraph line is and continues to be subject to the right of the owner of the servant estate to use his property for its primary purpose. What is said in this paragraph is not intended necessarily to deny that the right or easement condemned may be part of the statutory "land actually taken and occupied" and may have an independent value because capable of sale or lease. The record does not present this question in any concrete way.

[6] 5. Considering, not only the language of the statute, but the familiar elements of the situation to which it referred, we must infer that there was no intent to give the telegraph company a permanent specific location, from which it could not be thereafter removed, except by a cross-condemnation proceeding—if at all. It was as well understood in 1898 as it is to-day that the necessary use of a railroad right of way for railroad purposes at any selected place was subject to constant development and increase. Changes of the roadbed in order to lessen the gradients always had been possible and were coming to be very common. They involve excavations and fills. Much of the Kentucky railroads is through rough and mountainous coun-

try, and vast amounts of such work must have been anticipated. Double-tracking upon trunk lines to meet increasing traffic was known to be necessary. It would often involve removing any telegraph line close to the previously existing single track. Much of Kentucky's railroad system consisted of trunk lines; and the Legislature could not have overlooked the obvious fact that the permanent maintenance of a telegraph line in any particular location upon a railroad right of way might forever bar the reasonably necessary excavation, regrading, double-tracking, signals, switch tracks, terminals or other proper uses by the railroad of its own property; nor could the Legislature have intended that the telegraph company must pay the enormous damages which alone could rightly compensate the railroad company for the permanent deprivation of these rights. We then find written into this statute the specific direction that the line shall be "erected and maintained" in such a manner as not to interfere with the ordinary use of the property for railroad traffic. No exigency of construction requires us to think that the probable uses which we have just specified and other similar ones were not among the ordinary uses in contemplation of the Legislature. We think this statute was passed and its language chosen in view of the well-known situation, and that a reasonable construction of the statute requires it to be interpreted as providing that the right taken by condemnation is one which must be exercised by original location where it will least interfere with railroad uses and which is burdened by a future liability to move to other parts of the right of way, if such moving becomes reasonably necessary to avoid the forbidden interference. In saying this, and in referring elsewhere in this opinion to the burden of removal resting upon the telegraph company, we refer only to a removal to some other location within the limits of the right of way. Such apparent necessity as might develop for removal entirely outside of those limits—if such a case may be supposed—involves a contingency which we do not consider.

[7] Such a construction of the statute and the mutual rights and duties thereby created present no greater practical difficulties than are common in some other relationships. The standard of good faith is a simple one, and what the railway company would do if the telegraph line were its own is the measure of that standard. In such case, if the telegraph line were in the way of some desired use, the railway company would balance the trouble and expense of transferring the line against the reasons in favor of the transfer, and would decide accordingly. So, when the wire line belongs to the telegraph company, and the railroad desires to use the space on or above the ground for other purposes. The reasonable convenience of both parties must be balanced; an arbitrary decision may not compel nor prevent a transfer. If there were otherwise difficulty about holding that telegraph company's location was subject to possible shifting rather than permanently fixed, that difficulty would be here removed, because neither party can complain of this conclusion. It favors the railroad company, and the telegraph company has, by its petition, consented.

[8] 6. The railroad company objects to those provisions in the petition and in the judgment which provide for the future moving of the telegraph line to meet future railroad necessities, and its objection is that these are promissory stipulations, which have no place in the proceeding, and which cannot operate to reduce the damages to be awarded, because the performance of these stipulations will be, in a practical sense, largely at the will of the promisor. In the ordinary condemnation, where an exclusive possession is to be awarded to the condemnor, it may well be that such promissory stipulations cannot control the damages, and the same result has been reached even in the condemnation of a telegraph line over a railroad right of way. Louisville Co. v. Western Union Co. 184 Ind. 531, 111 N. E. 802, 803, Ann. Cas. 1917C, 628. However, we construe this statute as intending that the easement condemned shall be an easement subject to these limitations. It is not important that the telegraph company makes a promise to remove its line; when the event occurs which makes moving necessary, the right to maintain this line in the former location ceases; the judgment of the court formulating this limitation may, and in the public interest should, prescribe the method by which the reasonable right of the telegraph company to move its line in its own way and at its own expense may be preserved; but the controlling principle is that ultimately the right further to maintain the line in the first location expires and the railroad company may remove it. From this point of view, it is clear that the objection of the railroad company against being subject to promissory stipulations must fail. In adopting this view, we concur with the Supreme Court of Tennessee in saying, as it did, in 133 Tenn. 691, at pages 706 and 707, 182 S. W. 254, 258:

"Under this construction the terms set out and acceded to by the petitioner are not to be considered contract terms. They are not party-imposed, or court-imposed, but law-imposed. Any subsequent shifting in the pole line is to be referred for basis to the statute's provision for the safeguarding of the railroad user. It does not and will not depend upon the volition of the condemnor. An easement for a telegraph line is to be condemned, subject to such non-contract provisions in favor of the railway. To guarantee the observance of such terms by the petitioner, the petition sets them forth and judgment goes in accord."

The same conclusion has been reached in other cases, though with more dependence upon the form of the petition than we should be inclined to approve. See St. Louis Co. v. Postal Co., 173 Ill. 508, 535, 51 N. E. 382; American Co. v. St. Louis Co., 202 Mo. 656, 101 S. W. 576.

[9-11] 7. The diminution in the value of the right of way for railroad purposes is to be assessed. It is clear to us that the use by a railroad of its right of way for constructing and maintaining its own telegraph, telephone and electric signal lines, is use for a "railroad purpose"; indeed, we do not find, in the elaborate briefs of counsel for the telegraph company, any denial of this proposition. The railroad orders are transmitted by telegraph and by telephone, block and other distance signals are controlled through the use of electric currents passing over the wires, and, as matters were in

1898 and are now, a railroad can no more operate without a telegraph, telephone, and electric signal system than it can without tracks or cars. Com. v. Louisville Co., 164 Ky. 818, 832, 176 S. W. 375; Western Union Co. v. Nashville Co., 133 Tenn. 691, 718, 182 S. W. 254.

It necessarily follows that, for such interference as the condemnation causes to the use by the railroad company of its right of way for its own wire line, the condemnor must pay damages; and since any absolutely necessary use is an ordinary use, it also follows that the line condemned must be originally located where it will cause the minimum of interference with railroad use of the property for its own telegraph line.[4]

This is the principle which seemingly must control such condemnation proceedings in cases where the railway company has selected its location and built its line and in cases where there is no telegraph line along the right of way, but the railway company is about to build. Under such circumstances there is strong support for the "preferential right" contended for by the railroad and upheld by the Georgia courts. Western & Atlantic Co. v. Western Union Co., 138 Ga. 420, 427, 75 S. E. 471, 42 L. R. A. (N. S.) 225; Louisville Co. v. Western Union Co., 142 Ga. 531, 83 S. E. 126. Nor do we think any difference in the result necessarily follows from the fact that the existing line was built by the telegraph company through arrangement with the railroad company for a joint use under a contract by which the railroad company, in substance, leased the right of way to the telegraph company and the telegraph company paid its rent by telegraph service rendered. When such a contract expires by the election of the telegraph company (as here occurred), it is not easy to see why its rights, when it is driven to condemnation, are any greater because it formerly had a lease. See Western, etc., Co. v. Western Union Co., 138 Ga. 420, 75 S. E. 471, 42 L. R. A. (N. S.) 225. In this case, when its line was built, there was no statute for condemnation, and the line must have been erected under the expectation that at the expiration of the lease the telegraph company, failing in a new contract, would get off. While these appear to be the applicable principles, we do not need to pass upon them in any absolute way. A peculiar condition has here arisen, and it must be met according to the facts as they are. In the years which have passed since this controversy arose, the railroad company has built its own line for a great part of the Kentucky distance now involved—perhaps now the greater part of the more important lines. This line is complete and performs all the service needed by the railroad in its railroad operations. It consists of a line of poles and wires, erected usually upon the opposite side of the right of way from that occupied by the telegraph company's line, but in places erected on the same side, but on higher poles. To require now that

[4] Since interference with the railroad's own telegraph line is covered by the reference to "railroad purposes," it follows that "other telegraph line already constructed," in the last clause of section 1, is intended for the protection of the existing line of another telegraph company.

the telegraph company should remove its line from its present location, in order that the railroad company might occupy that same location, would be doing a great injury to one party without any compensating advantage to the other. It is not to be supposed that the railway company desires now to take down its own line, recently erected at great cost, and move it to the location occupied by the telegraph company's line; indeed, we do not find the railroad company claiming any intention of doing so, generally, if the condemnation could be entirely defeated. It is true the railroad company has not erected this line voluntarily, but has been compelled to do so because the telegraph company, through the aid of the courts, has maintained its possession of the preferred line, and hence, the conclusion that the railroad company cannot exercise its theoretical preferential right cannot be based on any election by it; but we think it has sufficient basis in the fact that no other outcome is now practically possible, save to allow the parties to keep their respective locations and compensate the railroad company in damages for the additional expense, past and future, thus caused. Neither party can complain of this conclusion; the railroad company because the alternative—that it may evict the telegraph company from the right of way which the railroad company does not need—cannot be accepted; the telegraph company, because it has selected this preferred location, always insisted upon it, and practically evicted the railroad company therefrom.

[12] 8. The telegraph company urges that the railroad company is entitled only to nominal damages, and hence that questions of evidence on the subject of damages are immaterial. In a case where it is thought that the telegraph company's easement is ambulatory or shifting, and constantly subject to the changing needs of the railroad, and where the telegraph line is to be erected at the edge of the right of way, a pole length away from the track, and not interfering with any present or prospective telegraph line of the railroad company, there is room to contend that nominal damages are sufficient. This result has been reached in several cases more or less dependent upon the conditions just stated. These cases are collected and sufficiently considered by Judge Sanborn, speaking for the Circuit Court of Appeals of the Eighth Circuit, in Northern Pacific Co v. North American Co., 230 Fed. 347, 354, 144 C. C. A. 489, L. R. A. 1916E, 572; and, without intending to pass upon rental value as a measure appropriate to this case, we do not hesitate to apply Judge Sanborn's general conclusion to a case like this, and to hold that the nature of the railroad's property and the character of the easement condemned require substantial, rather than nominal, damages.

Even if the present case indicated nothing more than nominal damages as to the interest "actually taken," so far as that interest can be separately conceived, yet it is one for substantial damages with reference to the diminution of the value of the right of way for railroad purposes. This conclusion would result from the element of conflict with the plaintiff's telegraph line, even if there were

no other element of damages, but also from the other elements we hereafter indicate. The evidence strongly tends to show that the location which the telegraph company insists upon occupying and which must be conceded to it under existing circumstances is the natural and best one for the railroad company's line, and that the construction of the latter in other places makes it not only less convenient of use but much more expensive to build and maintain.

[13]. 9. Our conclusion that the telegraph company's location is not to be in all respects fixed and permanent affects much of the damage claimed on the trial; but after the revision necessarily following this conclusion, we think the testimony given or offered tended to show that damages to the railroad—that is to say, a lessening of the value of the right of way for railroad purposes—will arise from the following sources:

(a) The necessary use of the railroad property for the maintenance, changing, and repair of the telegraph line. In the adoption of the Patton Case (telephone) into the telegraph company law made by Louisville Co. v. Lang, 160 Ky. 702, 706, 170 S. W. 2, it is perhaps implied that the particular strip needed for access for repairs should be specified. We cannot take this implication as intended to decide the point. It fails to observe the difference between farm lands and a railroad right of way. It would be manifestly impracticable for telegraph company employés to travel or for new poles to be carried along any particular strip away from the track. Practically, these employés must use the railroad track or any part of the railroad right of way that may happen to be necessary. Indeed, there are some miles of this pole line which cannot be reached at all except from the track.

(b) The troubles and delays resulting from the necessary opportunity to be given the telegraph company to move its line when the existing location is sufficiently needed for trackage or structures, excavations or fills, unobstructed vision, or any railroad use, and from collecting the expense of making such removal from the telegraph company if the railroad does the moving itself.

(c) The additional expense, past or future, resultant upon the erection and maintenance and operation of the railroad's telegraph or signal line upon a location less desirable than that which would have been used except for the telegraph company's line. It can make no difference with this additional expense whether or not the railroad company intends to, or has the right to, carry commercial wires upon the same pole line and do a commercial business.

(d) The impairment of the most perfect utility to the railroad of its right of way and tracks in those particulars not sufficiently vital to justify the removal of the telegraph company's line to another location. For example, poles or guys or braces are said to embarrass operations of spreaders, wreckers, pile drivers, steam shovels, blasting work, etc. The fact that the railroad company has acquiesced in this situation for a period of years or desired the same location for its own line is sufficient to show the lack of that obstruction which would be fatal to condemnation; but it is not sufficient to prevent the railroad from claiming damages—if any there are—for these or

similar burdens after it has lost that joint interest in the telegraph line which may have compensated for the acquiescence, or when it is not to have the benefit which might counterbalance the burden.

(e) Additional expense caused by the presence of this additional telegraph line in the matter of keeping the right of way free from weeds and refuse. This duty was imposed by statute (Kentucky Statutes, § 790), but a similar right, if not duty, would exist without statute (Postal Co. v. No. Pacific Co. [C. C. A. 9] 211 Fed. 824, 827, 128 C. C. A. 350). Clearly, any method of keeping the right of way clear is likely to be somewhat more expensive, if there is standing upon it a line of poles to be taken into account. One of these methods is by fire, and the telegraph company offers to release the railroad company from any claim for injury to the poles by fire; but, in spite of such release, the railroad company must, for its own protection against the falling of poles upon its track, exercise great care to prevent the burning of a pole, and, as it would be liable only for negligence, this release does not seem important in the present computation of damages.

(f) Other additional expense of maintenance of way and structures and keeping track open. It is said that poles and wires obstruct ditch cleaning, that poles on a slope cause slides and washouts, that old ties and refuse cannot be so conveniently burned, and that fallen wires and fallen poles must be guarded against and removed.

(g) Any element of danger added to the railroad operations. This diminishes the value of the right of way for railroad purposes. If it is to be reasonably anticipated that poles may fall across the track, that telegraph wires may fall upon signal wires, and interrupt signals, or that the line of poles and cross-arms, particularly on a curve, may interrupt the enginemen's view of signals—all these under conditions which have not called for the removal of the telegraph company's poles and wires to positions of entire safety—this indicates a diminution in value for which the railroad should be compensated.

It is true that many of these elements touch upon the speculative, and yet they constitute the very considerations which the parties would rightfully take into account in negotiating a sale or lease or considering the offer which must precede condemnation; the payment of compensation cannot be postponed until the contingency happens, and the amount must be fixed now by the use of that sound judgment in estimating uncertainties which juries are commonly called upon to exercise.

[14] While it is necessary that both the witnesses and the jury should understand the facts in regard to these separate items and other similar ones, if other there are, upon which they may base opinions and verdict, yet, of course, the final question is as to the entire damages to be awarded as a unit. It may happen, as the record here suggests, that when elements of damage are taken separately and each considered by itself and fixed at an amount which the proof tends to support considering that element alone, yet that the sum total of all the amounts so reached will be so large as to be plainly unreasonable; and the jury may well be cautioned that it should

take proof or estimates of the specific elements of damage only as an aid in solving the general question how much the value of the railroad right of way as a whole is injured by the erection and maintenance of the telegraph line as a whole.

[15] 10. While it has often been held that the measure of damages, where an easement is condemned, is the difference between the value of the servient estate before and the value after the imposition of the easement, yet this is only a convenient formula. When it is applied to a case of fee title of property subject to sale, it is clear and simple; not so when applied to a railroad right of way which was not held for sale, and which had no market value either before or after condemnation. In such a case, the total of the acreage values of the railroad right of way will only be confusing. The important question is how much the condemned easement damages the right of way for use for all appropriate railroad purposes. No one can be more competent to testify on this subject than railroad men familiar with the cost and effect of every operation which is or may be involved. In the end, much of their testimony will be matter of opinion, but it is of the typical character where opinion evidence must be received because it is the best. It is not necessary that they know the value of the land, because this is not substantially involved; nor is it necessary that they should know former sales of similar rights, for perhaps there never have been any, and, if there have been, each sale was a matter of bargain depending on its own peculiar circumstances. Of course, telegraph men, familiar with actual construction and maintenance problems, would be competent witnesses, as far as their knowledge extended. For instructive application of these principles to conditions analogous to those now involved, see Sanitary District v. Pittsburgh Co., 216 Ill. 575, 583, 75 N. E. 248; Cochrane v. Com., 175 Mass. 299, 302, 56 N. E. 610, 78 Am. St. Rep. 491; Consolidated Co. v. Baltimore, 105 Md. 43, 54, 65 Atl. 628, 121 Am. St. Rep. 553.

[16] 11. The Kentucky statute, upon which the proceeding was based, is said to be unconstitutional for three reasons, viz.: (1) That a view of the premises was not permitted, whereby the owner was arbitrarily deprived of the best evidence of value; (2) that the title of the statute does not sufficiently express its subject, and (3) that it contemplates a final condemnation without notice to mortgagees. These three grounds are thought not to be covered by anything held by this court in Louisville Co. v. Western Union Co., supra., or by the Kentucky Court of Appeals in Louisville Co. v. Lang, 160 Ky. 702, 170 S. W. 2, in each of which decisions the statute was upheld against the contentions there urged. Regardless of whether the question of constitutionality is not res judicata between these parties, we are not impressed that these new objections are insuperable. The statute says "the jury shall not be required to go upon or view such right of way." Considering the very common practice in condemnation proceedings, as well as in all judicial controversies involving the value or condition of property, whereby the trier of fact is permitted, in the discretion of the court, to see the property (a practice recognized by other Kentucky

condemnation statutes), this provision should not be construed as depriving the court of all discretion to permit such view. Both its letter and its spirit are satisfied by holding that it intended that inspection and view of the premises should not be an essential prerequisite to a verdict. The Legislature hardly deliberated on the nice distinction—if there is any—between saying that the jury should not be required to view and saying that a view should not be required, and, with the latter form of words, "required" would naturally be taken as synonymous with "necessary." In many cases, a view of the property would be difficult, confusing, and not helpful; in many cases, it would be far the best possible evidence. The discretionary power of the trial court to permit or to refuse according to the nature of the case ought not to be destroyed, unless by the plainest language; and, to say the least, this language is not plain.

[17] As to the lack of sufficient title for the act, it is enough to say that the title is broad enough to include all provisions of the act, and that the failure of the title to indicate the means to be employed is not a defect so clearly fatal that we would be justified in overturning, on that ground, a statute which has been recognized and enforced by the Kentucky Court of Appeals.

[18] No mortgagee is complaining of lack of notice. If the telegraph company chooses to condemn and pay the award, and take the chance that it is not cutting off a prior right which may ripen into title through foreclosure, we do not see that the mortgagor is concerned in the constitutionality of the statute which expressly sanctions that practice. The Supreme Court has repeatedly refused to hear complaints about the constitutionality of a law, except from those who are hurt. Red River Bank v. Craig, 181 U. S. 548, 558, 21 Sup. Ct. 703, 45 L. Ed. 994; Jeffrey Co. v. Blagg, 235 U. S. 571, 576, 35 Sup. Ct. 167, 59 L. Ed. 364.

[19] 12. The court below had a preliminary trial, in the absence of the jury, in which it heard evidence and determined that there was necessity for the condemnation, and that the telegraph line, as proposed, would not interfere with the ordinary use of the railroad. The railroad company insists that, although trial by jury is not inherently necessary in condemnation cases, yet, under the Kentucky procedure, the form of a common-law trial rather than of an extrajudicial award has been adopted, and hence that the case is one where, by the federal Constitution and statutes, the trial must be by a jury. It is further insisted that the issues cannot be divided up, and part of them excluded from the jury trial.

We do not find it necessary to decide the question which the railroad company presents, so far as concerns the broad issues of necessity and of the forbidden, general interference. The undisputed facts here lead to the inevitable inference that whatever precedent general necessity the law contemplates was present, and that there would not be any such universal, necessary, and serious interference as would broadly forbid condemnation generally. St. Louis Co. v. Southwestern Co. (C. C. A. 8) 121 Fed. 276, 285, 286, 58 C. C. A. 198. Upon these issues it would have been the duty of the court to instruct the jury to find

for the telegraph company, and so it is quite immaterial whether the railroad company was entitled to a jury trial upon them.

[20] However, we infer from the record (the specific question has not been argued) that there are comparatively small fractions of the desired right of way as to which it may be reasonably claimed that the interference with the railroad use is too serious to permit condemnation. For illustration, there may be bridges or tunnels or other structures or short sections of the right of way already so fully occupied that there is no room for another telegraph line in addition to that to which the railroad is entitled for its own use—that is to say, where another line cannot be so placed that it will not substantially obstruct the use by the railroad of its right of way for some railroad purpose. It is not important to examine the details of the present record in this respect. Before another trial is had, conditions may have changed; and in view of the constant probability of such changes and the shifting character which we have ascribed to the easement to be condemned, the judgment finally entered will necessarily speak as of its date in fixing the specific location of the line of telegraph poles and in adjudging that particular location to be requisite; and a change in location thereafter could be demanded by the railroad only because of conditions later arising. Hence it appears that, upon the new trial, disputable questions of necessity—i. e., the forbidden degree of interference—may be found to exist as to specific locations here and there upon the line, regardless of whether the controlling conditions existed at the former trial or have arisen since. If the railroad company's telegraph line at these spots can be built—or, if already built, can be operated—with reasonable safety and without prohibitive expense, then an award of damages will meet the case; if not, these particular locations should be exempted from the condemnation. The judgment to be entered must also recognize the necessary change of location in all instances that have developed up to that time, where, under the principles which we have announced, the railroad had become entitled to require such change.

It is thus apparent that some aspects of the question, whether there must be a jury trial as to necessity for condemnation, or as to the existence of an obstruction to, or interference with, the railroad not rightly to be compensated in damages, are not eliminated, but remain to be decided, in spite of the fact that the effect of the decision will be applicable specifically, and not generally.

It has been expressly held that the right of jury trial secured by the Constitution does not necessarily extend to condemnation proceedings, which need not be in the nature of suits at common law (Bauman v. Ross, 167 U. S. 548, 593, 17 Sup. Ct. 966, 42 L. Ed. 270); but it is also held that, when the condemnation proceeding is put into the shape of a suit at law calling for the action of a court, it must be treated as a case which is removable (Madisonville Co. v. St. Bernard Co., 196 U. S. 239, 246, 25 Sup. Ct. 251, 49 L. Ed. 462), and as a suit at law in which the right to a jury to assess the damages or compensation is declared by R. S. § 566, U. S. Comp. St. 1916, § 1583 (Chappell v. U. S., 160 U. S. 499, 513, 16 Sup. Ct. 397, 40 L. Ed.

510). On the other hand, it is the approved practice, both in Kentucky (Warden v. Madisonville Co., 125 Ky. 649, 101 S. W. 914) and generally (American Co. v. St. Louis Co., 202 Mo. 656, 101 S. W. 576; Western Union Co. v. Louisville Co., 270 Ill. 399, 110 N. E. 583, Ann. Cas. 1917B, 670; Western Union Co. v. Louisville Co., 183 Ind. 258, 108 N. E. 951; Western Union Co. v. Nashville Co., 133 Tenn. 691, 182 S. W. 254; St. Louis Co. v. Southwestern Co., supra, 121 Fed. at page 285, 58 C. C. A. at page 207), unless the statute otherwise directs (e. g., section 8254, Mich. C. L. of 1915), that the question of necessity and similar precedent conditions should be decided by the court in advance of or separately from the jury trial concerning compensation. The Kentucky statute now involved plainly contemplates the practice, for the prescribed forms of oath and verdict relate to compensation only (see sections 4 and 6, supra);[5] and even in Chappell v. U. S., the trial court had determined the necessity before it summoned the jury (see 160 U. S. 502, 16 Sup. Ct. 398 [40 L. Ed. 510]), and this action was not questioned.[6]

We conclude that it is carrying the analogy too far to say that, because a condemnation proceeding is a suit at law within R. S. § 566 (C. S. § 1583), for some purposes, all parts of it must be so considered for all purposes. When we depart from the common-law forms and practice, there may be very distinct issues of fact in the same case, some of which are historically—and seem rightly—proper to be heard by jury and others of which are not. Finding the amount of compensation is another term for assessing damages, and this always has been a recognized function of a jury. The determination of whether there are instances of exception to the general necessity for condemnation in this case, and the exclusion of such fractions of the line, if there are any, from the general condemnation, require a flexibility of judgment and an adjustment of alternatives not peculiarly within the function of a jury as that function is fixed either by theory or by precedent. They approximate at least as closely, and perhaps more nearly, the customary powers of a court of equity. Considering the general—and so far as we know the invariable—practice (where not controlled by specific statute) that these precedent questions should be determined by the court separately from the assessment of damages and observing the lack of any authoritative decision to the contrary in the federal courts, we conclude that whatever trial is to be had concerning these specific locations should be—as it was on the trial under review—to the court and not to the jury.

The subject of compensation for the use of the rights now condemn-

[5] So far as the first part of the judgment form in section 7 intimates that the question of necessity went to the jury, it is not sufficient to overbalance the inference from the remainder of the statute.

[6] Perhaps this fact led the reporter to state in the syllabus (p. 499) that the only trial by jury required in such a condemnation as there involved was upon the question of damages, although the opinion does not consider the subject of a trial of the issue of necessity. The Fourth Circuit Court of Appeals, after a historical review, and in applying the constitutional right to jury trial, goes no further than to find the right to a jury to determine damages or compensation. Beatty v. U. S., 203 Fed. 620, 624–626, 122 C. C. A. 16.

ed and during the interval since the contract expired and the injunction was issued is not overlooked; but it is not distinctly presented by this record. We assume that it may hereafter arise in some form.

The proceedings upon the trial may be said to have been generally in accordance with the conclusions we have expressed; but it was otherwise in some vital particulars, and the finding of the court, the verdict of the jury and the judgment entered thereon must be set aside, and the case remanded for new trial upon the question of amount of compensation, and for such further hearing and decision upon the question of the forbidden interference in specific places as we have indicated may be open.

KNAPPEN, Circuit Judge. I concur, but with the qualification that I am not to be understood as recognizing that the telegraph company, after recovery in the condemnation proceeding and payment of compensation, is subject to liability of being ousted by the railroad company from the right of way, in whole or in part.

E. I. DU PONT DE NEMOURS & CO. v. SMITH.

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

No. 1585.

1. EXCEPTIONS, BILL OF ⟸43(1)—TIME FOR PRESENTATION AND ALLOWANCE.
   A bill of exceptions may be allowed by consent after the time fixed by order or rule of the District Court, and after the expiration of the term at which the case was decided.
2. EXCEPTIONS, BILL OF ⟸43(1)—FAILURE TO PRESENT WITHIN TIME GIVEN—WAIVER.
   On the entry of judgment for the plaintiff, the court made an order allowing defendant 30 days in which to present a bill of exceptions; there being no standing rule on the subject. The bill was not presented until after the 30 days, and after the term of court had expired, when it was signed by the judge; plaintiff making no objection, but signing a stipulation as to what should constitute the record in the appellate court. The writ of error was signed on the same day. *Held* that, under such facts, the writ of error would not be dismissed on the ground that the bill was not signed within the time fixed by the order.
3. APPEAL AND ERROR ⟸780(1)—GROUNDS FOR DISMISSAL—INADVERTENCE OF COUNSEL.
   The extreme penalty of dismissal of a cause by an appellate court without a hearing on the merits should not be imposed upon a litigant because of the inadvertence of his counsel, except in cases of flagrant neglect, or where the court is compelled by statute or clearly established practice to do so.

   Pritchard, Circuit Judge, dissenting.

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

Action at law by Leslie C. Smith, an infant, by M. H. Smith, his next friend, against E. I. Du Pont de Nemours & Co. Judgment for plaintiff, and defendant brings error. On motion to dismiss writ of error. Denied.

L. O. Wendenburg, of Richmond, Va., for the motion.

J. Gordon Bohannan, of Petersburg, Va. (Plummer & Bohannan, of Petersburg, Va., on the briefs), opposed.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

WOODS, Circuit Judge. This is a motion to dismiss a writ of error on the ground that the bill of exceptions was not presented and signed within the time fixed by the order of the District Court. Judgment was entered against the defendant on the 3d of August, 1917. In the absence of a fixed rule on the subject, the District Judge made an order allowing the defendant 30 days thereafter in which to present his bill of exceptions. On the 27th of August defendant's attorney wrote to the plaintiff's attorney, inclosing a proposed order for an extension of 10 days after the adjournment of the term of the court. Having received no answer, on September 3d he wrote another letter, requesting that consent be indorsed on the proposed order. No reply was made to either of these letters; the plaintiff's attorney in his affidavit saying that the letters were not received, and defendant's attorney saying that he inferred from the failure to respond that the plaintiff's attorney had consented to the enlargement of the time. After the term had ended, on the 2d of October, 1917, the bill of exceptions was presented to the District Judge and signed by him in the presence of counsel for the plaintiff. At the same time counsel for plaintiff signed a stipulation as to what should constitute the record for the Circuit Court of Appeals. The writ of error was signed on the same day.

[1] When the time within which an act necessary to bring a cause to this court by writ of error or appeal is fixed by statute, this court has no power to relieve against the failure to comply with the statute, and the District Court has no power to take any steps looking to the perfection of an appeal or writ of error after it has lost jurisdiction. Hence, if the writ of error had not been granted in this case within six months, this court would be obliged to dismiss it. Old Nick Williams Co. v. United States, 215 U. S. 541, 30 Sup. Ct. 221, 54 L. Ed. 318. It is settled beyond question, however, that a bill of exceptions may be allowed by consent after the time fixed by order or rule of the District Court and after the expiration of the term at which the case was decided. Waldron v. Waldron, 156 U. S. 361, 15 Sup. Ct. 383, 39 L. Ed. 453; Jennings v. Philadelphia, etc., Co., 218 U. S. 255, 31 Sup. Ct. 1, 54 L. Ed. 1031. It follows from this holding that the District Court does not completely lose its jurisdiction after the expiration of the term, for, if it did, consent would not avail. The case first cited lays down the rule that if the bill of exceptions be allowed after the time fixed, either by consent or by an order of the court, and after the expiration of the term, it will be sufficient unless the point was expressly saved by objection made at the time to the allowance.

[2] In this case, after the expiration of 30 days fixed by the order, and after the expiration of the term, the bill of exceptions was allowed

by the District Court, and it does not appear in the record that any objection was made by counsel for defendant in error to the allowance. Unless, therefore, the case of Waldron v. Waldron, supra, has been overruled, the defendant in error cannot avail himself of the failure of the counsel for the plaintiffs in error to have the bill of exceptions signed within 30 days and before the expiration of the term. The authority of the Waldron Case to this effect was expressly recognized in Old Nick Williams Co. v. United States, 215 U. S. 541, 30 Sup. Ct. 221, 54 L. Ed. 318. These cases are not overruled, either expressly or impliedly, by Jennings v. Philadelphia, etc., Co., supra. There the appeal had been allowed and perfected. The Supreme Court of the District of Columbia had thus lost control and jurisdiction of the case by its removal to the Supreme Court of the United States. That the case is thus distinguished from Waldron v. Waldron, supra, and the case now before us, is obvious from this language of the court:

"The proceeding was coram non judice. The appellee was not in court, or before a court. The judge and the court had lost all power over the cause, the parties, and the record."

Under these circumstances the court held that the failure of the appellee to object to the allowance of the bill of exceptions could not avail the appellant, evidently for the reason that the cause was no longer in the lower court. The court says:

"So grave a matter as the allowance of a bill of exceptions after the close of the term and after the court had lost all judicial power over the record should not rest upon a mere implication from silence. There should be express consent, or conduct which should equitably estop the opposite party from denying that he had consented."

We think it clear, therefore, that the Supreme Court of the United States did not intend, in Jennings v. Philadelphia, etc., Co., supra, to overrule, without mentioning, the important case of Waldron v. Waldron, supra. The distinction is that in the latter case, as in this case, the District Court had not lost its control of the case by the perfection of the writ of error or appeal, while in the Jennings Case the Supreme Court of the District of Columbia had lost its control by the allowance and perfection of the appeal to the Supreme Court.

The evidence of consent to the allowance of the bill of exceptions and waiver of the time is very strong. The record does not show that any objection was made. The signing of the stipulation by counsel for plaintiff as to what should constitute the record, without the reservation of any technical rights, goes far to show waiver of all irregularities that were not jurisdictional. The case is thus even stronger against the defendant in error than was the case of Waldron v. Waldron, supra.

[3] We have the strong conviction that the extreme penalty of dismissal of a cause without a hearing on the merits should not be imposed upon a litigant for the inadvertence of his counsel, except in flagrant cases of neglect, or where the court is compelled by statute or clearly established practice to do so. In such cases orderly procedure may be well maintained by the infliction of the penalty of costs on the defaulting party or his attorney.

In our opinion, therefore, the motion to dismiss should be denied, but upon the condition that the counsel for the plaintiff in error pay the sum of $50 for costs of this motion as a penalty for his inadvertence.

Motion denied.

PRITCHARD, Circuit Judge (dissenting). I regret exceedingly that I cannot concur in the action of the majority of the court in refusing to grant the motion to dismiss the writ of error in this case. The judgment complained of was rendered by the District Court of the United States for the Eastern District of Virginia in this cause on the 3d day of August, 1917, at the April term, 1917, of the court, which term of court expired on the 29th day of September, 1917, when an order was entered adjourning and ending this term of the court; that on the 1st day of October, 1917, a new term, known as the October term, 1917, of that court, began; that on the 3d day of August, 1917, the day on which the judgment complained of was entered the court entered an order as follows:

"Memorandum. During the progress of the trial of the above-styled case the defendant by its attorney noted sundry exceptions to the rulings, action, and judgment of the court, and leave is given it to file its bills of exceptions within 30 days from this date."

While it appears that the lower court had no standing rule, nevertheless this order was tantamount to a rule of the court as respects this case. The plaintiff in error not only failed to file or have the judge of the lower court sign the bills of exceptions, or any of them, within the time prescribed by the order, but also failed to do this at any time during the April term of the court. However, on the 2d day of October, 1917, this being the second day of the October term, the defendant below filed, and the District Court signed for the first time, each and all of said bills of exceptions without the consent of the plaintiff below. As we have stated, it appears that there was no rule or practice of the court below under which bills of exceptions could have been signed at the October term, unless further time had been granted during the April term; and it further appears that no order was entered at the April term of the court enlarging the time within which bills of exceptions might be filed. I find nothing in the record to justify the contention that these bills of exceptions were signed by consent. The term of court having expired, without the time having been extended within which to file bills of exceptions, the court had no authority to permit the bills of exceptions to be filed.

In the case of Reliable Incubator & Brooder Co. v. Stahl, 102 Fed. 590, 42 C. C. A. 522, the Circuit Court of Appeals for the Seventh Circuit in a per curiam opinion, among other things, said:

"* * * The document sought to be brought up is not mentioned in the bill of exceptions, was in no way made a part of the record, and, if contained in the transcript, could be of no more significance upon the motion to strike out the bill of exceptions than when satisfactorily proved by affidavit. There can be no doubt that the paper was sent by counsel for the defendant in error to the clerk of the court, and it was perhaps placed on file; but the assertion that it was filed by plaintiff's attorney on July 13th, besides being

an evident mistake, is not clearly consistent with the statement in one of the affidavits 'that the court then and there signed the bill of exceptions, without objection being made or exceptions taken.' On the entire showing, it is evident that the attorneys for the defendant in error, at the time the bill was filed, and possibly until they came to examine the printed transcript, believed that there had been a regular extension of time for the signing and filing of the bill. It is certain that on July 3d they learned of the extension ordered three days before, and not unnaturally they may have assumed that that order was made within the time of a previous extension which had been duly ordered. Their mistake in that respect, however, did not alter the fact that during the term at which the judgment was rendered no order was entered allowing time beyond the term for signing and filing the bill, and did not place the plaintiff in error in a worse position than if the specific objection to the signing of the bill had been interposed at the time of signing. There is no proof which tends even remotely to show a purpose to waive the objection, or to consent to the signing of the bill out of proper time. When, during the term at which a judgment is rendered, it is proposed to allow time beyond the term for the filing of a bill of exceptions, it is well that a notation of the fact be made upon the docket of the court, or by an entry upon the order book; but when, after the term, the bill is presented for signature, it should contain an explicit statement of the extension, such as to demonstrate that both the signing and the filing are within the time allowed, or, if a waiver of the time is to be asserted, a distinct statement of the fact of consent by counsel or party present at the time of signing, or, what would be still better, a written agreement indorsed upon or attached to the bill showing that consent. Under no ordinary circumstances, if at all, will affidavits be received to show such consent—certainly not when the fact is disputed, as it is here. Indeed, it is not clear that consent after the expiration of the term is available. In Waldron v. Waldron, 156 U. S. 361, 378, 15 Sup. Ct. 387, 39 L. Ed. 457, it is said, 'The signing of the bill of exceptions after the expiration of the term at which the judgment was rendered was lawful, if done by consent of parties, given during that term.' It may be, however, that the cases cited do not go that far. Hunnicutt v. Peyton, 102 U. S. 333, 26 L. Ed. 113; Davis v. Patrick, 122 U. S. 138, 7 Sup. Ct. 1102, 30 L. Ed. 1090. * * * The suggestion that, by the order giving time for the preparation and filing of the transcript of the record in this court, the Circuit Court retained jurisdiction of the case for the purpose of signing the bill of exceptions, is manifestly untenable. The motion to strike out is sustained."

In Preble v. Bates (C. C.) 40 Fed. 746, the court said:

"* * * I conceive the rule to be this: That a bill of exceptions must be signed at the term in which judgment was rendered. This rule is subject to certain exceptions, dependent upon special circumstances, which, however, it is not necessary to consider in this case. * * *"

Also in the case of Reader v. Haggin, 160 Fed. 909, 88 C. C. A. 91, the Circuit Court of Appeals for the Second Circuit, said:

"* * * This court has repeatedly held that after the expiration of the term at which the cause was tried, unless the court reserves control over the case by rule or order, it is too late to allow a bill of exceptions. * * *"

In the case of United States v. Jones, 149 U. S. 262, 13 Sup. Ct. 840, 37 L. Ed. 726, the bills of exceptions were signed after the final adjournment of the court for the term at which the judgment was rendered. In discussing this phase of the question the Chief Justice said:

"* * * No order was entered extending the time for its presentation, nor was there any consent of parties thereto, nor any standing rule of court which authorized such approval. The bill of exceptions was, therefore,

improvidently allowed. Muller v. Ehlers, 91 U. S. 249 [23 L. Ed. 319]; Jones v. Grover & Baker Sewing Machine Co., 131 U. S. Appx. cl [24 L. Ed. 925]; Michigan Insurance Bank v. Eldred, 143 U. S. 293 [12 Sup. Ct. 450, 36 L. Ed. 162]. As the errors assigned arise upon the bill of exceptions, we are compelled to affirm the judgment; and it is so ordered."

Oxford & Coast Line R. Co. v. Union Bank of Richmond, Va., 153 Fed. 723, 82 C. C. A. 609, is very much in point. In that case this court said:

"* * * In the absence of a rule to the contrary, a party against whom there is a judgment in an action at law is entitled to prepare and file a bill of exceptions during the term at which the case was tried relating to questions reserved at the trial. However, in the district in which this case was tried there is a rule of court which only allows 20 days in which to prepare and file a bill of exceptions. Notwithstanding this rule, the court had the power to extend the time in which to prepare and file a bill of exceptions, provided it did so within the 20 days; but, once the court permitted the 20 days to expire, then it no longer had the power to extend the time, and the case would stand just as though the term had expired. This court, in the case of Yellow Poplar Lumber Co. v. Chapman, 74 Fed. 448, 20 C. C. A. 507, in commenting on the practice as to bills of exceptions, among other things, said: 'It is now a rule of practice universally followed in the courts of the United States that an exception to the ruling of a trial judge cannot be considered in the appellate court, unless it was duly noted during the trial, and preserved in a bill of exceptions, which was presented to and allowed by the court at the term during which the trial was had, or within a time provided for by an order entered during such term, or where it has been allowed under the standing rules of the court, or with the consent of the parties, or under such circumstances as clearly show that it was the intention of the court to, and that it did, retain by special order the control of the matter, for the purpose of examining, allowing, and signing the bill of exceptions.' * * *"

Mr. Justice Blatchford, in the case of Chateaugay Ore & Iron Co., Petitioner, 128 U. S. 552, 9 Sup. Ct. 152, 32 L. Ed. 508, in commenting on the rules of the Circuit Court for the Southern District of New York relative to the time allowed for the presentment, allowance, and signing of bill of exceptions, said:

"* * * And if the party omit to make a bill within the time above limited, unless the same shall be enlarged as aforesaid, he shall be deemed to have waived his right thereto."

The neglect of counsel for plaintiff in error cannot be said to be excusable, in view of the facts as they appear in the records. It should be borne in mind that counsel for plaintiff in error lived in Petersburg, within 40 minutes' ride of the office of the clerk of the District Court; but he failed to appear before the court below for the purpose of filing his bills of exceptions within the 30 days' time granted him in the court's order of August 3d. He simply contented himself by writing counsel for defendant in error, asking consent for a further extension of time, and admits that he never received any reply to these letters. Failing to hear from counsel for defendant in error, it was the duty of counsel for plaintiff in error to see counsel for defendant in error, who lived in Richmond, in person; but this he failed to do. If he had done so, no doubt opposing counsel would at that time have agreed to a further extension of time.

The rules as respect the preparation of a case to be brought here on writ of error are plain and explicit—having been interpreted by almost every Circuit Court of Appeals, as well as the Supreme Court, and it must be assumed that counsel are fully cognizant of their requirements. A failure to observe the same in a case like this can only tend to confusion and must ultimately lead to a demoralization of the procedure of this court. Mr. Justice Story, in his work on Equity Pleading (section 544), in commenting on the necessity of adhering strictly to the prescribed forms of procedure, says:

"The want of due form constitutes a just objection to the proceedings in every court of justice, for to reject all form would be destructive of the law as a science, and would introduce great uncertainty and perplexity in the administration of justice. Every irregularity of this sort is fraught with inconvenience, and generally tends to delays and doubts. And it has been well remarked that infinite mischief has been produced by the facility of courts of justice in overlooking errors of form. It encourages carelessness and places ignorance too much on a footing with knowledge amongst those who practice the drawing of pleadings."

In the case of Oxford & Coast Line R. Co. v. Union Bank of Richmond, Va., supra, this court also said:

"* * * While it is not the policy of the court to dismiss writs of error and cases on appeal on account of slight technicalities, at the same time the rules of this court, as well as the rules of the Circuit Court, are plain and easily understood. In this instance the provision of the statute relating to the question at issue is mandatory and must be enforced. It is incumbent upon attorneys who practice in the federal courts to observe and strictly follow the rules of practice and procedure in preparing and presenting bills of exceptions. In the case of Michigan Ins. Bank v. Eldred, 143 U. S. 298, 12 Sup. Ct. 452, 36 L. Ed. 162, the court, among other things, said: 'The duty of seasonably drawing up and tendering a bill of exceptions, stating distinctly the rulings complained of and the exceptions taken to them, belongs to the excepting party, and not to the court. The trial court has only to consider whether the bill tendered by the party is in due time, in legal form, and conformable to the truth; and the duty of the court of error is limited to determining the validity of exceptions duly tendered and allowed.' It is essential to the orderly procedure of the courts that attorneys should comply with the rules relating to the same; otherwise, it would be useless to promulgate rules for the guidance of those who may seek to review the action of the lower court."

Therefore, it appearing that the bills of exceptions were not filed within the time granted by the court, and it further appearing that the time was not extended by consent, it follows that this court should have granted the motion to dismiss the writ of error.

In view of the court's refusal to dismiss the writ of error, I confess that I cannot understand why counsel for defendant in error should be required to pay the sum of $50 as a penalty, inasmuch as the court has found that counsel is only guilty of excusable neglect.

For the reasons stated, I think the court should have granted the motion to dismiss.

In re PHŒNIX HARDWARE CO.

LONG et al. v. CHRISTY.

(Circuit Court of Appeals, Ninth Circuit. March 5, 1918. Rehearing Denied May 13, 1918.)

No. 3011.

1. CORPORATIONS ⟸89(1)—STOCKHOLDERS—LIABILITY.
   Where corporate stock was issued without subscription, the stockholders are liable to assessment, just as if they had been subscribers.
2. CORPORATIONS ⟸228—UNPAID SUBSCRIPTIONS—LIABILITY.
   A corporation's unpaid subscriptions are a trust fund for the benefit of the general creditors of the corporation, and may be reached on the insolvency of the corporation.
3. CORPORATIONS ⟸232(1)—STOCKHOLDERS—LIABILITY.
   Organizers of a corporation, who delivered to it a stock of goods and in exchange received the capital stock of the corporation, are, the value of the stock of goods being very much less than the par value of the capital stock, liable to general corporate creditors for the difference, though the transaction as between themselves and the corporation could not be questioned.
4. CORPORATIONS ⟸268(5)—PETITION TO ASSESS STOCK.
   Where the petition of the trustee of a bankrupt corporation, seeking to assess the outstanding capital stock on the theory that it had not been fully paid in, alleged that the holders were subscribers, and the proof showed that the stock was issued without subscription, the variance was immaterial; the liability of the stockholders being the same in each case.
5. LIMITATION OF ACTIONS ⟸66(4)—RUNNING OF STATUTE—BALANCES DUE ON UNPAID CAPITAL STOCK.
   Balances due upon unpaid capital stock of a corporation do not become payable, so as to start the running of limitation, until there has been a call or assessment.
6. CORPORATIONS ⟸246—STOCKHOLDERS—LIABILITY.
   The liability of a subscriber for the capital stock of a corporation is several, and not joint.

Appeal from the District Court of the United States for the District of Arizona; William H. Sawtelle, Judge.

In the matter of the bankruptcy of the Phœnix Hardware Company, a corporation. Petition by Charles B. Christy, as trustee in bankruptcy, against J. B. Long and others, to assess the outstanding capital stock of the bankrupt corporation. A decree of the referee levying an assessment was affirmed on review to the District Court, and the defendants, stockholders, appeal. Modified and affirmed.

This is a proceeding instituted in the bankruptcy court to assess the outstanding capital stock of the bankrupt corporation, the Phœnix Hardware Company, for the purpose of raising funds with which to pay the creditors of the bankrupt concern. The Phœnix Hardware Company was incorporated March 19, 1907, with a capital of $50,000, consisting of 500 shares, at a par value of $100 each. The board of directors was to consist of three stockholders, to be elected annually; the following named persons being designated in the articles to serve as directors until their successors were elected, to wit: J. B. Long, J. W. Long, and M. West. On the same day that the articles of incorporation were executed, the board of directors held a meeting, at which J. B. Long was elected president, J. W. Long secretary, and W. J. Kingsbury

statutory agent. Subsequent to this time there were never any meetings held, either of the stockholders or of the directors, of which minutes were kept or recorded. In fact, no other board of directors was ever elected than that named in the articles of incorporation.

Immediately prior to the organization of this company, a few days perhaps, J. B. Long and M. West purchased a stock of goods from the Arizona Hardware & Vehicle Company, an insolvent concern, for the sum of $9,950, or near that figure, the invoice value of which was about $20,000. This stock was turned over to the Phœnix Hardware Company in consideration of the entire capital stock of the company, and the stock was issued as follows, as shown by the stock books:

To M. West.....250 shares.
J. B. Long.....130 "
J. W. Long..... 80 "
Margaret M. Long..... 40 "

The referee finds that the subscribers to the capital stock paid $10,000 for the entire capital stock of the company, that by agreement the amounts paid on the subscriptions by each of the subscribers were credited thereon, and the balance unpaid of the par value of the stock was in effect credited by discount, and that the stock account between the bankrupt corporation and the subscribers was balanced. In pursuance of his findings, the referee levied an assessment upon the capital stock of the company of 33 per cent. allowing credits to the subscribers in amounts equal to the proportion of $10,000 each had paid and was credited with on the stock books, and entered a several order against each of the stockholders requiring payment of the sum found due upon the assessment. Upon review to the District Court, the orders and decrees of the referee were affirmed in all particulars, except that the stockholders were rendered jointly and severally liable for the several amounts found due under the assessment. The stockholders have prosecuted an appeal to this court.

W. J. Kingsbury, of Tempe, Ariz., and Joseph S. Jenckes and Struckmeyer & Jenckes, all of Phœnix, Ariz. (Metson, Drew & MacKenzie and E. H. Ryan, all of San Francisco, Cal., of counsel), for appellants.

J. C. Forest, of Phœnix, Ariz., for appellee.

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

WOLVERTON, District Judge (after stating the facts as above). [1] Appellants insist that there were no subscriptions to the capital stock of the Phœnix Hardware Company, and that the entire capital stock having been exchanged for the stock of merchandise, it was not liable to assessment for payment of the debts of the corporation.

As to the subscriptions, it is probably true that there were none such made in name, but there is no doubt that the stock was issued to the parties named and they became the holders thereof. As such holders, they would become equally liable for the payment of calls upon the stock as if they were originally subscribers thereto. A subscriber agrees to take and pay for the shares as calls are made, and a holder is liable for the calls until the stock is fully paid. So the objection that the holders of the stock were not subscribers, or even that the stock was never subscribed, is without merit. The stock was issued, and the liability arises in either event.

[2, 3] It is urged that at common law corporation creditors cannot hold stockholders liable on stock issued for property. Whatever

it may be, we need not discuss nor determine the rule at common law in this regard. A doctrine has been established in the United States which is altogether sufficient for resolving the present controversy. We refer to what has been termed the "trust" doctrine as applied to unpaid subscriptions on the capital stock of a corporation. The Supreme Court, in Sawyer v. Hoag, 17 Wall. 610, 620 (21 L. Ed. 731), says:

"Though it be a doctrine of modern date, we think it now well established that the capital stock of a corporation, especially its unpaid subscriptions, is a trust fund for the benefit of the general creditors of the corporation. And when we consider the rapid development of corporations as instrumentalities of the commercial and business world in the last few years, with the corresponding necessity of adapting legal principles to the new and varying exigencies of this business, it is no solid objection to such a principle that it is modern, for the occasion for it could not sooner have arisen."

So in Sanger v. Upton, Assignee, 91 U. S. 56, 60 (23 L. Ed. 220), the court said:

"The capital stock of an incorporated company is a fund set apart for the payment of its debts. It is a substitute for the personal liability which subsists in private copartnerships. * * * It is publicly pledged to those who deal with the corporation, for their security. Unpaid stock is as much a part of this pledge, and as much a part of the assets of the company, as the cash which has been paid in upon it. Creditors have the same right to look to it as to anything else, and the same right to insist upon its payment as upon the payment of any other debt due to the company."

The doctrine has subsequently been reaffirmed in several cases. County of Morgan v. Allen, 103 U. S. 498, 26 L. Ed. 498; 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; Richardson's Executor v. Green, 133 U. S. 30, 10 Sup. Ct. 280, 33 L. Ed. 516; Camden v. Stuart, 144 U. S. 104, 12 Sup. Ct. 585, 36 L. Ed. 363.

Some limitation has been impressed upon the doctrine by later adjudications, and, as now interpreted, it relates to the capital stock or assets of a corporation that has either suspended its business or has become insolvent, and whose assets have been placed in a court of equity, or other proper tribunal, and are in the course of administration for final settlement and distribution. 4 Thompson on Corporations (2d Ed.) § 3431; Hollins v. Brierfield Coal & Iron Co., 150 U. S. 371, 14 Sup. Ct. 127, 37 L. Ed. 1113.

In Scovill v. Thayer, supra, it was held, among other things, that a contract of a corporation with its stockholders that they should never be called upon to pay any other assessment than that paid at the outset, while good as between the corporation and the stockholders, was a fraud in law upon creditors, which could be set aside whenever their rights intervened and their claims were unsatisfied.

Clark v. Bever, 139 U. S. 96, 11 Sup. Ct. 468, 35 L. Ed. 88, is relied upon as supporting appellants' position. This case, along with Fogg v. Blair, 139 U. S. 118, 11 Sup. Ct. 476, 35 L. Ed. 104, and Handley v. Stutz, 139 U. S. 417, 11 Sup. Ct. 530, 35 L. Ed. 227, is referred to in Camden v. Stuart, supra, and the court says of them that they were not intended to overrule or qualify in any way

the wholesome principle adopted by the court in the earlier cases, and that they were only intended to draw a line beyond which the court was unwilling to go in fixing liability upon those who had purchased stock of a corporation, or had taken it in good faith in satisfaction of their demands.

Now, to apply the principle thus ascertained in the present case: The stock of merchandise of an insolvent concern was purchased by J. B. Long and M. West for $9,950. Immediately the Phœnix Hardware Company was incorporated, with a capital stock of $50,000, and the merchandise stock was turned into the company, in exchange for the whole of its capital stock. A board of directors was named in the articles of the corporation, and nothing else was done, except that it is shown that the articles were filed with the county recorder and the territorial auditor. The stock was issued, one half to M. West and the other half distributed among J. B. Long and his family. While the agreement to exchange $50,000 of capital stock for a stock of merchandise purchased for less than $10,000 would be binding as between the company and the stockholders, such an arrangement cannot always stand the test when the creditors are to be considered, and especially when the corporation has been overtaken by insolvency and bankruptcy. The creditors, when extending credit to the company had a right to believe that the concern had a bona fide capitalization of $50,000. With such a capitalization, it had the air of a big business concern, calculated to attract large credit. J. B. Long and M. West might have started business with the stock of merchandise when they purchased it. In that event, they would have been personally liable to their business creditors. By a promotion of the incorporation of the hardware company, and a turning of the business over to it, which was really all they did, they shifted that liability to the company, and relieved themselves.

Now, if it were designed that the company should start with a business capital equal only to the value of the stock of merchandise, it would have been fair to prospective creditors so to represent by capitalizing the company at that amount. Such a course of transaction could not have been characterized as a false representation to creditors. What these parties did, though in promoting the project, was to capitalize the concern at more than five times the value of the stock of merchandise, and then to accept the stock in payment thereof. Thus they constructed, apparently, a very substantial and reliable business entity, and so represented it to the business world. Yet they attempt to escape all stock liability by saying that they took the stock over as fully paid up in exchange for the stock of merchandise. Such a project or scheme is a fraud at law upon the prospective creditors of the corporation, and when the corporation is found to be insolvent the stockholders cannot be heard to say that their stock has been fully paid up. The unpaid stock must be regarded as a trust fund for the benefit of the creditors until they are themselves fully paid. The referee was right in allowing the value of merchandise as payment on the capital stock, but beyond that the stock was liable to assessment.

Nor do the cases of Coit v. Gold Amalgamating Co., 119 U. S. 343, 7

Sup. Ct. 231, 30 L. Ed. 420, and Bank of Ft. Madison v. Alden, 129 U. S. 372, 9 Sup. Ct. 332, 32 L. Ed. 725, help the appellants. In the former, property of the estimated value of $137,000 was put into the company in payment of $100,000 par value of stock. The court said in that case:

"If it were proved that actual fraud was committed in the payment of the stock, and that the complainant had given credit to the company from a belief that its stock was fully paid, there would, undoubtedly, be substantial ground for the relief asked. But where the charter authorizes capital stock to be paid in property, and the shareholders honestly and in good faith put in property instead of money in payment of their subscriptions, third parties have no ground of complaint."

In the latter case it was simply held that a stockholder in an insolvent corporation, who has paid his stock subscription in full by a transfer of a tract of land, in good faith and at an agreed value, for the use of the company's business, is not liable in equity to a creditor of the corporation, who had knowledge of and assented to the transaction at the time when it took place, solely on the ground that the land turned out to be less valuable than was agreed upon.

Emphasis is laid by appellants upon the declaration by these authorities that actual fraud must be shown. It must be observed that the cases lay stress upon the good faith of the transaction as well. In the present case, the very project devised bears the impress of actual fraud, and is so flagrant as to dispel all idea of good faith. The suggestion that the capital stock was of no value at the time is without force. It constituted the measure of the capitalization of the company, and this is really what was important from the standpoint of persons who were asked to extend credit to the company.

[4] These considerations also dispose of the error assigned to the court's ruling in overruling the demurrer to the petition. If there was any irregularity relating to the petition, it was that there was a variance between the proofs and the allegation. The petition alleges a subscription. The proofs show that the stock was issued without the formality of a subscription. The stockholders were rendered liable in either event, so the variance was immaterial.

[5] The next assignment of error relates to the statute of limitations. Balances due upon unpaid capital stock do not become due and payable until there has been a call or assessment. The call in the present case was made by the referee in bankruptcy well within the period of the Arizona statute of limitations, and hence the statute has not run. This conclusion is so well within the case of Scovill v. Thayer, supra, which was concerning a bankruptcy matter, that it is unnecessary to discuss the question further than to cite the case.

The point made that the trustee had not collected the outstanding bills receivable is without merit. He made reasonable effort to collect them, and was unable to do so, except in slight measure.

[6] An objection is made to the decree that it is joint and several against all the stockholders. The order and decree of the referee in bankruptcy was several only, and the District Court by its decree rendered the liability joint and several against all. In this the court was in error. "The liability of a subscriber for the capital stock of a com-

pany is several, and not joint." Hatch v. Dana, 101 U. S. 205, 210, 25 L. Ed. 885. See, also, Converse v. Hamilton, 224 U. S. 243, 32 Sup. Ct. 415, 56 L. Ed. 749, Ann. Cas. 1913D, 1292, and 10 Cyc. 679.

The decree of the District Court will be modified to conform to this holding; otherwise it will be affirmed, with costs in this court to appellants.

FAY v. HILL et al.

(Circuit Court of Appeals, Eighth Circuit. February 23, 1918.)

No. 4869.

1. EQUITY ⟸220, 362—TRIAL ⟸11(3)—BILLS—GROUNDS FOR DEMURRER—ADEQUATE REMEDY AT LAW.
   Under equity rule 22 (198 Fed. xxiv, 115 C. C. A. xxiv), the fact that there is a complete and adequate remedy at law is no ground for demurrer or motion to dismiss a bill, but the proper procedure is to move to transfer it to the law side.
2. TRIAL ⟸11(3)—TRANSFER—WAIVER.
   Failure to move to transfer a bill to the law side on the ground that there is a complete and adequate remedy at law, and proceeding to a hearing, is a waiver of the objection.
3. APPEAL AND ERROR ⟸1046(1)—FAILURE TO TRANSFER EQUITY CASE—HARMLESS ERROR.
   Where a bill to cancel a contract of a sale, on which the buyer had already begun an action, at least stated an equitable defense, it was immaterial that the bill was not transferred from the equity side, for, had it been transferred and treated as an answer to the action at law, it would have been disposed of by the court sitting as a chancellor before the trial of the action at law to the jury.
4. TRIAL ⟸4—EQUITABLE DEFENSE—DISPOSITION.
   Where an equitable defense is interposed in an action at law, it will have to be disposed of by the court sitting as a chancellor before the trial of the action at law to the jury.
5. CANCELLATION OF INSTRUMENTS ⟸32—JURISDICTION OF EQUITY.
   A bill seeking to cancel a contract of sale on the ground that it was obtained by fraud and deception, and that the minds of the parties had never met, states a case for equitable relief.
6. APPEAL AND ERROR ⟸1009(1, 4)—REVIEW—EQUITY CASES—FINDINGS OF FACT.
   In an equity case, findings of fact of the trial judge, who heard the testimony, are entitled to high consideration, and unless clearly against the weight of the evidence, or induced by mistaken view of the law, will not be disturbed by the appellate court.
7. SALES ⟸45—FRAUD—WHAT CONSTITUTES.
   As misrepresentations may be as well by artifices to mislead or concealment as by positive assertions, an individual, who for speculative purposes attempted to buy linseed oil for future delivery over a long period of time, must be deemed guilty of fraud, warranting cancellation of the contract, where he was insolvent and transacted his business under a purported corporate name, indicating a capital and commercial rating.
8. SALES ⟸36—MEETING OF MINDS.
   Where through telegraphic correspondence an individual acting under a purported corporate name bought linseed oil in large quantities for future delivery, and the seller, though diligent in making inquiry, acted under the mistaken belief that the buyer was a corporation of resources,

there was no meeting of the minds, and the seller, having been diligent, was entitled to rescind the contract.

9. EQUITY ⟸13—GROUNDS—HARDSHIP.
When hardship amounting to injustice would be inflicted on a party by holding him to his apparent bargain, it is within the jurisdiction of equity to relieve him.

10. SALES ⟸418(4)—BREACH—DAMAGES.
A purchaser of linseed oil for future delivery cannot, the seller having canceled the contract, recover damages in an action at law, where at the time of the cancellation the market price of the oil was less than the contract price.

11. EQUITY ⟸39(1)—JURISDICTION—SCOPE.
A court of equity, having obtained jurisdiction of a suit wherein cancellation of contract of sale was sought, will retain the jurisdiction to dispose of all controversies between the parties arising out of the transaction.

Sanborn, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Bill by Hugh Hill and Eugene Taylor, doing business as Edward Hill's Son & Co., against William Fay. From a decree for complainants, defendant appeals. Affirmed.

This is an appeal from a decree declaring two contracts between the parties to this action void, and enjoining the prosecution of an action at law based upon these contracts. The facts, briefly stated, are that the appellant was a civil engineer, residing in the city of St. Louis, without any commercial rating, and without any means, except a homestead, which was subject to a mortgage for nearly its full value; that in May, 1910, one Eberson, a manufacturer of paints, decided to enter the business of manufacturing linoleum, using a pigment, which he supposed would enable him to manufacture it successfully. He adopted the name of "Western Linoleum Manufacturing Company," intending to incorporate it thereafter, but which was never done. Appellant, a civil engineer, was to superintend the erection of the plant, for which he was to receive 10 per cent. of the total cost as compensation. He was not to receive any salary, nor any of the profits made in the operation of the plant, when operated. The plant was never erected; Eberson abandoning the enterprise. The appellant rented an office, placing on it a sign, bearing the name suggested by Eberson, "Western Linoleum Manufacturing Company." During the months of May, June, and August, 1910, he purchased some linseed oil, to be paid for in cash upon delivery, all of which, except one carload, was purchased and paid for by Eberson. In September, 1910, Eberson had given up the idea of building a linoleum plant, as he found the pigment which he had invented was not a success. No contracts for the purchase of linseed oil were made thereafter by appellant, except those in controversy. The Western Linoleum Manufacturing Company kept no bank account, its name was not listed in the telephone or city directories, and with the exception of one carload the purchases, as hereinbefore stated, were bought for and sold to Eberson, who borrowed the money to pay for the oil as it arrived. On November 30, 1910, he sent a telegram to appellee, a concern of means, in the oil business in the city of New York, asking for a quotation of prices on 150,000 gallons of linseed oil, equal monthly deliveries to be made from April to August, inclusive, f. o. b. cars New York, or other Atlantic ports; also St. Louis. Upon receipt of this telegram the appellees called up Mr. La Forge, of the American Linoleum Manufacturing Company, of which he was secretary and therefore acquainted with the linoleum trade of the country, for the purpose of inquiring about the standing of the Western Linoleum Manufacturing Company. Mr. La Forge informed them that he under-

stood that this was a plant which had been taken over by Cook a short time ago. Cook was the owner of the Trenton Oil Cloth & Linoleum Manufacturing Company, a very wealthy concern engaged in manufacturing linoleum. At the same time they put in an inquiry for a report on the Western Company with Dun's Commercial Agency. An effort was made by the appellees to ascertain from the Trenton Company about appellant's company, but it could not be reached. Thereupon on the same day appellees sent to the Western Linoleum Manufacturing Company the following telegram: "Eighty-four and one-half cents delivered St. Louis less one per cent. seaboard weights to govern, subject to prompt wire reply." On the same day it confirmed this telegram by letter. On the next day the appellees received a telegram from appellant, signed "Western Linoleum Mfg. Co.," accepting their offer. On December 2d appellees wrote to the Western Linoleum Manufacturing Company, acknowledging receipt of the telegram accepting their offer, and wrote as follows: "We haven't had the pleasure of doing any business with you in the past, and as this is comparatively a large order, will you kindly furnish us with references? As to our ability to carry out the contract, we refer you to [naming a number of large and responsible firms dealing in oil]." On the same day appellees received another telegram from the Western Linoleum Manufacturing Company asking for quotations on 125,000 additional gallons of linseed oil to be delivered between April and August in equal quantities monthly. On December 3d, appellees wired, quoting the same price for this last inquiry as for the previous order. The appellant wired back that the price was too high, and to wire if they can do better. On December 5th, appellees wired offering the oil "at 79¢ seaboard." This was accepted by appellant on the same day. On that day the purchasing agent of the Trenton Oil Cloth & Linoleum Manufacturing Company, the Cook concern, called appellees by telephone, asking about the Western Linoleum Manufacturing Company. When appellees informed them that they understood that was a plant which the Trenton Company had taken over, he answered that that was not so, that they only heard lately of such a company, and for the sake of their records were desirous of knowing who the company was.

Appellees, not having received any reply from the plaintiff to their letter asking for references, wired on December 8, 1910, the Western Linoleum Manufacturing Company, to telegraph when it answered that letter. On the same day they received a reply, signed "Western Linoleum Manufacturing Company," saying, "Letter mailed you yesterday." Between December 5th and December 8th appellees again undertook to get reports from the Dun Commercial Agency. On December 9, 1910, appellees received the letter which appellant had wired them as having been mailed by it on December 7th, but no mention was made of any references, nor did it ever send any references. On December 7th, appellees sent another telegram of inquiry to the Dun Commercial Agency, at St. Louis, and on December 8th, received a reply to this telegram, and also a report by mail. The report by mail was as follows: "Dec. 6, 1910. Efforts to locate the Western Linoleum Mfg. Co. have not been successful. Inquiry at 1416 Chemical Building, which is the office of Wm. Fay, who for many years has been consulting engineer, it is learned that he occasionally uses the above style. Various calls were made at his office, but were not successful in interviewing him. Inquiry in various other quarters elicits no information in regard to a business under this name in St. Louis or elsewhere. The name does not appear in the city or telephone directories, and several of those who have known Mr. Fay for years know nothing in regard to his connection with the linoleum business." The report by telegraph was as follows: "Apparently nominal style adopted by William Fay, a civil engineer, who made advantageous purchase of considerable linseed and apparently trying to negotiate arrangements to work it into linoleum. Unable to meet him, no answer to requests for statement. No financial responsibility traced to him, not known to principal linoleum jobbers." Upon receipt of these reports appellees sent appellant the following telegram: "Not hearing from you and in view of reports we get from agencies and St. Louis parties must consider sale made to you canceled." The total amount involved in these two contracts was about $225,000.

Appellant instituted suit against the appellees for breach of contract on the law side of the District Court, whereupon the appellees filed their bill on the equity side of the court, praying for the cancellation of the contracts, as having been obtained by fraud and misrepresentation, and to enjoin the prosecution of the action at law. Upon the hearing, the principal witnesses testified orally. The court rendered a decree in favor of appellees, canceling the contracts, and enjoining the appellant from prosecuting any action at law or in equity, based upon these contracts. The court found that "the contract had been obtained fraudulently, and further found that on the day the plaintiffs [appellees] repudiated the contracts, the price of linseed oil had fallen, and was worth less by five or six cents per gallon than when the price was agreed on, and that, instead of being damaged by the repudiation, the defendant [appellant] was benefited, in that he could have bought the oil for a much less price, if in good faith he was seeking to buy oil at all." From this decree this appeal is being prosecuted.

S. T. G. Smith, of St. Louis, Mo. (H. L. Dyer, of St. Louis, Mo., on the brief), for appellant.

Frank H. Sullivan, of St. Louis, Mo. (Jones, Hocker, Sullivan & Angert, of St. Louis, Mo., and Frederick T. Hill, of New York City, on the brief), for appellees.

Before SANBORN and SMITH, Circuit Judges, and TRIEBER, District Judge.

TRIEBER, District Judge (after stating the facts as above). [1, 2] It is insisted on behalf of appellant that the court, as a court of equity, was without jurisdiction, as there was a complete and adequate remedy at law, and therefore his plea to the jurisdiction should have been sustained. As the action was commenced after February 1, 1913, when the new equity rules were in force, the fact that the plaintiff had a complete and adequate remedy at law is no longer ground for demurrer or motion to dismiss. The proper procedure is to move to transfer it to the law side. Equity Rule 22 (198 Fed. xxiv, 115 C. C. A. xxiv). Failing to make such a motion, and proceeding to a hearing, was a waiver.

[3-5] But, aside from this, if there had been a transfer to the law side of the court, and the bill treated as an answer to the action at law, if it stated an equitable defense, it would have had to be disposed of by the court, sitting as a chancellor, before the trial of the action at law to a jury; and if upon such a hearing the equitable defense had been sustained there would be nothing left to try to a jury. This was decided by this court in Union Pacific R. R. v. Syas, 246 Fed. 561, — C. C. A. —. The facts alleged in the complaint make it clearly a case for equitable relief, as it seeks to cancel contracts alleged to have been obtained by fraud and deception, and that the minds of the parties had never met. Sharon v. Hill (C. C.) 20 Fed. 1; Sharon v. Hill (C. C.) 22 Fed. 28. The cancellation of the contracts would prevent their use in any other action instituted by appellant on these contracts.

[6] Was the decree right upon the facts? The findings of the trial judge, especially as most of the testimony was taken in open court, are entitled to high consideration, and unless clearly against the weight

of evidence, or induced by a mistaken view of the law, such findings will not be disturbed by the appellate court.

[7, 8] A careful reading of the testimony leads to the conclusion that the representations by appellant that it was a corporation, and by implication at least, with a capital and commercial rating, was such a concealment of facts as amounts to a fraud. In Smith v. Richards, 13 Pet. 26, 36, 10 L. Ed. 42, the rule laid down in Story's Equity Jurisprudence was followed:

"'Where the party, intentionally, or by design, misrepresents a material fact, or produces a false impression, in order to mislead another, or to entrap or cheat him, or to obtain an undue advantage of him, in every such case, there is a positive fraud, in the truest sense of the terms; there is an evil act, with an evil intent; dolum malum, ad circumveniendum. And the misrepresentation may be as well by deeds or acts, as by words; by artifices to mislead, as by positive assertions.'"

The court then proceeded:

"And even if the party innocently misrepresents a fact, by mistake, it is equally conclusive; for it operates as a surprise and imposition on the other party. Or, as Lord Thurlow expresses it, in Nevill v. Wilkinson, 'It misleads the parties contracting, on the subject of the contract.'"

Even if there was no fraudulent intent on the part of the appellant, there can be no doubt that the minds of the parties never met, as, when the appellees made the contract, they were under the impression that appellant was a corporation engaged in the manufacture of linoleum, with a capital and commercial rating. While it is the general rule that a contract may be made by correspondence or by telegraph and when the offer is made by the seller and accepted by vendee it is a valid contract, there are exceptions to this rule. When a party inquires for prices and misrepresents his financial standing, either expressly or by suppressing a material fact which, if known to the vendor, he would not have entered into the contract, in such a case a concealment of the true facts is a fraud on the vendor which entitles him to a rescission, provided he acts promptly. The evidence in this case sustains beyond question the finding of the trial judge that there was a material misrepresentation or concealment of the truth on the part of the appellant when he represented himself as the Western Linoleum Manufacturing Company. Nor can there be the least doubt that the appellees acted under this misapprehension and exercised extraordinary diligence for the purpose of ascertaining the commercial standing of the so-called Western Linoleum Manufacturing Company, and upon discovery of the true facts promptly rescinded the contract.

It must not be overlooked that these contracts of sale were not for immediate delivery, but for deliveries to be made at future times. The contracts were made in November and December, and the deliveries were to be made between April and August, in equal monthly installments. It was therefore of the utmost importance to the appellees that the vendee should be a responsible party, and financially able to accept and pay for the oil when delivered, although the price might have declined considerably in the meantime. As stated in Ar-

kansas Smelting Co. v. Belden Co., 127 U. S. 379, 388, 8 Sup. Ct. 1308, 1310 (32 L. Ed. 246), where there was a contract for future deliveries:

"During the time that must elapse between the delivery of the ore, and the ascertainment and payment of the price, the defendant had no security for its payment, except in the character and solvency of Billing and Eilers."

Had appellant made the inquiry for the price of oil in his own name, instead of in the name of a supposed corporation, which had no existence, there can be no doubt that appellees would never have entered into these contracts in the absence of references as to his financial standing. Therefore the minds of the parties have never met. A case directly in point is Fifer v. Clearfield & Cambria Coal & Coke Co., 103 Md. 1, 62 Atl. 1122. Other authorities in point are Cundy & Bevington v. Lindsay, 3 Appeal Cases, 459, 47 L. J. Q. B. 481, 38 L. T. 573, 6 Eng. Rul. Cases, 211, decided by the House of Lords; Boston Ice Co. v. Potter, 123 Mass. 283, 25 Am. Rep. 9; Rodliff v. Dallinger, 141 Mass. 1, 4 N. E. 805, 55 Am. Rep. 439.

[9] Another ground upon which relief is frequently granted by courts of equity is when a hardship amounting to an injustice would be inflicted on a party by holding him to his apparent bargain and it is unreasonable to hold him to it. Paget v. Marshall, 28 Ch. D. 255, 54 L. J. Ch. 575, 51 L. T. 351. The evidence satisfies beyond question that appellant was insolvent, having no means to respond to losses which appellees may sustain if, by reason of a fall in the price of oil, he refused to accept the oil when tendered, and that he entered into these contracts solely for speculative purposes, with neither intention nor ability to carry them out, if the price of oil should decline, when deliveries were to be made, but to take the profits arising from the transaction, if the price of oil appreciated.

[10, 11] Another ground upon which the decree must be sustained is the finding by the trial judge, warranted by the proof, that the price of oil had declined at the time of the cancellation of the contracts, and appellant could sustain no damage by the repudiation of the contract by appellees. It is true this would be a complete defense at law, but, a court of equity having obtained jurisdiction by reason of the equitable allegations, it retains it for all purposes.

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

SANBORN, Circuit Judge, dissents.

STOCKYARDS NAT. BANK OF ST. PAUL, MINN., v. FIRST NAT. BANK OF TOWNER, N. D.

(Circuit Court of Appeals, Eighth Circuit. February 23, 1918. Rehearing Denied May 29, 1918.)

No. 4917.

1. PLEDGES ⟸25—LOSS OF TITLE.
A pledgee of promissory notes, residing in a city other than that where the notes are payable, does not, the notes being payable at the bank of the pledgor, lose title by sending them to the pledgor for collection, where the pledgor received them for that purpose only, unless they are assigned in due course, for value, before maturity, and without notice to a bona fide purchaser.

2. BILLS AND NOTES ⟸339—BONA FIDE PURCHASE OF PROPERTY OF PLEDGOR —RIGHTS.
Plaintiff, which had received notes as collateral for a loan made to a bank at a distant city, transmitted the notes, which bore a blank indorsement on the back, to the pledgor bank for collection. The bills receivable register of the pledgor bank showed that all such notes had been erased, while the collection register showed that the notes were held by the pledgor bank for collection for plaintiff. *Held*, that a purchaser of the property of the pledgor bank, not being a bona fide purchaser within the law merchant, was not entitled to the notes as against plaintiff, for due diligence would have disclosed plaintiff's ownership.

3. EVIDENCE ⟸354(2)—BANK REGISTERS.
Where a pledgee of notes delivered them to the pledgor bank for collection, and the bank transferred its assets to defendant, who collected the same, the exclusion of the bills receivable register and the collection register of the pledgor bank, in an action by the pledgee to recover against the purchaser, was error.

4. EVIDENCE ⟸20(2)—JUDICIAL NOTICE.
That every bank keeps bills receivable registers and collection registers is so well known that courts may take judicial notice of the fact.

In Error to the District Court of the United States for the District of North Dakota; Thomas C. Munger, Judge.

Action by the Stockyards National Bank of St. Paul, Minn., against the First National Bank of Towner, N. D. There was a judgment for defendant, and plaintiff brings error. Reversed, with directions to grant new trial.

George A. Bangs, of Grand Forks, N. D. (George R. Robbins, of Grand Forks, N. D., on the brief), for plaintiff in error.

Edward Engerud, of Fargo, N. D. (Tracy R. Bangs, of Grand Forks, N. D., and Engerud, Divet, Holt & Frame, of Fargo, N. D., on the brief), for defendant in error.

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

TRIEBER, District Judge. For convenience we shall refer to the plaintiff in error as the plaintiff, and the defendant in error as the defendant, as they appeared in the court below. The facts are practically undisputed. The Farmers' State Bank of Towner, N. D., borrowed from the plaintiff the sum of $8,600, and to secure the same

hypothecated and delivered to it as collateral 15 notes of its customers, all of them payable at the Farmers' State Bank, in Towner, N. D. Shortly before these notes became due, the plaintiff, at the request of the Farmers' State Bank, sent these notes to the Farmers' State Bank for collection and remittance, and when collected and remitted to be credited on the principal note. When these notes were sent, the Farmers' State Bank executed its receipt therefor, which reads as follows:

"Received for collection from Stockyards National Bank, South St. Paul, Minn., the following list of notes, held as collateral to note of T. J. Cummings, the proceeds of which are to be remitted to said Stockyards National Bank, and indorsed on indebtedness here."

It then gives a list of the 15 notes received by it from the Stockyards National Bank. Three of these notes, amounting to $912.25, were collected by the Farmers' State Bank and remitted to the Stockyards National Bank and credited on the note. Each of these notes had been indorsed in blank by the Farmers' State Bank, by stamping on the back:

"Pay to the order of ....., without recourse. [Signed] Farmers' State Bank of Towner, by T. J. Cummings, Cashier."

The loan to the Farmers' State Bank was evidenced by a note of the cashier of that bank, but it is conceded by all parties that the loan was made for the sole use of the Farmers' State Bank, was credited to it on the books of the Stockyards National Bank, and drawn out by it in the usual course of business.

On November 9, 1915, the Farmers' State Bank, in pursuance of a proposition in writing made on October 28, 1915, by the defendant bank, sold its loans and bills receivable, fixtures, lease on the building, and good will to it, but retained all other property, which consisted of some real estate and some other assets. In consideration of this sale the First National Bank agreed to assume the payment of the Farmers' State Bank's deposit liabilities, but none other. The agreement also provided that the loans purchased must be satisfactory to the First National Bank, an examination of them to be made by at least two of the directors of the First National Bank, the loans to be listed and scheduled, and the accrued interest to be figured on all notes on which interest was from date, unearned interest was to be discounted where it had been paid in advance, and the notes to be taken at their present worth. The agreement further provided that, if the bills receivable accepted by the First National Bank are insufficient to pay all deposit liabilities assumed and list of them to be furnished, the Farmers' State Bank was to pay the defendant, in cash or acceptable paper, the difference, which was found to amount to $1,952.33, which was paid by the Farmers' State Bank to the First National Bank by draft and cash. The Farmers' State Bank also obligated itself not to enter into the banking business at Towner, where both banks were located, for 10 years, and that its bank would be liquidated and dissolved as a corporation.

The 12 notes amounted to $7,564.60 after the credit of the $912.25, which had been previously collected by the Farmers' State Bank and

remitted to the plaintiff. Nine of these collateral notes were past due at the time they were transferred to the defendant; three of them, amounting to the sum of $1,499, were not yet due. The First National Bank collected these notes, and the plaintiff brought this action to recover the balance due it on its note; the First National Bank having collected more than sufficient from these collateral notes to pay it. There was a trial to a jury, and the court granted a peremptory instruction directing a verdict for defendant.

When the examination was made by the directors of the First National Bank, the notes in controversy, and which had been theretofore pledged with the Stockyards National Bank, were claimed by the president of the Farmers' State Bank to be the property of that bank. These were the only notes, so far as appears from the evidence, held by the Farmers' State Bank at that time, which bore the indorsements hereinbefore set out. The bills receivable book of the Farmers' State Bank, which was offered in evidence by the plaintiff and by the court excluded, showed that all these notes in controversy had been erased, thus showing that they were no longer the property of the Farmers' State Bank. The collection register of the Farmers' State Bank, which was also offered in evidence by the plaintiff and by the court excluded, showed that these notes were held by the Farmers' State Bank for collection for the plaintiff bank.

Counsel for defendant, in their oral argument, concede that no claim of bona fide purchaser under the law merchant is made, but it based its claim upon an estoppel of the plaintiff bank, by reason of the fact that it had intrusted the notes to the Farmers' State Bank without any indicia on the notes that they were its property, or that they were sent to the Farmers' State Bank for collection only, and upon the additional ground that, the plaintiff having parted with the possession of the notes to the pledgor, it lost the pledge, so far as purchasers from the pledgor without notice are concerned.

[1-4] In our opinion the court erred in excluding the bills receivable and collection registers of the Farmers' State Bank, when offered in evidence by the plaintiff, and in directing a verdict for the defendant. The pledgee of promissory notes, residing in a city other than where the notes are payable, the notes in controversy being payable at the bank of the pledgor, does not lose title to the pledged notes by sending them to the pledgor for collection, the pledgor receiving them for that purpose only, unless they are assigned for value, before maturity, and without notice to a bona fide purchaser, in due course of business. Clark v. Iselin, 21 Wall. 360, 368, 22 L. Ed. 568; J. M. Radford Gro. Co. v. Powell, 228 Fed. 1, 142 C. C. A. 457. In Commercial National Bank v. Canal Bank, 239 U. S. 520, 36 Sup. Ct. 194, 60 L. Ed. 417, Ann. Cas. 1917E, 25, it was held that one who has no title cannot transfer title, unless the owner has given authority, or is estopped; nor can he, in the absence of such authority or estoppel, transfer title by warehousing the goods and indorsing the receipt, although such receipts are negotiable under the Uniform Warehouse Act of Louisiana. As these notes were undoubtedly the property of the plaintiff, the debt for which they were pledged being then unpaid, and it had given no authority to the Farmers' State

Bank to sell them, that bank could not by an unauthorized sale pass title to a purchaser who is not a bona fide purchaser under the law merchant.

Is this plaintiff, by intrusting these pledged notes to the Farmers' State Bank for collection, estopped from claiming the proceeds of the notes collected by the First National Bank, there being no claim that the law merchant applies? In our opinion it is not. To maintain the contention of being an innocent purchaser, it is not only necessary to show that the notes were bought without notice, but also without knowledge of facts sufficient to put it on inquiry whether the notes were in fact owned by the Farmers' State Bank, and that it exercised reasonable diligence to ascertain that fact, when from the facts brought to its attention there was reason to suspect that they were not the property of the vendor. In our opinion the defendant did not exercise the diligence required by law. The fact that each of these notes bore a blank indorsement on the back, which is only made when a note is assigned, while none of the other notes had such an indorsement, would naturally arouse in the mind of an experienced banker some suspicion, and it is then his duty to make inquiry to ascertain the cause of this unusual circumstance. What would have been more natural than for the directors of the defendant bank, when they made that examination, and they found these notes thus indorsed to examine the bills receivable register of the Farmers' State Bank, which the evidence shows was kept by it, and therefrom ascertain whether they belonged to the Farmers' State Bank? Had they done so, they would have learned at once that these notes were not the property of the Farmers' State Bank, but that they had been assigned to same other bank or person. After having ascertained from the bills receivable register that these notes no longer appeared thereon, the next step, for one exercising reasonable diligence, would have been to inquire how the notes came to be in the bank's possession —whether for collection, or some other cause.

Had they called for and examined the collection register of the Farmers' State Bank, which the evidence shows was kept by that bank, they would have ascertained that these notes were not the property of the Farmers' State Bank, but that they were held by it for collection for the plaintiff. That every bank keeps such registers is so well known that courts may take judicial notice of it, for from these registers the bank knows when notes held by it mature and are to be presented for payment, and whether its property or held for collection only, and, if the latter, by whom they had been placed there for collection, so as to account for them to the owner.

In our opinion the defendant did not exercise that diligence which the law requires of it, and, had it exercised it, it would have ascertained that these notes were not the property of the Farmers' State Bank, but of the plaintiff. As the defendant is chargeable with knowledge of all the facts which by the exercise of reasonable diligence it could have ascertained, it must be charged with the knowledge that these notes were at the time not the property of the Farmers' State Bank, but of the plaintiff. The court erred in excluding the books hereinbefore mentioned, and in directing a verdict for the defendant.

The cause is reversed, with directions to grant a new trial.

FEENER et al. v. UNITED STATES.

(Circuit Court of Appeals, First Circuit. March 26, 1918.)

No. 1317.

1. EVIDENCE ⊜314(1)—HEARSAY.
Where a witness stated that he was not in the secrets of the grand jury room, cross-examination as to his knowledge whether certain property generally described in the indictment was produced before the grand jury was properly excluded, for it would be mere inference or hearsay.

2. WITNESSES ⊜269(2)—CROSS-EXAMINATION—SCOPE.
Where a witness for the prosecution gave no testimony on direct examination upon the subject of his knowledge regarding the grand jury proceedings, the exclusion of cross-examination as to his knowledge whether property generally described in the indictment was produced before the grand jury was proper, despite defendant's contention that there was a variance between the description in the indictment and the grand jury's knowledge.

3. WITNESSES ⊜269(2)—CROSS-EXAMINATION—SCOPE.
Where defendants contended there was a variance between the description in the indictment of certain property and the grand jury's knowledge, cross-examination of a witness for the prosecution for the purpose of discovering witnesses who knew what testimony the grand jury had before them is properly excluded, where the matter was in no way raised on the direct examination of the witness.

4. INDICTMENT AND INFORMATION ⊜166—VARIANCE.
Where an indictment described property generally, averring that a more particular description was to the grand jury unknown, the prosecution must show that the grand jurors were in fact ignorant of a more particular description as to a substantial portion of the property, or acquittal must be had because of the variance between the indictment and the grand jury's knowledge.

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

Ida M. Feener and Martha Bense were convicted under Criminal Code, § 37, of conspiring to commit the offense of concealment by a bankrupt of property belonging to his estate from his trustee in bankruptcy denounced by Bankruptcy Act, § 29b, and they bring error. Affirmed.

E. Mark Sullivan, of Boston, Mass., for plaintiffs in error.

Thomas J. Boynton, U. S. Atty., of Boston, Mass. (Daniel A. Shea and Francis G. Goodale, Sp. Asst. U. S. Attys., both of Boston, Mass., on the brief), for the United States.

Before DODGE, BINGHAM, and JOHNSON, Circuit Judges.

DODGE, Circuit Judge. The two plaintiffs in error, Ida M. Feener and her sister, Martha Bense, have been found guilty, in the District Court, under section 37 of the Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1096 [Comp. St. 1916, § 10201]) of conspiring to commit the offense against the United States denounced by section 29b of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 554 [Comp. St. 1916, § 9613]); i. e., that of concealment by a bankrupt of property belonging to his estate from his trustee in bankruptcy.

The indictment alleged the filing of a voluntary petition by the defendant Feener on January 20, 1915, her adjudication on the same day, and the qualification of trustees of her estate on February 17 and 18, 1915. The alleged date of the conspiracy charged was January 1, 1915. The offense contemplated was thus described:

"Which said offense was to be committed by said Ida M. Feener by knowingly and fraudulently concealing while a bankrupt from her trustee in bankruptcy thereafter to be chosen, appointed, and qualified in a voluntary proceeding thereafter to be begun by her, * * * certain property belonging to the estate in bankruptcy of said Ida; that is to say, jewelry and diamonds to the amount and value of $2,000, and automobiles, parts of automobiles, and accessories to automobiles, of the value in all of $5,000, a more particular description of said jewelry, diamonds, automobiles, parts of automobiles, and accessories being to the jurors unknown, in that they should agree to fraudulently represent to said trustees that said property was in fact the property of said Martha, whereas, in truth and in fact, as they at all of said times well knew, said property belonged to said Ida."

There was uncontradicted evidence that at the alleged date of the offense there were three Packard automobiles and one detachable top formerly owned by the defendant Feener, and later taken over by the defendant Bense by a proceeding which, in form of law at least, was a foreclosure of a chattel mortgage thereon, which she claimed had been assigned to her by the defendant Feener.

There was also uncontradicted evidence that at said date there were four diamond rings and one pair of diamond earrings in the Collateral Loan Company's possession, having been previously hypothecated to it by the defendant Feener and for a long time in her possession.

The indictment was found by a grand jury convened in September, 1916. There was also uncontradicted evidence that it was then known, and had for some time been known, to said trustees in bankruptcy and to persons in the United States Attorney's office, as to the above automobiles and top, that they were in the custody of a receiver appointed by a Massachusetts court in an equity suit (by or against whom does not appear from the bill of exceptions); also that the above diamond rings and pair of diamond earrings were in the Loan Company, having been there deposited by the defendant Feener long before her bankruptcy. The bill of exceptions states that there were no other automobiles, tops, or accessories, or jewelry, "other than those referred to by any evidence in the case, shown to have been of the estate of the defendant Feener at the date of the offense charged."

[1, 2] The bill of exceptions does not purport to set forth all the evidence at the trial, and an assignment of error to the court's refusal to rule that upon said evidence the defendants were entitled to an acquittal has not been urged before us. The same is true regarding seven of the nine other assignments. The plaintiffs in error have been "content to urge their appeal upon their fourth and fifth assignments of error," which relate to alleged variances "between the grand jury's knowledge of or particular description of said jewelry and the indictment's description" thereof, or "between the grand jury's

knowledge of said jewelry and automobiles and the description of said articles as contained in said indictment."

One of the trustees in bankruptcy, a witness for the prosecution, testified that he located diamonds or jewelry standing in Ida M. Feener's name in the Collateral Loan Company, consisting of five specific things upon which loans had been negotiated some time in the fall of 1912. On cross-examination he stated that the five specific things referred to were produced in the bankruptcy court. To a question in his cross-examination whether they were produced before the grand jury, objection was made, and, as is agreed, the cross-examining counsel then claimed the right to inquire concerning what the witness knew of the grand jury proceedings, for the purpose of showing that a variance existed, as above. The court excluded "this line of inquiry"—the witness having stated that he "was not in the secrets of the grand jury room," the prosecution having stated, when objecting, that the witness did not appear before the grand jury, and there being nothing to show that he did appear before them. What the witness knew of the proceedings before them could thus have been at most only inference or hearsay. For that reason, and for the further reason that no testimony given by him on direct examination opened the subject of his knowledge regarding the grand jury proceedings, we cannot hold the court's ruling erroneous. The bill of exceptions sufficiently shows that by excluding "this line of inquiry," as above, the court did not exclude all inquiry regarding the proceedings before the grand jury. A previous witness for the prosecution, who had testified in those proceedings, had already stated in cross-examination that he had therein described the five articles of jewelry to the grand jury, the same being then in his possession, though he did not have them with him while so testifying.

[3] In a further cross-examination of the trustee in bankruptcy above referred to, he was asked if he knew "who it was first brought this matter to the attention of the district attorney," Objection being made to the question, the cross-examining counsel was asked to state how it was material. He answered, that he might "be able to discover who it was testified before the grand jury regarding the automobiles," and that if it appeared that the indictment had been obtained relating to property concerning which there had never been any testimony before the grand jury, the court might quash the indictment of its own motion. The court excluded the question, and we think rightly. As in the case of the question above referred to, it was upon a matter not opened in direct examination, and the inquiry, of course, could not be allowed, merely in order to assist the defendants in discovering witnesses who knew what testimony the grand jury had had before them.

[4] What had been said disposes of the fourth and fifth assignments of error, upon which the plaintiffs in error state that they are content to urge their appeal. It may be added that so much of the judge's charge as related to the question of variance is before us in the bill of exceptions, and we find nothing in his instructions which would warrant us in holding them erroneous, even if the assignments of error regarding them, or any of them, had been insisted upon. The

jury were told, in substance, that the prosecution must satisfy them, as to some substantial portion of the property referred to, that the grand jurors were in fact ignorant of a more particular description than that given in the indictment, and that, if it had failed so to do, there should be an acquittal by reason of a variance.

The judgment of the District Court is affirmed.

WORMSER BROS. et al. v. F. MARROQUIN & CO.

(Circuit Court of Appeals, Fifth Circuit. March 11, 1918.)

No. 3046.

1. SALES ⟸53(1)—ACTIONS—EVIDENCE.
In an action for the value of corn sold under a contract entered into in Mexico when that country was in a state of great disorder, which required the buyer to assume all risks of loss in transportation, provided communications were open, the question whether communications were open at the time of shipment *held*, under the evidence, for the jury.

2. SALES ⟸201(2)—CONTRACTS—LIABILITY OF BUYERS.
Where a contract for the sale of corn in Mexico required the buyer to assume all risks of loss during transportation and to pay drafts with bill of lading attached on presentation, the seller cannot recover for corn loaded in cars, which was destroyed by fire prior to shipment.

3. PAYMENT ⟸12(5)—CONTRACTS—ACTION—EXTENT OF RECOVERY.
Where, pursuant to a contract made in Mexico for the sale of corn, the buyer deposited $500 to the credit of the seller, the deposit must, as the price of the corn was fixed in Mexican currency, be deemed to have been made in that medium; so, on a suit in the United States involving the contract, the seller could not be charged $500 in United States money, a Mexican dollar at the time of the deposit having been worth only 44 cents in the currency of the United States.

In Error to the District Court of the United States for the Southern District of Texas; Waller T. Burns, Judge.

Action by F. Marroquin & Co. against Wormser Bros. and the Laredo National Bank, in which Wormser Bros. filed a cross-action. There was a judgment for plaintiffs, defendants Wormser Bros. also recovering on their cross-action, and defendants bring error. Reversed and remanded.

A. Winslow and Paul W. Evans, both of Laredo, Tex., for plaintiffs in error.

Hal W. Greer and A. C. Hamilton, both of Laredo, Tex., for defendants in error.

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

BATTS, Circuit Judge. Marroquin & Co. instituted suit against Wormser Bros. for the value of five carloads of corn, alleged to be worth $3,228.92. The contract is evidenced by telegrams which passed between the plaintiffs and defendants. A number of letters, copies of which were introduced by plaintiffs, were not, according to the evi-

dence introduced by the defendants, received by them. It is not necessary to determine whether the objections to the introduction of these letters were well founded, as the case may be disposed of without giving them consideration.

The transaction was initiated by two telegrams on October 6, 1913, from Julio Wormser to F. Marroquin & Co., the telegrams being sent from Nuevo Laredo, Tamaulipas, to Monterey, Nuevo Leon. The first of these telegrams the defendants deny sending, and is to this effect:

"Wire to Wormser Brothers, Laredo, Tam., best price of corn by carload lots for immediate shipment."

The second was as follows:

"Wire to Wormser Brothers, Laredo, Tam., best price of white corn in bulk to be shipped when communication is opened."

On October 7th, Marroquin wired in reply:

"We oblige you five carloads at the price understood depositing five hundred dollars and authorizing us to send draft attached to bills of lading. We sell on no other conditions."

On the same day Wormser Bros. wired Marroquin:

"We accept five carloads at your conditions. Please notify us when you have more. Letter follows."

Also on that day Wormser Bros. wired:

"We will take five cars, shipping when communication is open. You confirming. We will give instructions as to shipping."

On October 8th Wormser Bros. wired Marroquin:

"We accept five carloads at your conditions this morning. Laredo National Bank will wire deposit of five hundred dollars to your credit."

On the same day Marroquin wired Wormser Bros.:

"We received your order for five carloads and we have accepted it. We are waiting to hear from the bank, and draft must be paid at presentation before we make first shipment."

Wormser Bros. on the same day wired Marroquin:

"We wrote to-day giving instructions as to shipment. Payment consigned to Laredo National Bank."

On October 9th Laredo National Bank wired Marroquin:

"We will pay at presentation of bills of lading insurance policies and drafts the value of five carloads of corn that you will ship to Wormser Brothers."

On October 10th, Marroquin wired Wormser Bros.:

"First carload shipped second and third loaded. Wire consignment. Express your wish to take advantage of opportunity of three carloads same conditions wire immediately."

No letters relative to the contract and no other telegrams with reference thereto were received until after delivery of three carloads of the corn to the railroad. A member of the firm of Marroquin & Co.

testified that he took bills of lading on the three cars shipped in the name of F. Marroquin & Co., and consigned them to the same, so as to afterwards indorse them to Wormser Bros. That there were trains from the 6th to the 18th of October, 1913, and that this shipment was made between the 9th and 18th. He testified that he took out three insurance policies, one on each car of the corn shipped, which policies he put in their safe and sent later to the Mercantile Bank, Monterey, for transmission to the Laredo National Bank. The bills of lading, with drafts attached, were also sent to the Laredo National Bank through the Mercantile Bank, Monterey. The bills of lading and insurance policies, according to the evidence introduced by defendants, were not received in Laredo until three or four weeks later. Subsequent to the shipment of the first three cars, Marroquin & Co. secured additional cars for shipment, but before bills of lading were issued the corn was destroyed by fire.

[1] The trial court directed a verdict for plaintiffs for $2,161.81, and for defendants on their cross-action in the sum of $500. The $2,161.81 is the value of the corn at the price agreed upon in American money, and the $500 is the amount placed to the credit of Marroquin & Co. by the Laredo National Bank. At the time of the transactions detailed there were great disorders in Mexico, and all the parties understood the dangers incident to transportation. It is apparent, from the telegrams sent by Marroquin & Co., that they had no intention of taking any chance as to receiving the purchase price of the corn. They indicated the conditions under which they were willing to sell, and stated that they would sell on no other conditions, and made no consignment of any part of the corn until they had received assurances from the Laredo Bank that $500 of the money had already been paid, and that the drafts for the balance of the purchase price would be paid on presentation. On the other hand, it is quite as apparent that a condition of the sale imposed by defendants was that it was to depend upon communication being open. The testimony of the witness Marroquin indicates that trains were running at the time the bills of lading were issued. Evidence introduced by defendants was to the contrary. Apparently an issue was presented which should have been submitted to the jury.

[2] As to the two cars which were destroyed prior to shipment there does not appear to be any theory upon which Marroquin & Co. are entitled to payment for their value from Wormser Bros.

[3] When Marroquin & Co. drew their drafts on Wormser Bros. the amounts were calculated in Mexican money. The price given by wire was in the same medium. A receipt from the Mercantile Bank of Monterey to the Laredo National Bank is to the effect:

"We have debited your account as follows: Our payment to F. Marroquin & Co., according to your instructions as per duplicate voucher we are inclosing herewith, five hundred dollars."

This receipt, executed in Mexico, taken in connection with the circumstance that the price of the corn was given in Mexican money, and that the drafts were so drawn, would seem to clearly indicate that the $500 paid was paid in Mexican money. According to the testi-

mony, this was worth at the time 44 cents. Apparently it would be erroneous to charge defendants in error with more than the $220 received.

The judgment is reversed, and the cause remanded for trial in accordance herewith.

Reversed and remanded.

CLARK et al. v. FAIRBANKS.

(Circuit Court of Appeals, Fifth Circuit. March 12, 1918.)

No. 3079.

1. APPEAL AND ERROR ⟸781(6)—DISMISSAL—MOOT CASE—SETTLEMENT.
Where, pending an appeal from an order enjoining the sale of land under a statutory foreclosure proceeding in the state court, a purchaser from the mortgagor and his grantee contracted for an extension with the mortgagees, who recognized such purchaser as obligor in the entire transaction, the appeal will be dismissed; all questions other than costs having become moot.

2. COSTS ⟸232—DISMISSAL—MOOT CASE.
Where by reason of a settlement the questions involved in an appeal from an injunction order have become moot, costs must be assessed against the appellant in sustaining a motion to dismiss.

3. INJUNCTION ⟸235—DISMISSAL—MOOT CASE.
Where, pending appeal from an order enjoining mortgage foreclosure sale under statutory proceedings in state court, a settlement of the question involved was effected, appellants cannot, the appeal being dismissed, assert any rights for damages or costs on the injunction bond.

4. COSTS ⟸197—DISMISSAL—MOOT CASE.
Where, pending appeal from an order enjoining a sale under statutory foreclosure proceedings in a state court, a settlement was effected, the question of costs in the state court will be left for that tribunal on dismissal of the appeal.

Appeal from the District Court of the United States for the Western District of Louisiana; Rufus E. Foster, Judge.

Bill by W. D. Fairbanks against Ollie O. Clark and others. From an order enjoining sale of land under foreclosure proceedings in the state court, defendants appeal. Dismissed.

John C. Theus, of Monroe, La., for appellants.

W. F. Millsaps and R. H. Oliver, Jr., both of Monroe, La., for appellee.

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

NEWMAN, District Judge. This is an appeal from an order granting an injunction against the sale of certain real estate under a foreclosure of a mortgage under a statutory proceeding in the state court. It is unnecessary to discuss the merits of the matter in controversy in this case, because there is a motion by the appellee to dismiss the case in this court, as the case as it existed at the time it was heard in the Dis-

trict Court, and when the appeal was entered, has been settled by a subsequent agreement between the parties.

The mortgage which was foreclosed, and under which the sale was about to be made, was a mortgage given by L. M. Fairbanks to Ollie O. Clark, Carey C. Clark, and William E. Clark on the land covered by the mortgage in question here, which was, as recited in the record, a vendor's lien and special mortgage on the property sold by the Clarks to L. M. Fairbanks. After the purchase of the property by L. M. Fairbanks from the Clarks, he sold the property so purchased to W. D. Fairbanks, who filed the bill in the United States District Court to restrain the sale under the foreclosure of the mortgage. The order granting the injunction was made on March 28, 1917. The appeal to this court was allowed April 3, 1917, and the appeal filed in this court May 8, 1917.

[1] The motion to dismiss the appeal in this case is as follows, signed by counsel and sworn to by W. F. Millsaps, one of the counsel for the appellees:

"The appellee respectfully moves the court to dismiss the appeal herein for the following reasons:

"Subsequent to the order of appeal herein, that is, on the 29th day of June, A. D. 1917, L. M. Fairbanks and W. D. Fairbanks sold and delivered to H. D. Briggs, a resident of Ouachita parish, Louisiana, the property described in the petition for writ of injunction sued out in this cause, for a consideration of $10,000 and the assumption by said Briggs of all indebtedness due by L. M. Fairbanks and secured by mortgage on said property, as is shown by deed on file in the office of the clerk of court and ex officio recorder of mortgages for the parish of Ouachita, state of Louisiana, certified copy of such deed being annexed hereto, the assumption being of all indebtedness affecting the property involved in this litigation and on which the writ of seizure and sale issued out of the Sixth district court of the parish of Ouachita, state of Louisiana.

"On July 24, 1917, appellants substituted said Briggs as debtor instead and in place of appellee and L. M. Fairbanks, the vendor of appellee, received from said Briggs a check for the sum of $20,000 as a partial payment of the mortgage indebtedness, the basis of the foreclosure suit by appellants which was enjoined, and agreed that upon the payment by the drawee bank of the check so given and the further payment of $10,000 on or before August 15, 1917, and $10,000 on or before September 17, 1917, an extension would be granted on the balance of the indebtedness until the 15th day of March, 1918.

"The check for $20,000 was paid upon presentation by the drawee bank and that sum received by appellants; the two other partial payments of $10,000 each were made by the said Briggs and his assignee, Southern Carbon Company (now owner of the land), before their respective due dates, in accordance with the agreement of July 24, 1917, and these amounts accepted by the appellants; and thus there was extended the date of maturity of the debt formerly due by L. M. Fairbanks and affecting the property, sale of which was enjoined.

"Appearer shows that because of the facts above shown, the sale of the land by appellee, the novation of the debt by the substitution of a new debtor, the receipt of the payments made by Briggs and his assignee, and by the extension of time of maturity of the debt to a future date, there has been a valid settlement of all rights and differences respecting the subject-matter of the controversy involved in this cause, events have occurred which make a determination of the right to an injunction unnecessary or for your honorable court to grant any effectual relief, the appellants, on account of the transactions had with Briggs and others, are not entitled further to prosecute the cause entitled 'O. O. Clark et al. v. L. M. Fairbanks,' No. 9231 on the docket of the Sixth district court for the parish of Ouachita, state of Louisiana.

and in which a writ of seizure and sale was issued, which said writ is suspended by the proceedings in this cause, but are expressly relegated by the terms of the said contract to suit on the same in the event of default, and there exists at this time no actual controversy, so that to determine the question presented to this court would be to determine a moot question.

"Appellee attaches hereto certified copy of the deed of sale from W. D. and L. M. Fairbanks to H. D. Briggs, certified copy of receipt and agreement by appellants of date July 24, 1917, given by H. D. Briggs, and affidavit by H. D. Briggs, and affidavit by H. D. Briggs of the truth of the facts alleged in this petition.

"Wherefore appellee asks that this honorable court dismiss the appeal filed herein by defendants, at their costs."

The facts stated in this motion are not contested, although it is claimed by counsel for the appellants that certain costs have accrued and certain additional rights may exist in favor of the appellants, which justifies a refusal to dismiss the appeal here. It appears from the above that both L. M. Fairbanks, the original mortgagor, and W. D. Fairbanks, his vendee, have made a deed to the land in question here to Briggs, and that Briggs assumed the payment of the debt to the Clarks, it not to exceed in any event $95,000. Briggs has paid $40,000 of that amount, and agreed to pay the balance in March, 1918; the time for payment being extended to that date by the Clarks.

It appears, therefore, that there is no longer any controversy between W. D. Fairbanks and L. M. Fairbanks, the original mortgagor, on the one hand, and the Clarks, on the other. The issue made between them in this case before the court is clearly at an end, as between them, by the terms of the settlement. The only thing left in the case which might make an issue between them is the question of costs here and in the state court. No provision seems to have been made as to this between the parties in making the settlement by which Briggs assumed the payment of the debt due the Clarks. It seems from the agreement that Stubbs, Theus & Grisham, attorneys for the Clarks, are to retain control of the notes of Fairbanks, and also some other notes which Briggs will pay off, and some tax receipts, until final settlement is made, or until default and suit instituted on the same, when they are to be made matters of court record, and in the event of any default Briggs is to be credited with the entire amount paid.

[2, 3] So it seems that the Clarks have fully and finally accepted Briggs as their obligor in this entire transaction, and the two Fairbanks are relieved from all their liabilities in the matter. All that is left between the parties to this cause and to this appeal being the costs, as stated, it seems to us that the case here must be dismissed. What is left is only a moot question, and there is really no controversy between the parties to the cause as to the subject-matter of the litigation. The costs in this court and in the District Court must be taxed against the appellant in sustaining this motion to dismiss. No rights will exist in favor of the Clarks for any damages or costs on the Fairbanks injunction bond given in the District Court, as they have settled the case with the Fairbanks before its final determination in this court. This settlement would seem to preclude them from making any claim for damages on the Fairbanks bond, but this matter will be determined in the District Court.

[4] The costs in the state court, mentioned by counsel for the appellant, can well be left to the state court to be there taxed as the law and justice may require.

The motion to dismiss the appeal must be granted; and it is so ordered.

HOUGHTON WOOL CO. v. MORRIS et al.

In re RINGROSE & DRAPER.

(Circuit Court of Appeals, First Circuit. March 6, 1918.)

No. 1314.

1. BANKRUPTCY ⊂⊃81(1)—INVOLUNTARY PROCEEDINGS—SUFFICIENCY OF PETITION.

An involuntary petition in bankruptcy against a partnership *held* sufficient, where it was answered without objection thereto, although it did not distinctly allege that the partners individually were insolvent.

2. BANKRUPTCY ⊂⊃91(2)—PARTNERSHIP—FINDING OF INSOLVENCY.

Finding of a referee, confirmed by the court, that an alleged bankrupt partnership, at the time of making transfers of property, was insolvent, *held* supported by the evidence, although there was no specific finding or evidence as to the financial condition of the partners individually, as distinct from the firm.

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

In the matter of Ringrose & Draper, bankrupts; Lawrence G. Morris and others, petitioners. The Houghton Wool Company, objecting creditor, appeals from an order of adjudication. Affirmed.

George V. Phipps, of Boston, Mass. (Robert A. B. Cook and Phipps, Durgin & Cook, all of Boston, Mass., on the brief), for appellant.

Lee M. Friedman, of Boston, Mass. (Swift, Friedman & Atherton, of Boston, Mass., on the brief), for appellees.

Before DODGE, BINGHAM, and JOHNSON, Circuit Judges.

DODGE, Circuit Judge. This is an appeal from an adjudication in bankruptcy in involuntary proceedings against a firm composed of two persons as partners; transfers intended as preferences being relied on as acts of bankruptcy. The appellant, Houghton Wool Company, is one of the creditors alleged to have received such preference. It opposed adjudication, denying that the alleged bankrupts had committed the acts of bankruptcy charged or were insolvent.

[1] The involuntary petition alleged that Ringrose and Draper, doing business under the firm name of Ringrose & Draper, were insolvent, etc. It did not distinctly allege that the firm was insolvent, and that each partner was also insolvent, as in strictness it should have done, according to In re Forbes (D. C.) 128 Fed. 137, 139. It alleged only that "said Ringrose & Draper are insolvent" and committed acts of bankruptcy, in that "they did * * * transfer," etc., certain property; whether theirs or the firm's not being spec-

ified. If these allegations can be taken as meaning that the firm only was insolvent, they are at least as well adapted to convey the meaning that the partners named were insolvent. No objection, however, appears to have been at any time raised to the form of the petition.

In answers filed by each partner, each denied "that he individually or said firm is insolvent." But in the denial of bankruptcy filed by the present appellant it denied only "that the said alleged bankrupts * * * are insolvent," and after its appeal from the adjudication it applied for a decree "severing it in every way from the respondents and from the other objecting creditor, who have not joined in this appeal." The court allowed the application, and entered an order permitting it "singly to claim and prosecute the appeal."

[2] There was a reference to ascertain and report the facts, and a report, wherein the referee found that the alleged transfers had been made, and made with intent to prefer the creditors who received them.

He found also:

"If, as a matter of law and upon the foregoing evidence I may so find, that at the time of said transfers the respondent firm was insolvent."

The report did not set forth the evidence heard by the referee in full, but it did set forth the substance of "the foregoing evidence" referred to. The question is whether or not the finding that the firm was insolvent was warranted.

It is not contended that the evidence did not show insolvency of the firm, if such insolvency can be shown without specific proof that neither partner possessed sufficient resources, over and above his individual debts, to meet the partnership deficit or had assets enough to pay the firm's obligations. No specific proof appears in the evidence set forth in the report, expressly relating to the financial condition of each partner, as distinct from the firm.

The report contained, previously to the above conclusion, findings by the referee that when said transfers were made, and when the petition was filed, the unsecured indebtedness of the respondents was about $41,000, and that they had no assets, other than security held by a trust company for less than the amount of its claim, except possibly a claim incapable of realization except at the end of protracted litigation, and found by the referee to have had no fair valuation for the purpose of the issues before him. That there was sufficient evidence to support these findings is not disputed. Taken as they stand, they are capable of being regarded as findings that neither the respondents individually, nor the respondents as a firm, had assets equalling their liabilities, whether firm or individual; and the District Court so regarded them, as appears from its opinion.

The report shows that statements by Ringrose were in evidence, made in connection with the transfers to the respondent creditors. To one of them, who was urging payment of an overdue bill of $3,400, he said, after giving a check on account, that "that was all the firm could then pay"; that "the firm could not then pay him all they owed him"; that the bank had already called "the firm's loans,"

amounting to about $45,000; and that "the firm was not in shape to pay it." At a later interview he told the same creditor "he could not pay" the balance; that "they" had no wool; and, being asked whether "they" had any receivables, he gave an order on another firm for a balance due the respondents. The next day he gave the same creditor checks from two other customers, apparently making up the amount due, stating that "he was in a hole; that the other creditors might object to giving him the receivables and might holler about it; and he said do it, and he would take his chances." The referee found that at the time other creditors were pressing "the respondents."

To another of said creditors, who was urging payment of an overdue account of more than $16,000, Ringrose stated that "he could not make payment"; that "the bank had called the loans and—he could not pay it"; that "he had not any money"; that "they had" wool, and it was free and clear. To this creditor he then gave orders for about $12,000 worth of warehoused wool, further stating that the trust company had "called his loan," and (after showing the wool) that this was all, and the rest of the wool was pledged; that "he had no accounts receivable"; that the bank was holding "any cash the firm had" on account of having called "his" loan. The referee found that at this time "the firm" had no other unpledged wool and no receivables.

No statements by Draper appear in the evidence reported, nor, as has been said, anything expressly and distinctly relating to his financial condition independently of the firm. But in the absence of any evidence to the contrary, and especially as against this creditor, who had raised no distinct issue as to the separate assets or liabilities of either partner, we do not consider ourselves bound to hold the referee's conclusion unwarranted by any evidence before him. The inference might properly have been drawn, from the undisputed facts and Ringrose's statements, that neither partner was solvent to the extent necessary for the purpose of changing the financial condition of the firm, otherwise such as described by Ringrose in the above statements, to a condition of solvency. It is not contended that Ringrose's intention to prefer the creditors to whom he transferred all the firm's receivables and unpledged wool did not sufficiently appear from his statements made to them at the time. The alleged bankrupts have not appealed themselves from the adjudication, and have not been made parties to this appeal. The present appellant fails to satisfy us that the District Court erred in confirming the report and ordering adjudication.

The decree of the District Court is affirmed, and the appellees recover their costs of appeal.

DITTMAR v. FREDERICK STARR CONTRACTING CO.

(Circuit Court of Appeals, Second Circuit. January 16, 1918. On Rehearing, February 25, 1918.)

No. 124.

1. SHIPPING ⟸62—CHARTER OF DEMISE—SCOW WITH MASTER.
   The master of a scow, demised with the master, represents the owner in such particulars as making the lines fast.
2. EVIDENCE ⟸417(9)—CHARTER—PAROL EVIDENCE TO SUPPLEMENT.
   It is not a contradiction of a written charter of a scow for service in and about New York Harbor to show a parol agreement that, in case she was taken out of the harbor, the charterer should insure her for the benefit of the owner.
3. SHIPPPING ⟸58(2)—PLEADING.
   That a libel describes the cause as one for damages is not conclusive that the suit is in tort; and where a libel by the owner against a charterer sets out the contract, and alleges acts which constitute a breach, the suit may be considered as one on contract, although such acts were also acts of negligence.
4. SHIPPING ⟸54—INJURY TO VESSEL—LIABILITY OF CHARTERER.
   A time charterer of a scow, which contracted to insure her for the owner's benefit whenever taken out of New York Harbor, but which obtained a waiver of such requirement for an outside trip, on a promise to assume all risks and be responsible for any injury to the scow, became in effect an insurer, and liable for an injury to the vessel on the trip to the same extent that a marine insurer would be.

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

Suit in admiralty by William D. Dittmar, owner of the scow John J., against the Frederick Starr Contracting Company, with the Elliott C. Brown Company impleaded. Decree for libelant, from which the Brown Company appeals. Modified and affirmed.

For opinion below, see 235 Fed. 263.

Graves, Miles & Yawger, of New York City (Charles S. Yawger, of New York City, of counsel), for appellant.

Alexander & Ash, of New York City (Peter Alexander, of New York City, of counsel), for appellee Dittmar.

Harrington, Bigham & Englar, of New York City (T. Catesby Jones, of New York City, of counsel), for other appellee.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

WARD, Circuit Judge. The libel alleges that William D. Dittmar chartered the scow John J., including the master, to the Frederick Starr Contracting Company for one year; the Starr Company agreeing to return the scow in the same condition as when received, ordinary wear and tear excepted, also by an oral agreement to cover her for the benefit of Dittmar with insurance against marine perils whenever taken out of New York harbor.

[1] The charter was a demise, but the master, as we have often held, represented the owner in such particulars as making the lines

fast. Dittmar testified that in December, 1913, the Starr Company sent the scow outside of the harbor to Oyster Bay with a cargo of sand and gravel, to be delivered to the Elliott C. Brown Company, in pursuance of a telephone conversation between himself and Mrs. Starr that, in consideration of the waiving of the insurance by him, the Starr Company would assume all the risks and be responsible to him for injuries to the scow. This relieved the Starr Company from payment of the insurance premium.

[2] The answer denied that any such conversation took place. While there was nothing said on the subject in the correspondence by virtue of which the scow was chartered, it was not a contradiction of the writing to show that the understanding of the parties was that the scow was not to be taken out of the harbor limits, except upon the owner's consent and the payment of the premium of insurance by the charterer.

Dittmar testified that under this charter the Starr Company had on several previous occasions asked and obtained his consent to take the boat beyond the harbor limits and had paid for the insurance. The respondent does not satisfactorily meet this testimony. Starr does not deny the previous course of dealing, but only says that neither he nor any one in his office had any conversation with reference to any insurance on this boat on any trip to Oyster Bay. But we are convinced by Dittmar's testimony on the subject, in view of the uncontradicted practice on former occasions, as well as of the fact that Mrs. Starr was not examined as a witness.

January 2, 1914, at about 2:30 p. m., the scow was moved from the wharf at Oyster Bay by the Brown Company to a mooring buoy, and lines made fast. The wind gradually increasing, the scow dragged the anchor during the night and until 4 p. m. of the 3d, when the anchor held, but at 10 p. m. the hawser parted and the scow stranded.

Dittmar filed this libel to recover the damages so sustained against the Starr Company, which brought in the Brown Company under the fifty-ninth rule in admiralty (29 Sup. Ct. xlvi). The Starr Company defends on the ground that the master was incompetent and that the scow was moored to an insufficient mooring by the Brown Company. The Brown Company defends on the ground that the mooring was sufficient, but that the master allowed the scow to be made fast to it on too short a hawser, which for that reason parted in the high wind.

The trial judge held that, though the charter party was a demise, the master of the boat was the agent of the owner, so far as making fast to the mooring buoy was concerned; that the hawser was apparently sufficient; that the mooring anchor was insufficient, for which the Brown Company was responsible, for whose acts the Starr Company, the charterer, was responsible to Dittmar. He directed a decree for Dittmar for half damages and costs against the Brown Company primarily, and against the Starr Company secondarily. The Brown Company alone appealed, but at the hearing Dittmar contended that he should recover his full damages, while the Starr Company contended that any recovery by him should be against the Brown Company.

[3] The libel was filed "in a cause of damage civil and maritime." The trial judge thought that there was an effort to combine in the same

pleading a cause of action in tort with causes of action in contract. To determine this the whole libel must be looked at. The mere description of the cause as one for damages is not conclusive that the suit was in tort. The libel set forth the contract of chartering to the Starr Company and the contract of the Starr Company indemnifying the owner against injury to the boat when taken out of New York Harbor. So far as it alleges faults, it does so in connection with the contracts, and not as pure torts ex delicto. We think that the cause may be considered as one in contract. Shippen v. Tankersly (C. C.) 13 Fed. 537; The Queen of the Pacific (D. C.) 61 Fed. 213, 216; Austin v. Rawdon, 44 N. Y. 63; 1 Corp. Jur. 1013.

Though the mooring anchor did drag at first, it finally held the scow, and the proximate cause of the injury was the parting of the hawser, due to the failure of the master to secure the boat by a sufficient length of line. This could have been done by attaching one of the scow's lines to the mooring buoy, instead of lifting the buoy on deck and making fast the hawser attached to the scow's bitts. Thus a safe lead would have been given and undue chafing in the chock prevented. The scow was light and very high out of the water at the bow.

[4] This fault of the master would be no defense to a marine underwriter, and if the Starr Company had covered the scow with insurance in accordance with its contract, Dittmar could have recovered his damages under the policy. We think it was likewise no defense to the Starr Company, whose agreement to assume all risks and be responsible for injury gave it the character of a marine insurer. Relief to it from payment of the usual insurance premium and waiver by Dittmar of his right to insurance were sufficient considerations for the promise.

The libelant has a right to recover in full from the Starr Company, and there is no liability upon the part of the Brown Company. The court below is directed to enter a decree for damages and costs in favor of the libelant against the Starr Company, and in favor of the Brown Company for costs of both courts against the Starr Company. So modified, the decree is affirmed.

On Rehearing.

PER CURIAM. We see no reason for changing our original opinion.

EAST ST. LOUIS COTTON OIL CO. v. SKINNER BROS. MFG. CO.

(Circuit Court of Appeals, Eighth Circuit. March 8, 1918.)

No. 5001.

1. TRIAL ⊂330(4)—VERDICTS—INCONSISTENT VERDICTS.
Where defendant counterclaimed in an action for material furnished and labor performed, asserting plaintiff's breach of an alleged contract to install a ventilating system for an agreed price, while plaintiff asserted that no contract price had been fixed, a verdict for plaintiff, which also awarded damages to defendant on its counterclaim, is inconsistent with itself, and will support no judgment.

2. APPEAL AND ERROR ⊂=267(2), 544(3)—REVIEW—ASSIGNMENTS OF ERROR.
Whether a verdict supports the judgment is a question of law which appears on the face of the record without a bill of exceptions, and that objection may be assigned as a ground of reversal, though no exception is taken.

In Error to the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Action by the Skinner Brothers Manufacturing Company against the East St. Louis Cotton Oil Company, which counterclaimed. There was a judgment for plaintiff, and defendant brings error. Reversed, and new trial granted.

Thomas W. White, of St. Louis, Mo. (S. W. Fordyce, Jr., and J. H. Holliday, both of St. Louis, Mo., and Edward C. Kramer, Rudolph J. Kramer, and Bruce A. Campbell, all of East St. Louis, Ill., on the brief), for plaintiff in error.

John C. Robertson, of St. Louis, Mo., for defendant in error.

Before SANBORN, CARLAND, and STONE, Circuit Judges.

CARLAND, Circuit Judge. Skinner Bros., as plaintiff, sued the Oil Company, as defendant, to recover $4,594.79, upon an account, a copy of which was attached to the complaint. The items of the account consisted of charges for time, labor, and material. The defendant answered the complaint by a general denial and counterclaim. The counterclaim alleged that the plaintiff and defendant on or about February 15, 1916, entered into an agreement whereby plaintiff agreed, for the sum of $1,400, to build, install, and erect at defendant's place of business in a good and workmanlike manner and with reasonable expedition a ventilating system to remove dust from the atmosphere of defendant's building and escaping bran dust from cyclone collectors already constructed. As a part of said agreement defendant agreed to erect a platform of concrete and steel upon which to build the ventilating system, and to furnish the fans and motors to be used in the construction of the same; that defendant erected and built the platform, above mentioned, and plaintiff commenced to erect the dust collector or ventilating system, and worked on same until April 14, 1916, when it declined to work further and abandoned its contract; that the unfinished dust collector was of no value to defendant; that, at the time plaintiff was working upon the dust collector, it was also doing other work for defendant, for which defendant paid the plaintiff from time to time, according to time, labor, and material; that on or about March 1, 1916, plaintiff presented defendant with a statement of account in the amount of $4,291.05, supposed to cover work as last above mentioned; that defendant paid said account, believing that it did cover such work; that defendant subsequently discovered that plaintiff, without the knowledge and consent of defendant, included in said statement charges for time, labor, and material for the construction of the dust collector, amounting to $1,341.60; that no part of the contract price of $1,400 agreed upon for the construction of the dust collector was to be paid until the same was completed,

and performed satisfactorily its duty as a dust collector; that by reason of the payment of said sum of $1,341.60, on the dust collector contract, the erection of the concrete platform, supplying, unloading, and erecting fans and motors, erecting the steel work, and taking out said work and material, defendant had been damaged in the sum of $5,000, for which judgment was prayed against the plaintiff.

[1] Plaintiff replied to the counterclaim, alleging that there was no contract to build the dust collector for $1,400, but that plaintiff was employed to erect a ventilating system, called also a dust collector, upon an open account basis and for a reasonable compensation, and that plaintiff refused to complete the ventilating system or dust collector, for the reason that defendant refused to make payment on account. The allegations of the pleadings are not given as they were pleaded, and some are not given at all; the purpose of stating their substance being to illustrate the verdict returned by the jury. The case was tried, and the jury returned the following verdict:

"We, the jury in the above-entitled cause, find the issues herein joined under the petition of plaintiff in favor of said plaintiff, and we find that defendant is indebted to plaintiff by reason of the account stated in said petition in the sum of forty-five hundred and ninety-four and 79/100 ($4,594.79) dollars.

"We further find the issues herein joined under the counterclaim of defendant in favor of said defendant, and we assess the damages of defendant under said counterclaim at the sum of one thousand 00/100 dollars."

The amount found due the plaintiff by the verdict was the exact amount claimed by it in its complaint, and judgment was entered in its favor for this amount, less the $1,000 which the jury found was due the defendant. It appears from the evidence that, of the total amount claimed by the plaintiff in its complaint, $2,370.27 was for material furnished and labor performed in connection with the dust collector. At the trial the principal contest between the parties was as to whether the dust collector or ventilating system was to be constructed under a contract for the sum of $1,400, as the defendant claimed, or whether the work in connection with the same including materials furnished was performed and furnished on an open account basis, for a reasonable compensation as claimed by the plaintiff. The jury, therefore, in returning a verdict for the plaintiff as stated, found that the work performed and materials furnished in the construction of the dust collector was performed and furnished on an open account basis for a reasonable compensation, and thereby also found that there was no special contract as claimed by the defendant. On the other hand, in finding for the defendant on the issues joined under the counterclaim and assessing its damages at the sum of $1,000, the jury necessarily found that there was a special contract as claimed by the defendant, and that plaintiff had breached the same, to the defendant's damage in the sum of $1,000.

It requires no argument to make it plainly appear that the verdict of the jury is so inconsistent that no judgment could be entered upon it. Allen v. Sallinger, 105 N. C. 333, 10 S. E. 1020; Gwin v. Gwin, 5 Idaho, 271, 48 Pac. 295; Mitchell v. Brown, 88 N. C. 156; Mitchell v. Printup, 27 Ga. 469; Ruth v. McPherson, 150 Mo. App. 694, 131 S. W. 474; Barr & Martin v. Johnson et al., 170 Mo. App. 394, 155

S. W. 459; Bauer Engineering & Contracting Co. v. Arctic Ice & Storage Co., 186 Mo. App. 664, 172 S. W. 417; Johnson v. Labarge, 46 Mo. App. 433.

[2] As before stated, the important question litigated by the evidence was whether there was a special contract, and the jury found both ways on that question. It is assigned as error that the verdict is inconsistent with itself and that the trial court erred in entering judgment thereon. The question as to whether the verdict supports the judgment is a question of law, which appears on the face of the record without a bill of exceptions. Such questions may be assigned as ground of reversal, although no exception is taken. Denver v. Holmes Savings Bank, 236 U. S. 101, 35 Sup. Ct. 265, 59 L. Ed. 485; Nalle v. Oyster, 230 U. S. 165, 33 Sup. Ct. 1043, 57 L. Ed. 1439; Snowden v. Ft. Lyon Canal Co., 238 Fed. 495, 151 C. C. A. 431 (8th Cir.).

It results, from what we have said, that the judgment below must be reversed, and a new trial granted; and it is so ordered.

TITUSVILLE FRUIT & FARM LANDS CO. v. PORTER.

(Circuit Court of Appeals, Fifth Circuit. March 18, 1918.)

No. 3183.

1. WITNESSES ⟸275(6)—CROSS-EXAMINATION OF PARTY—IRRELEVANT MATTER.

In an action for injuries received by a servant as a result of an explosion, the question whether a superior employé had previously accused the servant of negligence in using explosives was irrelevant, and properly excluded on the servant's cross-examination.

2. WITNESSES ⟸275(2)—CROSS-EXAMINATION OF PARTY.

In an action for injuries received by plaintiff, a servant, in an explosion, it was proper to exclude on his cross-examination a question as to whether his superior had told plaintiff that, during the superior's absence, he would not be required to use explosives, for, while the master could show previous warnings to plaintiff, the question was not framed so as to elicit that information, and the superior could not know what plaintiff would be required to do under the direction of another.

3. TRIAL ⟸203(1)—INSTRUCTIONS—ISSUES.

In an action by a servant, injured by the explosion of caps used to detonate dynamite, but which contained a dangerous high explosive other than dynamite, the refusal of a cautionary instruction, requested by the master, that the question whether dynamite is dangerous is not in issue was proper; the trial court not being bound to negative issues in no way involved, and nothing having occurred to lead jury to believe that such question was in issue.

In Error to the District Court of the United States for the Southern District of Florida; Rhydon M. Call, Judge.

Action by Raymond L. Porter against the Titusville Fruit & Farm Lands Company. Judgment for plaintiff, and defendant brings error. Affirmed.

A. W. Cockrell, Jr., Robert S. Cockrell, and Alston Cockrell, all of Jacksonville, Fla., for plaintiff in error.

Chas. P. Cooper, of Jacksonville, Fla., for defendant in error.

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

WALKER, Circuit Judge. This writ of error presents for review a judgment in favor of the plaintiff in a case which has been in this court before. Porter v. Titusville Fruit & Farm Lands Company, 219 Fed. 881, 135 C. C. A. 604; Id., 238 Fed. 759, 151 C. C. A. 609. A reversal is sought because of asserted error in the action of the court in sustaining objections to two questions asked the plaintiff on his cross-examination and in refusing to give a charge requested by the defendant.

On his direct examination the plaintiff testified to the effect that a Mr. Ellis, an officer or employé of the defendant, who directed other employés what work to engage in, ordered the plaintiff to do specified blasting and to use dynamite caps and fuse in doing the work; that the plaintiff was ignorant of the danger from such caps, other than the one to which the fuse was attached, being exploded by sparks from the burning fuse, and was not warned of that danger, or instructed how to avoid it; and that he was injured in doing the work he was ordered to do by the explosion of some of the caps, which he left near by while he was preparing to set off a blast. In the course of his cross-examination it was brought out that on a former occasion, while he was an employé of the defendant, he had worked under a Mr. Davis, an employé superior to the plaintiff, but not to Mr. Ellis, having authority to give orders to the plaintiff. Exceptions were reserved to the action of the court in sustaining objections to the following questions asked the plaintiff by the defendant's counsel:

"Q. Don't you know that on that occasion Mr. Davis told you further that your carelessness a short time before in setting off dynamite there at the rock cut had come near causing the death of several people and that he didn't want you to have anything more to do with dynamite?"

"Q. Mr. Porter, didn't Mr. Davis, on that occasion, tell you that you would have nothing to do with dynamite while he was gone?"

[1] The first quoted question called for evidence, not of carelessness on the part of the plaintiff, but of Davis having charged him with carelessness. The fact that that question called for testimony of the entirely irrelevant fact of Davis imputing fault to the plaintiff, whether justly or not, is enough to prevent the sustaining of the objection to it being treated as a reversible error.

[2] The sustaining of the objection to the last quoted question is criticized on the ground that the effect of the ruling was to exclude evidence of the plaintiff having been warned of the danger to which he was exposed by obeying the order given to him by Ellis. It was disclosed that at the time the plaintiff was hurt Davis was absent on a business trip. It is not denied that it was permissible on the cross-examination of the plaintiff to elicit an admission by him that, before receiving and obeying the order given by Ellis, another representative

of the defendant, under whom he had formerly worked, had warned him of the danger from dynamite caps used in the way Ellis directed blasting to be done. The question under consideration was not so framed as to apprise the court that its object was to elicit such testimony. An affirmative answer to it would not have tended to prove that Davis warned the plaintiff of the danger of doing blasting in the way ordered by Ellis, or instructed him how to avoid such danger, but would have been an admission of the immaterial and irrelevant circumstance that Davis, before leaving, had made the statement that plaintiff would have nothing to do with dynamite while he (Davis) was gone, a fact in the future which could not have been known to Davis; the plaintiff being subject to the orders of another or others while Davis was away.

It is not reversible error to sustain an objection to a question which does not call for testimony material or relevant to any issue in the case. It is not made to appear that the action of the court with reference to the last quoted question had the effect of excluding evidence which the defendant was entitled to adduce. Davis was a witness for the defendant in the trial, and gave his version of what occurred on the occasion referred to in the questions to which objections were sustained.

[3] An exception was reserved to the refusal of the court to give the following charge, requested by the defendant:

"The question of whether dynamite is dangerous is not an issue in this case; the accident having occurred, not from dynamite, but from dynamite caps."

The statement of fact made in this charge was a correct one. The question of dynamite being dangerous was not an issue in the case. The plaintiff was hurt by the explosion of caps which contained a dangerous high explosive other than dynamite. No exception was reserved to the court's statement to the jury of the issues of fact in the case. It is not disclosed that anything occurred which was calculated to convey the impression to the jury that "the question of whether dynamite is dangerous" was an issue in the case. It is not denied that, if there had been such an occurrence, the court might properly have given such an instruction as the one embodied in the requested charge. But in the absence of any such occurrence it is not seen how the appellant could have been harmed by the court's refusal to give that charge. It is not a reversible error for a court to fail or refuse to negative the presence in a jury case of an issue of fact which has not been claimed or asserted to be involved in it. To hold that it is reversible error to refuse to give such a charge, when nothing has happened to mislead the jury as to the issues to be passed on by them, would open the door to requests for an indefinite number of unnecessary cautionary instructions.

The conclusion is that there was no reversible error in any ruling complained of.

The judgment is affirmed.

MORRIS & CO. v. PECHENKA.

(Circuit Court of Appeals, Eighth Circuit. February 28, 1918.)

No. 5023.

MASTER AND SERVANT ⟸155(2)—INJURIES TO SERVANT—DUTY TO WARN.

Where an endless carrier, which was part of a meat-pressing machine and was made of narrow wooden slats fastened transversely to chains, traveled in a flat position except at the turns over wheels at each end of the machine, at which points the slats that ordinarily lay close together, separated only to close again when they had passed the wheels, a packing company using the machine was not guilty of negligence in failing to warn an adult, who had long been employed in the packing industry and had used the machine itself for some weeks, of the danger of his fingers catching between the slats when they opened over the wheels, for the defect was obvious, and the employé was as capable of understanding it as any one else.

In Error to the District Court of the United States for the District of Nebraska; Joseph W. Woodrough, Judge.

Action by Joseph Pechenka against Morris & Co., a corporation. There was a judgment for plaintiff, and defendant brings error. Reversed, and cause remanded for new trial.

James C. Kinsler, of Omaha, Neb., for plaintiff in error.

David A. Fitch, of Omaha, Neb. (Ringer & Bednar and Gurley & & Fitch, all of Omaha, Neb., on the brief), for defendant in error.

Before HOOK, CARLAND, and STONE, Circuit Judges.

HOOK, Circuit Judge. Pechenka recovered a judgment against Morris & Co. for personal injuries sustained while working at a machine in its packing house at South Omaha, Neb. The charge of negligence on which the recovery proceeded was that there was a danger in the operation of the machine, unknown to him, of which the company failed to inform and warn him. On the other hand, the company claimed that whatever danger existed was so open and obvious that plaintiff as a man of ordinary intelligence should have seen and realized it.

The machine was for pressing pieces of hog carcasses. It was about six feet long, was supported by legs, and stood upon the floor. The part of it important here was an endless carrier, moving within the metal frame or standard. When in operation the pieces of meat were placed on the carrier at one end of the machine, carried forward under two superimposed cylinders for pressing, and then discharged to a table at the other end. The carrier was not unlike an endless moving sidewalk, or a broad belt in flat position, traveling horizontally, except at the turns over wheels at either end. It was about three feet wide, and was made of narrow wooden slats fastened transversely to chains. When in a horizontal position the sides or edges of the slats lay close together as the boards of a walk, but at the turns at the ends of the machine they opened and closed as they departed from and again approached a level. At the end of the machine, at which

the pieces of meat were discharged after being pressed, there was a long table placed close up to the slats of the carrier. The height or top of the table was even with the extreme outward bend of the carrier on its downward motion. It was therefore about the place of the widest opening between the edges of the slats. This was plaintiff's working place. His duty was to receive the pieces of meat from the carrier and keep them from piling up there and falling on the floor, by passing them back to other workmen at the table. He testified that from 15 to 20 times a day pieces of meat in being pressed under the cylinders would become fastened between the slats and would not loosely fall off on the table, and that in such cases it was his duty to detach them. The accident happened on an occasion of that kind. He put his hand under a piece of meat as it was being carried down on the slats and two fingers were caught and crushed. His testimony, with lack of certainty, was that his fingers must have been caught in the closing space between two slats. It is not clear how it could have happened that way. The slat openings did not begin to close above or at the level of the table, and the evidence of the proximity of the table to the machine made it unlikely that his hand or his arm was drawn below it, if indeed it were possible. It seems more probable from the record that his fingers were caught between the end of the table and the carrier; but we will take as a fact established, the one upon which the verdict was based.

The plaintiff was 48 years of age, and had been employed in packing houses in South Omaha for 16 years. He had been engaged at this pressing machine, performing the same duties, from 2 to 4 hours daily for 4 weeks before the accident. He had also worked at the other end of the machine, and had used the appliance there for starting and stopping it. At that end the order of the opening and closing of the slats of the carrier was the reverse of that at the end where he was injured. He had seen the machine in operation and at rest. There were guards at the sides of the metal frame of the machine covering the wheels and belts, but it cannot reasonably be said that its character and method of operation, including that of the carrier, were not discernible by a person of average intelligence using ordinary observation.

The machine was of a standard make, and it is not claimed here that it was defective in any particular, or that the endless carrier, while in motion, could or should have been guarded by a protective device. The verdict was not for either cause. The single contention is that the gradually closing edges of the slats on their downward return movement constituted a latent danger, and that the company should have warned the plaintiff of it. To warrant a recovery in such a case it should appear that the plaintiff did not know and appreciate the danger, and that his ignorance and failure to comprehend were excusable. In Kohn v. McNulta, 147 U. S. 238, 13 Sup. Ct. 298, 37 L. Ed. 150, the court said:

"It is not pretended that these cars were out of repair, or in a defective condition, but simply that they were constructed differently from the Wabash cars, in that they had double deadwoods or bumpers of unusual length to protect the drawbars. But all this was obvious to even a passing glance, and the risk which there was in coupling such cars was apparent. It required no

special skill or knowledge to detect it. The intervener was no boy, placed by the employer in a position of undisclosed danger, but a mature man, doing the ordinary work which he had engaged to do, and whose risks in this respect were obvious to any one. Under those circumstances he assumed the risk of such an accident as this, and no negligence can be imputed to the employer."

In Gleason v. Smith, 172 Mass. 50, 51 N. E. 460, it was said:

"The machine on which he was injured was an ordinary machine in perfect condition. * * * Although the plaintiff could not see the knives when the machine was in operation, there is nothing to indicate that an examination of the machine when it was at rest would not have shown that the guard did not fully cover the knives. * * * The defendant had no reason to suppose that he needed instruction in regard to this danger, and owed him no duty either to change the guards or to give him instruction or warning about it."

See, also, Connolly v. Eldredge, 160 Mass. 566, 36 N. E. 469; Mississippi River Logging Co. v. Schneider, 74 Fed. 195, 20 C. C. A. 390; King v. Morgan, 109 Fed. 446, 48 C. C. A. 507.

That the slats would close again on the turn was obvious to any person of ordinary powers. The danger inhered in the normal operation of the machine, and the plaintiff, who was a mature and experienced man, was as capable of knowing and understanding it as any representative of the company. The risk of fingers in a closing crack is generally learned by persons of average intelligence early in life, and plaintiff was entitled to no warning beyond that furnished by common experience.

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

FUERST BROS. & CO., Inc., v. POLASKY et al.

(Circuit Court of Appeals, Second Circuit. January 16, 1918.)

No. 118.

1. SALES ⊜442(2)—ACTIONS—DAMAGES.
   In a suit for breach of warranty, the ordinary measure of damages is the difference between the value of the article contracted for and that delivered.
2. COURTS ⊜329—FEDERAL COURTS—JURISDICTION.
   The federal court is without jurisdiction of a suit based on diversity of citizenship, unless the allegation of damages is sufficient on its face to satisfy the jurisdictional requirement as to the amount involved.
3. SALES ⊜435(5)—ACTIONS—DAMAGES.
   In an action for breach of warranty as to the amount of thorium contained in sand, an averment of special damage, in that the sand delivered contained approximately one-fifth less thorium than the sand which the seller agreed to deliver, so that 20 per cent. of the chemicals and labor used in extracting it were wasted, is insufficient as an averment of special damage, not showing that the character of the sand could not have been ascertained without treating the whole of it.
4. SALES ⊜442(6, 7)—DAMAGES—SPECIAL DAMAGE.
   Where sand sold contained about one-fifth less thorium than represented, and the buyers learned that fact after treating a small part, they cannot, having treated the entire amount, recover as special damages one-fifth of the expense of reduction, on the theory that, as the yield was

one-fifth less than the amount agreed upon, that percentage of expense was wasted.

5. SALES ⊜442(1)—DAMAGES—MEASURE.

Where sand contained a less quantity of thorium than represented, the buyers' measure of damages is the value of the extracted thorium in quantity equal to what the sand should have contained, less the cost of extraction, plus the contract price of the sand.

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

Action by Harry Polasky and another, trading as the New Process Gas Mantle Company, against Fuerst Bros. & Co., Incorporated. There was a judgment for plaintiffs, and defendant brings error. Reversed, and complaint dismissed.

Writ of error to a judgment of the District Court for the Southern District of New York for $3,986.75 in an action at law upon the verdict of a jury. The jurisdiction of the District Court depended upon diversity of citizenship and the amount in controversy. The complaint, after stating diversity of citizenship, went on to allege that on the 25th of June, 1915, the plaintiffs agreed to purchase of the defendant 30 tons of monazite sand, containing a minimum of 6 per cent. thorium oxide, at the rate of $55 for each per cent. of thorium oxide per short ton, the percentage to be based upon a European chemist's analysis; that thereafter the defendants delivered to the plaintiff 33.628 tons of monazite sand, representing to the plaintiff that the same contained by a European chemist's analysis 6.35 per cent. of thorium oxide, and charged the plaintiff $55 a ton for each percentage of thorium oxide contained in each short ton; that the plaintiff, relying on these representations, accepted the sand and paid to the defendant the sum of $11,744.58, at the rate of $349.25 a ton; that the sand did not contain 6.35 per cent. of thorium oxide, as represented, but only 5.31 per cent., as the plaintiff subsequently ascertained by analysis. The ad damnum was laid in the ninth and tenth articles of the complaint as follows:

"Ninth. That the difference between the value of the sand so delivered to the plaintiffs as aforesaid, and that which the defendant agreed to deliver, and for which the plaintiffs paid, is nineteen hundred and twenty-five ($1,925.00) dollars.

"Tenth. That by reason of the misrepresentations and breach of warranty of the defendant as aforesaid, the plaintiffs suffered additional damages in the sum of two thousand ($2,000) dollars, in that the sand delivered by the defendant to the plaintiff yielded approximately twenty per cent. (20%) less thorium than the sand which the defendant agreed to deliver, and that therefore twenty per cent. (20%) of the chemicals and labor were wasted, due to the fact that the said monazite sand was not up to the grade represented and warranted by the defendant."

The plaintiff proved delivery in the autumn of 1915, and that it stored the sand until some time in January or February, 1916, at which time it began to use it, and upon analysis found that it contained 5.31 per cent. of thorium oxide. After ascertaining breach of the contract it repudiated the delivery, but retained and used the sand, which the defendant would not receive. The damages were made up on the following principles, as stated in the complaint: First, the difference in the value of the sand paid for and that delivered, based upon content, computed at the figures stated in the contract, and amounting to $1,923.51, but stipulated at $1,925; second, that proportion of the cost of treating the whole of the sand actually delivered which the absent percentage of thorium oxide bore to the percentage stated in the contract. The jury found a verdict for both elements of damages under the charge of the judge and under exception of the defendant. In this court, and in the court below, the defendant questioned the jurisdiction over the subject-matter, the point being that the amount in controversy was less than $3,000.

Norbert Heinsheimer, of New York City (Henry K. Heyman, of New York City, of counsel), for plaintiff in error.

Charles S. Aronstam, of New York City (A. Freedman, of New York City, on the brief), for defendant in error.

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

LEARNED HAND, District Judge (after stating the facts as above). [1] This being a suit for breach of warranty, the ordinary measure of damages would be the difference between the value of the monazite sand contracted for and that delivered. Florence Oil, etc., Co. v. Farrar, 119 Fed. 150, 55 C. C. A. 656. Now the value of the lower grade of monazite sand is theoretically not to be determined by the absence of that thorium which the plaintiff paid for and did not get. Moreover, in the case at bar the plaintiff's own evidence actually showed that 5 per cent. monazite sand has a value of $50 per ton for each percentage, instead of $55. Hence the plaintiff might have asked that the value of the sand actually delivered be taken at $265.50 per ton, instead of the price paid, $349.25. The damages under that aspect would have been $2,816.35, instead of $1,925, though this was still not sufficient for purposes of jurisdiction. In order to supplement the discrepancy between the difference in value, stated at $1,925, and the jurisdictional amount, the plaintiff added to its ad damnum, by way of special damages, that proportion of the total cost of treating the monazite sand which the absent percentage of thorium bore to the total percentage contracted for, roughly 20 per cent. Its theory was that it might take as absolute loss that proportion of the cost which would have resulted in extracted thorium, if the delivery had been according to the contract.

[2, 3] If the allegation in the complaint of these added damages is on its face insufficient in law, the court below was without jurisdiction. Vance v. Vandercook, 170 U. S. 468, 18 Sup. Ct. 645, 42 L. Ed. 1111; North Amer., etc., Co. v. Morrison, 178 U. S. 262, 20 Sup. Ct. 869, 44 L. Ed. 1061; Globe Refining Co. v. Landa Cotton Oil Co., 190 U. S. 540, 23 Sup. Ct. 754, 47 L. Ed. 1171. The last case is particularly close, holding that even notice to the seller of the buyer's purposes is not sufficient to charge him with the loss resulting from their disappointment. There can be no doubt that the tenth article was insufficient as an allegation of special damages, for it did not allege that the plaintiff could not ascertain the character of the sand without incurring the cost of treating the whole of the sand, or that the defendant had contracted with reference to any such necessity nor indeed, even that it had had notice of it, assuming that such an allegation could have survived (Globe Refining Co. v. Landa Cotton Oil Co., supra), under the peculiar circumstances of the case. Without some sufficient allegations the damages were necessarily limited by the ninth article and were too small. It follows that the District Court was without jurisdiction, and should have dismissed the complaint sua sponte.

[4, 5] Furthermore, even if we were not strictly limited in jurisdictional questions to the form of the pleading, or assuming that, since the case was tried, and the plaintiff got a verdict, we might treat the pleadings as conformed to the proof, the result is no different, because under no pleading that the proof would admit was there jurisdiction. It appeared on the contrary that the plaintiff learned of the deficiency of the sand in thorium oxide when only a small part of it, between 3 and 4 tons, had as yet been ground. There was, besides, not the least color for saying that the defendant had even notice, to say nothing of more, of this supposed necessity to run through the whole of the sand. Finally, passing even these fatal deficiencies, there was no proof of special damages, if any such were recoverable. The proportion of the cost of treating the sand would not have been the measure. The proper measure would in that event have been the value of extracted thorium, in quantity equal to what the sand should have contained, less the cost of extraction, plus the contract price of the sand. There was no evidence of the value of extracted thorium, nor any basis for inference of its value.

The judgment is reversed, and the complaint dismissed for lack of jurisdiction, with costs.

BOSTON & YARMOUTH S. S. CO., Ltd., v. FRANCIS.

(Circuit Court of Appeals, First Circuit. March 6, 1918.)

No. 1326.

SHIPPING ⊂=166(1)—LIABILITY OF VESSELS—INJURY TO PASSENGER.

A verdict finding defendant steamship company liable for an injury to plaintiff, a passenger, by being thrown from a settee in the cabin on which she was sleeping, *held* supported by the evidence, from which it appeared that the vessel had just passed from the shelter of the land into rough water, that there was a drop leaf in the front of the settee, which could be hooked up to prevent persons lying thereon from being thrown out, and that there was a stewardess employed to look after the safety of lady passengers, and whose duty it was to hook up such leaves when passengers were lying on the settee in rough weather, but that she did not see plaintiff, and did not raise the leaf.

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

Action at law by Ida Francis against the Boston & Yarmouth Steamship Company, Limited. Judgment for plaintiff, and defendant brings error. Affirmed.

C. C. Barton, Jr., of Boston, Mass. (Barton & Harding, of Boston, Mass., on the brief), for plaintiff in error.

Wendell P. Murray, of Boston, Mass. (William J. Williams, of Boston, Mass., on the brief), for defendant in error.

Before DODGE, BINGHAM, and JOHNSON, Circuit Judges.

DODGE, Circuit Judge. The plaintiff in error (hereinafter called defendant) seeks to reverse a judgment in the District Court in favor

of the defendant in error (hereinafter called plaintiff) for damages for personal injuries sustained by her while a passenger on the defendant's steamer Boston, during a voyage from Boston to Yarmouth, Nova Scotia.

According to the undisputed evidence, her injuries were occasioned by being rolled or pitched, in rough water encountered after passing Cape Ann, from a settee in the cabin to the cabin floor. Upon this settee she had lain down and gone to sleep, partly dressed, some hours before. Not including the cushion upon it at the time, the settee was 14½ inches above the cabin floor. It was provided with a leaf on the side from which she fell, so arranged as to hang down in front when not in use, but capable of being raised and made fast with a hook and eye for the purpose of protecting passengers who might occupy it as a bed from being rolled or pitched off. This leaf had not been so raised or made fast.

The jury found specially that the defendant was negligent in permitting the plaintiff to go to sleep on the settee without putting up the leaf, and also in not discovering that she was sleeping on the settee at the time of the accident, and in not warning her of the danger therefrom. The jury found also that the plaintiff did not fail to exercise ordinary care for her own safety. As to a claim made by her for the defendant's failure to provide reasonable medical attendance and treatment after the accident, the jury further found the defendant negligent in failing to furnish her with such attendance and treatment.

The only error assigned is the court's refusal to rule that on all the evidence the plaintiff was not entitled to recover under any count of her declaration. There was testimony from the only stewardess on duty during the voyage, called as a witness by the defendant, in view of which we are clearly unable to hold that there was no evidence upon which the defendant's negligence could be found to have caused the accident. The stewardess testified, among other things, that when the settees were used for berths the board was hooked up by her, "which protects people from falling out"; that "she would not have permitted the plaintiff to go to sleep on that settee if she had noticed her"; that it was "not safe for a person to go to sleep on that settee unless the side board is up and held by the hook in such stormy weather"; also that she was "down there every quarter of an hour," and her duties were to look after the ladies throughout the ship, including the cabin. The jury could have found from such testimony that it was the stewardess' duty to notice the plaintiff's situation and guard against danger to her, either by warning her off the settee or by putting up the board.

Nor can we hold—although the plaintiff testified that she had been a frequent passenger on the steamer, knew that there was such a leaf and what it was for, and that there were berths in the cabin which she might have occupied in which she would not have been exposed to any danger of being thrown out—that no other finding was reasonably possible than a finding that the plaintiff's own negligence contributed to her injury. The jury could have found that she was

justified in relying on the stewardess to look after her safety by putting up the leaf, or by warning her of the danger in remaining on the settee without having it put up.

There was also testimony from the chief officer of the Boston from which negligence on the defendant's part in another respect might have been found. According to his testimony the wind was from the northwest, gradually increasing in violence during the voyage, and while the vessel was more or less protected from it, and the heavy sea raised by it, so long as she was under the lee of Cape Ann, she received their full force, after passing the cape, against her port quarter, being that part of her in which the ladies' cabin was situated. The jury might have regarded this as a change in conditions which the officers of the vessel ought to have anticipated, while the plaintiff could not reasonably have been expected to do so, and might have found that due care on their part required seasonable notice from them to the stewardess, to see that all occupants of berths or settees in the cabin were made secure.

The plaintiff testified that her arm or wrist was broken by her fall. The defendant's chief steward and the stewardess above mentioned testified that after examining her they found nothing to indicate that any bones were broken. Except by them, it did not appear that any measures for her relief were taken on the defendant's behalf, and as to what was done by them the evidence was conflicting. No physician was on board, and although, according to the chief steward, the company had at command the services of a doctor in Yarmouth, who could get there in about five minutes, and whom they had frequent occasion to call, no attempt appeared to have been made, after the boat's arrival at 8:15 a. m., to obtain medical aid for her, although the train for Digby, to which she went from the boat, did not leave the wharf until 9:40 a. m.

The evidence on the plaintiff's behalf tended to show that she asked that before she left the boat a doctor be sent for. This the stewardess and the chief steward denied. If, upon this or other disputed points bearing upon her treatment after the accident, the plaintiff's testimony was believed as against that tending to contradict it, the jury could have found that she did not receive that degree of care and attention which her injuries demanded, so far as was reasonably practicable for the defendant to afford it with such facilities as were at its employés' command.

The judgment of the District Court is affirmed, with interest, and the defendant in error recovers her costs of appeal.

CARROLL et al. v. CITY OF NEW YORK.

CITY OF NEW YORK v. CARROLL et al.

(Circuit Court of Appeals, Second Circuit. January 16, 1918.)

Nos. 133, 134.

1. COLLISION ⊂⊃123—LIABILITY—BURDEN OF PROOF.
A vessel, proceeding in violation of statutory requirements at the time of a collision, to escape liability, must show such violation did not contribute to the collision.

2. COLLISION ⊂⊃93—LIABILITY—FERRY.
While a ferryboat's occupation imposes additional duties upon vessels pursuing their lawful occasions near ferry slips, yet liability must be determined by the ordinary rules of navigation, where a collision between a ferryboat and another craft occurred 800 feet beyond the end of the ferry slip.

3. COLLISION ⊂⊃102—LIGHTS—LOOKOUTS—LIABILITY.
A ferryboat and propeller, which collided, the former being struck on the starboard side, *held* both liable; the ferryboat for not promptly observing the propeller's lights, it having the right of way under the starboard hand rule, and the propeller in violating statutory requirements as to speed and keeping to the middle of the channel. So the damages should be divided.

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

Libel by Howard Carroll and another, executors of the estate of John H. Starin, deceased owner of the steamboat Haven, against the City of New York, together with a libel by such respondent against such libelants. From decrees for the City of New York, Howard Carroll and another appeal. Reversed and remanded, with directions.

A few only of the facts regarding this collision need statement as a basis for legal ruling:

On a dark clear night, in the East River, with the tide strong flood, and a northwesterly gale, the ferryboat Queens, bound from her slip near the foot of Whitehall street to Staten Island, came in collision with the propeller Haven, bound from a North River pier into the Sound and so on to New Haven. The blow (nearly amidship) was by the bow of the Haven on the starboard side of the Queens, and not over three points (probably less) off a right angle; contact occurred about 800 feet off the end of the ferry racks, in a line between one of the Whitehall slips and the nearest wharf on Governor's Island, a distance of between 2,200 and 2,300 feet. Before collision the Queens had probably been carried by tide and wind broadside, or nearly so, somewhat to her own port hand.

On getting under way and blowing her slip whistle, the Queens noticed three tows, all on her port bow, all going out of the East River, and all on the Manhattan side of the channel. The estimated distance of the outside tow from the rack or pier ends was 600 feet. While such estimates are not at all reliable, it is found and admitted that all these tows were inside of or nearer Manhattan than the course of the Haven, which as found by the court below was to keep substantially the same distance; i. e., about 800 feet off the Battery, as she rounded into the East River.

The Queens blew one whistle, at least twice, to the tows on her port bow, and received assenting answers. She denies (and we so assume) that she ever blew any passing signal to the Haven, which vessel, however, gave one whistle, on the assumption that one of the Queens' signal blasts was intended for her.

The Haven had seen the Queens in, or just leaving, her slip, and when the propeller was passing the Aquarium, a distance of about 2,000 feet; the Queens did not notice the Haven until she was distant no more (by the ferryboat's testimony) than 1,000 feet. Again accuracy is not to be expected in this matter of distance; but we find as a fact, on the Queens' own evidence, that she paid no attention to the Haven, if indeed she saw her, until after the Queens had cleared the tows to her own port, and she was then almost across the Haven's path, although the red light of that vessel must have been plainly visible from the time she was about off the Aquarium. On this point no finding was made below.

The Haven was found at fault for violating the East River statute, both as to speed and proximity to the shore, and no contributing error was discovered in the Queens. Decrees accordingly having been entered, the owners of the Haven appealed.

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

Kirlin, Woolsey & Hickox, of New York City (William H. McGrann and Robert S. Erskine, both of New York City, of counsel), for the Queens.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [1] The findings below, to the effect that the Haven was exceeding the speed limit and not keeping in the middle of the channel, are supported by evidence, and we acquiesce in them. There was a violation of statutory requirements, and the burden of showing that such violation did not contribute to collision has not been borne; therefore the Haven must be held to liability.

[2, 3] The conduct of the Queens is sought to be justified under The Breakwater, 155 U. S. 252, 15 Sup. Ct. 99, 39 L. Ed. 139. That case does not mean nor say that a ferryboat's occupation completely frees her from the rules of navigation. It does impose additional duties upon all vessels pursuing their lawful occasions near ferry slips. What shall be the space or region, or the extent thereof, within which these duties are obligatory, is a matter of degree, depending on local and sometimes temporary conditions.

We held in The Paunpeck, 86 Fed. 924, 30 C. C. A. 494, that a ferryboat, colliding with another vessel 800 feet from her slip end, was to be acquitted or condemned by the usual navigating rules. That decision is applicable here; in both cases the conditions are those reasonably to be expected in the transaction of maritime business in the crowded waters of New York Harbor. Therefore the starboard hand rule applied, and the Haven had the right of way. That vessels might be approaching on her starboard bow, to which she must give way, was just as much to be expected by the Queens, as that others would appear to her port.

No reason at all is shown by the ferryboat why she did not see and navigate with reference to the Haven before she did. There is a suggestion—it is far from proof—that the propeller's light was not good; but there is no denial that navigation with reference to the Haven began when just clear of, or just clearing, the outermost tow. That was too late; collision was imminent. It is urged in excuse

that the gale and tide rendered it impossible for the Queens, a large boat of great freeboard, to turn in time to pass under the Haven's stern or pass her port to port. That may be true, but its truth would have been just as apparent, had the ferryboat seen the propeller and signaled her earlier. As it happened, nothing was done but to blow the danger whistles, when the Queens was practically across the bows of the privileged vessel. Probably, when those whistles were blown, nothing could be done; but no man is excused from the result of an unlawful situation, if he is not also excusable for getting into it. This last is the excuse lacked by the Queens; if she had seen and noted the Haven at the proper time, i. e., substantially when the Haven saw her, we do not think collision would have ensued; at all events the Queens has not shown the contrary, and thereby avoided the result of a fault on her part, as obvious as that of the Haven.

Holding, therefore, the Haven at fault, as found below, and the Queens also negligent, in that (1) she did not timely observe a situation to which (2) the starboard hand rule applied, the decrees below are reversed, with one bill of costs to appellants, and the causes remanded, with directions to enter decrees dividing the damages and lower court costs.

In re SOLTMANN.

Appeal of RATHBONE.

(Circuit Court of Appeals, Second Circuit. January 16, 1918.)

No. 127.

1. BANKRUPTCY ⟸334—CLAIMS—PROOF—SECURED CLAIM—DEFICIENCY.
   Where a trustee in bankruptcy was not a party to proceedings of a creditor to foreclose his fourth mortgage under which sale was had resulting in a deficiency judgment, the deficiency judgment did not constitute a liquidation of the claim under the mortgage, within Bankruptcy Act July 1, 1898, c. 541, § 57h, 30 Stat. 560 (Comp. St. 1916, § 9641), so as to be provable.

2. MORTGAGES ⟸427(1)—FORECLOSURE—EQUITY OF REDEMPTION.
   The mortgagor, or, if he has conveyed before suit brought, his grantee, is a necessary party to an action to foreclose, and, if not made a party, his equity of redemption is not foreclosed.

3. BANKRUPTCY ⟸213—TRUSTEE—RIGHTS OF.
   Under Bankruptcy Act, § 70 (Comp. St. 1916, § 9654), a trustee, when elected, is by operation of law vested with the bankrupt's title as of the date of adjudication, and where the trustee was not made a party to a suit to foreclose a mortgage on the bankrupt's property, begun after bankruptcy, though before election of the trustee, the equity of redemption, which passed to him, was not foreclosed by the judgment.

4. MORTGAGES ⟸567(1)—FORECLOSURE—PURCHASER.
   Where the mortgagor was not a party to a suit to foreclose, nor was his trustee in bankruptcy made a party, a purchaser at such foreclosure sale becomes an assignee of the mortgage, and if he enters into possession becomes a mortgagee in possession, so that if, upon sale thereafter of the premises under a prior mortgage, a surplus be paid into court, the purchaser will be entitled to it, and if a surplus still remains it will go to the trustee as owner of the equity of redemption.

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5. BANKRUPTCY ⟸334—CLAIMS—LIQUIDATION.
Where the trustee in bankruptcy was not a party to a suit to foreclose fourth mortgage, and the mortgagee recovered a deficiency judgment, which he attempted to prove against the bankrupt's estate, the sole question for determination, the claim not having been liquidated, was whether the amount bid at the foreclosure sale represented the fair value of the premises, and, the referee having found that the value of the land was ample to secure the whole of the mortgagee's claim, he was not obliged to fix its exact value.

6. BANKRUPTCY ⟸334—CLAIMS—LIQUIDATION.
Where a trustee in bankruptcy was not a party to a suit to foreclose a fourth mortgage, so that the deficiency judgment recovered by the mortgagee was not a liquidation of his claim, the judgment roll was admissible as some evidence of the value of the property.

7. APPEAL AND ERROR ⟸544(3)—REVIEW—DETERMINATION.
Appeals are decided on the record sent up whenever possible, and a decree will not be reversed where, from the record, the appellate court could determine the nature of evidence improperly excluded, and that it would not have affected the result.

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

In the matter of the bankruptcy of Edward G. Soltmann. From an order expunging his proof of debt, R. Bleecker Rathbone appeals. Affirmed.

See, also, 238 Fed. 241.

Eugene L. Bushe, of New York City, for appellant.

Walter B. Raymond, of New York City (Edwin S. Hall, of New York City, of counsel), for trustee.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

WARD, Circuit Judge. This is an appeal from an order expunging R. Bleecker Rathbone's proof of debt against the estate of Edward G. Soltmann, a bankrupt. Rathbone was the owner of a fourth mortgage for $15,000 on premises belonging to the bankrupt, subject to prior mortgages aggregating about $147,000.

After the adjudication Rathbone began an action in the state court to foreclose the mortgage, which was then overdue, filed the usual lis pendens, and obtained permission from the District Court to maintain the action and to make the receiver in bankruptcy a party defendant. Some two months or more after the trustee was elected the usual decree for foreclosure sale was made, and on November 20, 1915, the sale was had, resulting in a deficiency judgment for $16,334.50 against Soltmann, which was duly entered of record on the docket of judgments in the office of the clerk of the county of New York December 31, 1915.

[1] January 5, 1916, Rathbone filed a proof of debt in bankruptcy, relying upon this deficiency judgment as a liquidation by him of his claim under section 57h of the Bankruptcy Act. Judge Mayer rightly disallowed the claim, on the ground that the trustee not having been made a party the deficiency judgment did not constitute a liquidation of the claim by Rathbone under the mortgage.

[2-4] Thereupon Rathbone filed an amended proof of debt, asking that the value of the mortgage be liquidated as the court might direct under the same section. The referee in bankruptcy took much testimony of experts as to the value of the mortgaged premises, upon which he found that they were ample security for Rathbone's claim. Judge Manton confirmed the report and ordered the claim to be expunged.

The mortgagor, or, if he has conveyed before suit brought, his grantee, is a necessary party to an action to foreclose, and, if not made a party, his equity of redemption is not foreclosed. The trustee in this case was elected after suit brought, but became vested by operation of law with the mortgagor's title as of the date of adjudication, which was before suit brought, section 70, Bankruptcy Act. Consequently his equity of redemption has never been barred. Winslow v. Clark, 47 N. Y. 261; Landon v. Townshend, 112 N. Y. 93, 19 N. E. 424, 8 Am. St. Rep. 712. The purchaser at such a foreclosure sale becomes assignee of the mortgage, and if he has entered into possession he becomes mortgagee in possession. This is because the land is not sold and the mortgage is sold. Townshend v. Thomson, 139 N. Y. 152, 161, 34 N. E. 891; Jackson v. Bowen, 7 Cow. (N. Y.) 13; Robinson v. Ryan, 25 N. Y. 320; Miner v. Beekman, 50 N. Y. 337.

It results from the foregoing that Rathbone has lost his mortgage, and that the purchaser at the foreclosure sale is the owner of it. If, upon a sale hereafter of the premises under a prior mortgage, a surplus be paid into court, the purchaser at the foreclosure sale under Rathbone's mortgage will be entitled to it. If there remain after that a surplus, it will go to the trustee, as owner of the equity of redemption.

[5] Accordingly the question to be determined was whether the amount bid at the foreclosure sale represented the fair value of the premises. The referee found that the value of the land was ample to secure the whole of Rathbone's claim. We do not think he was obliged to fix the exact value as counsel contends. His finding of fact upon evidence sufficient to support it we are not disposed to disturb.

[6] Another objection made by counsel for Rathbone is that the referee refused to receive in evidence the judgment roll in the foreclosure action. We think this was error, and that he misunderstood Judge Mayer's opinion. While alone it was not sufficient to support a liquidation of the mortgage, it was some evidence of value.

[7] Appeals are decided on the record sent up whenever possible, it being sent back only under exceptional circumstances. We can gather from the facts and figures in this record that the amount bid at the foreclosure sale, together with the prior incumbrances, interest, and taxes, would indicate a value in November, 1915, of between $152,000 and $153,000. Consideration of this evidence does not alter our conclusion.

The decree is affirmed.

KANSAS CITY, C. & S. RY. CO. v. SHOEMAKER.

(Circuit Court of Appeals, Eighth Circuit. December 19, 1917.)

No. 4922.

1. RAILROADS ⊜301—MUTUAL RIGHTS AND DUTIES AT HIGHWAY CROSSINGS.
The driver of a railway motorcar had the right of way at a highway crossing over an automobile on the highway.

2. MASTER AND SERVANT ⊜137(3)—RAILROADS ⊜327(1)—LIABILITY FOR INJURIES—ACCIDENTS AT CROSSINGS.
It was the primary duty of the driver of an automobile, approaching a railroad crossing, to look and listen for engines, cars, motorcars, and other vehicles on the railroad, and to stop before colliding with any of them, and the driver of a railway motorcar had the right to rely upon the legal presumption that the automobile driver would faithfully discharge this duty, and would have been guilty of no breach of duty, or negligence towards a fellow employé riding on the motorcar, if he had seen the automobile approaching, and had driven steadily on until the collision occurred, in the faith that the automobile driver would stop, unless he perceived that the driver would not stop in time to prevent the collision, and thereafter failed to exercise reasonable care to stop the motorcar, so as to avoid the collision.

3. MASTER AND SERVANT ⊜265(3, 12)—ACTIONS FOR INJURIES—BURDEN OF PROOF.
A railway employé, suing for injuries sustained while riding on a motorcar which collided with an automobile, had the burden of proving his allegations as to the negligence of the driver of the motorcar, and that such negligence caused or directly contributed to the collision.

4. MASTER AND SERVANT ⊜285(1), 287(4)—ACTIONS FOR INJURIES—DIRECTION OF VERDICT.
Where there was no substantial evidence that the driver of the motorcar perceived, in time to stop and prevent the accident, that the driver of the automobile would not discharge his primary duty of stopping and preventing the collision, and that his failure to exercise reasonable care to stop the motorcar after so perceiving directly contributed to the injury, defendant's motion for a directed verdict should have been granted.

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

On motion for rehearing. Rehearing denied.

For former opinion, see 245 Fed. 117, —— C. C. A. ——.

John H. Lucas and William C. Lucas, both of Kansas City, Mo., for plaintiff in error.

J. C. Hargus, O. H. Dean, W. D. McLeod, and H. M. Langworthy, all of Kansas City, Mo., for defendant in error.

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

SANBORN, Circuit Judge, and BOOTH, District Judge. A consideration of the argument presented and the authorities cited by counsel for the plaintiff below on this motion for a rehearing has failed to convince that the instruction refused by the trial court and considered in the opinion of this court was either erroneous or clearly given to the jury in the general charge of the court below.

Nor has the elaborate argument to the effect that there was substantial evidence of the negligence of John Green, the section man who was operating the motorcar, persuaded us that the court below rightly refused the request of the defendant below for a direction to the jury to return a verdict in its favor. The plaintiff was a fellow servant of John Green in the section gang of the railway company. They were returning from work on the south end of their section on a motorcar which Green was driving along the railroad. At a crossing of the railroad by a highway there was a collision of an automobile, which one of its occupants was driving along the highway with the motorcar and a resulting injury to the plaintiff. The highway ran east and west and the automobile came from the west. The railroad ran from southeast to northwest and the motorcar came from the southeast. Green sat on the northeast corner of the motorcar, on the side of it opposite that from which the automobile came, and did not look for or see the automobile until the collision. Two of the section men who were riding on the west side of the motorcar saw the automobile approaching, but one of them testified that he said nothing because he supposed it would stop. The railroad at the crossing was on a fill or embankment 10 or 12 feet above the surrounding country, and, within 150 feet of the crossing, the highway rose by an ascending grade to the level of the railroad.

[1, 2] The driver of the motorcar had the right of way over the crossing. The railroad itself was a warning of danger to the driver of the automobile, and it was his primary duty to use his eyes and ears to look and listen for engines, cars, motorcars, and other vehicles operating upon the railroad and to stop his car before it could collide with any of them. The driver of the motorcar had the right to rely upon the legal presumption that the driver of the automobile would faithfully discharge this duty and stop his machine in time to prevent a collision. If Green had seen the automobile approaching, and had driven his motorcar steadily on until the collision occurred, in the faith that the driver of the automobile would stop it before it reached the railroad track, as it was his duty to do, Green would have been guilty of no breach of duty or negligence, unless he perceived that the driver of the automobile would not stop it in time to prevent the collision, and thereafter failed to exercise reasonable care to stop his motorcar so as to avoid it. St. Louis & San Francisco Railroad Co. v. Summers, 173 Fed. 358, 359, 360, 97 C. C. A. 328, 329, 330; Illinois Central R. Co. v. Ackerman, 144 Fed. 959, 76 C. C. A. 13; Hart v. Northern Pacific Ry. Co., 196 Fed. 180, 188, 189, 116 C. C. A. 12, 20, 21; Denver City Tramway Co. v. Cobb, 164 Fed. 41, 43, 90 C. C. A. 459, 461; Iowa Central Ry. Co. v. Walker, 203 Fed. 685, 686, 121 C. C. A. 579, 580.

[3, 4] The plaintiff below alleged, and the burden was on him to prove, the breach of duty, the negligence of Green, the driver of the motorcar, and the fact that his negligence caused or directly contributed to the collision. Substantial evidence that Green perceived, in time to have stopped his car and to have prevented the accident, that the driver of the automobile would not discharge his primary duty, stop his car, and prevent the collision, and that his failure to exercise rea-

sonable care to stop his motorcar thereafter directly contributed to the injury of the plaintiff, was indispensable to the latter's right to recover in this action. The record in this case has been searched in vain for any substantial evidence of these facts. On the other hand, there is persuasive evidence of eyewitnesses who were upon the west side of the motorcar, and who saw the automobile approach, that when the fact appeared that its driver would not slow or stop it in season to prevent the collision, but would violate his duty and drive right on, it was too late for Green to have stopped his car, or to have avoided the collision. For these reasons we are of the opinion that the court below should have granted the request of the defendant to instruct the jury to return a verdict in its favor.

The motion for a rehearing must be denied.

CARLAND, Circuit Judge, concurs in denying the motion for rehearing.

THE COLON.

(Circuit Court of Appeals, Second Circuit. January 16, 1918.)

No. 96.

1. SHIPPING ⟸84(3)—LIABILITY OF VESSELS—INJURY TO STEVEDORES.
   A ship is liable in rem for an injury to a stevedore resulting from a dangerously defective hatch cover furnished by it to the stevedores for their use.
2. SHIPPING ⟸86(2)—LIABILITY OF VESSEL—INJURY TO STEVEDORE.
   A finding by the trial court that the injury of a stevedore by the falling of a hatch cover on which he stood while helping to cover the hatch at night by artificial light was due to the fact that the covers had become worn until they were too short *held* supported by the evidence.
3. EVIDENCE ⟸75—SHIPPING—SUIT FOR INJURY TO STEVEDORE—DEFECTIVE EQUIPMENT.
   In a suit to recover for injury to a stevedore by the falling of a hatch cover, alleged to have been too short, which was marked and measured by one of the ship's officers the next morning, the failure of respondent to produce the cover or measurements *held* to justify the inference that such evidence would have shown it to be defective.

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

Suit in admiralty by John Ivancich against the steamship Colon; the Panama Railroad Company, claimant. Decree for libelant, and claimant appeals. Affirmed.

For opinion below, see 241 Fed. 592.

Richard Reid Rogers, of New York City, for appellant.

Lawrence B. Cohen, of New York City (William J. Martin and George V. A. McCloskey, both of New York City, of counsel), for appellee.

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

WARD, Circuit Judge. April 6, 1915, the steamer Colon was being loaded at Pier 67, North River. The stevedores had been stowing cargo in the wings of the lower hold at hatch 32, when at 9:30 p. m., they were called up by the foreman and told to put the hatch covers on the orlop deck hatch. In this hatch there were two iron strongbacks running athwartships between the coamings, and on these rested two wooden strongbacks running fore and aft. This divided the hatch into three fore and aft sections, each of which required 12 hatch covers, about 2 feet wide and 3 inches thick. The covers for the starboard section were piled on the starboard side of the hatch, of the middle section on the after end, and of the port section on the port side. There was a shoulder 1⅜ inches wide on the coamings and on each side of the wooden strongbacks, on which the ends of the covers were designed to rest, with a play of about half an inch.

The libelant and his partner took the first cover from the starboard pile, each holding one end, and placed it at the after end of the starboard section. They then took the next cover and put it in place; the libelant standing on the first cover and his partner on the deck. They proceeded in this way until they had placed the seventh cover, when the libelant, standing upon the sixth cover, turned around to go with his partner to get the eighth cover. The sixth slipped from place, and he fell into the lower hold, sustaining serious injuries. Judge Hazel found that the accident was due to the defective condition of the sixth hatch cover, by wearing at the ends, and entered a decree for the libelant.

[1] There can be no doubt of the liability of the vessel in rem, if the accident was caused by a defective hatch cover furnished to the stevedores. The Rheola (C. C.) 19 Fed. 926; The King Gruffydd, 131 Fed. 189, 65 C. C. A. 495; I. M. M. Co. v. Fleming, 151 Fed. 203, 80 C. C. A. 479.

[2] The claimant's theory, that a cover belonging to the middle section, which was narrower than the port or starboard sections, had been negligently placed by the stevedores in the pile of covers for the starboard section, is not sustained by the proofs. No. 2 hatch on the orlop deck was measured, as well as the clearances of the port, middle, and starboard sections, together with the width of the shoulders on each, and reduced to a diagram by Glasser, a city surveyor, for the libelant. Stone, the chief officer of the steamer, did the same thing for the claimant. Considering first the plan drawn by Glaser: He gives the width of the shoulders, both on the coamings and strongbacks, as 1⅜ inches. If we add the full 2⁶/₈ inches to his measurement of clearance in the middle section we get 5 feet 1½ inches, which would not cover 5 feet 1⅝ inches, his measurement of the clearance in the starboard section.

Stone's diagram would allow a middle section cover to just stay in place in the starboard section, if adjusted with the greatest care. He gives the distance between the strongbacks in the middle section as 5 feet 2 inches, and between the strongback and the coaming in the starboard section 5 feet 4 inches. If we subtract 2⁶/₈ inches, the

width of the shoulders, from the starboard section, we get a clearance of 5 feet 1¼ inches, so that, allowing a play of half an inch to the cover for the middle section, it would be 5 feet 1½ inches put in a space of 5 feet 1¼ inches. The least lateral movement would cause it to fall.

Therefore we are satisfied that the accident did not occur because a middle section cover was put in the starboard section. The cover must have fallen, as the District Judge found, because it was too short for safety, probably as the result of being worn at the ends. We suspect that when one of the stevedores, who was a foreigner, spoke of wearing at the corners, he meant ends.

[3] One of the stevedores marked the cover when it was examined the next morning. The failure of the claimant to preserve it, and to produce the measurements taken by the ship's carpenter and written down by the superintending engineer that morning, justifies the inference that the cover and the measurements, if produced, would have shown defective equipment. The Phœnix (D. C.) 34 Fed. 760, 762; The Lackawanna, 210 Fed. 262, 127 C. C. A. 80; The Bertha F. Walker, 220 Fed. 667, 136 C. C. A. 309.

The cases cited by the libelant of defective ropes and other equipment not in the actual charge of the injured party are not wholly applicable to a case like this, where he handled and placed the hatch cover said to be defective. If it was as much as an inch and a half too short, as the libelant's witnesses say, care on his part might have caused him to reject it or to chock it at both ends. Failure to do so might be regarded as negligence, which would entitle him to recover only half damages. But, as the work was being done at night, in artificial light, we are not disposed, in view of all the circumstances, to disturb the finding of the District Judge.

Decree affirmed.

THOMPSON BELDEN & CO. et al. v. LEISY BREWING CO.

In re MOISE.

(Circuit Court of Appeals, Eighth Circuit. February 23, 1918. Rehearing Denied May 29, 1918.)

No. 4952.

BANKRUPTCY ⊜314(3) — INTOXICATING LIQUORS ⊜147 — SALES — WHERE MADE.

Where a brewing company located in Illinois gave to the bankrupt the exclusive right to sell its beer at wholesale, the same to be delivered f. o. b. at Omaha, Neb., the sales must be deemed to have occurred in Illinois, where the brewing company was licensed, so the company was entitled to have allowed its claim against the bankrupt, based on sales made under the contract, though it was not licensed in Nebraska to sell intoxicating liquors.

Appeal from the District Court of the United States for the District of Nebraska; J. W. Woodrough, Judge.

In the matter of the bankruptcy of Walter Moise. The claim of

the Leisy Brewing Company was rejected by the referee, and, the order being reversed, and claim allowed on petition to review, Thompson Belden & Co. and other creditors, whose claims had been allowed, were permitted to appeal, the trustee declining. Affirmed.

F. S. Howell, of Omaha, Neb. (W. J. Connell, of Omaha, Neb., on the brief), for appellants.

Arthur F. Mullen, of Omaha, Neb. (F. A. Mulfinger, of Omaha, Neb., on the brief), for appellee.

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

TRIEBER, District Judge. The only question involved is whether, upon the undisputed facts, the appellee was entitled to have its claim against the bankrupt estate of Walter Moise allowed. The claim was rejected by the referee in bankruptcy, and on a petition to review the order of the referee was by the District Court reversed, and the claim ordered to be allowed. The trustee declining to appeal from the decision of the District Court, appellants, creditors of the bankrupt, whose claims had been allowed, were permitted to prosecute this appeal.

The facts are that the contract between the bankrupt and the appellee, a brewing company located at Peoria, in the state of Illinois, gave to the bankrupt the exclusive right to sell at wholesale its beer in certain territory, to be delivered in carload lots "f. o. b." at Omaha, Neb., at certain prices set out in the contract, and also to pay the freight on all its empty cooperage, cases and bottles, returned to it by the bankrupt, in carload lots. By a subsequent agreement the appellee agreed to furnish for the use of the bankrupt in the handling and delivery of its beer sufficient trucks and keep them in repair. The statutes of the state of Nebraska (Ann. St. 1911, § 4231 [chapter 50, § 11]) require all persons selling malt or other intoxicating liquors to procure a license and pay the tax prescribed. Any person selling them without having procured such license is guilty of a misdemeanor, and section 4231a (section 11a) provides:

"That in all cases where the purchase price for intoxicating liquors is paid to the person who makes manual delivery of any such liquors to the vendee thereof, the sale shall be held to have been made in the county where delivery and payment were made, as aforesaid."

The evidence also shows that the appellee was lawfully empowered to sell liquors at Peoria, in the state of Illinois, the place the beer was manufactured and shipped from to the bankrupt at Omaha, Neb.

The contention of the appellants is that as the beer was, under the contract between the parties, to be shipped to Omaha, the appellee to pay the freight, the sale was made there, and, appellee not having procured a license there, it cannot recover. Benbrook v. United States, 186 Fed. 153, 108 C. C. A. 265, rules this case and leads to an affirmance. The trial judge in that case had charged the jury:

"If you find the defendant, on receiving word that Joe Liles wanted medicine, or wanted whisky, on one or more occasions took from his place of

business a pint of whisky, and carried it and delivered it to Joe Liles, and collected the pay therefor at Joe Liles' boarding house in another part of the town of Fayetteville, then the * * * sale was made when the whisky was delivered and the money collected; * * * and if you should so find, and further find that, when such sales occurred, defendant had not paid the special tax to sell liquor at Joe Liles' boarding house, * * * then you should find him guilty as charged in the indictment."

The court reversed the conviction, and spoke through Judge Adams:

"According to this interpretation of the law, the large dry goods stores of our cities would be 'carrying on business' at the residences of their customers, provided they took orders at their stores for goods to be delivered and paid for at the residences. The usual and accepted meaning of these words, when applied to present methods of transacting business, would not, in our opinion, warrant such interpretation."

To the same effect are Jones v. United States, 170 Fed. 1, 95 C. C. A. 213, 24 L. R. A. (N. S.) 143; United States v. Lackey (D. C.) 120 Fed. 577; Wagner v. Breed, 29 Neb. 720, 732, 733, 46 N. W. 286; State v. Davis, 62 W. Va. 500, 60 S. E. 584, 14 L. R. A. (N. S.) 1142; Commonwealth v. Fleming, 130 Pa. 138, 18 Atl. 622, 5 L. R. A. 470, 17 Am. St. Rep. 763.

The judgment of the District Court is affirmed.

UNITED STATES v. DENVER & R. G. R. CO.

(Circuit Court of Appeals Eighth Circuit. February 23, 1918.)

No. 4937.

MASTER AND SERVANT ⊂⊃13—HOURS OF SERVICE ACT—VIOLATION—LIABILITY —"PERMITTED."

Where a telegraph operator employed by defendant, who performed duties for and was subject to the orders of a second railroad company, which through an accounting between the two companies made contributions to his salary, was required by the second company to remain on duty longer than allowed by Hours of Service Act March 4, 1907, c. 2939, 34 Stat. 1415 (Comp. St. 1916, §§ 8677–8680), defendant is liable for the penalty prescribed, whether the operator be treated as a joint employé of the two companies or as an employé of defendant alone, for in any case defendant was bound to see that such operator did not remain on duty for an excess period, and, if defendant failed, it "permitted" the operator to perform excess service in violation of the act.

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

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

Action by the United States against the Denver & Rio Grande Railroad Company to recover a penalty for violation of the Hours of Service Act. There was a judgment for defendant, dismissing the action, and plaintiff brings error. Reversed.

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

J. G. McMurry, of Denver, Colo. (E. N. Clark, of Denver, Colo., on the brief), for defendant in error.

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

AMIDON, District Judge. This is an action by the United States against the Denver & Rio Grande Railroad Company to recover a penalty for violation of the Hours of Service Act. The alleged violation grows out of permitting a telegraph agent at the station of Portland, in Colorado, to remain on duty beyond the limits fixed by the statute. The defendant's line is intersected at that point by the line of the Santa Fé Road. The operator is employed by the Rio Grande Company, and paid by it, and then the Santa Fé makes its contribution to the salary through the accounting between the two companies. The agent was, however, by reason of a contract between the companies, subject to the direction of the train dispatcher and officers of each company in the performance of his duties. The case was tried upon the pleadings and an agreed statement of facts. The trial court dismissed the action, and the government appeals.

The following is a summary of the controlling facts, somewhat reduced from the statement in the brief of counsel for the government. The operator was a joint employé of the defendant and the Santa Fé Company. For the services performed for the defendant the agent received his instructions directly from its chief dispatcher and other officials, and for services performed for the Santa Fé he received his instructions directly from the chief dispatcher and other officials of that company. The regular hours of his service were from 7:15 a. m. to 7:15 p. m. On June 17, 1915, he went on duty at his regular time at 7:15 a. m., and remained on duty until 8:45 p. m. Knowing that a train on the Santa Fé line was due to pass Portland about 7 o'clock p. m., he inquired of the train dispatcher of that company about handling said train, and was advised by the train dispatcher that the train might be expected through Portland at any time after 7 o'clock, and that he should attend to it on its arrival, giving it proper clearance through the interlocking plant. In response to this order he remained on duty until the train arrived at 8:45 p. m. and performed the desired service. The officers, agents and representatives of defendant, except only the operator himself, were not aware of the instructions of the train dispatcher of the Santa Fé, just referred to, nor of the operator's intention to remain on duty. After 7:15 p. m. the operator performed no service for defendant, but his services from 7:15 to 8:45 were wholly for the Santa Fé Company in the clearance of said train. For the overtime involved in this service defendant paid the operator, and was repaid by the Santa Fé Company. The officers and agents of the defendant, who allowed and paid the op-

erator's claim for overtime, had no knowledge that the overtime claimed by him involved a violation of the Hours of Service Act.

The decision of the trial court was wrong. That is so whether the agent be treated as the joint employé of both companies, or as an employé of the Rio Grande Company who, by arrangement between the two railroad companies, was subject to direction by the Santa Fé. It may be that if the government had sued the Santa Fé it would have been liable because it "required" the excess service. It does not follow, however, that the Rio Grande was not also liable. The agent was its agent, was employed and paid by it, and was at the post of duty to which that company assigned him. It could not escape liability by showing that the Santa Fé Company was the more primary cause of the excess service. Its duty under the statute still remained imperative. It was bound to see to it that the agent did not remain on duty for an excess period. If it failed to discharge that duty, it "permitted" the employé to perform the excess service, and was liable to the penalty fixed by the statute.

The judgment is reversed.

BERGEN POINT IRON WORKS v. SHAW.

(Circuit Court of Appeals, Fifth Circuit. March 14, 1918.)

No. 3190.

TRIAL ⇐238—INSTRUCTIONS.

Where, in a personal injury action, the court, in submitting the defense of assumption of risk, severely criticized that doctrine, and the jury, for an injury to an employé's arm similar to a sprained ankle, awarded $7,500 damages, the act of the court, in improperly accompanying the instruction with a criticism calculated to prevent the jury from applying the doctrine, was harmful, and necessitates reversal.

In Error to the District Court of the Canal Zone; William H. Jackson, Judge.

Action by William E. Shaw against the Bergen Point Iron Works. There was a judgment for plaintiff, and defendant brings error. Reversed and remanded.

Chauncey P. Fairman, of Cristobal, C. Z., for plaintiff in error.

Theodore C. Hinckley and Stevens Ganson, both of Panama, R. P., for defendant in error.

Before PARDEE, WALKER, and BATTS, Circuit Judges.

BATTS, Circuit Judge. Plaintiff (William E. Shaw, defendant in error) instituted suit against defendant (Bergen Point Iron Works, plaintiff in error) for damages for injuries to him as an employé, when, helping cut rivets, he held a bar against a defective rivet, which "hurriedly broke" when his fellow employé struck the bar. The testimony of a physician introduced by plaintiff indicates the character of the injury:

"Q. Will you please state in what condition you found the arm of the plaintiff, Shaw? A. The most noticeable thing is a little loss of extension; he does not have quite complete extension. * * * Q. In this case, the plaintiff having that injury, does it affect the movement of the arm? A. Yes; I should say at present he has a partial disability. I would not like to go on record that it will be of a permanent nature. It might improve in several months, or a year or two; but, as it has gone this length of time, it might be that he is liable to have some partial permanent disability there. Q. Doctor, are there any broken bones? A. Yes; we call such a condition a fracture, where the ligaments are detached from the joints. Q. It might be compared to a very severe sprained ankle? A. Yes. Q. In other words, it would be similar to a sprained ankle? A. Yes."

A verdict for $7,500 was returned.

The evidence was such as to call for a charge upon assumed risk. Charges drawn by defendant were tendered, but refused; the refusal being excused upon the ground that the substance had been given in the general charge. That part of the court's charge covering the matter of assumed risk was as follows:

"And then, again, another question would be, if the foreman assumed the responsibility of assuring that it was safe, and that no scaffold was necessary, and that they had to go to work without a scaffold, then I would say, as a matter of law, that he then took that share of responsibility upon himself, or recognized that his duty was to furnish a safe place; but if, after that, the plaintiff assumed to go there and work upon the place, knowing that it was unsafe, with his own eyes open, knowing that it was unsafe, then, although it was unsafe, and although the duty of making it safe was upon the defendant company, if, nevertheless, he went there with knowledge of that fact, and entered upon the work, and injury resulted, he would, as a matter of law, be held to have assumed the risk of working about an unsafe place.

"Now, that has been considered a very harsh principle of law, so much so that Congress has enacted legislation abolishing the defense of fellow servant, contributory negligence, and assumption of risk in certain cases different from this. It is an old law, that has come down to us from generations; that of defense of fellow servants, the defense of contributory negligence, and the defense of the assumption of risks. A great many law writers and distinguished men have discussed this question, and all have arrived at the conclusion that it is unfair and unjust, because a man whose bread and butter and the support of his family depends upon keeping his employment had to go to work in a dangerous place, that it was unfortunate that he should be deprived of his right of earning a living if he went to work in a dangerous place, knowing it to be dangerous. So Congress, in the exercise of its powers over all matters over which Congress has control, has enacted a law abolishing that defense of assumed risk, the defense of fellow servant, and the defense of contributory negligence in certain cases.

"But this is not one of those cases. In this case the old law still prevails, and, as hard as it may seem, that is, if a man, knowing his bread and butter and the support of himself and family depend upon it, goes to work deliberately in a dangerous place, knowing it to be dangerous, and takes that risk, he cannot complain, and he must accept it."

The defendant is not only entitled to a statement of the law in the charge of the court, but is entitled to have it placed before the jury unaccompanied by criticism well calculated to prevent its proper application. It would have been difficult for the jury to regard the attack on the law other than an invitation to nullify, by findings of fact, features objectionable to the court. The damages assessed by the jury

indicate that the court's denunciation of the law was not without effect.

The conclusion reached with reference to the refusal to give the charge requested, taken in connection with the objectionable part of the charge quoted, renders it unnecessary to consider the other assignments of error.

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

Petition of MOULTHROP.

In re GREENBAUM.

(Circuit Court of Appeals, Sixth Circuit. April 2, 1918.)

No. 3087.

1. BANKRUPTCY ⇐243—EXAMINATION INTO AFFAIRS OF BANKRUPT—EVIDENCE.

Where in the course of an investigation of the bankrupt's affairs under Bankr. Act July 1, 1898, c. 541, § 21a, 30 Stat. 551 (Comp. St. 1916, § 9605), the testimony of a large number of witnesses was taken stenographically before the referee, the bankrupt, in view of sections 39a(3), 47a(5), and 49a (Comp. St. 1916, §§ 9623, 9631, 9633), as well as a local bankruptcy rule declaring that no copies of testimony shall be furnished at the expense of the state, is entitled, on paying the charge fixed, to a stenographic copy of such testimony, for he must be deemed a party in interest to investigation of his affairs.

2. BANKRUPTCY ⇐243—EXAMINATION INTO AFFAIRS OF BANKRUPT—EVIDENCE.

In such case, the fact that the testimony has not been read over and signed by the witnesses as required by General Order No. 22, or that it could not be used in evidence against the bankrupt, cannot affect his right to inspection and a copy.

3. BANKRUPTCY ⇐243—EXAMINATION INTO AFFAIRS OF BANKRUPT—EVIDENCE.

In such case, trustee's denial by answer that his petition, on which was issued an order to show cause why the bankrupt should not surrender and deliver certain personal property as well as cash, was based upon testimony of some or all of the witnesses, does not affect the right of the bankrupt to a copy of such testimony.

Petition to Revise an Order of the District Court of the United States for the Eastern District of Michigan, in Bankruptcy; Arthur J. Tuttle, Judge.

In the matter of the bankruptcy of Joseph Greenbaum. Petition by Harry C. Moulthrop, trustee in bankruptcy, to revise an order of the District Court. Order affirmed.

B. J. Lincoln and Clark, Emmons, Bryant & Klein, all of Detroit, Mich. (Butzel & Butzel, of Detroit, Mich., of counsel), for petitioner.

Selling & Brand, of Detroit, Mich., for respondent.

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

PER CURIAM. On the petition of the trustee, an order was made requiring the bankrupt to surrender and deliver to that officer certain personal property amounting in value to upwards of $26,000, and to pay over to the trustee upwards of $1,800 in cash, alleged to have been concealed from the trustee by the bankrupt. In default of such delivery the bankrupt was ordered to show cause, on a day certain, why he should not be required so to do.

In the course of an investigation by the trustee of the bankrupt's affairs, had under section 21a of the Bankruptcy Act, which resulted in the order just mentioned, the testimony of a large number of witnesses was taken stenographically before the referee, without notice to and in the absence of the bankrupt. The testimony was transcribed at the expense of the estate, a copy filed in the cause, and another copy given the trustee. A local bankruptcy rule allows to the referee a folio charge for clerical assistance in taking and transcribing such testimony, and provides:

"No copies of testimony to be furnished at the expense of the estate. Parties ordering copies of the testimony to pay therefor at the rate of ten cents per folio."

The bankrupt informally requested a copy of this testimony, for the purpose of enabling him to prepare his answer to the order to show cause above mentioned Such copy was, on the trustee's request, withheld by the referee, who later denied the bankrupt's formal petition for such copy, accompanied by offer to pay for the same. On review of this order the District Judge, in a carefully considered opinion (243 Fed. 965), concluded that whatever might have been the case had the testimony not been filed, yet being so filed it became a part of the public records of the cause, to a copy of which the bankrupt was entitled under the bankruptcy act and the local rule referred to, and accordingly reversed the referee's order. The present proceeding is brought to review this order of reversal.

[1-3] We think the District Judge rightly directed that the bankrupt be furnished a copy of the testimony. Its taking was expressly authorized by section 21a of the act, which we think intended for the benefit not only of creditors, but of the bankrupt. The language of the statute, which provides that the testimony may be taken before the court, prima facie contemplates a more or less public proceeding; and, while the bankrupt is not entitled to notice, yet, without reference to whether he could be excluded from a public examination taken under order of the court (see Black on Bankruptcy, § 259, note 14), we think that, in the absence of express prohibition in the bankruptcy act, the testimony having been paid for out of the funds of the estate and having become part of the files and records of the case, any person interested therein was entitled, both under the general law [1] and in view of the general policy of the bankruptcy act as evidenced by sections 39a(3), 47a(5), and 49a, to see the testi-

[1] Daly v. Dimock, 55 Conn. 579, 12 Atl. 405; Brewer v. Watson, 61 Ala. 310; Ferry v. Williams, 41 N. J. Law, 332, 32 Am. Rep. 219.

mony and, under the local rule referred to, to have a copy of it on paying the fees therefor.

Neither the fact that the testimony has not been read over and signed by the witness (as provided by General Order No. 22, 89 Fed. x, 32 C. C. A. xxv), nor that it cannot be used as evidence against the bankrupt, can affect the right to inspection and copy. The lessening thereby of the probative value of the testimony does not take away the right of interested parties to have access to it. The trustee's denial, by answer, that his petition on which the order to show cause issued "is based upon the testimony of some or all of the said witnesses," does not impress us.

It is plain, to our minds, that the bankrupt is a party in interest with respect to proceedings whose object is to require a transfer of property under pain of contempt proceedings, and which may result in criminal proceedings under section 29 of the act. We cannot think that public interests will be endangered by furnishing the copy in question, especially as all the evidence had been taken two months or more before the copy was requested.

The order of the District Court is, accordingly, affirmed.

GREGORAT v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. March 7, 1918.)

No. 3060.

1. PERJURY ⊂=26(½)—NATURALIZATION—OFFENSES—INDICTMENT.
An indictment alleging that, in violation of Act June 29, 1906, c. 3592, § 23, 34 Stat. 603 (Comp. St. 1916, § 4379), defendant in a naturalization proceeding testified that he had never operated a saloon, or been arrested or charged with crime, or found guilty of violating any state law, whereas in fact it was not and is not true, and at the time of so testifying defendant did not believe it to be true, that he had not operated a saloon, etc., is sufficient against an objection that the indictment did not affirmatively state that defendant had operated a saloon, etc.

2. PERJURY ⊂=25(1)—NATURALIZATION—OFFENSE—SCOPE OF STATUTE.
Under Act June 29, 1906, § 23, an indictment charging that defendant in a naturalization proceeding knowingly gave false testimony as to a material fact need not aver that the fact was one required to be proven in such proceeding; that requirement being applicable only to affidavits.

3. CRIMINAL LAW ⊂=1169(3)—APPEAL—HARMLESS ERROR.
In a prosecution for knowingly giving false testimony in a naturalization proceeding, the admission of a transcript of the stenographer's notes of the proceeding was harmless, where defendant himself testified to the same facts shown by the transcript.

4. PERJURY ⊂=26(3)—NATURALIZATION—INDICTMENT—SUFFICIENCY.
Under Act June 29, 1906, § 23, punishing one who knowingly gives false testimony in a naturalization proceeding, an indictment alleging that defendant did unlawfully, willfully, and knowingly give false testimony is sufficient, though not averring defendant took the oath falsely, willfully, and knowingly.

5. CRIMINAL LAW ⊂=1128(1)—ERROR—REVIEW—QUESTIONS PRESENTED.
In a prosecution under Act June, 1906, § 23, for knowingly giving false testimony in a naturalization proceeding, the question whether it was

error for the court in its charge to the jury to incorporate that section of the Criminal Code (Act March 4, 1909, c. 321, § 125, 35 Stat. 1111 [Comp. St. 1916, § 10295]) defining perjury cannot be reviewed on writ of error, where the facts developed by the evidence were not shown by the record.

6. CRIMINAL LAW ⟸1090(S)—ERROR—EXCEPTIONS—NECESSITY.
The sufficiency of the evidence to sustain a conviction cannot be reviewed on writ of error, in the absence of exceptions and a bill of exceptions incorporating therein the evidence.

In Error to the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

Josef Domenick Gregorat was convicted of violating Act June 29, 1906, § 23, in that he knowingly did give, in a naturalization proceeding, false testimony as to a material fact, and brings error. Affirmed.

Louis H. Burns, of New Orleans, La., for plaintiff in error. Joseph W. Montgomery, U. S. Atty., of New Orleans, La.

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

BATTS, Circuit Judge. [1] Plaintiff in error was indicted for violation of section 23 of the act of June 29, 1906, in that he "knowingly did give, in a naturalization proceeding, false testimony as to a material fact." The indictment alleges that in a naturalization proceeding Gregorat testified that he had never operated a saloon, nor been arrested, nor charged with the commission of crime, nor found guilty of violating any state law. The indictment is attacked upon the ground that it does not affirmatively state that the defendant had operated a saloon, and that he had been arrested and charged with the commission of a crime, and that he had been found guilty of violating a state law; the allegation of the indictment being:

"Whereas, in fact, it was not and is not true, and at the time of so swearing and deposing the said Josef Domenick Gregorat did not believe it to be true, that he had not operated a saloon, or that he had never been arrested or charged with the commission of a crime of any kind, or that he had never been found guilty of violating any state law," etc.

Under the formerly well-recognized rules with reference to indictments in cases of perjury and false swearing, the indictment would doubtless have been insufficient. In any writing, other than an indictment, a statement that "it is not true that he did not operate a saloon" would be accepted as equivalent to a statement that "he did operate a saloon." There is no reason why a different rule should apply to indictments. Instead of being insufficient for lack of words, the indictment under consideration demonstrates that there is much still to be accomplished in the matter of simplification of indictments. The objection to the indictment is not sustained.

[2] The indictment is objected to upon the ground that it does not charge that the defendant gave false testimony as to a material fact "required to be proved in such proceeding." The quoted clause of the section is applicable alone to affidavits.

[3] The transcript of part of the notes taken by the stenographer at the trial of the naturalization proceeding was introduced in evidence upon what the defendant asserts was an insufficient identification, and over his objection that the notes constituted the better evidence. The notes were not available, and could not have been used if they had been. That the transcribed notes represented the facts was established by the defendant's own testimony and otherwise. Even if the evidence was improperly admitted, no harm resulted to defendant.

[4] Another objection to the indictment is that it does not charge that the defendant "took the oath falsely, willfully, and knowingly." The statute punishes one "who knowingly gives false testimony." The indictment alleges that the defendant did "unlawfully, willfully, knowingly," do the things denounced by the law.

[5] The charge of the court is objected to in the brief for plaintiff in error on the ground that it incorporated section 125 of the Criminal Code, which defines perjury. The elements of the crime defined by section 125, and of that defined by section 23 of the act of June 29, 1906, are substantially the same, and the indictment was doubtless good under either. The charge was probably sufficient and unobjectionable, notwithstanding the reading of section 125. No bill was taken to this assumed error, the facts developed by the evidence are not fully before us, and the matter cannot be passed upon.

[6] A question raised by the brief of plaintiff in error as to the sufficiency of the evidence cannot be determined, in the absence of an exception and a bill incorporating the evidence. That part of the evidence incorporated in other bills indicates that the finding of the jury was justified.

The judgment is affirmed.

In re KEANSBURG STEAMBOAT CO.

(Circuit Court of Appeals, Second Circuit. January 16, 1918.)

No. 100.

SHIPPING ⊂=166(3)—INJURY TO PASSENGERS—LIABILITY OF VESSEL.

The injury of two women passengers on a steamer, by stepping on a line which was being handled by a mate and two deck hands in a narrow passageway at the side of the boat as she was leaving her pier, although they were twice warned by the mate to stop, because the line had fouled at the pier end and was being allowed to run out through a chock, *held* due to their own negligence, for which the vessel was not liable.

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

Petition in admiralty by the Keansburg Steamboat Company, as owner of the steamboat Keansburg, for limitation of liability. From a decree holding the boat liable for an injury to passengers, petitioner appeals. Reversed.

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

Alexander & Ash, of New York City (Mark Ash, of New York City, of counsel), for appellant.

House, Grossman & Vorhaus, of New York City (Charles Goldzier and Frederick Hemley, both of New York City, of counsel), for appellees.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

WARD, Circuit Judge. June 8, 1916, the Keansburg Steamboat Company filed this petition to limit its liability for claims made against it by two passengers for personal injuries and at the same time denied liability therefor. The steamboat was appraised at $10,000, with pending freight of $195, and the petitioner gave a stipulation for value in the aggregate amount.

June 20, 1915, at about 7:50 p. m., the steamboat, with her full complement of passengers, left her wharf at Keansburg, N. J., on one of her regular trips to New York City. Her starboard side was made fast to the wharf. The forward mooring lines were cast off, leaving a 5½-inch line which led forward from a bitt on the starboard quarter of the main deck through a chock about 40 feet to a pile, the free end lying coiled on the deck. In accordance with the usual practice the engines were started astern, so as to throw the steamboat's bow to port, and the mate and two deckhands stood by to haul in this stern line as soon as the engines went ahead with the helm astarboard and the boat's quarter got abreast of the pile. But after the line was cast off from the bitt it fouled on the pile, and the mate ordered the men to let it run out through the chock, with the intention of picking it up again on the return trip. So far all was regular and proper.

Aft of the bitt and chock there was a very narrow passage, tapering alongside the house to the stern, where a row of passengers were sitting on camp stools alongside of the house; the furthest of them being Mrs. Mary Flaxbarth and her daughter Florence. They, seeing on the deck beyond the mate and the two deckhands, another sister, with her husband, belonging to their party, rose from their seats with the intention of joining them, and pushed forward past and against the remonstrances of the passengers sitting ahead of them. The mate twice called out to them to stop, but they either did not hear or did not understand him. Mrs. Flaxbarth stepped upon or against the line which was running out through the chock and fell forward, while her daughter, in an effort to help her, stepped into a bight of the line, was pulled forward against the bitt, and sustained severe injuries to her left ankle. Such a fouling of the line as occurred sometimes, but not frequently, happens. These ladies, as claimants, answered the petition, charging the petitioner with negligence in permitting a line to lie loose upon the deck and to run out when passengers were standing and walking in the neighborhood.

The foregoing is intended to be, and we think is, a correct statement of the facts found by the District Judge. Being of opinion on these findings that the petitioner was guilty of a lack of care for not protecting its passengers against such a danger, and that they them-

selves were not guilty of negligence, he entered a decree in favor of the claimants. Although the happening of an accident to a passenger makes a prima facie case of liability against the carrier, we cannot concur in the conclusion of the court below. It seems to us that the place where the claimants were sitting was a proper one for passengers, and of course it was a proper place for the bitt, chock, and line to be. The presence of the mate and two deck hands to handle the line was a sufficient precaution against danger from its fouling with the pile. The mate had no reason to expect that passengers would try to force their way through this narrow place, not more than 5 feet at the widest part, where the crew was at work preparatory to the departure of the boat. When he saw them coming, his twice repeated warning was sufficient to stop persons of ordinary prudence. If they had done so, no accident would have happened. Carriers of passengers are not insurers. They have a right to suppose that their passengers will exercise ordinary prudence and common sense. They are held to a degree of care according to the circumstances. Race v. Union Ferry Co., 138 N. Y. 644, 34 N. E. 280; Savage v. Steamship Co., 185 Fed. 778, 107 C. C. A. 648. We think the claimants, on the facts found, were injured because of their own recklessness.

The decree is reversed.

PENNSYLVANIA CO. v. AVRAN.

(Circuit Court of Appeals, Sixth Circuit. March 15, 1918.)

No. 3095.

1. RAILROADS ⊂⊃346(5)—CROSSING ACCIDENTS—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.
   In a crossing accident case, a railroad company, asserting the traveler's contributory negligence, has the burden of proof.
2. APPEAL AND ERROR ⊂⊃927(7)—REVIEW—DIRECTED VERDICT.
   Where the denial of defendant's motion for directed verdict was assigned as error, the testimony must by the appellate court be taken most strongly against defendant; the jury having found for plaintiff.
3. RAILROADS ⊂⊃350(15)—CROSSING ACCIDENT—JURY QUESTION—CONTRIBUTORY NEGLIGENCE.
   In an action by plaintiff, who was struck by a train while crossing defendant's tracks on foot about 8:30 on a May evening, the question whether plaintiff, who with her companions walked around the front end of a standing yard engine, which had been obstructing the crossing for longer than allowed, was guilty of contributory negligence, the view being obstructed by smoke, *held*, under the evidence, for the jury.

In Error to the District Court of the United States for the Northern District of Ohio; D. C. Westenhaver, Judge.

Action by Mary Avran against the Pennsylvania Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Squire, Sanders & Dempsey, of Cleveland, Ohio, for plaintiff in error.

Gage, Day, Wilkin & Wachner, of Cleveland, Ohio (Luther Day, of Cleveland, Ohio, of counsel), for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

PER CURIAM. Defendant in error was struck and injured by defendant's train while crossing on foot, defendant's railroad tracks on Third street, in Canton, Ohio, at about 8:30 o'clock on an evening in May. There was substantial evidence tending to support each of the allegations of negligence submitted to the jury, viz. an excessive speed of the train, failure to give warning of the train's approach by bell and whistle or otherwise, and failure to maintain a gate at the west side of the crossing. The only point made here (raised by motion to direct verdict) is that, as matter of law, plaintiff was guilty of contributory negligence.

[1-3] Third street runs east and west. Defendant's four tracks cross the street diagonally. There was substantial evidence that when plaintiff, with several companions, walking east on Third street, reached the first of defendant's tracks, the crossing was nearly covered by a standing yard engine with cars attached; that, after waiting a longer time than the engine could lawfully occupy the crossing, plaintiff and her companions walked around the front end of the engine, then to the second track, where she stopped, listened, and looked in each direction, and, seeing and hearing no approaching train, proceeded to the third track, where she again listened and looked in both directions, with like result, and then stepped upon the third track, when she was struck by defendant's engine drawing the Twentieth Century Limited. It appeared by the testimony of plaintiff and others that she was prevented by the presence of smoke from seeing the approaching engine and by the yard noises from hearing it.

The specific contention is that it was contributory negligence, as matter of law, for plaintiff to cross under these conditions. This contention must be rejected. While the testimony presented a question of fact as to plaintiff's negligence, it was not conclusive. Erie R. R. Co. v. Weber (C. C. A. 6) 207 Fed. 293, 125 C. C. A. 37. That the burden of proof of contributory negligence was on defendant, and that the testimony must, on this review, be taken most strongly in plaintiff's favor, are commonplaces. The case differs from Memphis Street Ry. Co. v. Bobo, 232 Fed. 708, 712, 146 C. C. A. 634, for the reason, if for no other, that it there appeared that the conductor whose negligence was in question "knew that the cloud of dust and smoke which obstructed his view to the south [made by a train which had just passed] would be scattered and dissipated in a few moments." In the instant case we cannot say that plaintiff was bound to assume that the conditions interfering with sight and sound would speedily disappear. The jury would have been warranted in concluding even that the smoky condition did not proceed entirely from the standing yard engine, and that noise was more or less incident to the general situation.

The judgment of the District Court should be affirmed.

FARLEY v. CAREY SHOW PRINT CO., Inc.

(Circuit Court of Appeals, Second Circuit. February 13, 1918.)

No. 128.

1. COURTS ⟸366(13)—PRECEDENTS—STATE DECISIONS.
The decision of the highest state court, construing local limitation statutes as to actions for wrongful death, though contrary to previous decisions of inferior courts, is binding on the federal courts.

2. APPEAL AND ERROR ⟸257—REVIEW—EXCEPTIONS—NECESSITY.
Where no exception was taken to the dismissal of the complaint, an appellate court need not consider the matter on plaintiff's writ of error.

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

Action by Annie Farley, as administratrix, etc., against the Carey Show Print Company, Incorporated. There was a judgment for defendant, dismissing the complaint, and plaintiff brings error. Affirmed.

Pierre M. Brown, of New York City, for plaintiff in error.

E. Clyde Sherwood, of New York City, for defendant in error.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

PER CURIAM. The action is to recover damages for the death of plaintiff's decedent, as authorized by section 1902, Code Civ. Proc. N. Y., which declares that it "must be commenced within two years after decedent's death." Within the time thus limited, suit was brought in the Supreme Court of New York, complaint was dismissed, but not on the merits, the dismissal affirmed, and leave to go to the Court of Appeals denied, without opinions. 173 App. Div. 936, 973, 158 N. Y. Supp. 1115. Thereafter and within one year from such affirmance, this action was begun.

[1] The causes of action being identical, defendant pleaded the bar of the statute. Plaintiff urged that section 405 of the Code enlarged the period of suit for a year after conclusion of the unsuccessful state court proceedings, put in all her fact evidence, and rested. Motion to dismiss was then granted. Before Sharrow v. Inland Lines, 214 N. Y. 101, 108 N. E. 217, L. R. A. 1915E, 1192, Ann. Cas. 1916D, 1236, it had usually been regarded as settled in this state that the right of action for death by wrongful act expired at the end of two years, that suit within such period was a prerequisite to any action, and that therefore the statutory provisions regarding limitations of actions (of which section 405 is one) did not apply. But the question had not been plainly put to the Court of Appeals before the cited case, and that decision refused to adopt a long line of rulings in the lower courts.

The point being one of construing a state statute creating a cause of action, the courts of the United States must follow the ruling of the highest state court. This is not a case where the supreme judicial authority of the statute-making power has reversed its own considered earlier judgments, to the detriment of contractual right presumably

resting thereon or secured thereby (Muhlker v. New York, etc., R. R., 197 U. S. 544, 25 Sup. Ct. 522, 49 L. Ed. 872), nor indeed has any earlier decision been overruled (Dernberger v. R. R. Co., 243 Fed. 21, 155 C. C. A. 551); for we must assume the same result would have been reached if any of the lower court cases had been taken far enough.

[2] Therefore plaintiff's right to sue was saved by section 405, but, as no negligence or wrongful act by defendant or any one else was shown, the dismissal was right. We no more consider it necessary to review the evidence than did the trial and appellate state courts, which heard what ought to have been, and was so far as we know, the same story. Indeed, we could properly decline even to consider the matter, as no exception was taken to the action of the court in dismissing the complaint (Reader v. Haggin, 160 Fed. 909, 88 C. C. A. 91), but the importance of recognizing the effect of the Sharrow Case on future and similar litigation in this circuit has justified this memorandum.

Judgment affirmed.

PAINE v. CUMBERLAND TELEPHONE & TELEGRAPH CO.

(Circuit Court of Appeals, Fifth Circuit. March 23, 1918.)

No. 3100.

ELECTRICITY ⟸19(3)—PRESUMPTIONS—RES IPSA LOQUITUR.

In an action against a telephone company for damages for the burning of plaintiff's property in which the company's wires were located, the rule of ipsa loquitur does not relieve plaintiff from the burden of showing negligence.

In Error to the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

Action by Ruffin B. Paine against the Cumberland Telephone & Telegraph Company. There was judgment for defendant, and plaintiff brings error. Affirmed.

W. O. Hart, of New Orleans, La., and B. M. Miller, of Covington, La., for plaintiff in error.

Jas. C. Henriques, of New Orleans, La., for defendant in error.

Before PARDEE, WALKER, and BATTS, Circuit Judges.

PER CURIAM. This is a suit charging the Cumberland Telephone & Telegraph Company with specific acts of negligence in connection with the burning of the property of plaintiff in error in which the wires of the Telephone Company were located. After hearing witnesses, the trial court directed a verdict in favor of the defendant.

The case is brought to this court upon two assignments of error, to wit:

"I. That this court committed an error in refusing to admit testimony as to previous fires in the telephone exchange of the defendant in the town of Covington, as set forth in bill of exceptions No. 1.

"II. That the court erred in directing a verdict in this case on motion of

the defendant after plaintiff had rested his case, but, on the contrary, should have ordered the trial to proceed, the whole as set forth in bill of exceptions No. 2."

After hearing the arguments and examining the record, we conclude that neither assignment is well taken. The evidence rejected by the court was not admissible under the pleadings, and the evidence offered wholly failed to sustain the charges of negligence set forth in the petition. The rule of res ipsa loquitur does not relieve the plaintiff in error from the burden of showing negligence. See Patten v. T. & P. R. Co., 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361, and Sweeney v. Erving, 228 U. S. 233, 33 Sup. Ct. 416, 57 L. Ed. 815, Ann. Cas. 1914D, 905.

The judgment of the District Court is affirmed.

BAYLEY & SONS, Inc., v. STANDART ART GLASS CO. et al.

(Circuit Court of Appeals, Second Circuit. January 16, 1918.)

No. 166.

1. PATENTS ⟸15—VALIDITY—DOUBLE PATENTING.
Where an inventor at the same time devises a container for electric lights of pleasing design and a mechanical contrivance conveniently united with an æsthetic cover, he has made two inventions, and, though he at first secures only a mechanical patent, he may within the two-year period procure a design patent, without violating the rule against double patenting.

2. PATENTS ⟸15—DESIGN PATENTS—CONSIDERATION.
A design patent for an ornamental electric light fixture must be viewed in its entirety; its effect being optical.

3. PATENTS ⟸328—VALIDITY—ANTICIPATION.
Design patent, No. 49,593, for an ornamental electric lighting fixture, comprising a bell-shaped canopy having a straight lower edge, below which is suspended in close proximity a hemispherical bowl, having a straight upper edge, *held* invalid for lack of invention.

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

Bill by Bayley & Sons, Incorporated, against the Standart Art Glass Company and another. From a decree for complainant, defendants appeal. Reversed and remanded, with directions to dismiss the bill.

The action is upon design patent 49,593, applied for March 25, and issued September 5, 1916. The specification is for an "ornamental electric lighting fixture," comprising a "bell-shaped canopy having a straight lower edge," below which is suspended in close proximity "a hemispherical bowl having a straight upper edge." The claim is for the fixture "substantially as shown and described." The drawing adds nothing to the above description, except that it shows the "canopy" as having six equidistant ribs, which (for all that is disclosed) might be either integral with the material of the fixture, or functionally a skeleton or framing into which the material is inserted or built. On October 12, 1915, the same patentee obtained a mechanical patent (1,156,454) for an "improvement in electric lighting fixtures," claiming such fixture "having a shade and a dish; the shade being formed of a plurality of panels formed of glass" secured together by ribs, with top and bottom binding chan-

nels, each of them being "a flat ring with inclined walls," in conjunction with "means for securing the ribs to the channels and for connecting the dish to the shade."

The evidence shows that plaintiff called this fixture the "Equalite," and sold it with success; witnesses testifying that the "light * * * was pleasing to the æsthetic emotions [and] it acquired distinctiveness and individuality among the trade." Comparing the drawing of the mechanical patent, as explained in its specification, with the drawing of the patent in suit, it is plain that both draftsmen had before them a single device, that the ribs of both drawings are the same, that said ribs have a mechanical purpose, and, in short, that the design patented is the contour shown in vertical section of the "shade and dish" of the mechanical improvement, though for design purposes the words "canopy and hemispherical bowl" are substituted.

The trial court found infringement, but denied an accounting, for reasons here immaterial. A final decree having therefore issued, defendant took this appeal.

John L. Lotsch and Isaac Steinhaus, both of New York City, for appellants.

Lester F. Dittenhoefer, of New York City (Dodson & Roe, of New York City, of counsel), for appellee.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). Error is alleged in that the patent in suit was not held anticipated by the earlier grant to the same patentee for a mechanical improvement.

[1] If the same man at the same time devises a container of pleasing design and a mechanical contrivance conveniently united with the æsthetic covering, he has made two inventions; and, though he patents one, that is no reason why within the statutory two years he may not patent the other. Such act would not be necessarily a case of double patenting, which is always unlawful. The question is unaffected by the accident that one of the two compared patents is for a design and the other for a mechanical arrangement of matter; and it is always the same, viz.: Is the same thing or inventive thought disclosed by both? Williams, etc., Co. v. Neverslip, etc., Co. (C. C.) 136 Fed. 210; President, etc., Co. v. Macwilliam (D. C.) 233 Fed. 439.

The "shade and dish" of the mechanical patent were shown as of the design shape but that shape was neither part of the invention nor essential to its operation or success; whatever merit that improvement possessed depended on the construction and mechanical interrelation of parts, which might just as well have been conical or polygonal, as bell-shaped or hemispherical. But the design patent covers nothing but the shape and effect thereof upon the eye of the particularly shown form of "canopy and bowl." Therefore there was no double patenting; and, as the later patent was applied for within two years after the earlier, the question whether, regarded as a publication, the first specification left no room for patentable invention in the second, is not before us.

[2, 3] There are, however, other design patents issued to other inventors, relating to the shapes of canopies and bowls for electric lights, and antedating the one in suit, which, in our opinion prevent the discovery of any invention in the patent at bar.

It is urged in support of the decree below that the novelty of a design is to be tested as a whole and that invention is persuasively shown by the commercial success of "Equalite." Undoubtedly a design must be viewed in its entirety, its effect is optical, and it can no more be tested piecemeal than can a picture (Dobson v. Dornan, 118 U. S. 10, 6 Sup. Ct. 946, 30 L. Ed. 63); but novelty is not invention, nor can aid be found in the sales of "Equalite." That word covers the light and the fitting thereof, all the material as fastened together; and the evidence wholly fails to show whether success is due to the mechanical excellence of the whole article, or the pleasing shape of its "canopy and bowl," which (as shown above) has no necessary connection with the mechanics of the contrivance. To ascertain whether it required invention to conceive and produce a plainly ribbed bell-shaped canopy proximately surmounting a hemispherical bowl, we have considered the design patents below noted,[1] and applied rules of decision often and lately stated by this court[2].

Finding no invention, it is ordered that the decree appealed from be reversed, and the case remanded, with directions to dismiss the bill, with costs in both courts.

[1] Grant, 45,629; Raymond, 48,082; and Pickhardt, 47,934—left no room for this invention in bell-shaped ribbed canopies with or without hemispherical bowls. The kind of mental operation involved, is well shown by the slightly later applications of the same patentee (49,567 and 49,558) showing canopies of hexagonal and circular horizontal section respectively. There would seem to be no difficulty in patenting one design for every figure of plane geometry.

[2] Baker, etc., Co. v. Cass Co., 220 Fed. 918, 136 C. C. A. 484; Denton v. Fulda, 225 Fed. 537, 140 C. C. A. 521; Strause, etc., Co. v. Crane Co., 235 Fed. 126, 148 C. C. A. 620, and Dietz Co. v. Burr, 243 Fed. 592, 156 C. C. A. 290, with the cases there collated.

T. L. SMITH CO. et al. v. CEMENT TILE MACHINERY CO.

(District Court, N. D. Iowa, E. D. February 19, 1918.)

No. 28.

1. JUDGMENT ⊂=675(1)—PERSONS CONCLUDED—SUIT FOR INFRINGEMENT OF PATENT.

A decree in an infringement suit against the user of a machine, holding the patent valid and infringed, is conclusive on both such questions in a subsequent suit by the same complainants against the manufacturer of the machine, which admittedly participated in the defense of the prior suit and paid all or the greater part of the expense, but is not conclusive as to infringement by another machine made by defendant, which was not involved in that suit.

2. PATENTS ⊂=328—VALIDITY AND INFRINGEMENT—MIXING MACHINE.

The Smith patent, No. 803,721, for improvement in mixing machines, is valid, but is for a combination of old elements, and is limited to the means particularly described in the specification and drawings. As so limited, *held* not infringed.

In Equity. Suit by the T. L. Smith Company, the Jaeger Machine Company, and the Waterloo Cement & Machinery Company against the Cement Tile Machinery Company, now known as the Stewart Manufacturing Company. On final hearing. Decree for complainants on one cause of action, and for defendant on the second cause of action.

Suit for alleged infringement by defendant of United States letters patent No. 803,721, issued to the T. L. Smith Company, as assignee of Thomas L. Smith, November 7, 1905, for improvement in mixing machines, for an accounting of damages and profits, and injunction restraining the defendant from further infringing said patent.

George L. Wilkinson, of Chicago, Ill., and Alfred Longley, of Waterloo, Iowa, for plaintiffs.

John E. Stryker, of St. Paul, Minn., for defendant.

REED, District Judge. The patent in suit contains 32 claims, of which Nos. 16, 17, 18, 28, 30, 31, and 32 are alleged in the petition to have been infringed by the defendant. In December, 1914, the plaintiffs brought suit in the United States District Court for the Northern District of Illinois against one Edward Foster, a resident of Illinois, for the alleged infringement of said claims and No. 5, in which suit, upon the final hearing, judgment and decree went in favor of the plaintiffs in February, 1916, against said Foster for infringing said claims, with a judgment for damages, an order for an accounting, and injunction, which decree was affirmed by the United States Circuit Court of Appeals for the Seventh Circuit February 1, 1917, except as to claim No. 5, which was held by that court to be in effect identical with claim No. 32. A petition for rehearing was denied by the Circuit Court of Appeals July 26, 1917. See Foster v. T. L. Smith Co., 244 Fed. 946, — C. C. A. —. In the defense of the suit against Foster (which will be called the Foster suit), the alleged infringing

machine was manufactured by this defendant and by it sold to Foster; this defendant participated, employed solicitors, and paid or agreed to pay the greater part if not the entire cost and expense of the suit. After the final determination of that suit, the plaintiff brought this suit against this defendant, who resides in this district, alleging that defendant was in privity with the defendant Foster in the Foster suit, is concluded and bound by the final judgment and decree in that suit, and further alleging that defendant is continuing to infringe the plaintiffs' patent, and asks judgment and decree for the damages and other relief awarded against Foster in the Foster suit, and further damages because of continuing to infringe the patent in suit, and for the usual accounting of damages, and preliminary and permanent injunctions.

The defendant has answered the petition, admitting the issuance of the patent to the plaintiff the T. L. Smith Company, the commencement of the Foster suit, and its result; that defendant made and sold to Foster the machine held in the Foster suit to infringe the plaintiffs' patent; that defendant participated in the defense of that suit, and paid the greater part or all of the expenses thereof, as alleged by the plaintiffs; but denies that it was in privity with Foster, or bound by the judgment or decree in that suit. The defendant further alleges the invalidity of the patent in suit, because anticipated by a number of prior patents and other devices in the prior art, and that since the commencement of the Foster suit it has made another mixing machine, which is different in material respects from the Foster machine, which does not infringe the plaintiffs' patent, nor any of the claims thereof herein involved.

[1] 1. The plaintiffs contend that the judgment and decree in the Foster suit is res adjudicata of every question involved in this suit, and that they are entitled to a judgment and decree against this defendant for the judgment and decree awarded against Foster; and counsel for defendant maintains that the decree in the Foster suit is not res adjudicata of any question involved in that suit, but is open to re-examination by this court of every question involved in that suit; also that defendant's present structure is not an infringement of any of the claims of the patent in suit involved herein, and was not involved or determined in the Foster suit. Upon the question of res adjudicata it is said in Southern Pacific Railroad Co. v. United States, 168 U. S. 1, at page 48, 18 Sup. Ct. 18, 27 (42 L. Ed. 355):

"The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked for the vindication of * * * person and property if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them (citing many cases)."

And see Hart Steel Co. v. Railroad Co., 244 U. S. 294, 37 Sup. Ct. 506, 61 L. Ed. 1148, D'Arcy v. Staples & Hanford Co., 161 Fed. 733, 88 C. C. A. 606, and Elliott Co. v. Roto Co., 242 Fed. 941, — C. C. A. —.

I am therefore of opinion, upon the admission of the answer, that the decree in the Foster suit is res adjudicata of the question of the validity of the patent in suit and of its infringement by the Foster machine.

[2] 2. The defendant's present machine was not involved in the Foster suit, and was not in fact made or put into practical use by it until shortly before its final determination. That suit is not, therefore, an adjudication that defendant's present machine infringes the plaintiffs' patent. Cromwell v. Sac County, 94 U. S. 351, 24 L. Ed. 195; Packet Co. v. Sickles, 5 Wall. 580, 592, 18 L. Ed. 550; Russell v. Place, 94 U. S. 606, 608, 24 L. Ed. 214, and cases cited; Bates v. Bodie, 245 U. S. 520, 38 Sup. Ct. 182, 62 L. Ed. —. The claims of the patent involved herein, with Figures 1 and 3 of the drawings, are set forth in the opinion of the Circuit Court of Appeals in the Foster suit (244 Fed. 946, — C. C. A. —), to which reference is made for said claims and drawings, and to the patent in suit for others of the drawings. The Circuit Court of Appeals, in its opinion in the Foster suit, said of the Smith patent:

"Smith's most general conception of his machine as an entirety is probably best stated in claim 32"

—which claim reads in this way:

"In a mixing machine, the combination of (1) a mixing receptacle having one clear and unobstructed opening for feed and discharge concentric, or substantially so, with the axis of revolution; (2) a tiltable frame supporting said receptacle; (3) means for tilting said frame either to the right or to the left of the loading point; (4) a circular toothed rack disposed around the middle of said receptacle; (5) a bevel pinion engaging said toothed rack and journaled in the tilting axis; and (6) means for connecting said pinion with the source of power."

Others of the claims involved also state in a general way the same essentials of the Smith structure in its entirety. Those elements, aside from the mixing receptacle and the tiltable frame, are elements 3, 4, and 5 of claim 32, and similar elements of claims 28, 30, and 31, to the end that the receptacle may be tilted to the right or to the left of its loading point, and this for the very obvious purpose of discharging or unloading its contents either to the right or to the left side of the loading point, or at any point within the entire circle of its revolution, which the Circuit Court of Appeals held are essential elements of the Smith invention, an improvement upon the Taylor patent of August 5, 1890, No. 433,663, and distinguishes it from that patent. Speaking of the Taylor patent the Circuit Court of Appeals said:

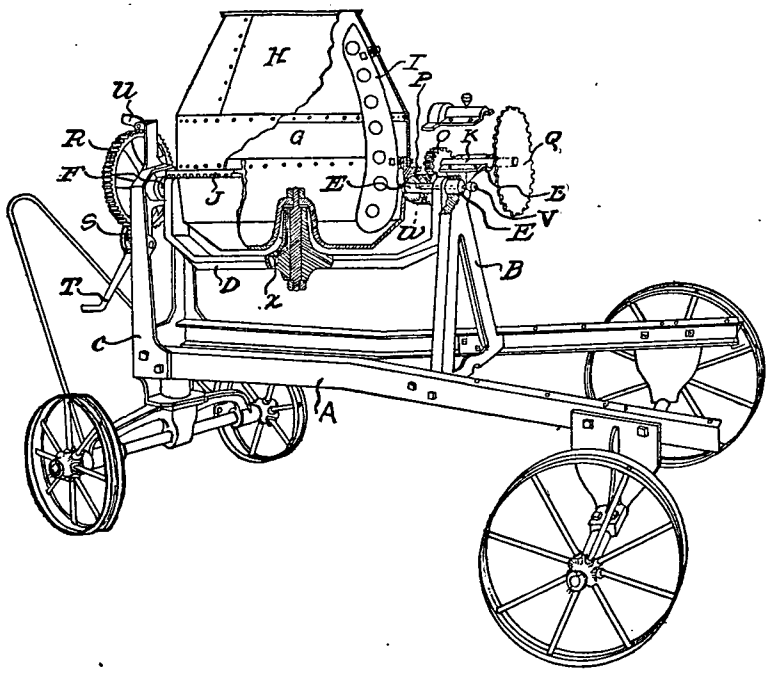
"The machine is supported upon a fixed frame. A tiltable yoke is supported by means of trunnions upon the fixed frame. Within the yoke is supported a receptacle of the pot or jar form. To the bottom of the receptacle is attached a bevel gear, which is engaged by a beveled pinion on a shaft, which is housed in the tilting yoke and carries at its outer end a spurred gear, which in turn engages another spurred gear, mounted to rotate around the

axis of one of the trunnions. The receptacle is thus rotated by means of two parallel shafts, two spurred gears, and two beveled gears. As the spurred gears are outside, and the beveled gears inside, of the stationary frame, the shaft, which is housed in the tilting yoke, limits the tilting, so that the receptacle can be loaded and discharged only on one side of the stationary frame. This Taylor structure lacks the Smith purpose and means of tilting, and likewise the simple and direct rotating means, both of which are essential elements of the Smith combination."

This quite clearly indicates that in the opinion of the Circuit Court of Appeals the Smith invention was not anticipated by the Taylor structure, and that the Foster machine so differs from the Taylor machine that it is an infringement of the Smith device. The Taylor patent expired in 1907, and its disclosures were at large thereafter.

The defendant's present device is a portable structure mounted on wheels, was exhibited in court at the hearing, and illustrated by a blueprint in evidence, marked "Defendant's Exhibit A" and "Plaintiff's Exhibit I" (attached hereto).

Defendant's Exhibit A—Plaintiff's Exhibit I.



The device and its mode of operation, as shown by the blueprint, may be stated substantially as follows: A rigid main frame *A* forming the body of a wheeled vehicle having upright end supports *B* and *C*. Upon this main frame is swung a tilting frame *D*, the upper ends of which are swung from solid trunnions *E* and *F*; the shaft *E* being mounted in support *B* and *F* journaled in support *C*. Mounted upon an upright

bearing *X* set in the lower portion of the frame *D*, the axis of which is at right angles with the axis of the trunnions *E* and *F*, is a bowl-shaped receptacle *G* formed with a tapering mouthpiece *H* resembling a hollow truncated cone and half encircled by the tilting frame *D*. Rigidly mounted upon the inner side wall of this receptacle is a blade *I*, which assists in causing the contents of the receptacle to mix when it revolves on its bearing *X*. To revolve the receptacle and mix its contents is a toothed circular rack *J*, encircling the body of the receptacle a little below its center, with its axis in line with the axis of the receptacle and a driving countershaft *K* journaled in the bearing *L* on the support member *B*, said rack being revolubly connected with the countershaft *K* to revolve the receptacle by means of intermeshing toothed gears *O* and *P*; gear *O* being mounted rigidly on the countershaft *K*, and the gear *P* journaled on the stud *E*, its teeth also meshing with the teeth of the rack *J*. Power is applied to the countershaft *K* through a large gearing *Q*. To dump or unload the contents of the receptacle it is tilted about the axis of the trunnions *E* and *F* by a tooth gear *R* mounted upon the trunnion *F* intermeshing with the pinion *S*, which is journaled on the support *C* and provided with a handle *T* by which its movement is controlled. By turning the handle *T* the receptacle is tilted on the trunnion *F* and tilting frame *D*, and its movement is limited to a movement through an arc of a circle by the frame *D* striking the bearing L, so that the receptacle will only discharge its load on the side or end opposite the loading point, and by dropping the pawl *U* into engagement with the teeth of the gear wheel *R*, the receptacle may be held in any selected position between its loading and discharging points while the revolution on its bearing *X* is free to continue or stop. The stud *E*, upon which the gear *P* revolves, is lubricated from an oil cup *V* through the duct *W* leading to the bearing surface. It is impossible for the frame *D* to make a complete revolution upon the trunnions *E* and *F*, because the arc of the circle, through which it can only swing, will cause it to strike the bearing *L* when turned in either direction.

The particular gearing which the Smith patent describes for rotating its receptacle comprises the circular support *22* (Figs. 2, 3, and 4 of the drawings) in which the mixing receptacle is mounted, having an annular set of teeth *24*, with which the teeth of the pinion *11* mesh, said pinion being mounted upon the inner end of the drive shaft *10* journaled in the tubular trunnion *9'*. The shaft *10* being driven by the pulley *12* (Fig. 1) revolves the receptacle directly without the use of any countershaft or intermediate gearing. The defendant's means for performing this function is the counter drive shaft *K*, and a train of at least three gears, while in the complainants' patent, the driving means described is direct from the pulley *12* through a single shaft mounted in the tubular trunnion *9'*, which was also the construction of the Foster machine, both of which are materially different from the defendant's present structure.

The Circuit Court of Appeals further said of the Smith machine:

"By having a 'middle' part, as in a pot or jar, the tilting means and likewise the rotating means are applied substantially in line with the center of gravity of the loaded receptacle, and therefore both movements may be most

readily effected, and also the driving pinion, journaled in the tilting axis, may thus engage the toothed rack on the periphery of the receptacle without the use of intermediary gears or other driving means."

The defendant's present structure plainly differs in essential particulars from the plaintiffs' combination, and its receptacle can only be rotated by means of two parallel shafts, one a countershaft, two spurred gears, and at least one intermediary gear meshing with them, and in use will not accomplish the result that the Smith machine accomplishes, in that its receptacle may be discharged or unloaded on either side of its loading point, while the defendant's receptacle can only be unloaded upon one side or end of the same, and that opposite its loading point.

The Smith patent is for a combination of old elements, and is within narrow limits to be accomplished by means particularly described in the specifications and drawings of the patent. Of such patents the Supreme Court in Electric Signal Co. v. Hall Signal Co., 114 U. S. 87, said at page 96, 5 Sup. Ct. 1069, 1075 (29 L. Ed. 96):

"To constitute identity of invention, and therefore infringement, not only must the result attained be the same; but, in case the means used for its attainment is a combination of known elements, the elements combined in both cases must be the same, and combined in the same way, so that each element shall perform the same function, provided, however, that the differences alleged are not merely colorable, according to the rule forbidding the use of known equivalents."

To the same effect are Fay v. Cordesman, 109 U. S. 408, 420, 3 Sup. Ct. 236, 27 L. Ed. 979; Thompson v. Boisselier, 114 U. S. 1, 11, 14, 5 Sup. Ct. 1042, 29 L. Ed. 76.

I am therefore persuaded that defendant's present structure does not infringe plaintiffs' patent. It follows that plaintiffs are entitled to a judgment and decree against the defendant for the award in the Foster suit, with costs, upon the question of the validity of the patent, but that the petition must be dismissed, at plaintiffs' costs, so far as it claims infringement by the defendant's present structure; and it is so ordered.

A decree may be prepared accordingly, in which each of the parties is given 30 days in which to prepare the record on appeal, if either of them shall take an appeal.

In re JONES.

(District Court, D. Maryland. November 2, 1917. Supplemental Opinion, November 14, 1917.)

1. BANKRUPTCY ⟸143(12)—RIGHTS OF TRUSTEE—INSURANCE.
Under Bankruptcy Act July 1, 1898, c. 541, § 70a, 30 Stat. 565 (Comp. St. 1916, § 9654), declaring that the trustee shall be vested with the title of the bankrupt, except in so far as it is exempt, to all powers which the bankrupt might have exercised for his own benefit and to property which, prior to the filing of the petition, he could by any means have transferred, or which might have been levied upon and sold under judicial process against him, but that, when a bankrupt shall have any insurance policy, which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within 30 days after the value has been ascertained, pay or secure to the trustee the sum so ascertained and hold the policy free from the claims of creditors, a life policy payable to the wife of the bankrupt, unless exempt by state statute, passes to the trustee, in bankruptcy, where the bankrupt, without the consent of his wife, had the right at any time to substitute another beneficiary.

2. EXEMPTIONS ⟸50(1)—LIFE INSURANCE POLICY.
A life policy payable to the wife of the insured, but reserving in him the power to change the beneficiary without his wife's consent, cannot be deemed for the benefit of the wife, so as to be exempt under Code Pub. Gen. Laws Md. 1904, art. 45, §§ 8, 9, exempting from liability for debts any policy on the debtor's life taken out or assigned by him for the sole use of his wife.

3. BANKRUPTCY ⟸396(3)—EXEMPTION—INSURANCE.
As Const. Md. art. 3, § 44, limits the power of the Legislature to grant exemptions from execution to property not exceeding in value $500, Code Pub. Gen. Laws Md. 1904, art. 83, § 8, purporting to exempt from execution all money payable in the nature of insurance, must be construed in the light of the limitation; hence a Maryland bankrupt, claiming as exempt an insurance policy having large surrender value, is entitled to an exemption only to the amount of $500, which exemption must be deemed in full satisfaction of all exemptions to which he might be entitled under section 8.

In the matter of the bankruptcy of Harry C. Jones, trading as H. C. Jones & Co. On petition of the trustee to compel the bankrupt to surrender a certain life policy or pay the surrender value thereof. Petition granted in part.

John F. Oyeman, of Baltimore, Md., for bankrupt and wife.
Joseph T. England, of Baltimore, Md., for trustee.

ROSE, District Judge. The bankrupt's life was insured. The insurance was payable to his wife, but he had the right at any time, and without her consent, to substitute any other beneficiary in her place. At the time of the filing of the petition in bankruptcy the policy had a cash surrender value of $1,725.85. The bankrupt had possession of it. The trustee says he is entitled to it, or to its surrender value. The bankrupt and his wife say that he is not. Some states do not suffer creditors to take any life insurance. In them the trustee has no claim upon any life policy. Holden v. Stratton, 198 U. S. 202, 25 Sup. Ct. 656, 49 L. Ed. 1018. When this is not

so, or when it is not clearly so, there has been much difference of opinion as to whether such policies, as that now in dispute, pass or do not pass to the trustee. The answer has in most cases turned upon the construction given to the varying phraseology of the applicable state statutes exempting some, but not all, life insurance policies from the demands of creditors.

It has been held that under the laws of New Hampshire (In re Whelpley [D. C.] 169 Fed. 1019), Ohio (Matter of Fetterman, 243 Fed. 975), Kentucky (Matter of Pfaffinger [D. C.] 164 Fed. 526), Wisconsin (Allen v. Central Wisconsin Trust Co., 143 Wis. 381, 127 N. W. 1003, 139 Am. St. Rep. 1107, 25 Am. Bankr. Rep. 126), Minnesota (In re Johnson [D. C.] 176 Fed. 591), and Missouri (In re Orear, 189 Fed. 888, 111 C. C. A. 150), such policies do not pass to the trustee; but, on the other hand, the state exemption laws do not prevent their passing in New York (In re Wolff [D. C.] 165 Fed. 984; In re White, 174 Fed. 333, 98 C. C. A. 205, 26 L. R. A. [N. S.] 451; In re Hettling, 175 Fed. 65, 99 C. C. A. 87; In re Draper [D. C.] 211 Fed. 230), Pennsylvania (In re Herr [D. C.] 182 Fed. 716; In re Dolan [D. C.] 182 Fed. 949; In re Jamison [D. C.] 222 Fed. 92; In re Shoemaker [D. C.] 225 Fed. 329; In re Flanigan [D. C.] 228 Fed. 339), Georgia (Malone v. Cohn, 236 Fed. 882, 150 C. C. A. 144), Louisiana (In re Bonvillain [D. C.] 232 Fed. 370), and Tennessee (In re Moore [D. C.] 173 Fed. 679).

It would scarcely be accurate to say that the varying conclusions to which courts and judges have come have been always due to the difference of the wording of the state enactments. It is not unlikely that some of the judges, who held that particular statutes protected the policy altogether, would have reached the same conclusion, had they been dealing with some of the laws which other judges decided did not prevent the policy from passing to the trustee. To attempt a detailed analysis of these decisions would therefore be little worth while.

The bankrupt and his wife say that the petition of the trustee should be denied, and that for two reasons: (1) Under the proviso of paragraph 5 of section 70, a policy of this sort does not pass to the trustee. (2) By the law of Maryland such policies are exempt from the demands of creditors, and under section 6 of the Bankruptcy Act are not affected by bankruptcy. If not exempt by the state law, is this such a policy as will pass to the trustee? In other words, is it a policy which, on the day of the filing of the petition in bankruptcy, had a cash surrender value payable to the bankrupt, his estate, or his personal representatives? If it is not, the trustee has no claim upon it. Burlingham v. Crouse, 228 U. S. 459, 33 Sup. Ct. 564, 57 L. Ed. 920, 46 L. R. A. (N. S.) 148; Everett v. Judson, 228 U. S. 474, 33 Sup. Ct. 568, 57 L. Ed. 927, 46 L. R. A. (N. S.) 154; Andrews v. Partridge, 228 U. S. 479, 33 Sup. Ct. 570, 57 L. Ed. 929.

The trustee says that on that day, or any other day, the bankrupt could have named himself as the beneficiary and thereby have made the cash surrender value payable to himself. The trustee argues

that to make determinative the circumstance that such designation would have to be made is to give greater weight to form or to ritual than to substance. He contends that to compel the bankrupt to change the beneficiary would not take from the wife any right which, in the eye of the law, is of any value. He cites to that effect the opinion of the Circuit Court of Appeals for the Sixth Circuit in Mutual Benefit Life Insurance Co. v. Swett, 222 Fed. 200, 137 C. C. A. 640, Ann. Cas. 1917B, 298, and the text-writers and adjudged cases therein referred to, all of which concur in holding that the original beneficiary has no vested interest in such a policy as that now before the court, or in its proceeds, and that until after the death of the insured she has nothing more than a mere expectancy in it. He asserts that the question has been before three Circuit Courts of Appeal, and that in two of them, the Fifth and Sixth, by a unanimous bench, it has been answered as he says it should be (Malone v. Cohn, 236 Fed. 882, 150 C. C. A. 144; Mutual Benefit Life Ins. Co. v. Swett, supra), and that only in the Second (In re Samuels, 237 Fed. 796, 151 C. C. A. 38) and there over the strong dissent of Judge Hough, has the contrary reply been given.

He accurately quotes the authorities. His argument is a strong one. No reply can be made to it, if it be assumed that, because the bankrupt can change the beneficiary, he usually will. To say that what the bankrupt for his pleasure would probably do to-morrow he could not be compelled for his creditors to do to-day would be in truth sticking in the bark; but, if we are to go to the very heart of the problem, is the case quite so clear? In point of fact, are not almost all of such policies taken out for the benefit of the wife, and does she not receive their proceeds in the overwhelming majority of cases in which she survives her husband? Must not the courts take judicial notice that under the present practice of many, probably of most, insurance companies, their ordinary form of policy reserves to the insured the right to change its beneficiary? This form they tender to an applicant for insurance, unless he asks for something else. He in most cases accepts it without a thought that he is not thereby making provision for his wife or his children. Is it quite worth while to shut one's eyes to facts like these, because it is legally possible on any day for the insured husband to take from his wife any chance of ever getting anything under his policy? The Circuit Court of Appeals for the Second Circuit (In re Hammel, 221 Fed. 56, 137 C. C. A. 80) thought not.

There has been no moment, since the issuance of the policy which the trustee now seeks, at which it had a surrender value payable to the bankrupt. It is true that, since it had a surrender value at all, there never has been a day upon which the bankrupt could not have had it made payable to himself; but it is equally sure that there is no evidence that there ever was an hour when he wished to do so, nor is there any reason to believe he ever did. The trustee asks that weight be given to substance rather than to form; but if it be given to the substance of things as in real life they are, and not to what in legal theory they may be, will he gain aught? The doctrine

approved in the Second Circuit will sometimes enable the bankrupt to apply to his own use the cash surrender value of policies for which his creditors' money has in fact paid. Such instances will be comparatively rare. The rule prevailing in the Fifth and Sixth Circuits will work hardship in a vastly greater number of cases. Under such circumstances, I feel constrained to stick to the letter of the statute, and to hold that the policy in question, on the day of the filing of the petition in bankruptcy, had no cash surrender value payable to the bankrupt, his estate, or his personal representatives, and that as a consequence it did not pass to his trustee.

This conclusion renders it unnecessary to consider whether such a policy is exempt under the Maryland statutes. Sections 8 and 9 of article 45 of the Code of Public General Laws exempt from liability for a man's debts any policy on his life taken out or assigned by him for the sole use of his wife or for her benefit. Whether these sections apply to such a policy as that now in controversy depends upon whether it is one which was taken out for the sole use or for the benefit of the wife. That, after all, is the same question which has already been asked and answered in passing upon the contention that, under paragraph 5 of section 70 of the Bankruptcy Act, it passed to the trustee. If the wife has a real interest in the policy, or if in any substantial sense it is for her benefit, it did not have a cash surrender value payable to the bankrupt. If she had not, it is not protected by the sections of the Maryland Code already mentioned.

Whether section 8 of article 83 is to be understood as exempting all life insurance policies, or their proceeds, from execution and seizure, and, if so, whether it is constitutional, in view of the language of section 44 of article 3 of the Constitution of Maryland, are questions that need not be here discussed, much less answered.

From what has been said, it follows that the petition of the trustee must be dismissed.

Supplemental Opinion.

[1] The opinion in this case was handed down on November 2d. Three days later, and before any order had been entered, the Supreme Court, in Cohen v. Samuels, reversed the decree of the Circuit Court of Appeals for the Second Circuit (237 Fed. 796, 151 C. C. A. 38) holding that such policy as that now in controversy, unless exempt by state statute, passed to the trustee in bankruptcy.

[2, 3] Does the Maryland law exempt such policies? As was pointed out in the previous opinion, they are not exempt by virtue of sections 8 and 9 of article 45 of the Maryland Code, unless they are for the benefit of the wife, and the Supreme Court has ruled that they are not. Are they made immune by section 8 of article 83, which purports to exempt all money payable in the nature of insurance, benefit, or relief, in the contingency or event of sickness, accident, hurt, or death of any person, from execution or seizure in satisfaction of debt on a claim upon judgment in any civil proceeding? This language is plain enough. Nobody would raise any question as to what it means, if it were not that section 44 of article 3 of the state Constitution limits the power of the Legislature to grant

exemptions from execution of property not exceeding in value $500. In view of this limitation, it has been argued that the legislative intent must have been different from that which its words naturally import. This contention is not persuasive, nor may it be assumed that the General Assembly was either ignorant of the constitutional prohibition or indifferent to it. Whatever may or may not be true as to individual members, the court must assume that the General Assembly knew the Constitution and sought to obey it. Nothing said or decided in Himmel v. Eichengreen, 107 Md. 612, 69 Atl. 511, or Dale v. Brumbly, 96 Md. 674, 54 Atl. 655, justifies the assumption that the power of the Legislature to exempt from execution can be exercised without limit as to value. In these cases it was held that what is now section 236 of article 23, which is the corporation law of the state, constitutionally exempts from liability to attachment all moneys, irrespective of the amount, payable under a certificate issued by a fraternal beneficial association. The decision was based on two grounds: (1) That attachment is not execution. (2) That the association in whose hands it was sought to attach the money would have no power under the laws of the state to pay any of that money to a creditor of one of its members. Neither of these reasons here applies. The restriction imposed by section 44 of article 3 of the Constitution must, until the Court of Appeals otherwise rules, be held binding; but, if so, it is unnecessary for the Legislature to say anything about it. It will of its own force be read into every act dealing with the subject.

Such was the interpretation put some 10 years ago upon section 8 of article 83 by Judges Wickes in the circuit court No. 2 in an unreported case. He was subsequently followed in this court by my learned predecessor, Judge Morris. That construction appears to be in every respect reasonable, and will be here applied. The bankrupt has claimed an exemption of $100 out of the general assets of his estate. He has not received it. He will be entitled, upon payment to the trustee in bankruptcy of $1,225.85, which is $500 less than the surrender value of the policy, to hold it free of all claims of the trustee, but in full satisfaction of all exemptions to which, under section 8 of article 83, he is entitled.

DOOLITTLE v. MUTUAL LIFE INS. CO. OF NEW YORK et al.

(District Court, N. D. New York. March 11, 1918.)

BANKRUPTCY ⊜105(1)—COURTS—JURISDICTION.

A voluntary bankrupt, who failed to schedule life policies which had a cash surrender value, and concealed their existence from his trustee, was discharged. The estate was not closed, nor was the trustee discharged as such, and the bankrupt having died, his executor, who sued on the policies in the state court, joined the trustee, as well as the receiver of the bankrupt's property, appointed by the state court in proceedings supplementary to execution. Thereupon the trustee began an action on the policies in the federal court, joining the executor and receiver. *Held* that, as the action was not one falling within Bankruptcy Act July 1, 1898, c. 541, § 11, 30 Stat. 549 (Comp. St. 1916, § 9595), but was one over which both the state and bankruptcy courts had concurrent jurisdiction, the latter court

will not stay further prosecution of the action in the state court, and neither tribunal having assumed such control over the proceeds of the policies as to oust the jurisdiction of the other, the judgment in the case first tried will control.

In Bankruptcy. Action by Julius T. A. Doolittle, as trustee in bankruptcy of George A. Reynolds, against the Mutual Life Insurance Company of New York, Richard S. Reynolds, as executor of the last will and testament of George A. Reynolds, deceased, and another. On application for an order staying defendants from further prosecuting an action in the state court. Application denied.

F. M. Calder, of Utica, N. Y., for plaintiff.

Lee & Dowling, of Utica, N. Y., for defendant executor.

Frederick L. Allen, of New York City, for defendant Mutual Life Ins. Co. of New York.

Julius Tumposky, as receiver, pro se.

RAY, District Judge. March 23, 1871, George A. Reynolds, of Utica, N. Y., now deceased, insured his life in the Mutual Life Insurance Company of New York in the sum of $10,000, and March 22, 1873, he further insured his life in the same company in the further sum of $10,000. Both policies were kept good down to the time of the death of said George A. Reynolds, which occurred September 30, 1916. He left a last will and testament, and which has been duly probated, and said Richard S. Reynolds is the executor thereof duly appointed.

August 23, 1893, Richard S. Reynolds, now executor of George A. Reynolds, recovered a judgment in the Supreme Court of the state of New York, duly entered and docketed, against said George A. Reynolds, for the sum of $20,257.14, and less payments there is now unpaid thereon (if valid and existing) the sum of upwards of $2,000. Execution thereon was issued and returned unsatisfied, and proceedings supplementary to execution were duly instituted, and September 5, 1893, one David C. Stoddard was duly appointed receiver of the estate and property of said George A. Reynolds by the state court. Thereafter, and in 1907, said Stoddard died, and since the death of said Reynolds, and July 30, 1917, one Julius Tumposky was appointed receiver in such supplementary proceedings in place of said Stoddard, deceased.

August 2, 1898, said George A. Reynolds filed his voluntary petition in bankruptcy in the United States District Court, Northern District of New York, and he was duly adjudicated a bankrupt, and Julius T. A. Doolittle was duly appointed trustee in bankruptcy of the estate of said George A. Reynolds, and duly qualified as such. He has never closed the estate nor been discharged as such. In his schedules said George A. Reynolds made no mention of said insurance policies on his life, which then had a cash surrender value of about $3,632, and he concealed their existence from his trustee in bankruptcy. The premiums were paid down to the time of the death of Reynolds, and the policies kept alive. About December 6, 1898, on his petition duly filed and due notice given, said bankruptcy court made

an order duly discharging said George A. Reynolds from all his provable debts. Prior to the death of said Stoddard the judgment in favor of said Richard S. Reynolds and all other judgments against said George A. Reynolds were canceled of record. It is claimed they were not paid.

Richard S. Reynolds, as executor of said George A. Reynolds, soon after his appointment, brought suit on said policies of insurance in the state court, and said Doolittle, as trustee in bankruptcy, and said Tumposky, as receiver appointed by the state court in such supplementary proceedings, have been made parties defendant therein. After the commencement of that action in the state court the said Julius T. A. Doolittle, as trustee in bankruptcy of George S. Reynolds, brought suit against said insurance company, said Tumposky, as receiver, and said Richard S. Reynolds, as executor, etc., of said George A. Reynolds, in the United States District Court of the Northern District of New York. In the suit brought by Richard S. Reynolds, as executor, he seeks to recover the amount of such insurance policies, but alleges the claims made by the other parties; while in the suit brought by Doolittle as trustee on the policies he alleges his interest therein to the extent of the surrender value, and claims that the receiver appointed by the state court has no interest in the policies, while said receiver claims that he is entitled to such cash surrender value, if any, by virtue of his appointment, etc., as receiver, under such judgment or judgments obtained more than four months prior to the bankruptcy.

The Insurance Company does not deny the validity of the policies, or that there was a surrender value as alleged, but raises some question as to the amount due. It is indifferent otherwise as between the parties, or as to the court in which the controversy is determined, but desires a judgment which will settle the controversy and protect it. It cannot be doubted that both courts have jurisdiction over the subject-matter and the parties; that is, concurrent jurisdiction exists. Each court has full and complete jurisdiction and power to settle the entire controversy. In effect the plaintiff in this action invokes the alleged power of this court to compel a trial and adjudication of the matter in the federal court to the exclusion of the state court. This is not the adjudication of a claim provable in bankruptcy, or an application to stay a suit commenced prior to bankruptcy in the state court to establish a claim against the bankrupt, and the injunction order prayed for is not authorized by section 11 of the Bankruptcy Act.

It has been decided by the Supreme Court that, where actions between the same parties for the same cause are pending both in the federal court and the state court, and no property has been seized by either which is the subject of the litigation, the federal court cannot rightfully stay the prosecution, trial, and determination of the case pending in its court to await the trial and determination of the case pending in the state court, as this, in effect, would be to subordinate and surrender its jurisdiction to the state court, and, in effect, a refusal to exercise its own powers and jurisdiction. See Rickley Land & Cattle Co. v. Miller & Lux, 218 U. S. 258, 262, 31 Sup. Ct. 11, 13, 54 L.

Ed. 1032; Harkrader v. Wadley, 172 U. S. 148, 164, 19 Sup. Ct. 119, 125, 43 L. Ed. 399; Palmer v. Texas, 212 U. S. 118, 125, 29 Sup. Ct. 230, 232, 53 L. Ed. 435. See, also, Freeman v. Howe, 24 How. 450, 16 L. Ed. 749; Buck v. Colbath, 3 Wall. 334, 18 L. Ed. 257; Taylor v. Taintor, 16 Wall. 366, 21 L. Ed. 287; Ex parte Crouch, 112 U. S. 178, 5 Sup. Ct. 96, 28 L. Ed. 690.

This being so, by what right can the federal court, except as authorized by some statute, prevent the state court from proceeding and exercising its jurisdiction by staying the parties in the state court from proceeding there? To enjoin the parties from proceeding in the state court would be, in effect, to prevent the state court from exercising its jurisdiction. Here we have $20,000 in the hands of the insurance company, which it is ready and willing to pay to the party or parties entitled thereto, when the rights of the respective claimants are determined. The executor of the insured claims and sues for it in the state court, and all parties claiming an interest are made parties, and can set up their rights and have them determined in that suit. The state court is rightfully proceeding to adjudicate the rights of the parties in and to that fund. The plaintiff here has invoked the jurisdiction of the federal court, which he has the right to do, and this court can proceed to adjudication of the rights of the parties, unless it be held that the money due on the policies is a fund now, in effect, within the control of the state court, and that such court is proceeding to adjudicate concerning it. It is not clear that such is not the status of affairs. The $20,000 is not actually in court, but the insurance company concedes it belongs to some one or all of the other parties, and the rights of those parties in that money is the sole subject of controversy and litigation.

But, irrespective of this, I am of the opinion that the federal court has no power to stay the parties or the plaintiff from proceeding with the case pending in the state court, as that in effect would be for the federal court to stay proceedings in the state court, which, in such a case as this, it cannot do. Clearly the federal court does not have possession of the fund, and has not had it, and has made no decree concerning it. There is a class of cases where the federal court may, in aid of its own jurisdiction and to render its decree theretofore pronounced effectual, restrain all proceedings in a state court which would have the effect of defeating or impairing its jurisdiction. Julian v. Central Trust Co., 193 U. S. 93, 112, 24 Sup. Ct. 399, 48 L. Ed. 629, and cases there cited.

But this does not justify the federal court in staying proceedings in a state court for the purpose of drawing to itself exclusive jurisdiction over a matter so that it may make a decree concerning it, at least, not unless it has the property or subject-matter of the litigation in its custody or possession and is duly proceeding to adjudicate concerning it. This subject is quite fully considered in 17 Standard Encyclopedia of Procedure, 812, etc. In Woren v. Witherbee Sherman & Co., 240 Fed. 1013, this court was requested to enjoin the parties from proceeding further in this court until a suit first brought and pending in the state court between the same parties for the same cause (to re-

cover damages for alleged negligence) was tried and determined. This court held it had no power to do this, as it would be a refusal to exercise its jurisdiction and powers which the plaintiff had the right to invoke, notwithstanding he had first brought suit against the same defendant on the same cause of action in the state court.

It is claimed that, as questions arise under the bankruptcy law, the federal court should assume jurisdiction; but the state court is competent, and has power to determine those questions. Questions arise under the state laws, also, and with equal force it may be argued that the state court should therefore retain and exercise its jurisdiction. I am convinced this court cannot restrain or enjoin the plaintiff in the state court from proceeding in that action. Neither can the state court enjoin the plaintiff in this action in the federal court from proceeding therewith. The judgment in the case first tried will determine the questions involved. The one court, under the circumstances existing, will not interfere, directly or indirectly, with the other.

The motion must be denied.

WILLIAMS v. MILLER.

(District Court, W. D. Virginia. January 16, 1918.)

1. REMOVAL OF CAUSES ⊜89(1)—TIME FOR FILING PETITION.
   A petition for the removal of a cause from the state to the federal court should regularly be filed on the return day of the writ.
2. REMOVAL OF CAUSES ⊜89(1)—RIGHT OF—TIME FOR FILING PETITION—WAIVER.
   The requirement that a petition for removal should be filed on the return day is in the nature of a limitation and may be waived.
3. JUDGMENT ⊜898(1)—RELEASE—VACATION—AUTHORITY OF LAW COURT.
   A law court has power to set aside a release of its judgment, at least when the judgment creditor, in executing the release, used a scroll by way of a seal.
4. JUDGMENT ⊜823—EFFECT—LIEN.
   A judgment rendered in West Virginia creates no lien on the defendant's property in Virginia, and in order to acquire a lien or the right to execution the judgment creditor must bring an action at law in Virginia on the West Virginia judgment.
5. JURY ⊜12(5)—JURY TRIAL—ACTION ON FOREIGN JUDGMENT.
   In an action on a foreign judgment, the defendant, while estopped to inquire into the merits of the original cause, is entitled to a jury trial on any defense open to him.
6. COURTS ⊜262(3)—FEDERAL COURT—EQUITY JURISDICTION—ATTACHMENT.
   Code Va. 1904, § 2964, providing for the issuance of an attachment on a bill in equity to enforce any claim, legal or equitable, does not extend the equitable jurisdiction of the federal District Court for Virginia, so as to give that tribunal jurisdiction over a suit on a West Virginia judgment wherein attachment under such statute was sought against property of the judgment debtor located in Virginia, for the judgment debtor was entitled to a jury trial on the issues open to him.
7. COURTS ⊜262(2)—EQUITY JURISDICTION—FEDERAL COURT.
   The federal District Court for Virginia may entertain a suit on the equity side to vacate a release of a West Virginia judgment, despite Rev.

St. § 723 (Comp. St. 1916, § 1244), forbidding suits in equity, where there is a plain, adequate, and complete remedy at law, for the jurisdiction of a law court in setting aside such a release is equitable in its nature, involving a matter as to which no jury trial can be had; hence, as the judgment debtor would not be deprived of any constitutional right to a jury trial, jurisdiction cannot be denied on the ground there was an adequate remedy at law in the West Virginia court.

In Equity. Bill by one Williams, executrix, against R. B. Miller, which was removed from the state court. On motion to dismiss. Motion denied.

The complainant, a citizen of Virginia, filed her bill in equity in the circuit court of Bland county, Va., and thereupon sued out an attachment, which was duly levied on land belonging to the defendant in that county. The defendant, who is a citizen of West Virginia, but who was served with process in Bland county, Va., after some delay, removed the case to this court, and thereupon filed a motion to dismiss. The bill asserts that a judgment at law for something over $5,000 was rendered by the United States District Court for the Southern District of West Virginia in May, 1915, in favor of one Randolph Henry against the defendant, Miller, and that this judgment was assigned by the judgment creditor to the testator of the plaintiff in the suit at bar; that after the death of the plaintiff's testator and her qualification as executrix the plaintiff was induced by the defendant's fraudulent misrepresentations to execute a release of said judgment in consideration of a check for $250, which has not been deposited, and which the plaintiff subsequently offered to return. The relief prayed for is the cancellation of the release, in the execution of which a scroll was used by way of a seal, and the subjection of defendant's land to the plaintiff's original claim.

The attachment was sued out under a Virginia statute (section 2964, Code 1904), which reads in part as follows: "When a person has a claim, legal or equitable, * * * to any debt, * * * or to damages for the breach of any contract, * * * he may, on a bill in equity filed for the purpose, have an attachment to secure and enforce the claim. * * *"

S. W. Williams, of Roanoke, Va., for plaintiff.

Joseph M. Sanders and Russell S. Ritz, both of Bluefield, W. Va., for defendant.

McDOWELL, District Judge, (after stating the facts as above). [1, 2] The defendant, Miller, was personally served with process in Bland county on the return day of the writ. The petition for removal, therefore, should regularly have been filed on that day. However, this requirement is in the nature of a limitation and may be waived (Ayers v. Watson, 113 U. S. 594, 598, 599, 11 Sup. Ct. 201, 34 L. Ed. 803), and counsel for plaintiff has expressly waived this objection.

[3] The motion to dismiss is founded on the theory of a want of equity jurisdiction because of an adequate remedy at law. I think there is power in the court which rendered the judgment here in question to set aside the release. 2 Black, Judgments (2d Ed.) § 1016; 2 Freeman, Judgments (4th Ed.) § 478a; 17 Am. & Eng. Ency. (2d Ed.) 871; 23 Cyc. 1500; Jeffries v. Mutual Ins. Co., 110 U. S. 305, 4 Sup. Ct. 8, 28 L. Ed. 156; U. S. v. Biggert, 70 Fed. 38, 16 C. C. A. 616. Such doubt, if any, as there is, arises from the fact that the release here (a scroll having been used) is under seal. The alleged fraud is in the inducement to the execution of the re-

lease. 4 Minor's Insts. (3d Ed.) 792; Taylor v. King, 6 Munf. (Va.) 366, 8 Am. Dec. 746; George v. Tate, 102 U. S. 564, 570, 571, 26 L. Ed. 232; Mease v. Mease, Cowp. 47; Dorr v. Munsell, 13 Johns. (N. Y.) 430. But even in the exercise of the more ordinary jurisdiction of law courts the rule that a law court cannot consider fraud in the inducements to the execution of a sealed contract is open to some doubt. See 34 Cyc. 1069, note, and Wagner v. Nat. Ins. Co., 90 Fed. 395, 33 C. C. A. 121. The reason for the rule was the solemnity of the act of affixing the seal. Where a scroll has been used in executing a release, the reason for the rule has lost much of its force. There is little or no more solemnity in making a scroll than in signing one's name. Moreover, the law court, in setting aside an entry of the satisfaction of a judgment, or a release of such judgment, is exercising an equitable power (Watson v. Reissig, 24 Ill. 281, 76 Am. Dec. 746; Plano Co. v. Thompson, 21 S. D. 300, 112 N. W. 149, 11 L. R. A. [N. S.] 396, 130 Am. St. Rep. 722, 724; Ross v. Hicks, 11 Barb. [N. Y.] 483, 484), and hence would not, I believe, be restrained by a confessedly technical rule unknown to the equity courts.

[4-6] Conceding the power of the law court in West Virginia to cancel the release, there would be no sort of doubt of the jurisdiction of this court of the present case, if this court had an independent equity jurisdiction to grant the ultimate relief here sought—the enforcement of the attachment lien. The power to cancel the release would come from the power to do complete justice. 1 Pom. Eq. § 181; Clarke v. White, 12 Pet. 178, 188, 9 L. Ed. 1046; Kennedy v. Creswell, 101 U. S. 641, 646, 25 L. Ed. 1075; U. S. v. Union Pac. R. Co., 160 U. S. 1, 52, 16 Sup. Ct. 190, 40 L. Ed. 319. However, I am unable to see that this court has an independent power to enforce the lien. Although the plaintiff here is not suing on an unliquidated claim, and occupies somewhat higher ground than that of a simple contract creditor, still she is, as to the ultimate relief asked, presenting a legal demand. A judgment rendered in West Virginia creates no lien on the defendant's property in this state. In order to acquire a right to execution or a judgment lien in this state, the plaintiff would have to bring an action at law in this state on the West Virginia judgment. That judgment in such action would be effective to estop inquiry into the merits of the original cause of action, but the defendant would be entitled to a jury trial on any defense open to him. In other words, aside from the prayer to cancel the release, the plaintiff has none but a legal demand against the defendant. The state statute (section 2964, Code Va.) creates a lien, contemporaneous with the institution of the suit, such as was unknown to the ancient equity courts. It cannot (independent of some other equity) give a federal equity court jurisdiction, as the defendant would be deprived of his constitutional right to a jury trial. Scott v. Neely, 140 U. S. 106, 11 Sup. Ct. 712, 35 L. Ed. 358; Cates v. Allen, 149 U. S. 451, 13 Sup. Ct. 977, 37 L. Ed. 804; Hollins v. Brierfield, 150 U. S. 371, 14 Sup. Ct. 127, 37 L. Ed. 1113. It follows that this court has not jurisdiction to enforce the lien, unless it has an independent right to cancel the release.

[7] At least in the state courts it seems that it is generally held that there is equity jurisdiction to cancel a fraudulently obtained release of a judgment. 19 Ency. Pl. & Pr. 140; 2 Freeman Judgments (4th Ed.) § 478a; 34 Cyc. 1070. I have not encountered any federal case bearing directly on this question. By force of section 723, Rev. Stats. (Comp. St. 1916, § 1244), forbidding suits in equity where there is a plain, adequate, and complete remedy at law, the federal courts are required to decline equity jurisdiction in many cases where it would be maintained in some of the state courts. Unfortunately the books at my command do not enable me to ascertain the period at which the power of the law courts to set aside releases of judgments for fraud, duress, or mistake came into existence. I am likewise for the same reason unable to ascertain how ancient is the equity jurisdiction; but I can think of no very strong reason why the undoubtedly ancient equity jurisdiction to cancel contracts for fraud, etc., should not have included cancellation of releases of judgments. In the absence of the historical information which might furnish an easy solution of the present question, I think it advisable to assume that the power of the law courts became established prior to 1789. The question thus presented is not free from difficulty. The relief of canceling a contract induced by fraud is equitable in nature. But if the law courts, since ancient times, have had the power to afford this relief, there is some ground for arguing that section 723 forbids such jurisdiction to the federal equity courts. However, the most satisfactory solution of the question seems to me to be that the statute was not intended to apply to a case such as we have here. In setting aside a fraudulent release of its own judgment, the law court is, as has been said, exercising an equitable power. The relief is usually granted on motion. A jury could not be demanded as of right on such a trial. 1 Freeman, Executions (3d Ed.) § 54; 3 Freeman, Executions (3d Ed.) § 361, p. 2048; Wilson v. Stilwell, 14 Ohio St. 464, 468; Laughlin v. Fairbanks, 8 Mo. 367, 370; Anderson v. Carlisle, 7 How. (Miss.) 408; Morton v. Walker, 7 How. (Miss.) 554; Union Pass. R. Co. v. Syas, 246 Fed. 561, — C. C. A. —.

There are many powers of the law courts which have been immemorially exercised without the aid of a jury. Trials on habeas corpus, contempt, mandamus, and prohibition are such. The equitable powers of law courts over their own judgments, illustrated by orders in respect to the execution of writs of possession, are also, as I believe, always exercised without a jury. The power that the law court has to set aside a fraudulent release of its judgment is founded on its control of its own records, or control of its own processes. Because, in exercising this power, it administers a relief which is equitable in its nature, it seems to me to follow that no jury trial of the issue could be required. If the court were to lay such issue before a jury, the verdict (as on an issue out of chancery) would be advisory only. I do not contend, of course, that an issue as to the validity of a release of a judgment (especially if not under seal) might not be so presented in a court of law as to raise an issue properly to be tried by a

jury. If an action at law be brought on the judgment, and the defendant pleads the release, a replication setting up fraud in procuring the release would present such an issue. But the right of the plaintiff at bar in the law court in West Virginia would be presented by motion, and would, as I believe, be properly tried by the court without a jury. If I am right in so thinking, section 723 does not seem to present any obstacle to the jurisdiction here. The most important and fundamental object of the statute was to prevent the equity courts from depriving a party of his constitutional right to a jury trial. As no right of jury trial would be here destroyed, and as the relief to be had in the law court is equitable, it would seem that the statute would be strained in holding it to apply here. It savors too much of technicality and mere literalness to hold that a plaintiff in equity must be sent to a law court to secure equitable relief. Such unnecessary circuity of action, delay, and expense for no legitimate purpose could hardly have been intended.

Moreover, we have not here a case in which the remedy at law can be afforded by any law court having jurisdiction of the person or property of the releasee. There is only one law court that can cancel the release here in question. This fact, coupled with the further fact that that particular law court is in another jurisdiction, would seem to give some further weight to the assertion that the remedy at law here is not such as is within the intent of the statute. At any rate the remedy at law in this case does not seem to be as adequate as the remedy in equity; and the facts in each case must determine the question as to the adequacy of the remedy at law.

I should, perhaps, say further that the objection that the bill does not allege that the plaintiff has exhausted her recourse against the defendant's personal property does not strike me as being sound. So long as the release stands uncanceled, she has no right to an execution. And again, if this court has jurisdiction to cancel the release, its further jurisdiction to do complete justice and enforce the attachment lien is not affected by adequacy of a remedy at law in this respect. Purely legal remedies are enforced in equity, in order to do complete justice, if there is also a right to grant equitable relief. This ground for dismissal was perhaps suggested by an erroneous belief that the plaintiff is here seeking to enforce a judgment lien. She has no judgment lien. She has a statutory lien of attachment only. If this court has an independent right to cancel the release, it has the further right to enforce this lien, and I cannot see that the existence of some other remedy at law, if it existed, could destroy this right.

MURPHY v. MITCHELL.

(District Court, N. D. New York. March 18, 1918.)

PLEADING ⇐8(15)—FRAUD—GENERAL ALLEGATION.

General allegations of fraudulent representations and of threats and promises are insufficient, unless accompanied by a statement of the representations, threats, and promises, or at least the substance thereof.

At Law. Action by Mary A. Murphy against John Clark Mitchell. On motion to strike allegations from amended complaint. Granted in part.

See also (D. C.) 245 Fed. 219; 246 Fed. 732.

Return of order to show cause why certain allegations or statements should not be stricken from the plaintiff's amended complaint. This motion comes up after the service of a new or amended complaint, subsequent to the order of this court giving permission to file same, and which order also provided that the complaint be made more definite and certain in certain particulars, or that certain allegations be stricken therefrom.

Rushmore, Bisbee & Stern, of New York City, for the motion.
Edgar T. Brackett, of Saratoga Springs, N. Y., opposed.

RAY, District Judge. Since this motion was made the plaintiff has filed her affidavit, in which she states that the complaint has been made as definite and certain in regard to false and fraudulent representations and threats and promises as is possible under all the circumstances. General allegations of fraudulent representations and of threats and promises are insufficient, unless accompanied by a statement of the representations, threats, and promises, or at least the substance thereof. The defendant is entitled to a reasonable amount of information when such charges are made. This has been pointed out heretofore in this case. If the plaintiff has no information whatever upon which to base the charge, it ought not to be made. If the plaintiff has some information, and sufficient information to justify the charge, then the substance of the misrepresentations, threats, promises, etc., should be stated.

I think this motion, in part, must be granted. The allegation in the fifth paragraph that Sullivan "was peculiarly under the influence and control of the defendant, who wrongfully exercised such influence and control for his own benefit," is a general allegation, but a conclusion merely, and I think there should be a statement as to what acts, if any, were done by defendant, constituting a wrongful exercise of his influence and control over said testator, Dennis Sullivan.

The allegation in the sixth subdivision, "that in carrying out said conspiracy he improperly and unduly influenced the said Dennis Sullivan," and also, "and wrongfully and by improper and undue influence, and by deception and misrepresentations, and by threats and promises, induced said Dennis Sullivan," etc., is also a general allegation, but a mere conclusion.

Does the complaint later set out, so far as possible, the required details? In paragraph 8, we find the following: That Sullivan was "thus" induced to sign said paper "by the false and fraudulent statements of the defendant and those confederated with him as aforesaid, and acting for him, and by undue influence practiced upon him"; that among other of which false representations made by the defendant and his confederates to said Dennis Sullivan are the following, to wit:

"That the estate of said Dennis Sullivan was hardly sufficient to pay the pecuniary legacies and establish the trusts which he desired to provide for

his grandchildren, as set forth in his said will of 1913; that in order to insure his sisters' receiving anything under his will he should give them pecuniary legacies of only $10,000 each, as there would be no residue under his will after paying said pecuniary legacies and establishing said trusts (and many other like fraudulent representations), the detail or substance of which it is impossible for the plaintiff to state, as the same are not known to the plaintiff."

These must be regarded as the false and fraudulent representations referred to in the complaint as having been made to induce and procure the testator to make the alleged new will. But no threats or promises are stated, and no act done to influence the decedent, except the making of the statements quoted as set forth.

There is no general description of the nature or character of the threats or promises made, if any were made, or of the acts done, if any acts were done. In these regards the defendant is given no information whatever. If the plaintiff has any information on the subject, the substance of that information should be set forth; that is, at least the general nature and character of the threats and promises made should be stated. But, if the plaintiff has no information, then there is no justification in law for the allegation that threats and promises were made, and that acts were done to improperly or wrongfully influence the testator.

The allegation that Sullivan was peculiarly under the influence of the defendant and others associated with him can stand, and if the influence was wrongfully and improperly exercised by the speaking of words, the making of false or untrue representations, those stated, it is proper to so allege; but there is nothing in the amended complaint to indicate this.

As to the statement in subdivision 5, folio 9, "who wrongfully exercised such influence and control for his own benefit," the addition of the words "by making to him the false and untrue statements hereinafter set forth" would make this a proper allegation; but it would be unjust to the defendant to leave the door open for all manner of evidence on the trial, which the defendant would be in no condition to meet, not having been apprised thereof.

I think the motion to strike or expunge from the amended omplaint certain allegations should be granted, as follows:

1. In paragraph or subdivision 5, folio 9, strike out "who wrongfully exercised such influence and control for his own benefit."

2. In subdivision or paragraph 6, folio 12, strike out the words "and by improper and undue influence," and also the words "and by threats and promises," so it will read, in lines 3, 4, and 5 of said folio, as follows:

"And wrongfully and by deception and misrepresentations induced said Dennis Sullivan," etc.

3. In the same paragraph, folio 14, strike out from lines 4 and 5 the words "and such undue influence exercised upon."

4. In subdivision or paragraph 8, lines 5 and 6 thereof, strike out "and by undue influence."

As to the allegation or statement in the paragraph numbered "8," reading, "and many other like fraudulent representations, the details

or substance of which it is impossible for the plaintiff to state, as the same are not now known to the plaintiff," I am of the opinion it cannot properly be stricken out. The word "like" is, of course, more or less indefinite; but certain representations are set out immediately preceding this statement, and on the trial the court would, of course, confine the proof to similar and like statements of the same character and on the same subject. It would hardly be just to rule out similar and like statements on the same subject, made prior to the execution of, and as an inducement to the making of, the alleged will, if made at about the same time.

5. From paragraph 16, strike out the words "undue influence and."

6. From paragraph 19, strike out the words "and undue influence."

It may be that I have overlooked some expression that should be stricken out, coming within my ruling. If so, the omission can be corrected on a settlement of the order to be entered pursuant hereto.

If the parties cannot agree on the order, it may be settled on five days' notice.

ST. LOUIS CAR CO. v. J. G. BRILL CO. et al.

(District Court, E. D. Pennsylvania. May 11, 1918.)

No. 1741.

EQUITY ⇐262—PLEADING—FURTHER AND BETTER STATEMENT OF CLAIM.

Where a bill, based on written instruments to which defendants were parties, set forth the execution and import of the writings, that was a sufficient statement of the ultimate facts, within equity rule 25 (198 Fed. xxv, 115 C. C. A. xxv), and defendants, though entitled to know the contents of the instruments, could not compel plaintiff to set forth copies of such writings, by motion for a further and better statement of the claim, without averring ignorance thereof as a basis for the motion.

In Equity. Suit by the St. Louis Car Company against the J. G. Brill Company and Henry K. S. Williams, trustee. Sur motion for a further and better statement of the nature of plaintiff's claim. Motion dismissed, with leave to defendants to renew it upon ground shown.

Frank C. Curtis, of Troy, N. Y., for plaintiff.

Chas. Biddle, of Philadelphia, Pa., and Joseph L. Levy, of New York City, for defendants.

DICKINSON, District Judge. This motion is based upon rule 20 of the Equity Rules (198 Fed. xxiv, 115 C. C. A. xxiv). The complaint of deficiency in the bill is too lengthy for quotation, and does not readily lend itself to condensation. The story which the plaintiff has ready for recital at the trial of the cause is clearly enough indicated.

The plaintiff claims to be the owner of letters patent, issued and reissued. The validity of some of the claims of the reissued patent has been adjudged, and of others judicially denied. Disclaimer of some of the claims has been made. The J. G. Brill Company, one of the defendants, is averred to have been a real party to this litiga-

tion, and to be concluded by the decree made. The letters patent were assigned to Henry K. S. Williams, the other defendant, as trustee, in accordance with an agreement entered into between the plaintiff and the Brill Company. By the terms of this agreement the Brill Company were given the right to manufacture convertible or semi-convertible cars, which were the subject-matter of the patent, upon the payment of royalties to the trustee, certain payments out of which were to be made by the trustee to the plaintiff. The license granted the Brill Company was revocable after 60 days' default in the payment of royalties and demand made. The Brill Company manufactured under this license. Some royalties were paid, but the Brill Company made cars without the warrant of a license, and made default in the payment of royalties for cars made under the license. Later they refused to pay royalties. The plaintiff then gave notice of the revocation of this license.

The claim of the plaintiff and the general purposes of the bill are set forth in what may be characterized as its preamble. The parties are the plaintiff and the Brill Company and Williams, as trustee. Injunctions, preliminary and perpetual, against infringement of the patent, are prayed. An accounting for profits, and a decree of judgment for profits and for damages against the Brill Company, is sought. A decree awarding judgment for royalties due is also asked to be entered. There is a prayer for the annulment of the license, and relief is further asked against the trustee, in that he may be decreed to account for the moneys received by him belonging to the plaintiff.

Judged by the principles of general chancery practice, this bill is undoubtedly open to attack on many grounds, and even since the present equity rules went into effect may be still open to attack. The discussion covered by the brief submitted by counsel for plaintiff has taken a very wide range. The argument is too lengthy and too elaborate to be indicated even in a summary. We dispose of the greater part of it by the comment that it is an anticipation of a possible answer to the bill. When such answer is presented, the defenses suggested in the argument get into the case. At present we are concerned with the motion before us. We do not see any real difficulty with which the defendants are met in making answer. This may go to the facts averred, or to the legal merits of the bill.

The plaintiff relies, as part of its case, upon certain written papers. Rule 25 of our Equity Rules (198 Fed. xxv, 115 C. C. A. xxv) restricts the plaintiff to a statement of "the ultimate facts." These are the execution and import of the writings. Copies of them might have been set forth. Defendants have a right to know the contents of these papers. As they were parties to the papers, there is a fair presumption that they have such knowledge. If they have the papers, it is idle to require the plaintiff to set them forth. If they are in ignorance of them, an averment of this fact should be required to base the demand for a copy.

Rule 26 (198 Fed. xxv, 115 C. C. A. xxv) furnishes the answer to many of the criticisms made of this bill. Some of the suggested defenses may be found to be well based. We cannot rule on them on this

motion. Defendants, it seems to us, may admit or deny any one of the averments of this bill, or raise the question of its legal effect, without further information than what is given them by the bill itself. If they require more information than they have, as, for illustration, that they are without information or knowledge of the existence or contents of any of the papers referred to, let them so state. If they wish any of these papers for greater certainty to be spread upon the record by being made part of the pleadings, they may make them part of their answer. No real reason has been shown, for instance, that the averment of an assignment of letters patent should be accompanied by a copy of the instrument of assignment.

In dismissing the motion, leave is granted to defendants to renew it upon ground shown.

Motion dismissed, with leave, etc.

DE GENARO v. JOHNSON, Brigadier General, Commander of 77th Division, U. S. A., at Camp Upton, N. Y.

(District Court, E. D. New York. February 27, 1918.)

HABEAS CORPUS ⊜16—SELECTIVE DRAFT—CERTIFICATION INTO MILITARY SERVICE.

Where a registrant under the Selective Service Law (Act May 18, 1917, c. 15, 40 Stat. 76) is certified into the military service, the decisions of the examining boards as to his physical condition cannot be reviewed on habeas corpus; hence one so certified cannot, where he refused to undergo an operation as directed by the military authorities for the cure of a pre-existing trouble, obtain his discharge under habeas corpus on the ground that he could not be compelled to submit to the operation, even if without operation such person might be entitled to be discharged from service.

Habeas Corpus. In the matter of the application of Aniello De Genaro for a writ of habeas corpus against Evan M. Johnson, Brigadier General, Commander of the 77th Division, U. S. A., at Camp Upton, N. Y. Writ dismissed, and relator remanded.

Achille J. Oishei-Hoschek, of New York City, for relator.

Melville J. France, U. S. Atty., of Brooklyn, N. Y., for defendant.

CHATFIELD, District Judge. The relator is in the National Army at Camp Upton. He claims to be suffering from hernia, and raises the contention that both the local board and the examining officers of the army at Camp Upton were aware of this physical disability, even though the examination by the medical examiners of the local board, and the further examination at Camp Upton, did not result in his rejection for physical disability.

In general, the case is like that of Traina, recently decided ([D. C.] 248 Fed. 1004), in which it was held that the Selective Service Law and sections 1116 and 1342 of the Revised Statutes (Comp. St. 1916, §§ 1116, 2308a), make the decision of the examining board final so far as an application to the court by way of habeas corpus is concerned.

But the relator raises a further point, as to which no decision seems to have been rendered. He alleges that the physical examination at Camp Upton resulted in his being ordered to undergo an operation to relieve him from the hernia complained of. He has refused and still refuses to submit to this operation, and in consequence of this refusal applies to this court for release through a writ of habeas corpus, alleging that the army has no authority to hold him, inasmuch as they cannot compel him to submit to the operation, and as he is therefore within the class of persons who are entitled, upon physical examination, to be discharged from further military service.

It is evident that the unwillingness of the relator to submit to an operation could be used by a person so disposed as an excuse for further escaping military service, even though he might be willing and anxious to have the operation performed under ordinary circumstances. In any such case, the court should not act directly in contravention of the provisions of the Selective Draft Law, by which the findings of the boards and their examiners are final on such questions. The ordinary provisions of the military law then apply, and must be construed in connection with the laws under which the National Army has been created; but if a person were admittedly found to be physically disabled, by an examining board of the army, and if the army authorities should refuse to discharge him, for purely arbitrary or disciplinary reasons, the courts have no authority to take testimony, examine into the man's physical condition, upon a hearing, and discharge him as held without authority of law, even if the facts appear as he alleges.

The writ must be dismissed, and the relator remanded.

UNITED STATES v. 462 BOXES OF ORANGES.

(District Court, D. Colorado. February 21, 1917.)

FOOD ⊂=24—"ADULTERATION"—ORANGES—WHAT CONSTITUTES.

An interstate shipment of oranges, frozen before shipment, which were undergoing decomposition because of the freezing and would ultimately become unfit for food, are adulterated, within Food and Drugs Act June 30, 1906, c. 3915, 34 Stat. 768 (Comp. St. 1916, §§ 8717–8728), and may be condemned, even though the oranges were not harmful, if eaten.

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

At Law. Libel by the United States for the condemnation of 462 Boxes of Oranges on the ground that they were adulterated, in violation of the Food and Drugs Act, which were claimed by Ivan C. McIndoo. Decree of condemnation.

On December 18, 1916, the United States attorney for the district of Colorado, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district a libel for the seizure and condemnation of 462 boxes of oranges, consigned on December 6, 1916, by S. M. Guthrie, Lindsay, Cal., remaining unsold in the original unbroken packages at Denver, Colo., alleging that the article had been transported from the state of California into the state of Colorado, and charging adulteration in violation of the Food and Drugs Act. The article was labeled:

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

"Lindsay's Favorite Brand Ivan C. McIndoo. Lindsay, Tulare County, California." Adulteration of the article was alleged in the libel, for the reason that it consisted in part of decomposed oranges.

Thereafter Ivan C. McIndoo, Lindsay, Cal., claimant, filed his answer, denying the allegations in the libel. On February 14, 1917, the case came on for trial before the court, a jury having been waived, and after the submission of testimony it was held that the oranges were adulterated within the meaning of the Food and Drugs Act.

Harry B. Tedrow, U. S. Dist. Atty., and Jno. A. Gordon, Asst. U. S. Dist. Atty., both of Denver, Colo.

Hughes & Dorsey and A. A. Lee, all of Denver, Colo., for defendants.

LEWIS, District Judge (orally). There is no doubt about the facts in this case, but I think there is question as to whether or not the facts bring the shipment within the terms of the act of Congress. We declined to meet this question heretofore in connection with a shipment of apples; that is, we refused to issue the writ of seizure. The charge was that some of the apples were rotten, but on preliminary inquiry it appeared that many of them were sound—were in good condition for use, and could be readily seen and separated from the unsound. It is pretty difficult to free our minds from the idea of deception in the sale of this kind of fruit in the condition that the evidence shows these oranges are, and yet that element ought to be eliminated, because the act of Congress in no sense undertakes to reach the purpose of the act by bringing within its terms any fraudulent conduct in the sale of the article. You cannot determine the condition of an orange from looking at it as you can an apple. Now the evidence, I take it, does bring the shipment within the literal terms of the act; the oranges were decomposed in the sense that on account of prior freezing they were undergoing a deteriorating change; that is, a large per cent. of them. I presume there is a process of decomposition going on when an apple is passed through the stages of what is popularly called mellowing; it is hard when picked and is kept for several months or weeks before it becomes highly palatable. You would not count that—if that be decomposition—as being within the meaning of the act of Congress, for that is a process purely of nature itself, normal to that fruit.

It is true that freezing does not destroy the wholesomeness, immediately, of fruit—either fruit of this character or other fruits—but it starts the process, which, in a short time, will destroy it for all food purposes; and I conclude from this evidence that would be true in this case of a great per cent. of these oranges. On account of having been frosted they would from that cause alone within a reasonable time become wholly unfit for food purposes; within a time less than required to render them unfit for food if they had not been frosted. There is evidence that they were not hurtful if eaten—nothing poisonous about them—nothing harmful in any degree; but there is also evidence that frosting may cause them to have a bitter taste. However, we must conclude that freezing, as already said, through the necessary processes of nature that immediately follow, would lead to the total destruction of this shipment as a food product. Now, if that be true, is it not decomposition within the meaning of the stat-

ute? There is no doubt about the facts, that these oranges were frozen before they were shipped from California where they grew, and that rendered them increasingly unfit as a food product. From the time they were frozen they became increasingly less wholesome on that account.

I believe that is decomposition constituting adulteration within the statute. I think you expressed the true issue in the case, Mr. Lee, when you said the sole question is whether or not the facts, which are undisputed, bring them within the intent and purpose of the statute. My judgment is that in the sense of the statute they were adulterated when they were seized at Denver on the 18th of December.

You may take a decree of condemnation without costs.

STODART v. MUTUAL FILM CORP. et al.

(District Court, S. D. New York. June 15, 1917. Supplemental Opinion, June 29, 1917.)

1. COPYRIGHTS ⊂⊃65—INFRINGEMENT.
   The scene of plaintiff's play, which was duly copyrighted, was laid in the north woods, and one of its supposed merits consisted in the fact that it contained an atmosphere of local color. The plot, which was trite and conventional in the extreme and revolved around the hero, a simple-hearted poetic north woods guide, a so-called society girl, and the villain, a rich person from the city, made much of an incident whereby the hero and the society girl lost their way and were compelled to spend the night in the woods together. Defendant's motion picture play contained the same characters, and the scene was laid also in the woods, while the plot revolved around a similar incident. *Held*, that plaintiff's copyright was infringed.

2. COPYRIGHTS ⊂⊃75—INFRINGEMENT—DEFENSES.
   Where defendant copied plaintiff's play in its entirety, it cannot defeat a suit for infringement of copyright on the ground that an earlier novel contained similar incidents; for, while an author, who reworks an old plot, is not entitled to protection as to the plot, he is entitled to be protected in his treatment of the same.

3. COPYRIGHTS ⊂⊃75—VALIDITY—TITLE.
   Though the title of a copyrighted play was old, the entire copyright cannot be treated as invalid, and a suit for infringement, wherein the play was practically copied, defeated.

4. BROKERS ⊂⊃94—AUTHORITY TO SELL.
   The mere possession of the manuscript of a play by a play broker is not of itself sufficient to give the broker authority to contract for the sale of the copyright.

5. COPYRIGHTS ⊂⊃90—INFRINGEMENT—ATTORNEY'S FEES.
   Where there was a preliminary injunction, motion touching interrogatories in a suit for infringement of a copyright, and a trial of one day in the District Court, the attorney for the plaintiff, who was successful and recovered damages for the infringement, should be allowed a fee of $300.

Supplemental Opinion.

6. COPYRIGHTS ⊂⊃83—SALE—BURDEN OF PROOF.
   Where defendant, who was sued for infringement of a copyrighted play, asserted the validity of its purchase of the play from a broker, who had possession of the manuscript, defendant has the burden of proving that issue.

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7. BROKERS ⟸94—SALES—POWER OF SALE.
Where a play broker, who was given possession of the manuscript of a copyrighted play, was required to submit to the author any offers for the motion picture rights, the broker had no authority to sell the copyright, for authority to sell implies a right under some conditions to close the bargain unconditionally.

8. BROKERS ⟸103—ACTS—RATIFICATION.
Where an author, after delivering to a play broker the manuscript of a copyrighted play, with directions to submit to him any offers for the motion picture rights, took no action for two months after learning of a notice in a magazine concerning defendant's production of a motion picture play with similar incidents, but which bore a different title and was stated to have been written by another, such delay cannot be deemed a ratification of the broker's unauthorized disposal of the play.

In Equity. Suit by Robert Stodart against the Mutual Film Corporation and another for infringement of copyright. Decree for plaintiff. Decree affirmed, 249 Fed. 513, — C. C. A. —.

Paul N. Turner, of New York City, for plaintiff.

Elijah N. Zoline, of New York City, and James P. Grier, of Chicago, Ill., for defendants.

LEARNED HAND, District Judge. In this cause the plaintiff sues two moving picture companies for infringement of copyright of his play, "The Woodsman," by performance of the same upon the screen. It is conceded that in the year 1911 plaintiff composed a play by the title in question and secured its proper copyright under the statute in that case provided, and that the defendants have performed upon the screen a moving picture drama entitled "The Strength of Donald MacKenzie." The first question, therefore, is whether this picture is an infringement of the plaintiff's copyright.

[1] The scene of the play is the north woods of Maine, and one of its supposed merits consists in the fact that it contains an atmosphere based upon the woods and life in the woods. The plot I need not consider in great detail. It is trite and conventional in the extreme, and its only claim to originality is in the setting of the scenes, all of which are out of doors and in the supposed local color. There is a simple-hearted and poetic hero, a north woods guide, who wins the heart of a person described as a society girl, whatever that may be. The latter, who is the heroine, is at the time of the play engaged to a villain, a rich person from the city, who supports himself out of the income of filthy and squalid tenements which are outside of the law. He is a typical villain, of unqualified rascally character, who, observing the tenderness of his lady for the heroic and poetic guide, employs the usual needy tool, and with him plots to compromise the lady and the hero in such a way as to make her suppose that the hero has intended her wrong. This he does by directing his tool, who is a half-breed Indian, to change a mark upon the trail upon which the lady and the hero are to start off on the morrow. The tool does as directed, the couple are lost in the woods, and a compromise is effected sufficient to disturb the susceptibilities of the respectable. The lady doubts her hero. An imbecile father at once assumes that the hero has attempted to seduce his daughter, and all looks black for the hero and bright for the villain, as romance requires. The hero, how-

ever, induces the tool to repent upon the latter's deathbed, and he betrays the schemes of the villain, who is utterly confounded, and the couple live happily forever after.

The moving picture play is beyond question a direct copy from this plot almost in its entirety. The characters are the same. The hero is a woodsman guide with a turn for poetry, a strong father, and a poetic mother. The heroine is betrothed to a rascal in the city, who lives upon the income of foul and illegal tenements. The lady and the villain go with her father to the north woods of Maine, and there encounter the hero guide, for whom she develops a sentimental leaning, to the discomfiture of her betrothed. He thereupon suborns a half-breed villain to change the direction of a sign upon a trail upon which the lady and the hero are to leave on the morrow. The hero mistakes the trail by virtue of the sign, is compelled to spend the night with the lady in the open, to the great horror of all the respectable people who form the party and who go out in search of them. The hero's motives are at once misunderstood, both by the lady and by an imbecile father; the villain's tool is about to die from a wound, just as in the original; he repents and discloses the artifices of the villain, and the villain is thus exposed, to the eternal justification of the respectable nonentities. There are some incidents in the play which are not in the film, and some incidents in the film which are not in the play; but they are trivial and do not concern the plot. So far as infringement is concerned, the case needs no discussion.

[2] Three points of defense are raised: First, that the play was in the public domain and was not entitled to protection. Nothing of the sort has been proved. The nearest approach is a play based upon Mr. Owen Davis' novelette, entitled "The Sentimental Lady," which was dramatized under the title "An Everday Man." There are incidents in that play which are similar to those of the plaintiff's play. There is no reason to suppose one is copied from the other. The points of similarity are only these: That the scene takes place in the woods of the Adirondacks; that the lady and the hero are compromised by being left on a desert island for a short time. The hero, however, is not a poetic and romantic guide, but, strangely enough, a lawyer. The villain, who has nothing to do with illegal tenements, does not attempt to compromise his lady and the hero, so that the hero's motives shall be misconstrued; there is no change of the mark on the trail, no confession. There is nothing between the two but a similarity of incident, already mentioned. Now, incident is different from plot. It may be said that the incidents here are like those in the plaintiff's play, but that the plots are quite different, and the question here is of plot.

The defendant relies upon the case of London v. Biograph, 231 Fed. 696, 145 C. C. A. 582, in which Judge Lacombe held that, where the copyrighted plot was in the public domain, it could not be protected. This, of course, is true; but in that case it could be said that the supposed infringement was no nearer to the copyrighted plot than the copyrighted plot was to the plots in the public domain. If that had been true in this case, the case would apply; but the defendants have copied the plaintiff's copyright much more nearly than that which

resembles anything which is in the public domain. A man may take an old story and work it over, and if another copies, not only what is old, but what the author has added to it when he worked it up, the copyright is infringed. It cannot be a good copyright, in the broader sense that all features of the plot or the bare outlines of the plot can be protected; but it is a good copyright in so far as the embellishments and additions to the plot are new and have been contributed by the copyright. That is this case. Therefore the first defense I overrule.

[3] The second defense is that, because the title, "The Woodsman," was old as applied to plays, therefore the whole copyright is invalid. I cannot see how any one can think so. The title has not been copied by the defendants, and the copyright of the title may be invalid. On that question I have nothing to say. But the idea that because a part of the copyright is invalid it cannot be protected in any part is a strange and new doctrine. If it had been shown that Mr. Stodart deliberately plagiarized the title from some one else, it might be arguable that he could not bring a suit in this court under the doctrine of unclean hands; but nothing of that sort was true, and, indeed, nothing of the sort was even asserted. Therefore I overrule the second point.

[4] The only remaining point is the question of defendant's title to the play. It is undoubtedly true that before April 25, 1916, Stodart had given the manuscript of this play to one Russell E. Smith, a play broker, who seems to have disappeared, and that subsequently on April 25, 1916, he wrote him a letter in which he said:

"You will kindly try to sell for me the film rights only; contract, of course, to be submitted to me."

In this letter he told him that in no case should he accept less than $500 cash down, and, if possible, $500 with future rights. We have no evidence in the case from Mr. Stodart, who was the only witness called, as to the circumstances under which he let Smith have a copy of the play before April 25, 1916, and the case must be judged upon the assumption that he gave him no express power of sale certainly before that date. The first question, then, is whether the mere possession of the manuscript of a play by a play broker is of itself sufficient to give him an authority to make a contract for the sale of the copyright. The mere statement of that proposition seems to me to be its answer. Even were this not an incorporeal hereditament, but a chattel, the mere possession without power of sale would not conclude the owner. Whatever may be the effect of the most recent legislation in Great Britain, neither judicial decision nor legislative act has gone so far in this country as to create any such implied power of sale where one was intended. Therefore on March 23, 1916, the date of Smith's conveyance to the defendant, so far as this case shows, he had no power to sell.

I pass the question whether a sale in his own name, which is what he made, would be a valid exercise of the power. If Stodart had later learned of Smith's sale, and had by inaction ratified it, that would be sufficient; but there is no evidence that he did, and there is affirmative evidence that he did not. It may even be that if, by the letter of April 25, 1916, Stodart had given Smith a right to make such a sale as Smith had in fact actually made, that would be the equiva-

lent of a ratification. That question likewise I pass, for it is clear that he gave him no such right by that letter, because the letter created no power to sell at all, but required, as was expressly stated, that any contract of sale should be submitted to Stodart before it was closed. This was in effect nothing more than giving a power to take an offer from a prospective buyer and submitting it to Stodart.

It therefore becomes unnecessary to decide whether, if Smith had had a power to sell the copyright without reference back to Stodart, his disregard of instructions not to sell for less than $500 would have concluded the owner. Probably that is the case, but I need not so decide. The effective point of difference is that, by refusing to allow him to close a contract without submission to himself, Stodart did not give him any express power of sale, and, as I have said, did not, by intrusting with him the manuscript of the play, give him any implied or apparent authority to sell.

It therefore follows that the plaintiff is entitled to the usual decree, that is, to an injunction and accounting, and there remain only two other questions: First, the damages; and, second, the allowance to the plaintiff's attorney.

The parties wish me to fix the damages now and without taking any further testimony on the subject. So far as the value of the play goes, I should accept Mr. Stodart's own figure in the letter of April 25, 1916, which is $500, and that value I do fix. But he says that I should allow something more, because in fixing that value he supposed that he would get the publicity of his own name upon the advertisements of the play, which has had on the motion-picture screen a considerable vogue. I cannot, of course, tell what the value of that publicity would be to the plaintiff; at best it must be in the nature of a guess, but as the parties wish me to fix it now, and without going into any further evidence touching the success of the play, I will fix it at $400, making $900 in all.

[5] Next comes the question of Mr. Turner's allowance as attorney for the plaintiff. There has been a preliminary injunction motion touching the interrogatories and a trial of one day in this court. The interrogatories were somewhat troublesome. Taking everything into consideration, I will allow him a fee of $300, making a total of $1,200, together with the costs of the suit. As the plaintiff wishes in addition an account of damages, an accounting will be provided in the decree, as already stated, which will be before Mr. Philip L. Miller, 51 Wall street. The question of who shall bear the expense of the accounting in case no profits are shown will come up after the master has reported.

Supplemental Opinion.

This is a reargument of the cause, based wholly upon the theory that Smith's possession of the manuscript was sufficient color of authority to give him power of sale, and that the plaintiff's subsequent inaction after learning of the proposed motion play ratified Smith's sale.

[6, 7] The first point is based upon the theory that Smith was a factor, and that, having possession, he could give a title. I pass the questions whether the New York Factors Act (section 43 of the Personal Property Law [Consol. Laws, c. 41]) could possibly cover the sale of an incorporeal right like copyright, under the phrase

"merchandise," because it is clear in any event that the supposed factor must at least be intrusted with the "merchandise" for purposes of sale. The evidence in the case fails upon second scrutiny as much as on first to justify the affirmative conclusion—the defendant having the burden—that Smith held the manuscript for purposes of sale. Just what their arrangement was before April 25, 1916, it is indeed impossible to tell, except by inference, because Smith, who, so far as appears, was quite available, was not called, and Stodart who alone was examined, would or could tell nothing definite about it. That Smith had written him a letter appears certain from the letter of April 25, 1916, which purports to be an answer. That earlier letter Stodart says was only to say that he would like to sell the film rights. It seems most probable that he did not have the manuscript at that time, and under what circumstances he got it we do not know. All that Stodart would say was that in a talk some weeks earlier he had said to Smith that he would like to sell the play, if he could get a good price for it. Assuming that he gave Smith the manuscript after that, it would by no means follow that he gave it to him for the purpose of sale. It is at least equally consistent—indeed, I think more so—that he should have let him have it merely to show it to prospective purchasers, so that they might make any offers upon it.

Even if the letter of April 25, 1916, had contained a power of sale, it would by no means follow that the same power existed when Smith did sell; but that letter did not in fact grant such a power, if it had been earlier. The acceptance of any offer was to be subject to its submission to Stodart, which effectively took from Smith a power to sell. Such a power implies a right in the agent under some conditions to close the bargain unconditionally; it can never exist unless there is some right to bind the principal without any subsequent assent. Thacher v. Moors, 134 Mass. 156; Biggs v. Evans, [1894] 1 Q. B. 88.

[8] The second point is whether Stodart learned of the proposed play so long before he took action as to ratify Smith's sale. This aspect of the case is dealt with in the briefest possible way on the trial. All that appears is that the notice in the Moving Picture World of June 10, 1916, came to Stodart's knowledge about two months before the play was produced. To learn what that notice was we must turn to Stodart's affidavit of January 2, 1917, in which he says that the account of the plot was similar, so far as it went, to that of "The Woodsman," but that the author was stated to be William Russell. This may have been enough to put him on inquiry for a possible infringement, but it hardly indicated that Smith had sold the play, even though he had not returned it. Even if it be thought sufficient to require some action, Stodart's letter of September 28, 1916, was an inquiry proper for the case. He was justified in assuming at first, anyway, that Smith had not turned knave. There is no evidence that the delay actually prejudiced the defendant, and the period of two months is not sufficient, of itself and unexplained, to impute a ratification by inaction, assuming that there can be any ratification at all until the principal has full knowledge of the facts.

I think, considering the very trifling character of the play, that I fixed the damages too high. Instead of $900, I shall award $500, with $300 counsel fee, and an accounting, if the plaintiff desires.

STODART v. MUTUAL FILM CORP. et al.

(Circuit Court of Appeals, Second Circuit. February 13, 1918.)

No. 143.

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

Bill by Robert Stodart against the Mutual Film Corporation and the American Film Company, Incorporated. From a decree for complainant, defendants appeal. Affirmed.

For opinion below, see 249 Fed. 507.

Elijah N. Zoline, of New York City, and James P. Grier, of Chicago, Ill., for appellants.

Paul N. Turner, of New York City, for appellee.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

PER CURIAM. Decree affirmed.

REEVES v. YORK ENGINEERING & SUPPLY CO.*

(Circuit Court of Appeals, Fifth Circuit. March 25, 1918.)

No. 3066.

1. CORPORATIONS ⟸426(9)—OFFICERS—RATIFICATION.
Where the president of a corporation, who had charge of its buying and selling, purchased machinery, and such machinery was installed by the corporation, and part of the price paid in accordance with the terms of the contract, there was a ratification of the president's act, regardless of his authority to purchase the machinery.

2. MECHANICS' LIENS ⟸32—CONSTITUTIONAL LIENS—PERFECTION.
Under Const. Tex. art. 16, § 37, declaring that mechanics, artisans, and materialmen of every class shall have a lien upon the buildings or articles made or repaired by them for the value of their labor done thereon, or material furnished therefor, and that the Legislature shall provide for the speedy and effective enforcement of such liens, a seller of ice and refrigerating machinery, which was complete in itself and could be disconnected without injury from the purchaser's plant as it theretofore existed by unbolting four connections, is entitled to a lien thereon.

3. BANKRUPTCY ⟸192—MECHANICS' LIENS—PERFECTION.
Claimant sold ice and refrigerating machinery to a Texas corporation which became a bankrupt. The machinery was complete in itself and could be disconnected without injury to the bankrupt's plant as it theretofore existed by unbolting four connections. Adjudication in bankruptcy followed less than a month after delivery, and claimant within four months of delivery filed the contract of sale which was in the form of a letter with an acceptance written thereon by the bankrupt. The letter showed that the bankrupt was engaged in manufacturing artificial ice at the place of its address. *Held* that as claimant had a materialman's lien under Const. Tex. art. 16, § 37, and as the requirements of Rev. St. Tex. 1911, arts. 5622–5627, providing for the filing of the contract within four months, are intended merely to give notice to persons other than the purchaser, claimant acquired a lien valid as against the trustee in

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

*Rehearing denied May 28, 1918.

bankruptcy who under Bankr. Act July 1, 1898, c. 541, § 47a, 30 Stat. 557 (Comp. St. 1916, § 9631), took the rights of a lien creditor, for the land on which the machinery was installed could readily be located from the contract.

Walker, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Eastern District of Texas; Gordon Russell, Judge.

In the matter of the bankruptcy of the Alliance Milling Company. The York Engineering & Supply Company filed proof of claim, alleging a constitutional and statutory lien, and on the same day it filed a petition, setting up the facts of the transaction out of which the claim arose. J. H. Reeves, trustee in bankruptcy, filed a protest, and, the judgment of the referee allowing the claim and lien having been affirmed by the District Court, he appeals. Affirmed.

Cecil H. Smith, of Sherman, Tex. (J. D. Williamson, of Waco, Tex., J. A. L. Wolfe and Head, Dillard, Smith, Maxey & Head, all of Sherman, Tex., and Thompson, Knight, Baker & Harris, of Dallas, Tex., on the brief), for appellant.

N. C. Abbott, of Houston, Tex., for appellee.

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

BATTS, Circuit Judge. The Alliance Milling Company was adjudged a bankrupt on April 5, 1916. May 23, 1916, the York Engineering & Supply Company, appellee, filed proof of claim in the sum of $2,411.25, alleging a constitutional and statutory lien for material and machinery furnished and placed on the property of the bankrupt; and, on the same day, filed a petition setting up the facts of the transaction out of which the claim arose. The trustee filed a protest. The referee allowed the claim and lien. The trustee excepting, the matter was certified to the United States District Court, where the judgment of the referee was affirmed. The judgment is before this court for review.

On January 15, 1916, the bankrupt entered into a contract with the appellee, by which it agreed to purchase certain ice and refrigerating machinery, as follows: Eleven sections of Shipley double-pipe flooded ammonia condensers, each section to be 8 pipes high, 18 feet 2 inches long, the condensers to be of 2-inch and 3-inch ammonia pipe, together with the necessary stands and header connections for both water and ammonia; each section to have inlet, outlet, pump-out and purging connections; also one purge drum, 10 by 6 long, with connections; one ammonia receiver, 24 in diameter by 16 long, to be of welded pipe, with all necessary pipe connections; one gauge glass, with automatic ball check valves.

Payments were to be 25 per cent. cash on arrival of material, 25 per cent. cash when material was erected, and 50 per cent. in four months' note, bearing 8 per cent. interest, dated and delivered at the time of the second payment. The bankrupt received the material, and, prior to the adjudication, placed the same in its ice plant by

connecting it with its ice machinery then operated by the company. The erection was outside of the old ice plant on a concrete base especially prepared for it, its own weight holding it in place. The machinery was complete in itself and could be disconnected, without injury, from the plant as it had theretofore existed, by unbolting four connections. An employé of the selling company, under the arrangement made at the time of the sale, was sent to see that it was properly erected. The contract was made with J. N. Rayzor, as president of the purchasing corporation. Delivery was made early in March, 1916.

The report of the referee, supporting the claim of the appellee, both as to the amount and the lien, was excepted to, the exceptions presenting the following points: (1) That the president of the bankrupt corporation did not have authority to bind the corporation by a contract and create a mechanic's lien, either upon the condenser or real property of the corporation, by its installation upon the premises; (2) that, having no authority from the board of directors, the president could not create a mechanic's lien as against this property; (3) that, the condenser being a fixture, the trustee's taking possession thereof (he being an attaching creditor under section 47a of the Bankruptcy Act) was not a ratification so as to create a mechanic's lien; (4) that title to the condenser, it being a fixture, passed by sale of all properties of the bankrupt to the purchaser, and no mechanic's lien existed on the condenser as against the purchaser; (5) the property being sold without any contract reservation of title, no contract lien has since been placed upon the property; (6) the mechanics' and materialmen's statutes made no provision for the retention of lien upon the specific machinery, sold without reservation of title; (7) that the property involved was not of a character to become attached to and made a component part of the realty, so as to give rise to any character of lien; (8) that claimant sold the property pursuant to a written order, and reserved no title, and the property was simply set into the plant, connected with other machinery by removable connections, and its character is such that it constitutes no integral part of the realty, nor such a fixture or addition thereto or improvement thereon as gives rise to a lien under the statutes.

Upon judgment by the District Court in favor of claimants, assignments of error were made to a like effect.

Section 37, art. 16, of the Constitution of Texas, provides:

"Mechanics, artisans and materialmen of every class, shall have a lien upon the buildings and articles made or repaired by them, for the value of their labor done thereon, or material furnished therefor; and the Legislature shall provide by law for the speedy and efficient enforcement of said liens."

Article 5621 of the statutes of Texas provides:

"Any person, or firm, lumber dealer, or corporation, artisan, laborer, mechanic, or sub-contractor, who may labor or furnish material, * * * fixtures or tools to erect any house or improvement, or to repair any building or improvement whatever, * * * upon complying with the provisions of this chapter, shall have a lien on such house, building, fixtures, improvements * * * and shall also have a lien on the lot or lots of land necessarily connected therewith, to secure payment for the labor done, lumber, material, machinery or fixtures * * * furnished for construction or repair."

Article 5622:

"In order to fix and secure the lien herein provided for, it shall be the duty of every original contractor, within four months * * * to file his * * * contract in the office of the county clerk of the county in which such property is situated, and cause the same to be recorded in a book to be kept * * * for that purpose. * * *"

Article 5623 is with reference to persons furnishing material, etc., to any contractor.

Article 5624 makes provision for the filing and recording of a sworn account, when there is no written contract, and a form of affidavit is given which provides for a description of the improvement and of the lot or tract of land upon which it is placed. It concludes with a proviso to the effect that "a substantial compliance with the above form shall be deemed sufficient to fix and secure the lien."

Article 5626 provides:

"In case the contract is filed and recorded as provided for in article 5527 [5622], a like description of the house, building or improvement, and the lot or tract of land shall accompany the same, as is required in the foregoing forms, except that the same is not required to be under oath."

On the 24th of April, 1916, the York Engineering & Supply Company filed for record the contract between that company and the bankrupt in the form of a letter, dated January 15, 1916, submitting a proposition, and an acceptance in writing of the same date by the "Alliance Milling Company, per J. N. Rayzor, president."

[1] The primary question presented is whether Rayzor, the president of the corporation, could, by his act in buying the property, create a lien upon the thing bought and the realty of the corporation. Rayzor was president of the corporation, and had charge of its buying and selling, and the purchase was made by him. The machinery was installed by the company, and a part of the purchase price was paid by it in accordance with the terms of the contract. Whether or not the president primarily had authority to make the purchase, that which followed constituted a ratification.

If he had not the authority, and if there had been no ratification, the property belongs to appellee. If he had the authority to make the purchase, the legal consequences which follow from such a purchase resulted.

Appellant claims that a lien under the Texas law, on this character of property, is acquired only through: (a) A chattel mortgage; (b) a reservation of title in the sale contract; (c) a mechanic's lien under the Constitution; (d) a mechanic's lien under the statutes. He insists properly that no chattel mortgage was taken, and that there was no reservation of title. His contention that the facts do not bring the claim under the constitutional provision, and that the claimants have failed to comply with the statutory requirements, presents the points to be determined.

[2] The courts of Texas hold that a lien is created by the Constitution of the state in favor of "materialmen of every class" upon "the buildings and articles made or repaired," for "material furnished therefor." The existence of this lien is not dependent upon any action taken under the terms of the statute. Bassett v. Mills, 89 Tex. 167,

34 S. W. 93; Strang v. Pray, 89 Tex. 525, 35 S. W. 1054; National Bank v. Taylor, 91 Tex. 78, 40 S. W. 876, 966; De Bruin v. Land & Irrigation Co. (Tex. Civ. App.) 194 S. W. 655. If the terms of the Constitution are applicable to the instant case, all the objections of appellant are lacking in merit.

"This provision (of the Constitution)," says the court in Bassett v. Mills, supra, "in so far as it gives a lien, is as broad as language can make it." In Strang v. Pray, supra, the Supreme Court of Texas uses this language:

"It was the intention of the members of the convention which framed and adopted this section of the Constitution to give full and ample security to all mechanics, artisans, and materialmen for labor performed and material furnished for the erection of all buildings and other improvements, and the courts must give such construction to this language as will carry out that intention."

From this language and the decisions examined, it is apparent that the Texas courts give a liberal construction to the provision of the Constitution, in an effort to give effect to its manifest intent. It would have been difficult for the Constitution makers to have used a more comprehensive word than "material," and protection is given "materialmen of every class." The words "buildings and articles made or repaired" are also very comprehensive.

It is contended that, if it should be held that a lien exists in this case, it would be necessary to make a like holding in every instance where machinery was sold by a manufacturer to a dealer, or by a dealer to an individual. Neither proposition is sound. It is easily to be conceived that a lien would follow a sale in one case, when the sale would not have that effect in another. The usual effect of a sale of a piece of machinery is the same as the ordinary effect of the sale of lumber or other material that goes into the construction of a house. If the sale is in the course of business, and without reference to any particular improvement, no lien results, unless it is specifically retained. If, however, the material is sold with regard to the making of a certain improvement, no reason is seen why the constitutional rule should not apply. It is not always the case when gas fixtures are sold, or a cooking range is sold, or engines and boilers are sold, that a lien upon the property so sold, or upon any other property on which it is to be placed, results. But if the material is bought with the purpose of incorporating it into a building or improvements, the terms of the Constitution would seem to apply. The Constitution gives the lien to "materialmen of every class." The lien is given "upon the buildings and articles made or repaired." The language is broad and the purpose is clear. There is nothing to indicate that merely raw material is intended to be included within its terms. Certainly, some classes of manufactured products would always be so included. For instance, no one would think of undertaking to maintain that nails and screws, locks, doors, and windows were not within the terms of the Constitution. No reason is made sufficiently to appear why such machinery as was furnished in the instant case, capable of incorporation into and made a part of the plant and furnished for that purpose, should not be held to be included.

As was suggested in Banner Iron Works v. Ætna Iron Works, 143 Mo. App. 1, 122 S. W. 764:

"In the case of machinery or other articles furnished to a factory or place of business, an important circumstance, in the attempt to ascertain the intention of the proprietor, is the adaptability of the article or machine to the work or business of the place. Thomas v. Davis, 76 Mo. 72, 43 Am. Rep. 756. If the thing furnished was necessary to that work or business, or necessary to the purpose for which the building was designed and used, or was a convenient accessory, or commonly employed in connection with such business, the intention of the proprietor of the establishment to annex it permanently to the realty may be inferred."

It is clear that the condenser was sold and purchased with the view of its being made a part of a particular plant. The purchaser was conducting the business of manufacturing ice. The proposition made by the letter of the claimant, and which was accepted by the ice manufacturing company, described the sections of the condenser to be furnished, indicated their length and included the necessary stands and header connections; also the inlet, outlet, pump-out, and purging connections. It also provided for connections to a purge drum. The ammonia receiver was to have the necessary pipe connections. A provision was to the effect:

"It is understood that the purchaser will furnish the necessary pipe connections between the compresser and condenser, and between the receiver and freezing system. We are also allowed to use part of the present header fittings, provided they are of proper size."

It is apparent reference was made to a system already installed, to which the condenser, etc., described in the letter was to be attached. The understanding between the seller and the buyer, to the effect that the representative of the former should see to the installation, is also evidence of this fact; and, finally, the proof that a base was made upon which the condenser was set identifies the machinery sold with the improvement contemplated at the time of the sale, and which was in part to have been paid for "when material is erected."

Appellant cites authorities to the effect that machinery of the character in question is not of the kind to which the materialmen's liens apply. An examination discloses no conflict with the views expressed. Among the cases cited is Rose v. Persse, 29 Conn. 257, where gas fixtures were held not to be subject to the lien; the court, however, holding that the materials were not furnished in pursuance of any contract for the erection of any building, but by virtue of a mere contract of sale and purchase. In Boston Furniture Co. v. Dimock, 158 Mass. 552, 33 N. E. 647, it was held that portable cooking ranges, with zinc to place them on, and pipes for connection, are not such parts of the building as to entitle the seller to mechanic's lien; the court holding that the true test is structural connection with the building.

In Collins v. Mott, 45 Mo. 100, the court held that the term "improvement," as used in the Missouri act, is synonymous with building, and did not include engines and boilers, stating that:

"No terms are used which include such engine, etc., unless they have become part of the realty, when the lien, of course, would cover them."

In Haslett v. Gillespie, 95 Pa. 371, it was held that where new machinery is furnished for and placed in the old mill, the party supplying the same is not entitled to a mechanic's lien against the building. The court held that the building was neither repaired, altered, nor enlarged; the machinery being a bolt header and a screw cutter, so placed as to be operated by belting already in use.

In Thompson v. Smith, 67 N. H. 409, 29 Atl. 405, 68 Am. St. Rep. 679, it was held that a portable steam engine used in a factory could not be made the basis of the claim of a mechanic's lien.

These cases are consistent with the position taken. Many authorities could be cited showing the comprehensive meaning given the word "material," among them Grand Island Bank v. Koehler, 57 Neb. 649, 78 N. W. 265; Selden v. Meeks, 17 Cal. 128; Parker L. & I. Co. v. Reddick, 18 Ind. App. 616, 47 N. E. 848.

[3] The statute is somewhat more comprehensive than the Constitution. To "fix" the lien of the statute, it is required, where a contract is in writing, that it be filed in the office of the county clerk. The building and lot upon which it is sought to fix a lien may be described by a statement to be filed, which need not be sworn to. The statute merely requires "a substantial compliance" with the terms of the article providing for the description. A reasonable construction would be that if the purpose of the law is accomplished, and the owner and persons dealing with him are given the protection to which they are entitled, the law will be held to have been complied with.

The only objection made to the manner of compliance by appellee with the statute was that a statement describing the building and lot was not filed. This objection was not made in the original objections of the appellee before the master, nor in the objections to the master's report, unless included under some generalization.

It could very well be argued, in view of the purpose of the statement, and the provision requiring only substantial compliance, that the contract itself gave sufficient notice of the property to be affected by the lien. The letter constituting the contract was addressed to "Alliance Milling Co., Denton, Tex." At that place the Alliance Milling Company had an ice plant. It was provided that the purchaser would furnish pipe connection "between the compresser and condenser, and between the receiver and freezing system." The sellers were allowed to use part of the "present header fittings." At a number of places "connections" were provided for. The character of the machinery was identified by reference to the manufacture of ice.

As hereafter indicated, if the lien is one provided for by the Constitution, no action under the terms of the statute is necessary for its creation; as to such liens, all that could be provided for by the statute would be the enforcement of the remedy and the protection of the owner of the land and improvement and subsequent lien creditors and mortgagees. At the time of the adjudication of the bankrupt, the trustee took the property under the terms of the statute as if he had been a lien creditor. Section 47a of the Bankruptcy Act. At that time, however, the four months in which, even under the terms of the statute, a materialman might fix his lien had not elapsed. Under the

Constitution the appellee had its lien, and the trustee took subject to the lien. Before the expiration of the four months, the contract between the York Company and the bankrupt was filed, and all of the facts connected with the purchase, delivery, and installation were brought to the knowledge of the trustee. In the case of F. & M. National Bank v. Taylor, 91 Tex. 78, 40 S. W. 876, 966, the Supreme Court adopts the opinion of the Court of Civil Appeals, in which this language is used:

"The bank cannot insist in this case upon any of the principles of estoppel, for it took the note and mortgage and furnished the money on April 3, 1894, while Taylor was actually at work on the building, and must be held therefore to have legal and full notice of his mechanic's lien and the amount of his debt, and every other fact which inquiry of Taylor would have elicited. At that time Taylor unquestionably had a mechanic's lien, and the taking of the notes and mortgage afterwards presents no principle of estoppel, even if such a defense had been pleaded."

Construing the facts of that case, in connection with the opinion, the court in De Bruin v. Land & Irrigation Co. (Tex. Civ. App.) 194 S. W. 655, said:

"Undoubtedly, as between the persons named in the Constitution and the owner of the property, the lien is fixed by the Constitution. * * * In the case of National Bank v. Taylor, 91 Tex. 78 [40 S. W. 876, 966], it was held that, as between the owner and the contractor, the Constitution fixed the lien, without any notice, or filing of claim, or any other act on the part of the contractor; but, so far as innocent subsequent purchasers or mortgagees and lienholders are concerned, the statute must be complied with, in order to fix the lien. It was held, however, that actual notice of the lien would be sufficient, without recorded notice; and that, where a subsequent lienholder knew that the contractor was at work on the premises when he loaned the money and took his mortgage, he would be charged with notice. * * * We deduce from the different decisions of this state that the Constitution gives a lien to the persons named thereon, and that, as between the owner of premises on which labor is performed, or for which material is furnished, and those persons, the lien arises and may be enforced without the aid of the statute; but, as to third parties who have not actual notice of the labor having been performed or the material furnished, the lien is not enforceable unless the statute has been complied with."

The only objection which can be made to the manner in which appellee complied with the statute is a claim that he failed to file a statement showing the lot upon which the improvements were placed. The contract which was signed by the Milling Company, and which indicated that the condenser was to be placed with the ice-making machinery already installed, was recorded. At the time the trustee took possession of the property, the lien had attached under the terms of the Constitution, and no person had become a mortgagee of the ice company, or a creditor of the company, with rights arising out of a failure to record an instrument creating a lien. The status of the York Company as a creditor secured by a lien was not changed by the appointment of the trustee. After the appointment, for the balance of the four months succeeding the accrual of the debt, the York Company had the right to comply with the statute, and thereby give notice to all persons who might otherwise part with value to the bankrupt or become a creditor of a class entitled to peculiar consideration. The only purpose of such a compliance with the statute by the recording of the

contract and the statement with regard to the building and land involved would have been to give notice. This end could be just as effectually accomplished by actual notice as by filing the contract. Even in those cases in which, under the terms of the Texas statute, a mortgage of land or personal property is void as to innocent purchasers for value or lien creditors, the protection is not extended where actual notice of the prior unrecorded instrument exists. Whatever peculiar standing the trustee may have is by virtue of the terms of the Bankruptcy Act. He has exactly the same standing as an attaching or other lien creditor, and no more. If such a creditor, there being no bankruptcy proceedings, had on the 5th day of April, 1916 (the day on which the adjudication was had), acquired his lien, it would have been a lien subject to be defeated, either by the record of the contract in accordance with article 5627, or by the materialman's giving actual notice of his lien. Constructive notice could have no greater dignity, either as to the lien creditor or the trustee, than actual notice. It is to be kept in mind that the constitutional lien is not created by compliance with the articles of the statute cited, and that all that could have been done by compliance with the statute would have been to give notice.

The conclusion which has been reached accords with abstract equity. But for the sale and installation a few days before the bankruptcy, the trustee would have had no estate to administer, except the plant as it existed prior to the purchase from appellee. This addition to its value was made at the expense of the claimant. The property was not paid for, and no other creditor can reasonably or equitably complain if the property sold is first subjected to the lien of the unpaid seller.

The property has been in the possession of and used by appellant since the sale. The court below may find it necessary to modify the judgment to meet the resulting conditions. With this saving the judgment is affirmed.

WALKER, Circuit Judge (dissenting). In the opinion of the writer the allegations of the petition asserting the claim made by the appellee and the evidence offered in support of those allegations do not show the existence of a state of facts giving rise to the lien provided for by the section of the Constitution of Texas which is set out in the foregoing opinion. That section provides for mechanics, artisans, and materialmen having a lien upon "the buildings and articles made or repaired by them for the value of their labor done thereon, or material furnished therefor." The subject of the lien given by that section is "the buildings and articles made or repaired by" a mechanic, artisan or materialman. It is not made to appear that that upon which a lien was claimed and allowed was a building or article made or repaired by the appellee. So far as the writer is advised, no authoritative ruling has been made which indicates that the liberality of construction which has been applied in giving effect to that provision goes so far as to make it permissible to accord to that provision the effect of giving a lien to a materialman not having the relation to the subject of the claimed lien which that provision requires to exist to entitle him to a lien. It seems to the writer that the statute must be relied upon as support for the claim made. If either of the quoted statutory provisions

entitled the appellee to acquire a lien, it was incumbent upon it to pursue the applicable method which the statute requires to be observed to fix a lien. Keating Implement & Machine Co. v. Marshall Electric Light & Power Co., 74 Tex. 605, 12 S. W. 489; Berry v. McAdams, 93 Tex. 431, 55 S. W. 1112.

The written contract between the appellee and the bankrupt was filed and recorded pursuant to the provision of the above-quoted article 5622. The contract as filed and recorded was not accompanied by the description of any house, building, or improvement, or of any lot or tract of land, pursuant to the provision of article 5626 of the Texas statutes. What was put on record did not give any information as to the location of the machinery on which a lien was claimed. It disclosed only the sale of itemized parts or pieces of machinery f. o. b. York, Pa., at a stated price, part of which was payable in cash on arrival of the material, and the balance in two installments payable thereafter.

An obvious purpose of such provisions as the one last mentioned is to enable any one having dealings with reference to property which may be subjected to liens to acquire from a public record definite information of the presence or absence of a statutory lien on that property. The record of a written contract for the furnishing of specified machinery or material, unaccompanied by a description of the structure in which the machinery or material was installed or used or a statement of the location of that structure, hardly could be regarded as a disclosure of such information. The above-quoted article 5626 evidences a legislative determination of what is required for the identification of the property on which a lien is sought to be established. What the appellee filed for record did not furnish that identification. It cannot be said that one searching the record could have learned therefrom that the appellee was claiming a lien on the particular property on which a lien in its favor was adjudged by the decree under review. The failure to have the recorded contract accompanied by a statement of the data mentioned in article 5626 was a failure to comply with a requirement which is made a prerequisite to the acquisition of the lien claimed. Whitney-Central Trust & Savings Bank v. Luck, 231 Fed. 431, 145 C. C. A. 425. The conclusion of the writer is that because of that failure or omission the appellee was not entitled to the lien it claimed.

WILLIAMSON & BROWN LAND & LUMBER CO. v. MULLINS LUMBER CO.

(Circuit Court of Appeals, Fourth Circuit. January 29, 1918.)

No. 1545.

1. TRESPASS ⊂=20(3)—ACTIONS—EVIDENCE.
In an action for the cutting and removal of timber from land of which plaintiff is the legal owner, plaintiff may prove title prima facie by showing exclusive possession not obtained by disseisin of defendant.

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

2. ADVERSE POSSESSION ⟸43(4)—DURATION OF POSSESSION—CONSTRUCTION OF STATUTE.

Under the law of South Carolina, which requires continuous possession of land for 10 years by one occupant or his heir or agent to give title by adverse possession, the possession of a grantee under a deed which, although by reason of technical defects it does not convey a legal title, conveys the equitable title cannot be tacked to the possession of the grantor.

3. ADVERSE POSSESSION ⟸112—PERSONS ENTITLED TO CLAIM BY PRESCRIPTION.

Under the law of South Carolina, as settled by decision, that exclusive adverse possession by successive occupants of land in privity with each other for 20 years raises a presumption of a grant at the beginning of the period, the presumption continues in favor of subsequent occupants, and it is not necessary that one who succeeded to the possession after the expiration of the first 20 years should show a perfect chain of legal conveyances from his predecessor, who was in possession at that time, although he takes subject to any conveyance or lien given or created by any preceding possessor under whom he claims and of which he had notice.

4. MORTGAGES ⟸534—FORECLOSURE SALE—RIGHTS ACQUIRED BY PURCHASER.

A purchaser at a foreclosure sale under a mortgage, in a suit to which a grantee of the mortgagor was not made a party, does not obtain a legal title, but only an equitable assignment of the mortgage, nor has he the rights of a mortgagee in possession, unless he takes possession before the lien expires by limitation.

Connor, District Judge, dissenting.

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

Action at law by the Williamson & Brown Land & Lumber Company against the Mullins Lumber Company. Judgment for defendant, and plaintiff brings error. Reversed.

Henry E. Davis and F. L. Willcox, both of Florence, S. C. (Willcox & Willcox, of Florence, S. C., on the brief), for plaintiff in error.

W. F. Stevenson, of Cheraw, S. C., and James W. Johnson, of Marion, S. C., for defendant in error.

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

WOODS, Circuit Judge. The only question before us is whether the District Judge was in error in granting an involuntary nonsuit at the close of the plaintiff's evidence. The complaint alleges that the plaintiff was the owner and entitled to possession of the land in dispute, and that in 1913 "the defendant, well knowing that the plaintiff had acquired the ownership of the property in question and was entitled to the possession thereof, willfully and wantonly entered upon the tract of land and cut and removed the timber from 391 acres thereof," to the damage of the plaintiff $15,000. The defenses involved were: First, a general denial; and, second, possession of the defendant under paramount title.

The plaintiff introduced the following documentary evidence: Deed from C. W. Elliott to Butters Lumber Company, dated June 29, 1896, recorded August 26, 1897; deed from Butters Lumber Company to Cape Fear Lumber Company, dated December 4, 1899, entered on the records of Horry county January 17, 1900, ineffectual to convey the legal title, because it had no witnesses; deed from Cape Fear Lumber Company to the plaintiff, Williamson & Brown Land & Lumber Company, October 28, 1907, entered on the records of Horry county March 6, 1908, also ineffectual to convey the legal title, because it had no witnesses. This deed was re-executed by an instrument duly witnessed on September 13, 1910, recorded September 20, 1910. To show that the defendant also claimed under C. W. Elliott, the plaintiff introduced a mortgage of C. W. Elliott to Armon G. Strickland dated October 31, 1891, recorded January, 1893; judgment record of the foreclosure in an action commenced in 1910; deed from W. L. Bryan, clerk of the court, under the foreclosure, to Chas. K. Gerrald, dated May 1, 1911, recorded May 1, 1911; deed from C. K. Gerrald to Mullins Lumber Company, dated August 25, 1911, recorded September 5, 1911. The Butters Lumber Company, to whom Elliott had conveyed before the foreclosure, was not made a party to the foreclosure suit. As evidence of title by possession, the plaintiff also introduced testimony tending to show that Elliott had been in possession of the land for about 30 years before his conveyance to the Butters Lumber Company, and that the Butters Lumber Company, Cape Fear Lumber Company, and the Williamson & Brown Land & Lumber Company had successively held possession from the date of the conveyance to the Butters Lumber Company to the commencement of this action.

[1] The action is not to recover the possession of the land from the defendant, for it was not alleged that the defendant was in possession. It is not an action for the mere invasion of the plaintiff's possession by the defendant as a trespasser, for there was no allegation that the plaintiff was in actual possession at the time of the alleged trespass. The cause of action, therefore, presented by the plaintiff, was a cutting and appropriation of timber by the defendant as trespasser, and its liability to the plaintiff as owner of the legal title. This put the title in issue. Nevertheless, the plaintiff would have proved a good title prima facie by showing on the trial its own exclusive possession, not obtained by disseisin of the defendant. The law is thus stated in Beaufort Land & Investment Co. v. New River Lumber Co., 86 S. C. 358, 68 S. E. 637, 30 L. R. A. (N. S.) 243:

"As we have seen, possession not obtained by a tortious act is prima facie evidence of title, and upon this the plaintiff may rest until the defendant justifies his invasion of the possession by proving either title in himself or a license to enter from the true owner. We conclude, therefore, that, if the plaintiff held possession of the land, not acquired by the disseisin of the defendant, it was entitled to hold the land, and to recover of the defendant damages for invasion of its possession, and for the cutting of timber, unless the defendant proved title in itself, or a license from one proved to be the true owner, and that the court was in error in charging otherwise."

See Cathcart v. Matthews, 91 S. C. 464, 74 S. E. 985, Ann. Cas. 1914A, 36.

When a plaintiff puts his title in issue, this presumption of title from possession against the defendant as a trespasser may be overcome by proof offered in the course of the trial, either by the plaintiff or defendant. Here the plaintiff, not content to rest on its evidence of possession and of defendant's trespass on that possession, undertook to show that it had obtained a good legal title: First, under the statute of limitations by adverse possession of one of its predecessors in title for 10 years; and, second, by presumption of a grant from the state or the true owner by adverse possession of successive occupants in privity with the plaintiff and with each other for the period of 20 years. If the evidence was sufficient to support a reasonable inference of title in the plaintiff, either by a single possession under the statute, or by successive possessions creating the presumption of a grant, the judgment of nonsuit must be reversed.

[2] The rule in South Carolina, differing from that in other jurisdictions, is that title can be acquired under the statute of limitations only by continuous adverse possession for 10 years of one occupant or his heir or agent. Successive trespasses, even when connected by formal deeds, cannot be tacked, to make out the statutory period of 10 years. McLeod v. Rogers, 2 Rich (S. C.) 19; Pegues v. Warley, 14 S. C. 180; Bryan v. Donnelly, 87 S. C. 388, 69 S. E. 840. Under this rule the District Judge was clearly right in holding that the plaintiff had not made out a title in itself by adverse possession. None of the occupants under whom plaintiff claims held continuous adverse possession for 10 years, except Elliott. Elliott's possession for 30 years made a good title in him, which he conveyed to Butters Lumber Company. But the title thus acquired by the Butters Lumber Company under the statute of limitations by virtue of the adverse possession of Elliott, its grantor, could not avail the plaintiff because the paper purporting to be a deed from the Butters Lumber Company to the Cape Fear Lumber Company, which conveyed to the plaintiff, was ineffectual to convey the legal title for lack of witnesses. This break in the chain was fatal to the plaintiff's claim by adverse possession of Elliott, a predecessor in title for 10 years under the statute of limitations.

It is insisted, however, that the Cape Fear Lumber Company, which conveyed to plaintiff, acquired a good title under the statute by adverse possession from December 4, 1899, to September 13, 1910, when it made a valid conveyance of its interest to the plaintiff. This contention rests on the erroneous conception that the possession of the plaintiff was the possession of the Cape Fear Lumber Company up to the day that it executed a valid conveyance to the plaintiff. The execution by the Cape Fear Lumber Company on October 28, 1907, of the paper intended to convey the title and the payment of the purchase money, which it recited, less than 10 years after the beginning of the alleged possession of the Cape Fear Lumber Company, was at least an equitable conveyance at that time, and the possession under it thereafter by the plaintiff was not under the Cape Fear Lumber Company, but adverse to it and all the world. Ellison v. Cathcart, 1 McMullan (S. C.) 5; Bank v. Smyers, 2 Strob. L. R. (S. C.) 24;

Watts v. Witt, 39 S. C. 356, 17 S. E. 822; Betts v. Gahagan, 212 Fed. 120, 128 C. C. A. 636.

[3] The next inquiry is whether the evidence of adverse possession for more than 20 years in the aggregate by successive occupants in privity with each other ending with the plaintiff's possession tended to show title in the plaintiff. In South Carolina exclusive adverse possession of successive occupants in privity with each other raises the presumption of a grant from the state or the true owner at the beginning of the period. This rule is not founded on any statute of limitations, but is a rule of law adopted by the courts for the repose of the title of the person in possession. Arthur v. Arthur, 2 Nott & McC. (S. C.) 96; Stockdale v. Young, 3 Strob. 501, note; Lewis v. Pope, 86 S. C. 285, 68 S. E. 680. There was evidence of adverse possession in the successive holders in privity with each other from Elliott to the plaintiff, which, tacked together, made in the aggregate adverse possession for more than 20 years. Against the inference that these possessions would warrant the jury in finding the title in the plaintiff, the defendant submits this argument: The presumption from 20 years' successive possession is that a good conveyance was made at the beginning of the period of 20 years, and not at the end. Trustees v. McCully, 11 Rich. 424; Thompson v. Brannon, 14 S. C. 542; Trustees v. Jennings, 40 S. C. 168, 18 S. E. 257, 891, 42 Am. St. Rep. 854; Metz v. Metz, 48 S. C. 472, 26 S. E. 787. The grant must therefore be presumed to have been made to Elliott, the first holder, who was in possession at the beginning of the period, and not to the plaintiff, who was in possession at the end; since the title is presumed to have been in Elliott at the beginning, the plaintiff cannot recover unless he can show a perfect chain of legal conveyance from Elliott to himself.

The unsoundness of this view and the impossible result to which it would lead are made clear by the attempt to apply it. A. asserts title by successive possessions without legal conveyances of persons in privity with each other and with him. If he proves his own adverse possession for 9 years, the possession of B., under whom he entered, for 9 years, and the possession of C., under whom B. entered for 3 years, he has made out his title by presumption. But under defendant's theory of the law, if A. proves his own possession for 9 years and the possession of B., under whom he entered for 20 years, he fails, because he has proved title by presumption in B., and has not proved that the legal title has passed from B. to him by legal conveyance.

We venture to think, both on principle and authority the law may be thus stated: The successive possessions for 20 years give rise to the presumption of a grant to the first taker at the beginning. Starting with the first taker, the successive adverse possessions may be tacked to make out the full period of 20 years from which a good title is presumed in the last taker against all persons who are strangers in title to the successive possessors in privity with each other claiming the land as their own. This rule, that the possessions of successive holders in privity with each other for 20 years, though without formal deeds of conveyance from one to the other, is sufficient to confer good

title on the last holder against all the world, except those who have a superior claim from one of the preceding successive holders, is settled by authority in South Carolina. The exact relationship of privity between the successive holders, whether created by parol gift, sale, or otherwise, is of no concern to the outside world. The purpose of the presumption from lapse of time is to quiet the title of the last holder found in possession after 20 years of connected adverse possession.

This is decided and illustrated in Thomson v. Peake, 7 Rich. (S. C.) 353, where the last holder was held to have good title to the land on proof of successive adverse possessions for 20 years of those in privity with him without proof of successive formal conveyances. 2 Washburn on Real Property, 348. "The lapse of 20 years is sufficient to raise the presumption of a grant from the state, of the satisfaction of a bond, mortgage, or judgment, or of a grant of a franchise or the payment of a legacy, or almost anything else that is necessary to quiet the title of property." Riddlehoover v. Kinard, 1 Hill, Eq. (S. C.) 376; Hutchinson v. Noland, 1 Hill (S. C.) 222; Young v. McNeill, 78 S. C. 143, 155, 59 S. E. 986. It follows that the plaintiff, by its evidence of successive possession of persons in privity of plaintiff and with each other, commencing with Elliott, made a case for submission to the jury of title by presumption for 20 years' consecutive possessions.

[4] But each successive possessor with notice takes subject to any conveyance or lien created by the act of any preceding possessor under whom he claims. This is on the familiar principle that, as one in possession cannot dispute the title of the person under whom he claims, he is bound by the conveyance of the land and liens placed on the land by any such person of which he has notice, either actual or constructive, before the time of his own adverse entry. Applying this principle, Butters Lumber Company and the plaintiff, claiming by successive possessions from it, were bound by the antecedent mortgage placed on the land by Elliott, the first taker from whom they derived title. Hence, if the mortgage had been foreclosed in an action in which the holder of the legal title was a party defendant, and the Mullins Lumber Company had acquired title under the foreclosure, its title would be good against the plaintiff. Under different conditions the principle was discussed and applied in Coleman v. Coleman, 71 S. C. 518, 51 S. E. 250.

But the defendant is not in a position to avail itself of this rule, for the reason that it derived no title from Elliott under the mortgage, and never had any right as assignee of the mortgage to assert against the plaintiff a claim to hold the land as mortgagee in possession. When the suit for foreclosure was commenced in 1910, Elliott had conveyed the land to Butters Lumber Company by deed dated in 1896, recorded in 1897, and the Butters Lumber Company was not made a party to the foreclosure suit. Hence Gerrald, the purchaser at the foreclosure sale, obtained no title to the land, but only an equitable assignment of the mortgage. Givins v. Carroll, 40 S. C. 415, 18 S. E. 1030, 42 Am. St. Rep. 889; Williams v. Washington, 40 S. C. 457, 19 S. E. 1; Brobst v. Brock, 77 U. S. (10 Wall.) 519, 19 L. Ed. 1002; Bryan v. Brasius, 162 U. S. 415, 16 Sup. Ct. 803, 40 L. Ed. 1022. His attempted con-

veyance in turn operated as an equitable assignment of the mortgage to the defendant. It follows that the defendant had no title whatever from Elliott, and could assert no right against the plaintiff, based on the theory that it acquired title from a common source.

Nevertheless, if the defendant was a mortgagee holding possession of the land, acquired without force or wrongdoing at the time of the commencement of this action, it would be entitled to hold possession against the plaintiff until payment of the mortgage. Bailey v. Bailey, 41 S. C. 338, 19 S. E. 669, 728, 44 Am. St. Rep. 713; Sims v. Steadman, 62 S. C. 304, 40 S. E. 677; Bryan v. Brasius, 162 U. S. 415, 16 Sup. Ct. 803, 40 L. Ed. 1022. Assuming the possession of the defendant under the claim of assignment of the mortgage at the time this action was commenced, this possession could not avail against the plaintiff as that of a mortgagee in possession, for the reason that at the time of the entry of defendant in 1913 the mortgage had been extinguished as a lien by a lapse of time. Section 3535 of Code of Laws of South Carolina, 1912, provides that no mortgage "shall constitute a lien upon any real estate after the lapse of twenty years from the date of the creation of the same," except upon entry on the record of an acknowledgment, which does not appear here. In Lyles v. Lyles, 71 S. C. 391, 51 S. E. 113, it was held that under this statute the lien of a mortgage is not extinguished until the lapse of 20 years from the maturity of the mortgage debt. The date of the maturity of the debt does not appear in the record, but in the absence of evidence of the date of maturity the rule is that the debt will be considered immediately due. Harrison v. Cammer, 2 McCord (S. C.) 246; Wilks v. Robertson, 3 Rich. (S. C.) 182; 2 Daniel, Neg. Inst. 88; 1 Jones on Mort. 75. It does not help the defendant to assume that a payment of $10 made at the date of the mortgage was payment of interest, indicating that the debt did not mature until October 31, 1892, a year after the date of the mortgage, for the defendant did not enter until 1913, more than 20 years after October 31, 1892.

The conclusion that under the evidence the defendant had no valid claim to possession under Elliott, either as grantee or mortgagee in possession, eliminates all questions of common source of title and the right of a mortgagee in possession, and places the defendant in a position of standing on its alleged possession unconnected with Elliott, the source of the plaintiff's claim.

The last point made by the defendant is that the statute above cited (Civil Code, § 3535) is not available to the plaintiff, because section 147 of the Code of Procedure, relating to the time of the commencement of actions, provides that the time does not run in favor of one who is out of the state. This section obviously has no effect to exclude foreign corporations from the benefit of section 3535 of the Civil Code relating to the extinguishment of liens by lapse of time.

On the record as presented, we conclude that the District Judge erred in ordering an involuntary nonsuit, first, because evidence of possession at the time of the alleged trespass by the defendant was prima facie evidence of title; and, second, because the evidence of possessions of successive holders in privity with the plaintiff and with

each other was evidence of a grant to the first holder which inured to the benefit of the plaintiff, the last holder.

Reversed.

CONNOR, District Judge (dissenting). I regret that, after anxious consideration, I find myself unable to concur in the conclusion reached by the court. I concur, without hesitation, in the process of reasoning and the conclusions stated, forcibly and clearly, in the opinion of Judge WOODS, in every respect, save the last proposition.

The title was in Elliott prior to his conveyance to the Butters Lumber Company. His title is founded upon the law of South Carolina, by which, after 20 years' adverse possession, under a claim of right, a presumption arises that a grant was issued by the state, or deed executed by the true owner to the person holding such possession. This presumption is indulged because experience has justified the conclusion, when possession for this period is shown, that a grant or deed has been executed, which has either been lost or destroyed. It has, for its purpose, the security of titles. Ricard v. Williams, 7 Wheat. 109, 5 L. Ed. 398. The principle is clearly stated in Ellen v. Ellen, 16 S. C. 140:

"Title to land growing out of long-continued possession—long enough to presume a grant, deed or other muniment of title—attaches at the beginning of the possession, in a presumption of law, that a deed was executed at that time which has since been lost."

This rule of law is not peculiar to South Carolina, but obtains, either by decisions of the court, or by legislative enactment in all of the American states—differences being found only in respect to the period of time during which possession is required to raise the presumption. In the light of the evidence in this case, the court takes it, as a fact, that Elliott either had a grant from the state, or a deed from the true owner. He conveyed to the Butters Lumber Company thereby vesting a perfect title in that company. This title may be divested:

(1) By a deed executed in accordance with the statute of South Carolina; it is conceded that no such deed was introduced in evidence.

(2) By an ouster, or disseisin, under color of title, followed by a continuous possession, in the disseisor, for the full period of 10 years; this is not shown.

(3) By possession, without any connection either of possession, or claim by those in possession, for 20 years.

The Butters Lumber Company undertook to convey to the Cape Fear Lumber Company by deed, ineffectual, because not properly executed —January 17, 1900. Assuming that, at that time, the Cape Fear Lumber Company took possession of the land, this action was instituted October 9, 1916; hence 20 years had not expired. If either the Cape Fear Lumber Company or plaintiff had remained in possession for 10 years, the deeds under which they entered, while invalid, and ineffectual to convey title, were color of title, such possession would have ripened into title. It is conceded that neither of these companies were in possession for the statutory period; hence, no title was acquired through this source. It is said:

"The successive possession for twenty years gives rise to the presumption of a grant to the first taker at the beginning."

In this I concur. It is further said:

"Starting with the first taker, the successive, adverse possessions may be tacked to make out the full period of 20 years from which a good title is presumed in the last taker to the successive possessors claiming the land as their own."

From this proposition the conclusion is reached that the plaintiff may tack the possession of the Cape Fear Lumber Company and its own possession, admittedly less than 20 years, to the prior possession of the Butters Lumber Company and Elliott, for the purpose of completing the 20 years and raising a presumption of a deed to itself. In this conclusion I am unable to concur. The presumption based upon Elliott's possession for 20 years exhausted its probative force when invoked to show title in him. The title which vested in the Butters Lumber Company is based, not upon a presumption, but upon a valid deed from the owner, Elliott. If a grant from the state to Elliott had been shown, and his deed to the Butters Lumber Company introduced, is it not clear that, upon the plaintiff's evidence, it would fail in this action? The presumption of the existence of a grant or deed is as effectual, for the purpose of vesting title, as if a grant, or deed, had been introduced. If the plaintiff is dependent upon Elliott's possession to raise the presumption that a grant or deed was executed to it, the evidence rebuts the presumption, and shows that the title is in the Butters Lumber Company. In other words, having invoked the presumption to show title in Elliott and having shown that his title vested in the Butters Lumber Company, I am unable to perceive how it may again invoke the same presumption to show title in itself, which is contrary to the truth, as shown by its own evidence.

It is said, and in this I concur, that:

"Possession not obtained by a tortious act is prima facie evidence of title, and upon this the plaintiff may rest until the defendant justifies his invasion of the possession by proving either title in himself, or a license to enter, from the true owner."

This language is quoted from the opinion of the learned judge, who writes the opinion here, when a member of the Supreme Court of South Carolina. The law is stated with his uniform clearness and accuracy. The distinction between the two cases is seen by reference to the facts stated in that case. The judge says:

"The important question is thus raised, whether a plaintiff alleging *both title and possession* (italics mine) is entitled to recover damages upon proof of his possession and the invasion of it by the defendant, without giving proof that he has a perfect title."

This question is answered in the affirmative and sustained by an able, learned discussion, and citation of authority. Beaufort Land & Investment Co. v. New River Lumber Co., 86 S. C. 358, 68 S. E. 637, 30 L. R. A. (N. S.) 243. Here there is no allegation in the complaint that plaintiff was, at any time, in possession; but it is alleged that "the plaintiff was the owner and entitled to the possession of a tract of land," etc., and that "defendant, well knowing that plaintiff was

the owner, and entitled to the possession thereof, entered upon and cut and removed timber," etc. The action is not trespass quare clausum fregit, or for the invasion of plaintiff's possession, for manifest reasons. As said in the opinion, the title is in issue. The principle upon which the plaintiff in the case cited recovered cannot aid the plaintiff in this case; to entitle it to recover it must show, at least, prima facie title.

I concur in the opinion that defendant did not acquire title by the purchase at the foreclosure sale. If it acquired the equitable rights of the original mortgagee, they must be asserted and administered in a court of equity. While the plaintiff has not, as I respectfully think, acquired the legal title to the land, and cannot, upon its own showing in this action, recover the value of the timber alleged to have been cut by defendant, it would seem that it has acquired equitable rights, which will be protected and enforced in a court of equity; here its right to recover depends upon its showing that it had the legal title. I cannot think that it may recover of defendant, as it seeks to do, upon the evidence introduced before the District Court, the value of the timber, which was apparently the principal value of the land.

I think that the judgment of nonsuit should be sustained.

WHITAKER et al. v. WHITAKER IRON CO. et al.*

(Circuit Court of Appeals, Fourth Circuit. February 5, 1918.)

No. 1551.

1. WILLS ⇐860—TITLE AND RIGHTS OF LEGATEES—STOCKHOLDERS' SUIT—"DEVOLVE."

By his will a testator empowered his executors to convert all his property into cash at any time, except certain stock in a corporation, which they were to hold in trust for the benefit of his wife until her death, when it was to become a part of his residuary estate, which, after payment of special bequests, was to be equally divided between his children or their representatives, taking into account advances made them. *Held*, that the legatees did not by devolution take title to the stock on the death of the wife while it remained in the hands of the executors, who had power to sell the same, and that they could not maintain a stockholders' suit against the corporation and others (quoting Words and Phrases, Devolve).

2. CORPORATIONS ⇐211(6)—STOCKHOLDERS' SUIT—SUFFICIENCY OF BILL.

A bill filed by complainants as stockholders against the corporation and others, considered in the light of the corporate records produced in response to complainants' prayer for discovery, *held* to state no cause of action.

3. CORPORATIONS ⇐209—STOCKHOLDERS' SUIT—LACHES.

Minority stockholders, seeking redress for alleged fraud, must act promptly, and a bill filed at least 12 years after the transactions alleged to have been fraudulent, with no excuse given for the delay, shows such laches on its face as to warrant its dismissal.

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

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

*Rehearing denied May 7, 1918.

Suit in equity by Martha E. Whitaker, individually and as executrix of the will of Carrie C. Updegraff, deceased, and Ruth E. Whitaker, against the Whitaker Iron Company and others. From a decree dismissing the bill, complainants appeal. Affirmed.

For opinion below, see 238 Fed. 980.

Henry A. Brann, Jr., of New York City, for appellants.

John A. Howard, of Wheeling, W. Va. (George R. E. Gilchrist, of Wheeling, W. Va., on the brief), for appellees.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

PRITCHARD, Circuit Judge. This is an appeal from a decree of the District Court of the United States for the Northern District of West Virginia. The facts upon which the decree is based are as follows:

In 1900, the Whitaker Iron Company acquired the Wheeling Corrugating Company for $250,000 in Whitaker Iron Company stock. In doing that two distinct methods were used; one by which the Wheeling Corrugating Company conveyed its property and assets to the Whitaker Iron Company, which assumed payment of the liabilities of the Wheeling Corrugating Company, and the other by which the individual stockholders of the Wheeling Corrugating Company assigned and delivered their stock to the Whitaker Iron Company and received in return $250,000 in Whitaker Iron Company stock. Thus the Whitaker Iron Company became the owner of all the property and assets as well as the entire capital stock of the Wheeling Corrugating Company.

From the time of that transfer in 1900 to near the close of 1904, the business of the Wheeling Corrugating Company was conducted by the Wheeling Corrugating Company in its own name as the business had theretofore been conducted; but its entire capital stock, consisting of 2,255 shares, was owned by the Whitaker Iron Company and voted at stockholders' meetings of the Wheeling Corrugating Company by the Whitaker Iron Company, except 6 shares, which by action of that company's board of directors September 26, 1900, were transferred to six different persons, so as to qualify them to serve as directors of the Wheeling Corrugating Company.

Toward the close of 1904, the Whitaker Iron Company, together with the Laughlin Nail Company, entered into an arrangement for the organization of the Whitaker-Glessner Company, whereby a certain plant of the Whitaker Iron Company, then an operating company in Wheeling, was to be transferred to the Whitaker-Glessner Company, and a certain other plant of the Laughlin Nail Company, then an operating company in Martins Ferry, Ohio, was to be transferred to the Whitaker-Glessner Company. In addition to its plant in Wheeling, the Whitaker Iron Company agreed to transfer to the Whitaker-Glessner Company 2,255 shares of the capital stock of the Wheeling Corrugating Company, and to sell to the Whitaker-Glessner Company the good will of the Wheeling Corrugating Company. At that time the Whitaker Iron Company was the owner of all of the capital stock of

the Wheeling Corrugating Company, aside from the 6 qualifying shares mentioned, and also held the legal title to all the property and assets of the Wheeling Corrugating Company.

When this property came to be appraised by the interests of the Laughlin Nail Company, the other party to the formation of the Whitaker-Glessner Company, it was noticed that the Wheeling Corrugating Company had divested itself of all its property and assets by its transfer to the Whitaker Iron Company in 1900, but that the Whitaker Iron Company was also the holder of all of the capital stock of the Wheeling Corrugating Company. Thereupon, to give to the 2,255 shares of Wheeling Corrugating Company stock the value of $1,322,900.79, and its good will the value of $255,200, at which they were being sold to the Whitaker-Glessner Company by the Whitaker Iron Company, the Whitaker Iron Company and the Wheeling Corrugating Company, by unanimous vote of their stockholders and by action of their respective boards of directors, rescinded the action whereby the Wheeling Corrugating Company conveyed its property and assets to the Whitaker Iron Company, as was done in 1900; but the acquisition of the capital stock of the Wheeling Corrugating Company by the Whitaker Iron Company in 1900, as the other method adopted to acquire the Wheeling Corrugating Company, was ratified and confirmed; and, following such corporate action in 1904 by the two corporations interested, the Whitaker Iron Company conveyed, and the Wheeling Corrugating Company received back, the same property that had been conveyed in 1900.

From the time in 1900 when the Whitaker Iron Company bought the Wheeling Corrugating Company for $250,000 in Whitaker Iron Company stock to the time in 1904 when the Whitaker Iron Company made the reconveyance to the Wheeling Corrugating Company the net earnings of the Wheeling Corrugating Company had been allowed to accumulate; and this caused it to come about that in the formation of the Whitaker-Glessner Company the Whitaker Iron Company received for the 2,255 shares of the capital stock of the Wheeling Corrugating Company and for the good will of the Wheeling Corrugating Company the sum of $1,676,000, which was paid to it by the Whitaker-Glessner Company in 16,760 shares of the capital stock of the Whitaker-Glessner Company, of a par value of $100 per share.

The Whitaker Iron Company disposed of its 16,760 shares of Whitaker-Glessner Company stock on January 27, 1904, by ordering a distribution in kind amongst its own stockholders of shares of Whitaker-Glessner Company stock equivalent to a 300 per cent. dividend on its own $500,000 capital stock, making 15,000 shares, and delivered in pledge 1,500 other shares to Robert C. Dalzell, as trustee, as collateral to secure the bonds of the Portsmouth Steel Company, then a subsidiary corporation, and retained in its own treasury 260 other shares, thus making the total of 16,760 shares.

Pursuant to ordering the distribution to its own stockholders of the 15,000 shares of Whitaker-Glessner Company stock January 27, 1904, the Whitaker Iron Company on March 15, 1905, by action of its stockholders and directors, had the Whitaker-Glessner Company is-

sue and deliver the 15,000 shares direct to and amongst the stockholders of the Whitaker Iron Company, according to their respective interests, and in that distribution the estate of George P. Whitaker received 1,500 shares; that number of shares being the equivalent of a 300 per cent. dividend upon the 500 shares of Whitaker Iron Company stock the estate then owned.

This holding of 1,500 shares of Whitaker-Glessner Company stock by George P. Whitaker's estate was increased 750 shares by a 50 per cent. stock dividend declared by the Whitaker-Glessner Company April 30, 1910, and thereby that estate came to own 2,250 shares of Whitaker-Glessner Company stock.

The estate of George P. Whitaker, pursuant to a decree of the circuit court of Cecil county, Md., filed April 17, 1912, in equity cause No. 2,913, made a distribution of these identical 2,250 shares of Whitaker-Glessner Company stock, and on June 12, 1912, Martha E. Whitaker, as executrix of Carrie C. Updegraff's will, received from the estate 282 shares of Whitaker-Glessner Company stock, her full distributive share, and on June 12, 1912, Ruth E. Whitaker received from the estate 94 shares of Whitaker-Glessner Company stock, likewise her full distributive share.

The estate of George P. Whitaker, deceased, is now the owner of 500 shares of stock of the Whitaker Iron Company. Martha E. Whitaker, as executrix of the will of Carrie C. Updegraff, deceased, is entitled as one of the appellants to an undivided one-tenth interest in the estate of George P. Whitaker, deceased; Ruth E. Whitaker, the other appellant, is entitled to an undivided one-thirtieth interest in the estate of George P. Whitaker, deceased; together appellants are entitled to an undivided four-thirtieths interest in the estate of George P. Whitaker, deceased.

The appellants, among other things, prayed that:

"And these plaintiffs further pray for discovery in full and deposit in this court, and that said designated defendants, and the legal representatives thereof, be required to set forth a complete list and description of every date, book, account, record, and writing of whatsoever nature, relating to or connected with the aforesaid matters, or any of them, which now are or ever were in their possession or control, or state where same can be found, if removed therefrom, and deposit the same in the office of the clerk of this court for inspection."

In response thereto the appellees produced the records of the corporation bearing upon the matters in controversy before the court below for its inspection, and in verification of the certified copies which were filed with and made a part of the pleadings of appellees. The court below found the facts as they were shown to be by the discovery made through the production of the corporate records mentioned, and also found that appellants, having prayed for full discovery, had been given what they asked for, and could not now be permitted to refuse to receive that which they had called for, the authenticity of which they did not deny.

Accordingly, the suit was dismissed in the court below upon the grounds: (a) That the appellants were not bona fide stockholders; (b) that upon the showing made by the discovery the appellants were

not entitled to the relief which they seek; (c) upon jurisdictional grounds.

[1] We will first consider the question as to whether the appellants are entitled to maintain this suit. While they do not allege that they are the owners of any of the stock of what is known as the Whitaker Iron Company, they do allege that the estate of George P. Whitaker owns stock in the Whitaker Iron Company, and that they are entitled upon a distribution of that estate to receive a certain number of the shares of such stock. The will of George P. Whitaker, deceased, empowers the trustee to convert the stock of the Whitaker Iron Company into money and, after complying with the residuary clauses of the testator's will by satisfying advancements and charges to be made against each of the distributees, to distribute the rest of the fund as directed: "To be paid and distributed * * * to * * * Carrie Whitaker and George P. Whitaker, Jr., share and share alike."

These appellants take through George P. Whitaker, Jr., and Carrie Whitaker, and the provision in the will, "To be paid and distributed * * * to * * * Carrie Whitaker and George P. Whitaker, Jr.," implies the payment of money and the distribution of the same. This provision of the will clearly shows that it was the purpose of the testator to have the trustee, whom he invested with the legal title to this stock, dispose of the same by converting it into money and making an equal distribution of the proceeds thereof subject to the limitations mentioned. The learned judge who heard this case in the court below, in referring to this phase of the question, among other things, said:

"In the memorandum opinion heretofore filed, I expressed doubt as to whether plaintiffs are entitled to be considered stockholders of the Whitaker Iron Company. I then held that the determination of that question must depend largely upon the terms of George P. Whitaker's will, which was not before me, and upon whether or not plaintiffs held, by any other independent title, shares of stock in the Iron Company. For this reason I required the supplemental bill or statement to be filed by plaintiffs touching these two points. This supplement discloses that plaintiffs hold no stock other than as distributees of George P. Whitaker's estate, which they claim has devolved by law upon them. Whether this is so or not must depend upon the construction to be given the Whitaker will. An authenticated copy of it is not yet filed in the case, but what purports to be an unauthenticated copy of it is presented by plaintiffs, which seems to be conceded by defendants to be a true copy. From it, it is clear that testator first directed his stock in the Iron Company and other personalty to be held in trust for the benefit of his widow and upon her death to go into his residuary estate, which residuary estate was to be divided equally between his five children, but advancements made to, and debts owing from, these children were to be ascertained from his books and accounted for by each in the distribution. He then adds: 'My sons Henry C. Whitaker and Cecil N. Whitaker being dead, the share of Henry C. I hereby direct to be paid and distributed to his children, Carrie Whitaker and George P. Whitaker, Jr., share and share alike.' Plaintiffs take only through Carrie Whitaker and George P. Whitaker, Jr., and then take only such sum of the whole residuary estate, now in the hands of the Maryland executor and not yet finally settled; this stock and other personalty has been reduced to money and the amounts, if any, that Henry C. Whitaker may have owed his father, the testator, are charged and accounted for. I cannot see, from the terms of this will, the Iron Company's stock in kind. have or can devolve by law upon plaintiffs, unless, by agreement between

them and the executor of the estate, they are transferred to and accepted by them in lieu of the money the will gives them."

Under these circumstances it cannot be said that any of the stock devolved by operation of law upon either of the appellants. "An estate is said to 'devolve' on another when by operation of law, and without any voluntary act of the previous owner, it passes from one person to another; but it does not devolve from one person to another as the result of some positive act or agreement between them. The word is itself of intransitive signification, and does not include the result of an act which is intended to produce a particular effect. It implies a result without the intervention of any voluntary actor. Francisco v. Aguirre, 29 Pac. 495, 497, 94 Cal. 180; First Nat. Bank of San Jose v. Menke, 60 Pac. 675, 677, 128 Cal. 103." Volume 3, Words and Phrases (Old Series), page 2050. Thus it will be observed that appellants do not own a single share of stock in the Whitaker Iron Company by gift or purchase, and, as we have stated, none of these shares of stock devolved upon either of them by operation of law.

Among other things, the bill contains the following allegation:

"Said estate has not been judicially settled. By the terms of his will, settlement was suspended during the lifetime of said testator's widow. Death has called her to his realm of eternal dreams. The defendant Joseph C. Coudon is the only surviving executor trustee of said will and estate of George P. Whitaker."

[2, 3] According to appellants' own showing, they would not be entitled to any of the shares of stock which "have not been judicially settled." The showing made by appellees in the court below in response to the request of appellants clearly shows that there is no foundation upon which to maintain this suit, even if the appellants had been bona fide stockholders at the time of the institution of the same. The court below, in referring to this point, among other things, said:

"Now that the defendants have substantially complied with this prayer, I am not inclined either to reject or refuse to consider these records at the instance of these plaintiffs so asking their production; and in this condition of things I am constrained to believe that only a very few facts drawn from these records will be necessary to show that plaintiffs' charges are groundless and they have no standing in equity. The bill charges that the Iron Company bought the Corrugating Company on September 17, 1900, for $250,000, and that on January 21, 1904, some three years and four months thereafter, the Iron Company 'conveyed its West Virginia properties to the former company (Whitaker-Glessner) for a consideration of 16,760 shares of the latter's capital stock, par value $1,676,000.' Those records show the fact to be that the Iron Company sold to the Whitaker-Glessner Company the capital stock of the Corrugating Company alone for 16,760 of these shares, par value $1,676,000, and that 15,000 of these shares were distributed in kind to Geo. P. Whitaker's estate, from which plaintiff Martha E. Whitaker, executrix, received 282 shares, and plaintiff Ruth E. Whitaker 94 shares. The contract filed shows that they have sold these shares to Gutman and his associates for $115 per share. Taking the facts admitted by the bill, and supplement them with the few above stated from these supplied records, it is apparent that these officers, directors, and controlling stockholders so bitterly charged with fraud, mismanagement, and corruption, in fact secured by purchase for their corporation, charged to have been defrauded in the premises, the Corrugating Company for $250,000, and in less than three years and a half thereafter sold it for more than six times the price given for it, taking in payment stock at

par which in fact was worth and was actually sold by these plaintiffs at an advance of $15 on the $100 par value. This purchase and sale of the Corrugating Company, it is to be borne in mind, was consummated more than a decade ago, when there were no unusual conditions, such as now exist, to advance prices for such properties. Comment is hardly necessary. It is reasonable to infer, I think, that a good many corporation stockholders in this country would be really delighted to be 'defrauded' in this way. It is well settled that any minority stockholder, seeking redress, must act promptly. Laches in such matters should always put a chancellor upon guard and cause him to more carefully ascertain the circumstances, and facts before assuming jurisdiction in the premises. Here more than 16 years have elapsed since the purchase was made of the Corrugating Company, more than 12 since the 'backdated reconveyance,' and more than 2 years elapsed, after plaintiffs sold their stock, before they instituted this suit."

The foregoing is conclusive, and for the reasons hereinbefore stated we are of opinion that the decree of the lower court should be affirmed.

WOODS, Circuit Judge. I concur in the result on these grounds: The transactions complained of as fraudulent are alleged to have taken place from the years 1900 to 1904, more than 12 years before the bill was filed on the 7th of April, 1916. There was no allegation of ignorance on the part of the plaintiffs of the alleged fraud, nor how nor at what time they obtained knowledge of it, nor what efforts were made to ascertain the facts. This delay, without explanation, constitutes such laches as to warrant dismissal of the bill upon its face. Wollensak v. Reiher, 115 U. S. 96, 5 Sup. Ct. 1137, 29 L. Ed. 350; Hardt v. Heidweyer, 152 U. S. 547, 14 Sup. Ct. 671, 38 L. Ed. 548.

In addition to this, the plaintiffs in their bill make only the most general and indefinite charges of fraudulent conversion of corporate assets by the directors. The tenor of the bill indicates plainly that they relied upon discovery to be made by the defendants to make evident particulars of the transactions mentioned to establish the indefinite charges of fraud. The answer of the defendant and its exhibits is a substantial and full response to the demand for discovery. They set out the particulars of all the transactions brought in question by the plaintiffs, and so far from giving any indication of fraud they tend strongly to show that all earnings and profits of the several corporations involved were properly applied for the benefit of the stockholders. Since the plaintiffs relied on discovery to establish their charges, and discovery has shown nothing tending to establish them, the District Court was right in dismissing the bill for lack of equity in this respect, as well as for laches.

KROUSE et al. v. BREVARD TANNIN CO. et al.

(Circuit Court of Appeals, Fourth Circuit. February 5, 1918.)

No. 1563.

1. CORPORATIONS ⟸211(6)—STOCKHOLDER'S SUIT—SUFFICIENCY OF BILL—JURISDICTIONAL ALLEGATIONS.
Equity rule 27 (198 Fed. xxv, 115 C. C. A. xxv), prescribing the jurisdictional requisites of a stockholder's bill, as has been stated by the Supreme Court, which framed it, "is intended to have a practical operation, and to have that it must as to its requirements be given such play as to fit the requirements of different cases." If the allegations of the bill are deemed too general by defendants, their remedy is by motion for further and better particulars under rule 20 (198 Fed. xxiv, 115 C. C. A. xxiv); but the requirement that the bill set forth with particularity the efforts of plaintiff to secure such action as he desires does not apply, where the allegations clearly show that by reason of antagonistic control of the corporation such efforts would have been futile.

2. CORPORATIONS ⟸211(6)—STOCKHOLDER'S SUIT—SUFFICIENCY OF BILL.
A stockholder's bill *held* to state facts sufficient to entitle complainants, as minority stockholders, to invoke the jurisdiction of a court of equity.

3. CORPORATIONS ⟸210—STOCKHOLDER'S SUIT—PARTIES.
A suit in a federal court by minority stockholders against the corporation, which is a corporation of the state, having its property and business therein, and the managing director, who is also a citizen and resident of the state, in which the bill alleges transactions by the directors, who are also the principal stockholders, by which the corporation has been defrauded of property for their individual benefit, should not be dismissed on motion because the other directors are not parties, where by reason of their being out of the jurisdiction they cannot be served, and if brought in their joinder would oust the jurisdiction of the court. In such case, such directors, while proper, are not indispensable, parties, even though full relief as to all the transactions alleged cannot be granted without their presence, and the court, having jurisdiction over the corporation and its property, may and should, under equity rule 39 (198 Fed. xxix, 115 C. C. A. xxix), and Judicial Code (Act March 3, 1911, c. 231) § 50, 36 Stat. 1101 (Comp. St. 1916, § 1032), proceed without them, and grant such relief as the proofs may warrant and as is within its power.

4. COURTS ⟸347—UNITED STATES COURTS—PROCEDURE—MOTION TO DISMISS BILL.
While it is within the discretion of the court to entertain a motion to dismiss a bill for want of equity apparent upon its face, made under equity rule 29 (198 Fed. xxvi, 115 C. C. A. xxvi), at any time before the hearing, the rule contemplates that it be made before the answer is filed, and if made afterward it must be determined on the allegations of the bill, without aid from the denials or allegations of the answer.

Appeal from the District Court of the United States for the Western District of North Carolina, at Asheville; James E. Boyd, Judge.

Suit in equity by Charles C. Krouse and Louis T. McFadden against the Brevard Tannin Company and William F. Decker. From a decree dismissing the bill, complainants appeal. Reversed.

Mark W. Brown, of Asheville, N. C. (Clarence E. Sprout, of Williamsport, Pa., and John E. Cupp, of Philadelphia, Pa., on the brief), for appellants.

Duff Merrick and F. A. Sondley, both of Asheville, N. C., for appellees.

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

CONNOR, District Judge. Plaintiffs are citizens and inhabitants of the state of Pennsylvania. Defendant Brevard Tannin Company is a corporation chartered pursuant to the laws of North Carolina, January 13, 1903, conducting its corporate business in the Western district of said state. Defendant, Wm. F. Decker, is a citizen and inhabitant of the same state.

Plaintiffs, in their bill, allege: That the objects and purposes for which defendant corporation was formed are: To erect and operate factories for the manufacture of tanning extracts, and other extracts obtained from trees, bark, leaves, plants, etc. To conduct a general tanning business, manufacturing leather and leather goods and other products made from skins, hides, and peltry of animals. To deal in all kinds of timber, logs, wood, barks, etc., and to manufacture them into all kinds of marketable products and commodities. To manufacture, buy, sell, and otherwise deal in extracts, oils, fertilizers, glue, etc. That the authorized capital stock of said corporation is $500,000, divided into shares of $100 each, one half to be preferred and the other half common stock. That, of the authorized issue, 1,750 shares of preferred and 1,250 shares of common stock has been issued. That Edward D. Adams owns 1,100 shares preferred and 620 shares of common stock. That George L. Adams owns 335 shares preferred and 311 shares of common stock. That defendant W. F. Decker owns 100 shares preferred and 100 shares common stock. Plaintiff Chas. C. Krouse owns 42 shares preferred and 41 shares of common stock. Louis T. McFadden owns 49 shares preferred and 41 shares common stock. George L. Adams, Edward D. Adams, and Wm. F. Decker are, and have been since its organization, directors of the company. George L. Adams is, and has been since its organization, president; Wm. F. Decker, secretary and treasurer and manager of the company.

As grounds of complaint, and the basis upon which complainants seek the intervention of the court and relief against the alleged wrongful conduct of the majority stockholders, directors, and managing officers of the company, the plaintiffs, among other things, allege: That they have, at all times, refused to permit plaintiffs to have any voice in the control and management of the company. That Edward D. Adams has never attended a meeting of the board of directors, never visited the plant, or given any attention to the affairs of the company, but has willfully neglected and carelessly absented himself from the meetings of the board of directors. Practically the same complaint is made of Geo. L. Adams, another director, with the result "that the business is deteriorating" in a number of respects, pointed out in the bill. That the said directors, being also the managing officers, with in-

tention of defrauding the Brevard Tannin Company and the complainants, caused to be issued and delivered to the said W. F. Decker, one of the directors aforesaid, 100 shares of the common stock of the company, for which no consideration passed from the said parties to the company, "but the same was issued and delivered to the said Wm. F. Decker as a part of an unlawful and fraudulent agreement between the said Edward D. Adams, Geo. L. Adams, and Wm. F. Decker, as hereinafter set out." That on the 15th day of March, 1913, the said Edward D. and George L. Adams and Wm. F. Decker caused a deed to be executed of the company to John W. McMinn, for the nominal consideration therein expressed of $10, conveying to said McMinn certain tracts of land described in an exhibit attached for the real consideration of $27,000. That there was no warrant or authority given to the said parties to make such sale, but that it was made at a grossly inadequate price, to the great prejudice of the company. That on October 28, 1912, defendant Wm. F. Decker, director of said company, entered into a contract with one Louis Carr, afterwards assigned to the Carr Lumber Company, by which said Decker was to receive all of the wood usable in making tanning extracts from a tract of land containing 69,000 acres, a part of the Vanderbilt estate. That an interest in the said contract was subsequently assigned by Decker to George L. Adams. That in making said contract Decker was acting for and in behalf of the stockholders of the Brevard Tannin Company, and said contract was in fact made by Decker with Carr, for the use and benefit of the said company. That the contract was made in his own name, and he has refused and neglected, and still refuses and neglects, to assign the same to the company. That the contract was taken in the name of Decker, pursuant to a fraudulent agreement and understanding between said Edward D. and Geo. L. Adams and Decker. That by the sale of the land to McMinn the company was denuded of all woodland which it then owned, and all of its available wood supply in that vicinity taken from it. That the issue of the 100 shares of stock to Wm. Decker was made in consideration of the promise of said Decker to supply the company with wood from the Vanderbilt tract. That he is not now able, nor has he been able since the execution of said contract, to supply the company with wood, except by virtue of the acquiescence of the Champion Fibre Company, to which said Decker has sold all of the wood to be taken from the Vanderbilt tract, to the extent of his capacity to produce during the whole period of his contract with said Louis Carr.

The bill charges: That Wm. F. Decker embezzled and converted to his own use $93.11 of the money of the defendant company. That he forged the name of one John Morris upon a check drawn by said company for $337.75, appropriating the amount to his own use. That said Decker fraudulently appropriated other money belonging to said company to his own use, giving particulars thereof—all of which acts on the part of Decker were well known, or should have been known, to said Edward D. and Geo. L. Adams. That Decker cut wood from the lands of the company, and sold same, of the value of $456, to the Champion Fibre Company, which he converted to his own use.

That by reason of the negligence, carelessness, and inattention of the business of the said directors and managing officers the stockholders of the company have been damaged, the property allowed to depreciate and decay, its business permitted to be dissipated, so that the company has lost approximately the sum of $50,000 a year during the year 1915, and during the year 1916 the sum of $100,000 per year, etc.

For the purpose of meeting the jurisdictional requirements of equity rule 27 (198 Fed. xxv, 115 C. C. A. xxv; Hopkins, Eq. Rules [2d Ed.] 172), complainants allege: That they were shareholders of the company at the times of the transactions mentioned, of which they complain. That the suit is not a collusive one to confer jurisdiction on the District Court of the United States for the Western District of North Carolina, of which said court would not otherwise have jurisdiction, but is instituted in good faith for the purposes herein stated. That they brought the transactions of which they complain to the attention of said Edward D. Adams, Geo. L. Adams, and Wm. F. Decker, as officers and directors of said Brevard Tannin Company, so they would have full opportunity to redress said wrongs; but said officers and directors failed and refused so to do, and assumed the same antagonistic and partisan attitude as that theretofore manifested by them towards plaintiffs.

The bill prays that process issue to the defendant company and to Wm. F. Decker. The other directors are not within the jurisdiction of the court and are not joined as defendants. They pray that a receiver be appointed to preserve the property of the company until the final decree, and for such other and further relief as the nature and circumstances of the case require, etc.

Defendants filed joint answer, denying all of the material allegations of the bill, setting out, by way of exhibits, the contracts referred to and the correspondence between complainants and the officers and directors of the company. The record states that, after the bill and answer had been filed, and after depositions had been taken by defendants, on the merits of the suit, and after said action had been set down for hearing, defendants orally moved to dismiss the bill upon the ground that it did not allege facts sufficient to constitute a cause of action, and upon the further ground that it appeared from the bill that Geo. L. Adams and Edward D. Adams were indispensable parties defendant and that they were without the jurisdiction of the court, and if they were made parties defendant the jurisdiction of the court would be ousted, because of the citizenship of the said George L. and Edward D. Adams; and it was upon this motion that the final decree was entered. This statement is signed by the District Judge. The decree dismissing the bill recites the motion and:

"That the court is of opinion that said bill fails to properly allege facts sufficient to constitute the cause of action therein attempted to be set up, and said bill is therefore hereby dismissed."

[1] The brief, and oral argument of defendants, challenge the right of the complainants to invoke the equitable power of the court, because they have not complied with the requirements of equity rule 27. As this question lies at the threshold of the discussion, it should be

disposed of before the sufficiency of the bill, in other respects, is considered.

The rule prescribing the allegations which are required to be made, in bills brought by stockholders in such cases, was first formulated in 1882 and known as equity rule 94, in accordance with the conclusion reached by the courts as the result of former decisions. Hawes v. Oakland, 104 U. S. 450, 26 L. Ed. 827. In the new equity rules of 1912 it is No. 27. 226 U. S. 656, 33 Sup. Ct. xxv; Hopkins, New Fed. Eq. Rules, Annotated (2d Ed.) 172. The only addition made to the original rule are the words at the end, "or the reasons for not making such effort." 213 U. S. 435, 29 Sup. Ct. 540, 53 L. Ed. 862. The bill, in regard to the sufficiency of the allegation required, of the particularity of the efforts of the plaintiffs to secure such action as they desired on the part of the managing directors and, "if necessary, of the shareholders," is critically analyzed. It is insisted, and authorities cited to maintain the contention, that the averments made by complainants that "they brought the transactions of which they complain to the attention of the directors," etc., does not meet the requirements of the rule; that the complainants should have set forth the time and place, the specific manner in which the efforts were made, etc. It is further objected to the sufficiency of the averment that complainants were shareholders at the time of the transactions complained of; that they should have stated the dates upon which they became shareholders.

In regard to the criticism of the bill upon the first ground, it would seem that if the directors were informed of the conduct complained of, and an opportunity given them to investigate the truth of the charges, and they failed and refused to do so, or to take any action in regard thereto, the spirit of the rule was complied with. While it may be that complainants should have alleged the date upon which they became shareholders, the remedy for their failure to do so was to move the court, as permitted by rule 20 (198 Fed. xxiv, 115 C. C. A. xxiv), that "further and better particulars" in this respect be furnished. This is a new rule, based upon the English practice. A number of defendant's grounds of objection to the bill would have been met by its application. The purpose and scope of the rule—construed in the light of decisions of the English Court of Chancery—is discussed in an enlightening and interesting manner by Judge Dayton (D. C. N. D. W. Va.) in Whitaker v. Whitaker Iron Co., 238 Fed. 980. The principle upon which rule 94 (27) is founded, before its adoption, and the rule itself, has been discussed and construed in a large number of cases in the federal courts. Many of them are cited in the briefs of counsel in this case. While the underlying thought upon which the rule is based is well understood, of necessity its application is, to a large extent, dependent upon the facts developed in each case. "Rule 94 is intended to have practical operation, and to have that it must, as to its requirements, be given such play as to fit the conditions of different cases." Del. & Hudson Co. v. Albany & Sus. R. R. Co., 213 U. S. 435, 29 Sup. Ct. 540, 53 L. Ed. 862. In that case the questions certified to the court present, in a large measure, the contentions made in this appeal. The rule is quoted—the last clause—prescribing the

necessity for setting forth, with particularity, the efforts of plaintiffs to secure action on the part of the managing directors or trustee, and, if necessary, of the shareholders, and the causes of their failure to obtain such action, constituted the debated point in the case. Mr. Justice McKenna, in an enlightening opinion, discusses the decisions and principles involved, saying:

"The purpose of the rule hardly needs explanation. It is intended to secure the federal courts from imposition upon their jurisdiction and recognizes the right of the corporate directory to corporate control; in other words, to make the corporation paramount, even when its rights are to be protected or sought through litigation. Cases in this court have indicated such right. But the directory may be derelict and the interest of stockholders put in peril, and a case hence arises in which the right of protecting the corporation accrues to them. Rule 94 (27) expresses primarily the conditions which must precede the exercise of such right, but emergencies may arise in which the antagonism between the directory and the corporate interest may be unmistakable, and the requirements of the rule may be dispensed with, or it is more accurate to say, do not apply."

After citing cases, in which the requirements of the rule were enforced, the learned justice cites as an illustration of the cases, "where the circumstances take the cases out of the rule." Doctor v. Harrington, 196 U. S. 579, 25 Sup. Ct. 355; 49 L. Ed. 606. After stating the essential allegations in the bill in that case, he says:

"It will be observed, therefore, that there was no compliance with the requirements of rule 94 (27), as expressed in its letter. The efforts that were made to secure the action of the managing directors or trustees were not 'set forth with particularity.' Nothing was alleged but the domination of John J. Harrington and his control of the directors. What he did, and in what way he exerted control, was not alleged. In other words, the bill seemed to show a case, not of compliance with the requirements of rule 94 (27), but circumstances which excused from such compliance. * * * And we decided that these principles (upon which the rule was based) were satisfied by the allegations of the bill and that such antagonism existed between the complainants in the suit and the directors of the corporation that they would suffer irremediable loss if not permitted to sue. In other words, complainants were in such a situation by reason of the power which Harrington possessed over * * * the corporation—directors and stockholders—that appeals to them for action would have been futile."

Almost every suggestion made in this case is made and disposed of in the opinion in that case. A few illustrative cases may be cited:

"Equity rule 27, * * * which requires certain preliminary steps to be taken by the stockholder before bringing his suit, will be dispensed with when the interests of the directors are antagonistic to those of the corporation, where this fact is shown by the pleadings." Ogden v. Gilt Edge Consol. Mines Co. (C. C. A. 8th Cir.) 225 Fed. 723, 140 C. C. A. 597:

"The bill alleges that plaintiff has not made request of the officers and directors to bring the action because of the fact that such request would be a useless and idle performance, and that the defendants McKinney and associates, who made the contract, and benefit by it, are in the absolute control of the affairs of Quinesec. The record fully sustains these allegations. The requirement of equity rule 27, in the respect referred to, was thus met."

An exhaustive review of the recently decided cases in Heinz v. Nat. Bank of Commerce, 237 Fed. 942, 150 C. C. A. 592, relieves us of the necessity of doing more than refer to the opinion of Judge Booth in that case. In Wathren v. Jackson Oil & Refining Co., 235

U. S. 636, 35 Sup. Ct. 225, 59 L. Ed. 395, Mr. Justice Hughes, in pointing out the respects in which the bill failed to comply with the rule, says:

"Nor does it appear that, by reason of antagonistic control of the corporation, such a request would be futile."

There the plaintiff was the holder of a majority of the stock—no suggestion of fraud is made. The class of cases coming within the exception to the rule is stated by Mr. Justice Brandeis in United Copper Co. v. Amal. Copper Co., 244 U. S. 261, 37 Sup. Ct. 509, 61 L. Ed. 1119, as when the directors "stand in a dual relation which prevents an unprejudiced exercise of judgment," or "that such application would be futile (as when the wrongdoers control the corporation)." The allegations in the bill, which, upon its motion, defendants admit to be true, bring the case clearly within the cases to which, as said by Mr. Justice McKenna, "the rule does not apply."

[2] We are thus brought to consider the challenge made to the bill and sustained by the court—that it does not sustain facts sufficient to constitute a cause of action, or to entitle the complainants to seek any relief in a court of equity. It is true that the specific relief demanded is the appointment of a receiver; but the court is not compelled to grant the prayer, but may, upon the proofs adduced, either dismiss the bill for failure of proof, or grant such relief as, upon the allegation and proof, the complainants show themselves entitled to. If, as alleged and admitted by the motion to dismiss, the managing officers, being also the majority shareholders, have conducted the affairs of the corporation, conveyed its property, made contracts, as alleged—committed other acts prejudicial to the interests of the complainants, minority stockholders—it would seem that a court of equity should take cognizance at least to the extent of investigating and ascertaining the truth in regard to the transactions set forth in bill. It may be that, upon full investigation, the defendants will be able to show that the plaintiffs are making a false clamor, and that they have no ground for complaint. It appears that an answer was filed and depositions taken by defendants before the motion to dismiss was made. It would seem more in accordance with the course usually pursued by courts of equity that the cause should proceed to a hearing rather than at this stage of the proceeding a motion to dismiss allowed. We are of the opinion that there was error in holding that the bill did not allege facts sufficient to entitle plaintiffs to invoke the jurisdiction of the court.

[3] It is said, however, that Edward D. Adams and George L. Adams are indispensable parties defendant, and that, if brought into the case as defendants, the jurisdiction of the court would be ousted. While, as provided by rule 29 (198 Fed. xxvi, 115 C. C. A. xxvi), the motion to dismiss may be made for nonjoinder of essential parties, the practice of courts suggest, not a decree dismissing the bill, but an order to make such parties. It is insisted that this would not help the complainants, because, as George L. Adams is a citizen and resident of Pennsylvania, the residence of complainants, upon being brought into the record, a case would be created wherein complainants and

one of the defendants are citizens and residents of the same state. Rule 39 (198 Fed. xxix, 115 C. C. A. xxix; Hopkins, New Fed. Eq. Rule 204) provides that:

"In all cases where it shall appear to the court that persons who might otherwise be deemed proper parties to the suit cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to parties before the court, the court may, in its discretion, proceed in the cause without making such persons parties; and in such case the decree shall be without prejudice to the rights of the absent parties."

See, also, Judicial Code, § 50.

Are Edward D. Adams and Geo. L. Adams necessary, or indispensable, or only proper, parties? For an interesting discussion and analysis of decided cases regarding this question, which has given to federal courts much concern, see Street's Fed. Eq. Prac. vol. 1, § 502 et seq. It may be conceded that, if Edward D. and George L. Adams are indispensable parties, within the definition found in well-considered opinions of the Supreme Court, the bill must be dismissed. It is not within the saving provisions of equity rule 39, or section 50 of the Code. The corporation is a party defendant, served with process on its secretary and treasurer, and one of the directors, Wm. F. Decker, individually, also is a party. It is insisted that, because the other two directors, nonresidents, who have willfully and negligently failed to discharge their manifest duties as directors, and have either knowingly or fraudulently permitted its managing officer to make contracts in fraud of, and prejudicial to, its property and interests, and embezzle its funds, are not made parties because service cannot be had on them, the court had no power to make any decree for the protection of the property or the rights of the shareholders. We are unable to perceive why, with the corporation and its managing director, secretary, and treasurer, under whose control the property is found, as parties to the suit, a decree may not be made appointing a receiver of the property, with direction that he bring such actions, or suits in equity, against the directors, or other persons, as may be necessary to protect its interests. Whether in this suit decrees may be made, regarding the transactions set out in the bill of which plaintiffs complain, in the absence of Edward D. and George L. Adams, is not necessary to decide. If the court has before it the necessary parties to enable it to grant any substantial relief, the bill should not be dismissed. While it is true that, in the absence of George L. Adams, a decree cannot be made giving relief to the company for the wrong sustained on account of the matters alleged in regard to the contract made with Louis Carr, and alleged to have been assigned to Geo. L. Adams, pursuant to a fraudulent agreement between Edward D. Adams, Geo. L. Adams, and W. F. Decker, the fact that the contract was made and assigned to Geo. L. Adams, under the circumstances alleged, establishes for the purpose of this suit a valuable property right in the company, which should be protected and enforced in some appropriate manner by this court, or through its receiver. The purpose for which the intervention of the court is invoked in this suit is not necessarily that

decrees be made herein, respecting such transaction, of which complaint is made, but that full and complete relief be afforded to the corporation against the frauds, neglects, and wrongdoings—breaches of duty—of its directors and officers. This is not a case in which the title to the corporate property is vested in the directors, and it is sought to affect it—transfer title or otherwise. The property, rights of action, and remedies for wrongs sustained by the corporation are vested in the corporate entity, which is unable to assert or enforce them or protect its property, by reason of the antagonistic relation assumed by its officers and directors. The condition presented by the record is somewhat similar, in this respect, to that dealt with in Lowenthal v. Georgia Const. & P. R. R. Co. (D. C.) 233 Fed. 1010. The defendant railroad company executed a deed to the Columbia Trust Company, of New York, to secure a large bonded indebtedness. The plaintiff held $6,000 of the bonds, upon which default had been made in payment of interest. He called upon the trustee to take action for the foreclosure of the trust. The trustee declined to act. The plaintiff, among other things, alleged that the corporation was insolvent, etc. Upon a motion to dismiss the bill, because the trust company was not a party, Judge Speer—quoting rule 39—said:

"The contention that the bill must be dismissed because the trustee is not made a party defendant is equally unfounded. The trustee is a corporation and a citizen of New York. It is not found in this district, and does not voluntarily appear. But the railway property is here, and to this the lien and mortgage securing plaintiff's bonds inheres. Here, also, is the defendant corporation, a corporation of this state. In such cases the court may entertain jurisdiction and proceed to the trial and adjudication of the suit between the parties who are properly before it; but the judgment and decree rendered therein shall not conclude or prejudice other parties not legally served with process, nor voluntarily appearing to answer. * * * Obviously, to join the trustee as a party, as a citizen of another state, at this time, when it cannot be served, would be to hazard the jurisdiction of the court to grant preliminary relief now sought."

It is undoubtedly true, as argued by counsel for defendants, and sustained by the abundant authority cited by them, that "when a decree will directly affect a person or his rights he must be a party to the proceeding, regardless of any question of estoppel." The rule in regard to the necessity for joinder of parties in suits in equity is stated by Chief Justice Marshall in Elmendorf v. Taylor, 10 Wheat. 167, 6 L. Ed. 289:

"In the exercise of its discretion, the court will require the plaintiff to do all in his power to bring every person concerned in interest before the court. But, if the case may be completely decided as between the litigant parties, the circumstance that an interest exists in some other person, whom the process of the court cannot reach, as if such party be a resident of some other state, ought not to prevent a decree upon its merits. It would be a misapplication of the rule to dismiss the plaintiff's bill because he has not done that which the law will not enable him to do."

See Shields v. Barrow, 17 How. 130, 15 L. Ed. 158.

In Barney v. Balto. City, 6 Wall. 280, 18 L. Ed. 825, Mr. Justice Miller says:

"The learning on the subject of parties to suits in chancery is copious, and within a limited extent the principles which govern their introduction are

flexible. There is a class of persons having such relations to the matter in controversy, merely formal or otherwise, that, while they may be called proper parties, the court will take no account of the omission to make them parties. There is another class of persons whose relations to the suit are such that, if their interest and their absence are brought formally to the attention of the court, it will require them to be made parties, if within its jurisdiction, before deciding the case. But, if this cannot be done, it will proceed to administer such relief as may be in its power between the parties before it. And there is a third class, whose interest in the subject-matter of the suit, and in the relief sought, are so bound up with that of the other parties, that ther legal presence as parties to the proceeding is an absolute necessity, without which the court cannot proceed. In such cases the court refuses to entertain the suit, when these parties cannot be subjected to its jurisdiction."

It would seem that the instant case is within the second class. The plaintiff alleges that, by reason of the fraudulent and wrongful conduct of its majority stockholders and managing officers, the corporate property has been dissipated and its business prejudiced; that rights of action have accrued to the corporation against such officers. These transactions are set forth in the bill and admitted for the purposes of this discussion. The bill further charges that the president, directors, and secretary and treasurer, whose duty it is to prosecute such actions as may be necessary to protect the rights of the corporation, occupy in respect to such transactions antagonistic relations to the corporation and its rights. It so happens that the suit to redress the wrongs and enforce the rights of the corporation must be brought against those whose duty it is to bring and prosecute them to judgment. The plaintiffs bring the corporation and one of the managing officers before the court, and seek such relief as it may be in its power to grant. They challenge the power of the court to grant any relief, and demand that, in the face of the allegations in the bill, admitted to be true, the suit be dismissed because two other persons, also directors, who are beyond the jurisdiction of the court, are not made parties, and that if made parties, by reason of the place of their residence, the court would be without jurisdiction to proceed. Conceding that, without their presence, or the presence of Geo. L. Adams, full and complete relief in respect to one of the transactions of which complaint is made, cannot be granted, we do not perceive any valid reason why, with the corporation before the court, it may not proceed to investigate the truth of the allegations of the bill for the purpose of ascertaining whether any relief may be granted. If it shall appear that the corporation has sustained injury by the conduct of its officers, why may not a receiver be appointed, with direction to institute such suits in equity or actions at law as may be necessary to protect the interests and enforce the rights of the corporation? For that purpose we are of opinion the court has before it the essential necessary parties. The decree would not prejudice the right of the nonresident persons, in such actions, to deny and demand proof of the allegations against them. In dismissing the bill for nonjoinder of these parties there was error.

[4] Defendants suggest that, conceding the attack on the bill is not sustained, the court, by an examination of the answer, will learn that full and complete denials, sustained by exhibits attached, are

made, and that the decree, for that reason, should be affirmed. It is held that the motion to dismiss for nonjoinder of parties must be disposed of upon the allegations of the bill, without the aid of any allegations in the answer. Bogert v. Southern Pac. Co. (D. C.) 211 Fed. 776. By equity rule 29, demurrers and pleas are abolished; defenses must be made either by a motion to dismiss or by answer. In this case defendants answered, and depositions by defendants were taken. While it is within the discretion of the court to entertain a motion to dismiss for want of equity apparent upon the face of the bill, at any time before the hearing, the rule contemplates that it be made before the answer is filed:

"If the defendant move to dismiss the bill or any part thereof, the motion may be set down for hearing by either party upon five days' notice, and if it be denied, answer shall be filed within five days thereafter, or a decree pro confesso entered."

The defendant may not, by filing his answer, move to dismiss upon denials of the allegations of the bill, or by new matter set up in his answer. The motion must be heard and decided upon the allegations of the bill, as upon demurrer. The rule which prevails in courts of equity, in disposing of motions to dismiss because the bill does not set up facts sufficient to constitute a cause of action, is to overrule the motion, and let the case go to hearing, unless it is founded upon an absolutely clear proposition that, taking the allegations to be true, the bill must be dismissed at the hearing. Rallston Steel Car Co. v. Nat. Dump Car Co. (D. C.) 222 Fed. 590.

For the reasons stated, the decree dismissing the bill must be reversed, and the cause proceed to hearing.

Reversed.

ROGERS v. HINCKLE.

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

No. 1574.

1. VENDOR AND PURCHASER ⊂=70—OPTION TO PURCHASE—PRICE—CONSTRUCTION.

A contract between complainant and defendant, after its reformation by the court to conform to the actual agreement of the parties, gave complainant an option to purchase for $35,000 certain land and the personal property thereon, which entitled him also to the surrender of a mortgage for $5,000 on his own property held by defendant. The contract further provided that, in case defendant received a bona fide offer for the land acceptable to him before expiration of the option, complainant might purchase at the same price. Such an offer was received of $25,000 for the land and personal property, but having no reference to complainant's mortgage. Complainant tendered such amount and demanded a conveyance of the land and the surrender of the mortgage, and on defendant's refusal brought suit for specific performance. *Held* that, under the contract, his tender was insufficient, as the offer received by defendant was equivalent to one of $30,000 for the entire property covered by the contract, including the mortgage.

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

2. SPECIFIC PERFORMANCE ⊂⊃126(1)—PERSONS ENTITLED TO REMEDY.
Complainant's tender having been more than sufficient as the contract read before its reformation, and as defendant also prayed for affirmative relief, complainant, who paid a valuable consideration for the contract, was entitled to specific performance on payment of the sum found due by the court.

Cross-Appeals from the District Court of the United States for the Eastern District of South Carolina, at Charleston; Henry A. Middleton Smith, Judge.

Suit in equity by H. K. Rogers against E. E. Hinckle, as trustee. From the decree, both parties appeal. Affirmed.

The opinion of the District Judge was as follows:

The complaint in this case appears to have been originally filed in the court of common pleas for the county of Florence about the 6th of January, 1917. Thereafter, on the ground of diversity of citizenship, the cause was duly removed to this court. The defendant, having been duly served with process, has appeared and answered. The case, being at issue, came on to be heard. The testimony has been taken, and counsel for both plaintiff and defendant have been heard. The facts of the case appear to be that the plaintiff, H. K. Rogers, was heavily indebted upon certain mortgages to J. F. Muldrow and Mrs. Emma Lee Muldrow. He seems to have purchased from them, or one of them, three tracts of land in Florence county (the largest tract being a tract partly in Florence and partly in Darlington county), for which he agreed to pay the sum of $40,000. He seems to have paid no cash, but paid the $40,000 by three bonds secured by mortgages: One bond dated December 16, 1912, conditioned for the payment of $20,000 to J. F. Muldrow, secured by a mortgage of 585 acres, partly in Florence and partly in Darlington counties, with certain personal property; one bond of the same date to Emma Lee Muldrow, conditioned for the payment of $15,000, secured by a mortgage upon two tracts of land in Florence county, one tract containing 173 acres and the other tract containing 10.36 acres. These two bonds together made $35,000, and the other $5,000 he paid by a bond of the same date for $5,000 to J. F. Muldrow secured by a mortgage on 143 acres of land in Darlington county, sometimes referred to as the home place of H. K. Rogers. It will be seen, therefore, that the property purchased by H. K. Rogers comprised three tracts of land, of 585 acres, 173 acres, and 10.36 acres, for which, with the personal property referred to in the mortgage, he agreed to give the price of $40,000, and which $40,000 was paid by a mortgage of $35,000 on the purchased premises, and a mortgage for $5,000 on a separate piece of property in the county of Darlington, which belonged to Rogers personally, and which he did not purchase from Muldrow. For convenience hereafter in this decree this last property, which belonged to Rogers personally, will be referred to as the Darlington property, and the other three pieces of property, which were purchased from J. F. Muldrow and Emma Lee Muldrow, will be referred to as the Florence property, although the largest of the three pieces is also partly in Darlington county.

These mortgages were all on the 8th day of January, 1913, assigned by the Muldrows to one John Kuker. Thereafter a concern called J. F. Muldrow Company became bankrupt, and in pursuance of some settlement of the indebtedness of the Muldrows, either directly or through the said J. F. Muldrow Company, these three mortgages given by H. K. Rogers to J. F. Muldrow and Emma Lee Muldrow were assigned to the defendant, E. E. Hinckle, as trustee for certain creditors, subject to the prior assignments made to John Kuker. E. E. Hinckle thus owning as trustee all the three mortgages, negotiations were had between himself and the plaintiff, H. K. Rogers, to put the matter in a shape which might obviate the necessity and expense of a foreclosure, and after the negotiations an agreement was entered into, on or about the 7th day of January, 1916, to the effect that H. K. Rogers would convey to

E. E. Hinckle, as trustee, the three tracts of land, with the personal property thereon, so as to vest the title to the property absolutely in E. E. Hinckle, subject only to the payment of the prior mortgages assigned to John Kuker, and then that Hinckle would agree that the property might be repurchased by H. K. Rogers for the sum of $35,000, and that, if Rogers paid the sum of $35,000, which was $5,000 less than he owed on his three mortgages, he would receive the property in Florence county and also have his outstanding mortgage on the property in Darlington satisfied and the mortgage returned to him; it being distinctly understood that the agreement was to the effect that he was to get a concession of $5,000 on his purchase price—that is to say, in lieu of paying $40,000, he was to pay only $35,000, and thereupon have the Florence property and his original own individual property in Darlington free from mortgage.

In pursuance of this agreement Rogers on the 7th day of January, 1916, executed a deed of conveyance to E. E. Hinckle of the three tracts of land in Florence county, purporting to be for the sum of $35,000, and in the conveyance declared that the property conveyed was subject to the mortgages given to secure an indebtedness which was then larger in amount than the consideration stated, to wit, $35,000, which mortgages were to be kept open as muniments of title. On the same day, January 7, 1916, Hinckle, as trustee, executed a lease to Rogers of all the three tracts of land in Florence county, with the personal property, to run as to the 31st of December, 1918, for the annual rent of $2,250, to be paid on the 15th of October in each year; and on the same day Hinckle executed an agreement in writing that in consideration of the conveyance to him of the property by Rogers and of the lease of the same from him by Rogers he granted to Rogers the right and privilege of purchasing the three tracts in Florence county and the personal property leased "at such price and on such terms as shall be acceptable to me and offered by a bona fide purchaser therefor at any time previous to the 1st day of October, 1918," or "if no such bona fide offer shall be made for the purchase of the property during the period mentioned, then at and for the sum of thirty-five hundred dollars ($3,500.00)." The agreement further stipulated that Hinckle would within the time above mentioned, on demand of Rogers, convey to him the three described tracts free of incumbrances upon Rogers complying with the terms of the option by the payment of the stipulated purchase price. No mention is made in this agreement or option as written of the tract of land in Darlington county or the mortgage for $5,000 thereon. Thereafter, on or about the 15th of December, 1916, one D. T. McKeithan, a bona fide purchaser, made an offer to Hinckle to buy the three tracts land in Florence county with the personal property thereon included in the lease, for the sum of $25,000. Nothing in this offer covered or referred to the mortgage for $5,000 on the Darlington property held by Hinckle by assignment from Kuker; so that the effect of McKeithan's offer was to pay Hinckle $25,000 for the Florence tracts and personal property and leave Hinckle still holding the $5,000 mortgage on the Darlington property. McKeithan was informed by Hinckle that, under the latter's agreement with Rogers, Rogers was entitled to the privilege of first making the purchase at the price offered. On the submission of this offer to Rogers he purported to accept and then required that on the payment by him of $25,000 Hinckle should execute to him a conveyance of the three tracts of land in Florence county free of all incumbrances and at the same time deliver to him duly satisfied the $5,000 mortgage on the Darlington property.

This Hinckle declined to do, and thereupon H. K. Rogers instituted these proceedings, first, to have the option or agreement of 7th January, 1917, reformed and corrected, by therein distinctly stating that upon Rogers complying with the terms of the option the outstanding mortgage for $5,000 on the Darlington property should also be delivered to him by Hinckle duly satisfied; and, second, for a specific performance of the option so reformed, by requiring Hinckle on the payment of $25,000 to convey to Rogers the three tracts with the personal property in Florence county free from all incumbrances and also to deliver to him fully satisfied his mortgage for $5,000 on the tract in Darlington county.

The defendant by his answer denies that the option or agreement of January 7, 1917, ever covered or was intended to cover the mortgage for $5,000 on the Darlington property, and denies that defendant ever agreed that, if Rogers complied with the terms of that option, that mortgage would be paid and delivered up to him. The defendant further, by way of a counterclaim for affirmative relief, sets up the mortgage for $5,000 on the Darlington property and prays a foreclosure and sale of it.

[1] The first question to be determined under the pleadings is as to whether or not the option or agreement of the 7th of January, 1916, should be reformed and corrected. After hearing all the testimony the court is satisfied that this option or agreement as written failed to correctly express the agreement or understanding of the parties in two particulars: First, in that the words thirty-five hundred dollars as the price to be paid by Rogers was evidently a mistake or typographical error and that it should read thirty-five thousand dollars. Next, under the testimony and admissions of defendant it clearly appears that the understanding and agreement of the parties was that Rogers should have a concession of $5,000 on the price of $40,000 at which to repurchase the property, and that if he paid the $35,000, or if he paid such a price as should be acceptable to Hinckle, and offered by a bona fide purchaser at any time previous to the 1st day of October, 1918, the mortgage for $5,000 on his Darlington property was to be part of the property purchased or acquired by the payment of the purchase price; otherwise, he could not have been sure of obtaining the concession of $5,000.

It is therefore ordered, adjudged, and decreed that the option or agreement herein executed by E. E. Hinckle, trustee, on the 7th day of January, 1916 (according to the instrument put in evidence in this case), be and the same is hereby reformed and corrected as follows: First, by striking out the words "thirty-five hundred dollars ($3,500.00)" in letters and figures on the line next above the last line of the first page, and inserting in lieu thereof "thirty-five thousand ($35,000.00) dollars"; second, by inserting between the words "deed" and "upon," in the third line of the second page the following words: "And to deliver up to him the mortgage for $5,000 on the 143 acres in Darlington county duly satisfied."

[2] The next question is: Is the plaintiff entitled in these proceedings to a specific performance of this option or contract as reformed? The plaintiff's construction of the contract is that, the offer made by McKeithan as a bona fide purchaser being $25,000, he, the plaintiff, was entitled, on payment of the same amount, to have a conveyance of the three tracts of land and personal property in Florence county free of incumbrances, and also to have the mortgage for $5,000 satisfied upon the Darlington property. This construction and claim of the plaintiff is, however, in effect $5,000 less than the offer made by McKeithan, and, if allowed, would result in Rogers obtaining, not only the concession of $5,000 on his original purchase price of $40,000, but of obtaining a concession of $15,000 on that purchase price, for he would thus obtain for $25,000 what he had originally agreed to pay $40,000 for. In the opinion of the court Rogers is not entitled to specific performance upon any such construction of the contract as contended by him. The offer purporting to be accepted by Rogers is not the offer made by McKeithan. The offer made by McKeithan was $25,000 for the three tracts of land in Florence and the personal property alone, and this left Hinckle free to hold and enforce his mortgage for $5,000 on the Darlington property, and therefore, in effect, the offer of McKeithan was $30,000, and not $25,000. This would have given Rogers a concession of $10,000, or $5,000 more than he was entitled to by his own understanding of the agreement. Yet Rogers' attempt is to obtain a concession of $15,000, on the ground that his tender of the $25,000, being the amount offered by McKeithan for a part of the property, should, under the wording of the option, cover the whole of the property therein mentioned, and entitle Rogers, not only to that property that McKeithan was to get, but to the $5,000 mortgage. This the court finds that he is not entitled to; that the true option was to allow him to acquire the property, including his $5,000 mortgage, only by an offer and a payment equivalent to the bona fide offer received by Hinckle. This he has failed to comply with.

The plaintiff, however, submits to the court that, if the court reforms the agreement, he should be allowed, on compliance with the agreement in accordance with the construction of the contract now made by the court, to require specific performance on the part of Hinckle; that is to say, that if Rogers will now pay the sum of $25,000, with interest from the date of tender, say the 16th day of December, 1916, and will recognize as valid and outstanding the mortgage upon his property in Darlington, and leave Hinckle free to foreclose or enforce it, he should have specific performance of the contract. The defendant insists that Rogers is not entitled at this stage to any such decree; that he is not entitled to a specific performance until he should have tendered the amount, the full payment under the option; and that, having been notified of the offer made by McKeithan and having failed to tender an amount equal to it, he has lost his right to a specific performance. The agreement or option in the present case and under all the circumstances is not one in which time would so appear to be of the essence of the contract as to defeat the right of the court to relieve against a forfeiture. It does not appear that the rights of any third parties have intervened, such as would make it inequitable to allow Rogers the opportunity now to comply with his option. One of the earliest acts of the Court of Chancery, in a case of mortgage by way of conditional sale, was to refuse to allow the forfeiture, but to decree a time for redemption, under what was called the equity of redemption. This present option is not dissimilar, and if the court could relieve upon the positive terms of a sale under which the title became absolute in the mortgagee upon the failure of the mortgagors to perform, it can certainly relieve under the circumstances of the present agreement.

It is to be borne in mind that this agreement is not a mere option, but an express understanding for valuable consideration, and that Rogers has already executed his entire part of it. He was under no obligation to execute the conveyance of the land to Hinckle, thus yielding up his equity of redemption; yet he did so. He conveyed to Hinckle his title to the land, which would, if he had retained, have insured him an opportunity to exercise his equity of redemption under any proceedings for foreclosure. He also accepted a lease of the property, which is expressly made one of the considerations for the option. This lease seems to have secured under the name of rent what in effect paid the interest on the price of $35,000. And, furthermore, the defendant himself does not stand on the option as written, for it is necessary to reform the option also to protect the defendant Hinckle. If the option was in force as it read for $3,500 only, and not $35,000, the tender made by Rogers would have been ample to cover all his obligations. It is not a case in which counter equities should be overlooked. Both plaintiff and defendant have come into court, setting up and seeking affirmative equitable relief. The maxim. "He who seeks equity must do equity," is as appropriate to the conduct of the defendant as that of the complainant. Brown v. Lake Superior Iron Co., 134 U. S. 535, 10 Sup. Ct. 604, 33 L. Ed. 1021. Rogers has already parted with all the consideration he was to give for the option. The defendant, having received it, is not discharged on his part by the mere signing of the option; he must perform its stipulations as required by its terms in the same conformity to equity as is required of the complainant.

It is therefore ordered, adjudged, and decreed that the plaintiff, H. K. Rogers, do, within 30 days from the date of this decree, pay to the defendant, E. E. Hinckle, trustee, the sum of $25,000, with interest thereon at the rate of 7 per cent. per annum from the 16th day of December, 1916, together with the sum of $5,350, with interest thereon at the rate of 7 per cent. from the 8th day of February, 1916, together with the sum of $250, which is allowed by this court as a reasonable counsel fee to be paid under the terms of the mortgage for the recovery of the said sum of $5,350, with interest in these proceedings, and that upon the payment of all the same the defendant, E. E. Hinckle, as trustee, do execute and deliver contemporaneously with such payment to the plaintiff, H. K. Rogers, a deed of conveyance in good and sufficient form of all the three tracts of land in Florence and Darlington counties described in the agreement or option contract of the 7th of January, 1916, free of incumbrances, with all the other property that day leased to said H. K.

Rogers, which shall be on hand at the time of compliance by the said H. K. Rogers with this decree, and do at the same time deliver up to the said H. K. Rogers his bond and mortgage to J. F. Muldrow, dated the 16th day of December, 1912, to secure the sum of $5,000, on the tract of land in Darlington county containing 143 acres, duly satisfied in form to have such satisfaction duly recorded on the record of the said mortgage.

It is further ordered and decreed that on the failure of the plaintiff to comply with this decree by the payment of the sums above mentioned within the time limited he shall be debarred of any further right, title, or privilege in and to the lands and premises described in the option or agreement dated January 7, 1916, and of any right, title, or privilege under said agreement, and that the defendant may apply to this court for an order of foreclosure and sale of the 143 acres in Darlington county, or for such other decree to enable him to foreclose and realize thereon as may be meet and proper. It is further ordered that the cost of these proceedings to the date of this decree, including the entry thereof, shall be divided; each party paying his own costs where the same are severable, and one-half where the costs are incurred in the cause generally.

W. F. Stevenson, of Cheraw, S. C., for appellant and cross-appellee.

Henry E. Davis, of Florence, S. C. (Willcox & Willcox, of Florence, S. C., on the brief), for appellee and cross-appellant.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

PER CURIAM. We are satisfied with the disposition of this case by the court below, and find no occasion to add anything to the views expressed in the opinion of the learned District Judge.

The decree is accordingly affirmed.

REID v. SHAFFER.

(Circuit Court of Appeals, Sixth Circuit. March 6, 1918.)

No. 2872.

1. CANCELLATION OF INSTRUMENTS ⟸58—INCIDENTAL RELIEF.
   Equity having jurisdiction of a suit to cancel a contract between complainant and defendant, giving defendant a percentage of the profits which were expected to result from complainant's acquisition of a leasehold, in which transaction defendant was interested, on the ground that defendant concealed a profit received from the owner, may, for the purpose of doing complete justice between the parties, decree a recovery of the sum concealed by defendant.
2. PRINCIPAL AND AGENT ⟸48—DUTY OF AGENT.
   Absolute faithfulness and loyalty are required of an agent in whom confidence is placed, and personal benefit to him secretly obtained is incompatible with relation to agency.
3. FRAUD ⟸11(2)—MISREPRESENTATIONS—OPINION.
   Where defendant, when he interested complainant in the acquisition of a leasehold, stated that it could be obtained for $60,000, but when the negotiations were actually entered into the owner demanded $65,000, defendant's statements concerning the $60,000 were a mere expression of opinion only.
4. PARTNERSHIP ⟸5—RELATION—INTENTION.
   The relation of the parties is determined by their intention, and mere participation in profits will not alone establish a partnership.

5. CONTRACTS ⊂=147(3)—CONSTRUCTION.
In construing a contract, the intent of the parties is to be gathered from the entire contract and all the circumstances of the case.

6. JOINT ADVENTURES ⊂=4(1)—GOOD FAITH—DUTY OF ASSOCIATES.
Where parties engage in a common enterprise by way of joint adventure, each has the right to demand and expect from his associates good faith in all that relates to their common interests.

7. JOINT ADVENTURES ⊂=1, 4(1)—WHAT ARE—CONCEALMENT OF PROFITS.
Defendant interested complainant in the acquisition of a leasehold, stating that it could be bought for $60,000. The owner, who was selling the lease, to buy out his partners in the dry goods business, demanded $65,000. Complainant, after an independent investigation, agreed to pay the amount demanded, and he and defendant entered into a contract providing that for compensation for his services defendant should receive a certain percentage of the expected profits of the transaction. When the transaction was closed the owner was able to buy out his associates for $60,000, instead of $65,000, as he expected, and on defendant's demand the owner paid him the extra $5,000, which profit defendant concealed. *Held*, that the parties, regardless of the form of the contract, were joint adventurers, there being no sharing in the losses, so as to make them partners, and, while defendant was bound to exercise good faith towards complainant and to account for the profits, his concealment of the profit under the circumstances, as it was unexpected, should not work a forfeiture of his rights in the whole enterprise.

8. JOINT ADVENTURES ⊂=5(1)—ACTIONS BETWEEN ASSOCIATES—REMEDY.
While assumpsit is the proper remedy for the recovery of a liquidated sum withheld by one joint adventurer from his associates in the transaction, recourse may be had to equity, where the amount is unliquidated and there is also a prayer for cancellation of the written contract between the parties relating to the transaction.

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

Suit by Charles B. Shaffer against George F. W. Reid. From a decree for complainant, defendant appeals. Reversed, with directions.

R. M. Brownson, of Detroit, Mich. (Alex. J. G. Groesbeck, of Detroit, Mich., of counsel), for appellant.

Hal. H. Smith and Leo M. Butzel, both of Detroit, Mich., and Henry A. Gardner, of Chicago, Ill., for appellee.

Before WARRINGTON and DENISON, Circuit Judges, and HOLLISTER, District Judge.

HOLLISTER, District Judge. Burns-Hickey Company, a corporation engaged at Detroit in the dry goods business, Burns and Hickey each owning half of the common stock, and Navin and Mullin owning the preferred stock, had a lease from the Ferguson estate on the premises in Detroit in which it carried on its business, running for 25 years from August 17, 1912, at $25,000 a year. Burns, the president, and Hickey disagreed and the stockholders authorized, and caused to be advertised, a sale of the assets, including the lease.

Reid, the appellant, for many years connected with Bradstreet's Mercantile Agency and at the time and for a number of years their representative at Detroit, knew Burns and of his business troubles and

of the intended sale. Burns had several offers for the lease, one at $75,000, one at $80,000, and one at $100,000, which apparently failed only because of technical objections raised by the prospective purchaser's lawyer. The lease was of great value, the property being situated in that part of Detroit which at that time commanded large rentals constantly and rapidly increasing in amount.

Shaffer, the appellee, was a capitalist of Chicago, having apparently much ready money, with whom Reid had become acquainted through an investment of Shaffer's in Detroit. Burns wished to get rid of the other stockholders and to continue the business himself. He had practically no money, but he devised a plan for the sale of the lease, which contemplated a payment of sufficient cash by the purchaser to buy out the other stockholders, and, after the assignment of the lease to the purchaser, a re-lease from him for the balance of its term. Hickey offered to sell for $20,000. The sale of the assets was proceeding at a loss, and it is probable Burns at first thought that each of the interests of Navin and Mullin could be had at the same figure, for Navin told Burns he would take what the others did. Burns did not then know what Mullin would take.

Reid at first determined to buy the lease himself. Not having the ready money, he tried to borrow it and tried to interest others. Failing, he thought of Shaffer, and got in touch with him through Shaffer's brother, Harry, who was connected with Shaffer's Detroit business. Shaffer and his attorney, Gardner, came from Chicago to Detroit, and on March 12, 1913, paid $65,000 to Burns. Shaffer took an assignment of the Burns-Hickey lease and executed on that day a new lease to Burns-Hickey Company and Burns of the same premises at a rental of $35,000 a year for the first 12 years and for the remaining 12 years, 5 months and 16 days of the lease $40,000 a year. On the same day, Shaffer and Reid entered into a contract wherein it was recited:

"Whereas, George F. W. Reid, acting for the said Charles B. Shaffer, has carried on all the negotiations looking to the purchase of the lease of said property, and the re-leasing of the same; and whereas, the parties hereto are desirous of settling the compensation to be paid by the said Charles B. Shaffer to the said George F. W. Reid for his services and arranging for the payment of the same"

—and in consideration of these witnessed, among other things, that Reid was to have $2,000 per year net after Shaffer had received from rentals $65,000, with 6 per cent. interest, and agreed "to accept said payment as hereinbefore stipulated in full payment for his commissions and services rendered to" Shaffer. It was provided further that, in case the premises should be vacated, Reid should be given "the first opportunity of negotiating a lease of said premises for thirty-five thousand ($35,000) dollars or better"; that in case the premises should be leased for less than $35,000 then his payment under the contract should be prorated, and in default by Burns-Hickey Company in payment of rent the $2,000 would be suspended until the premises were leased to other parties.

On the same day Burns paid his associates $20,000 each, totaling

$60,000, and on the next day, March 13, he gave two checks to Reid, each for $2,500, one dated March 13 and the other March 17. The payee was not named. Reid put in his own name, indorsed the checks, and drew the money in cash from the bank on which they were drawn. He had an account at that bank. In a later transaction, Shaffer found out that Reid had received these checks. Thereupon he brought this suit against Reid to recover $5,000 and for a cancellation of his contract with Reid, on the alleged ground that Reid was his confidential agent in the transaction, upon whom, and upon whose representation that the cash required was no less than $65,000, he relied—praying that Reid account to him for the $5,000, that the contract be canceled, and Reid enjoined from prosecuting any suit on it.

The trial court found the action to have been properly brought in equity, that Reid deceived Shaffer as to the amount of cash necessary for the deal, had acted in the dual capacity of confidential agent for both Shaffer and Burns in the same transaction, and, while so acting, improperly received compensation from each for his services. The prayer was granted. All of the errors assigned either cover these two findings, or attack the findings and final decree on the ground that they are contrary to the evidence and without sufficient evidence to support them.

[1] We think the equity jurisdiction of the court was properly invoked. The action was to cancel a written contract continuing in nature, which, by its terms, gave Reid certain control in obtaining new tenants in the event the property became vacant. Shaffer was not required to await Reid's pleasure in bringing a suit, and his remedy was fuller, more complete, and more adequate by an action in equity to cancel the contract, and, thus obtaining jurisdiction, to obtain, if justly he should have it, a decree in one suit canceling the contract, and incidentally, in doing complete justice between the parties, to obtain a recovery of the money. Simpkins' Federal Equity Suit (2d Ed.) pp. 22, 23, 24; Bank of Kentucky v. Stone (C. C.) 88 Fed. 383, 391; Schmidt v. West (C. C.) 104 Fed. 272, 274; Mutual Life Ins. Co. v. Pearson (C. C.) 114 Fed. 395, 397; 2 Story's Eq. Jur. (13th Ed.) art. 700; Boyce v. Grundy, 3 Pet. *210, *215, 7 L. Ed. 655; Sullivan v. Railroad Co., 94 U. S. 806, 811, 24 L. Ed. 324.

[2] On the facts so stated, and in view of the rule of agency that when one authorizes another to act for him and in his stead, relying upon him and on his judgment and discretion, absolute faithfulness and loyalty are required of him in whom the confidence is placed, and personal benefit to him secretly obtained is incompatible with the relation between the parties (Mechem on Agency [5th Ed.] §§ 178, 1588, 1589, 1590), no attack on the decree could successfully be made. But the facts stated are but the skeleton of the case, the complete structure of which only appears when all the facts, circumstances, and necessary inferences are disclosed.

[3-7] On Reid's initiative, through Harry Shaffer, he and Shaffer met and discussed the purchase of the lease. In that conversation there is no doubt that Reid, in speaking of the amount of cash involved, said something about $60,000, and indicated his plan that he and

Shaffer should share the profits equally. Shortly thereafter Reid, on March 4, 1913, wrote a letter to Shaffer at Chicago, in which he set forth the advantages of Burns' lease, and Burns' intention to buy out the interests of the other stockholders from the money received for the lease. The letter proceeds:

"The net cost of the lease to you is $65,000, and he will in turn pay you $32,500 per annum for the first ten years, plus 5 per cent., and for the next fifteen years he will pay you an annual rental of $35,000, and will in turn assign to you the subleases as they are made and this will be net to you. The way I figure is this: That it will take between eight and nine years to pay you back the entire $65,000, together with interest at 5 per cent; after that time the excess over the $25,000 will be divided equally."

He said men of ability who knew the conditions in Detroit were all of opinion—

"that this is a very excellent proposition so far as we are concerned and cannot see any chance whatever for any loss. * * * I am convinced that this is a good proposition, and I only wish I, personally, were in possession of this amount of money, as I would be very glad to invest my own funds in same if I had it. * * * You can depend upon me to protect your interests at all times, and will say that this is right in my line, for the reason that I own a number of pieces of real estate in Detroit and have made a very close study of the conditions here, and in this proposition I know that I am right, and that there is no chance whatever for you to lose, but, on the contrary, will make a large sum of money."

Shaffer's Chicago lawyer, Gardner, after reading the letter, was requested by Shaffer to go to Detroit and determine whether the proposition was a good one in his opinion. Gardner came to Detroit and met a number of important persons acquainted with real estate values. He talked with Reid, who took him to see Burns. Gardner testified:

"Burns said it was a very good deal; that he had an offer at that time of $75,000 cash for his leasehold, but that he was anxious to go on with the business, and he would rather sell his leasehold for $65,000 and get a lease back than sell it for $75,000."

Gardner reported to Shaffer favorably. After hearing Gardner's report, Shaffer, seeing the opportunity for greater profit, wrote Reid (March 7) that his attorney had submitted his report and that after thinking the matter over he determined to make the following offer—

"which you may submit to Burns: I will pay $65,000 cash for an assignment by the present lessees of the lease from the Ferguson estate. I will then execute a sublease to Burns on the following terms: $35,000 per year for 12½ years, and $40,000 per year for the balance of the term. * * * If this proposition is satisfactory, send me a copy of the original lease at once. My attorney will prepare a lease from me to Burns and will submit it to him for approval. * * * Of course, there may be certain minor details to consider; but we can settle them when the papers are prepared."

It thus appears that Reid's proposition to Shaffer was not accepted, and Shaffer's counter proposition not only contained a material increase in the rental ($50,000) but left the way open for him to obtain, as he did obtain when the transaction was carried through, 6 per cent. on his $65,000 before anything was paid to Reid, instead of 5 per cent.

Burns objected to the increased rental. Reid wrote to Shaffer March 10, 1913:

"When I proposed the increase in rental to Mr. Burns, he at first felt that we were pressing him pretty hard, but after explaining it to him, and talking the matter over with him, I proved to him that the proposition was a fair one, inasmuch as, at the end of 12 years, he would share in the benefits of the increased value of the property and could well afford to pay that rental. He finally consented. It is my judgment, however, that after a conference between all of us on Wednesday that every detail can be arranged satisfactorily to all concerned."

Burns accepted, but not until after his friend Clark of the First National Bank advised him to do so. Shaffer's proposition of $65,000 in cash and larger rentals was made with absolutely no reliance upon Reid, or anything he had said. Even if it were true that Reid had at first said positively that the cash involved was $60,000, that representation was not the inducing cause of Shaffer's entering into the transaction. However, after full independent investigation, Shaffer fixed the figure at $65,000 himself, as the cash he was willing to pay. In fact, Reid did not know, and could not have known, that Mullin would take $20,000 for his stock. Burns did not know, nor could he have known, that fact, for Mullin was demanding $25,000, and was not willing to take less until the very day the transaction was closed. Burns then brought him to terms by telling him that, unless he took $20,000, the whole deal would fall through.

The record does not disclose when, if at all, Reid learned of Mullin's demand. Notwithstanding Shaffer's testimony as to the positive quality of Reid's statement (denied by Reid), Harry Shaffer's testimony, on cross-examination, that Reid said he "thought" the stockholders would sell for $60,000, must be taken as true, because, if for no other reason, it alone comports with reason and probability. That Shaffer honestly thought the original figure was $60,000 is shown by his letter of March 5 to his brother, Harry, the day after receiving Reid's letter. He says, among other things:

"It shows that I am obligating myself, not only to pay the $65,000, but, in addition, $25,000 a year for 25 years, which changes this thing very materially. As I understood it from the conversation in Mr. Reid's office, when I put up this $60,000 then, but $65,000 now, that was the extent of my liabilities. * * * However, rather than to disappoint you and Mr. Reid, if, on examination by my lawyer, he finds it a fairly safe investment, I will put up the money on this condition: After I get my money back, which will take about 8½ years, there will be an income of $10,000 a year. I will take $6,000 of this, and you and Mr. Reid split the other $4,000. You dug up the dough; consequently you are entitled to half of the commission with Mr. Reid. That would be my way of looking at it, and I think Mr. Reid will be perfectly agreeable that you should have it."

Whatever was said about the $60,000 was nothing more, and could have been nothing more, than a tentative suggestion of the probable amount of cash the transaction would require. It was the expression of an opinion only. Southern Development Co. v. Silva, 125 U. S. 247, 256, 8 Sup. Ct. 881, 31 L. Ed. 678. Reid took Burns' proposition of $65,000 and certain rentals to Shaffer. Burns made the price, not Reid. Shaffer was in Chicago; Burns in Detroit. Shaffer sent back

a counter proposition for submission to Burns. The terms were made by Shaffer, not Reid. Reid gave his opinion to Shaffer on the value of Burns' offer; but it was not that which influenced Shaffer. He relied on Gardner. Reid tried to bring Burns up to Shaffer's offer, but Burns did not rely on him in accepting it. He relied on Clark. We are unable to see how, under these circumstances, he was the confidential agent of either Shaffer or Burns, on whose judgment and discretion they or either of them relied.

But it is said by Shaffer that Reid told him $65,000 was the least Burns "could buy his partners out for." Just when and where that was said, if it was said, does not clearly appear. But, assuming that Reid said so and that it is material, the facts show the statement to be substantially true. Burns testified positively and repeatedly that he never offered the lease to Reid, or anybody else, at less than $65,000. Why Burns put this figure at $65,000 is easy to understand. Hickey would sell for $20,000; Navin had said he would take what the others took; but Mullin was insisting on $25,000. This makes $65,000. In one aspect, if Navin would require what Mullin was willing to take, $70,000 would be needed. It may be that Burns' necessities were such, including his desire to get rid of the other stockholders and run the business himself, that, as he says, he might have taken less than $65,000. He could not say. That he might have done so is mere speculation. This we regard as unimportant, for the price he fixed was his own, never deviated from, and was a figure prudence and apparent necessity required. Shaffer knew what the money was needed for, and neither Burns nor Reid knew, nor could have known, but that the amount necessary was at least $65,000.

We are unable to see anything in the relation between Reid and Shaffer, under the circumstances disclosed, which imposed a duty on Reid to Shaffer to try to get Burns to throw off a part of the cash the stockholders were demanding. If it is suggested that Reid is estopped to deny an agency by the offer in his letter to look after Shaffer's interest and by the language of the contract, it may be said that the offer was declined by Shaffer, and in any event was made after the cash price was fixed, and really had to do with matters subsequent to the purchase. What relation, in legal contemplation, is established in the infinite variety of men's dealings with each other, is sometimes a matter of exceedingly careful discrimination. Reid's lawyer, McKay, with whom Reid and Gardner consulted briefly, dictated the contract in their presence; but it is not probable that the use of the words "negotiations" and "commission" and "compensation" were intended, through any technical meaning they bear, to give a character to the contract different from the relation the testimony and the contract show the parties bore to each other.

The relation Reid sustained to Shaffer was quite different from agency within the meaning of the rule. From the beginning Reid insistently and repeatedly demanded of Shaffer one-half of the profits after Shaffer got his money back and interest. The profits were all rentals over the $25,000 a year Shaffer must pay as assignee of the original lease. Shaffer and Harry understood Reid's claim perfectly.

Harry, who had introduced Reid to his brother, and who was accustomed to receive 25 per cent. of the profits of deals in which he introduced his brother as the financial man, was demanding one-half of Reid's share of the profits. The matter was never settled until the day the transaction was closed, and afterwards, as nearly as may be gathered from the record, Shaffer held the whip hand and required Reid to agree to Harry's participation with Reid in equal shares. Reid was compelled to come to Shaffer's terms. These were based on rentals fixed by Burns in the original proposition brought to Shaffer. Those terms showed a profit, figuring not too exactly, of about $10,000 a year. Even this Shaffer was not willing, as the contract shows, to divide on the percentage of 50 per cent. to himself and 25 per cent. each to Reid and Harry. But the division he was willing to make, and did make, was 20 per cent. for each of the others. The $2,000 to Reid in the contract is that 20 per cent.

It will be noticed, however, that at the increased rentals required by Shaffer, and obtained by him, the annual profit would be something between $12,000 and $13,000, resulting in Shaffer's obtaining considerably over 60 per cent. and Reid and Harry considerably less than 20 per cent. But the circumstances and the contract itself show that the basis on which Shaffer and Reid were dealing was a division of the profits. It is true Reid's share was a fixed sum, but it was nevertheless a share in the profits, because he had not dealt with Shaffer on any other basis during the whole transaction, and the contract itself shows that if the rate of rental were reduced to less than $35,000 Reid must suffer proportional abatement, and if Shaffer's lessee defaulted in the rent Reid would get nothing.

Reid was not Shaffer's agent, nor was he his partner. The relation of the parties to each other is determined by their intention. Berthold v. Goldsmith, 24 How. 536, 542, 16 L. Ed. 762; Beecher v. Bush, 45 Mich. 188, 204, 7 N. W. 785, 40 Am. Rep. 465. It was said by Mr. Justice Harlan in London Assurance Co. v. Drennen, 116 U. S. 461, 472, 6 Sup. Ct. 442, 444 (29 L. Ed. 688):

"Mere participation in profits would give no such interest contrary to the real intention of the parties. Persons cannot be made to assume the relation of partners, as between themselves, when their purpose is that no [such] partnership shall exist. There is no reason why they may not enter into an agreement whereby one of them shall participate in the profits arising from the management of particular property without his becoming a partner with the others, or without his acquiring an interest in the property itself, so as to effect a change of title."

"The real test of partnership," says Judge Ward, "is whether the parties are jointly interested as principals and may bind each other by their acts or engagements within the scope of the enterprise." Keith v. Kellermann (C. C.) 169 Fed. 196, 199.

It is immaterial that the words "commission," "compensation," "negotiations," etc., are used, for the intention of the parties is to be gathered from the entire contract and all the circumstances of the case. It was said by Judge Cooley in Beecher v. Bush, 45 Mich. 188, 194, 7 N. W. 785, 40 Am. Rep. 465, citing Chancellor Kent in Post v. Kimberly, 9 Johns. (N. Y.) 470, 504:

"The law must declare what is the legal import of their agreements, and names go for nothing when the substance of the arrangement shows them to be inapplicable."

The circumstances will not stand the tests which determine agency or the partnership relation, and yet Reid's relation to Shaffer required good faith. Reid may be described as a "quasi partner," responsible to Shaffer for losses sustained by misconduct or misapplication of the funds, who owes with respect thereto the same duties and obligations as would exist if the parties had been partners in fact and law. Marston v. Gould, 69 N. Y. 220, 225. The enterprise was a joint adventure. The subject is dealt with at some length in Jackson v. Hooper, 76 N. J. Eq. 185, 197, 74 Atl. 130 (27 L. R. A. [N. S.] 658), wherein the headnote aptly states the opinion of the court:

"A 'joint adventure' may exist where persons embark in an undertaking without entering on the prosecution of the business as partners strictly, but engage in a common enterprise for their mutual benefit; they each have the right to demand and expect from their associates good faith in all that relates to their common interests."

Shaffer claims the $5,000 as his own, since it was a part of his $65,000; but it was not his. The money belonged to Burns, who made it when he forced Navin to abate his price in that amount, and we see no reason, as between them, why Burns should not have given it to Reid if he wished to do so. But, as between Reid and Shaffer, good faith required that Reid should inform Shaffer of the receipt of the money. The understanding for a division of profits necessarily meant all profits. The division on the basis of profits required that both parties should know what all the profits were.

It would not be useful to discuss at length the respective theories of Burns and Reid upon which the payment was made. Some of their explanations have elements of plausibility, and some are altogether futile; but it is quite clear that, for some reason, Reid did not wish it known he had received the money. On our theory of the case the reason was that Reid appreciated his relation to Shaffer, and was willing to, and did, secretly appropriate an unexpected profit which belonged to both parties. Equity requires that Reid account to Shaffer for that money. On such accounting, a part of it would belong to Reid; but just what part, under the terms of the contract, it would be impossible now to determine. The money should be paid to Shaffer. Such payment will accelerate the time when Reid's receipts are to begin, and thereby lengthen the time during which he will participate; but that participation will include the $5,000 in the ratio that $2,000 a year bears to the total profit of that year.

Since what Reid was to get was not "commissions," as upon an agency, or "compensation" for services rendered, whatever the contract says, and the transaction was a joint adventure on the basis of profits, we know no rule which would require a forfeiture by Reid of all the fruits of the joint enterprise. As it was not contemplated that any part of the profits should be paid to Reid until a time still far in the future, we think the just disposition of the case requires the present payment to Shaffer of the $5,000 and interest, but that the

contract should remain in full force. Under all the circumstances, neither party can justly complain of this conclusion.

[8] We are aware that in some cases of joint adventure assumpsit has been regarded as the proper remedy for the recovery of a liquidated sum withheld from the other by a joint adventurer. Galbreath v. Moore, 2 Watts (Pa.) 86; Hurley v. Walton, 63 Ill. 260. Yet the impossibility of fixing an exact sum which could be recovered at law, together with the prayer for a cancellation of the contract, and the other circumstances hereinbefore stated, leave no doubt of the jurisdiction of the court in equity, notwithstanding the misconception of the parties of their relative rights, as shown in the bill and answer. The bill specifically prays "for such other and further relief as the equities of the case may require." A just balancing of the equities requires the present payment of the $5,000 and interest to Shaffer, and the retention by Reid of his share of all the profits, as hereinbefore set forth.

It follows, from what has been said, that the decree below should be reversed, in so far as it directs a cancellation of the contract and adjudges Shaffer to be entitled to the $5,000 and interest from Reid as his agent, or is otherwise inconsistent with this opinion. The District Court is directed to enter a decree in accordance with the views herein expressed. The costs of the appeal will be divided equally between the parties.

EDWARDS v. BODKIN.

(Circuit Court of Appeals, Ninth Circuit. March 8, 1918.)

No. 3046.

1. APPEAL AND ERROR ⇐773(3)—DISMISSAL—BRIEFS.
   Where plaintiff prosecuted an appeal in forma pauperis under permission of an order of the Circuit Court of Appeals relaxing rules 23 and 24 (150 Fed. cxiv, cxv, 79 C. C. A. cxiv, cxv), the appeal cannot be dismissed because no printed brief containing a concise abstract or statement of the case had been filed or served as required by such rules.

2. APPEAL AND ERROR ⇐724(1)—SPECIFICATIONS OF ERROR—EQUITY.
   While in an equity case the specifications of error should state as particularly as may be in what respect the decree is alleged to be erroneous, the rule should be relaxed in favor of plaintiff, prosecuting an appeal in personam pursuant to an order allowing him to appeal in forma pauperis.

3. APPEAL AND ERROR ⇐397—NOTICE OF APPEAL—CITATION.
   Where an appeal was allowed in open court, and was perfected during the term at which the appeal was rendered, there was sufficient notice of appeal without any citation.

4. EQUITY ⇐363—PLEADING—MOTION TO DISMISS.
   A motion to dismiss a bill of complaint admits the truth of its material allegations.

5. PUBLIC LANDS ⇐103(1)—CONTESTS—INITIATIVE.
   A notice of contest against an entryman on public lands, in support of which the contestant made oath that he did not know and had no means of knowing the facts, is insufficient to initiate a contest.

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6. PUBLIC LANDS ⟸106(2)—LAND DEPARTMENT—DECISION.
While a decision of the Land Department that an entry was abandoned is conclusive as to the facts, it may be inquired into by the courts as a question of law.

7. PUBLIC LANDS ⟸40—ENTRIES—ABANDONMENT.
The failure of an entryman on arid lands withdrawn under Act June 17, 1902, c. 1093, § 3, 32 Stat. 388 (Comp. St. 1916, § 4702), as susceptible of irrigation, to continuously reside upon or cultivate the land, which, though later withdrawn for irrigation works, was finally released, during the time when no reclamation project had been devised or installed, cannot be deemed an abandonment; Act June 27, 1906, c. 3559, § 5, 34 Stat. 520 (Comp. St. 1916, § 4724), expressly saving such cases, and the entryman having prepared the land for cultivation and established a residence thereon.

8. PUBLIC LANDS ⟸96—REGULATIONS—AUTHORITY OF SECRETARY OF INTERIOR.
While Reclamation Act, § 10, authorizes the Secretary of the Interior to make such regulations as may be necessary and proper to carry the act into full force and effect, he is not authorized to amend, modify, or change Act May 14, 1880, c. 89, § 2, 21 Stat. 141 (Comp. St. 1916, § 4537), fixing the rights of a successful contestant, who has secured the cancellation of any pre-emption, homestead, or timber culture entry.

9. PUBLIC LANDS ⟸102—REGULATIONS—AUTHORITY OF SECRETARY OF INTERIOR.
Any right under regulation 7 of June 6, 1905, issued by the Secretary of the Interior under Reclamation Act June 17, 1902, § 10, which a successful contestant of a homestead entry on land withdrawn as susceptible of irrigation might have had, was lost by the promulgation of regulation 6 of January 19, 1909, declaring that, where a contest has been allowed prior to a first form withdrawal, the withdrawal, if made before the termination of the contest or entry of the successful contestant, will terminate all rights acquired by such contest, where the land, before termination of the contest or entry by contestant, was withdrawn under the first form for irrigation works, and the contestant had only a preference.

10. PUBLIC LANDS ⟸46—SOLDIERS' SCRIP—RIGHTS.
Scrip issued under the law and regulations relating to soldiers' additional homestead rights is subject to the regulations of the Land Department, and also to the equitable rule that an actual settler is to be preferred over claimants who seek to assert scrip rights to the public domain.

11. PUBLIC LANDS ⟸103(1)—PROTESTS—HEARING.
Where a contest against an actual entryman under the homestead laws was sustained, the entryman's protest against the contestant's lieu land selection should not be denied, on the ground that he had not served the contestant with a copy of the appeal, for, while the decision of the Land Department on questions of fact is final, it is based on the presupposition of a hearing in good faith.

Appeal from the District Court of the United States for the Southern Division of the Southern District of California.

Bill of complaint by William B. Edwards against Patrick H. Bodkin, to have defendant declared a trustee holding title to certain lands for the benefit of plaintiff. From a decree dismissing the bill, without leave to amend, plaintiff appeals. Reversed, with directions.

Wm. B. Edwards, of Redlands, Cal., in pro. per.

Duke Stone, of Los Angeles, Cal., for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. This is an appeal from a decree dismissing a bill of complaint without leave to amend. We shall designate the parties here as plaintiff and defendant, as they were in the court below.

[1, 2] 1. The defendant has interposed a motion to dismiss the appeal on the ground that no printed brief has been filed or served containing a concise abstract or statement of the case, presenting succinctly the questions involved in the manner in which they are raised; that no specification of errors relied upon is stated, and no citation has been issued and served upon the defendant as required by the rules of this court.

The plaintiff is prosecuting this appeal in forma pauperis, under the permission of an order of this court relaxing rules 23 and 24 (150 Fed. cxiv, cxv, 79 C. C. A. cxiv, cxv) requiring the printing of the transcript of record and briefs. In an equity case the rule requires that the specifications shall state as particularly as may be in what respect the decree is alleged to be erroneous. We find no special difficulty in understanding the questions involved in the controversy, and we think the plaintiff, who is prosecuting this appeal in personam, has stated the case as well as he knows how, and under the circumstances the rule in this respect should also be relaxed in his favor.

[3] The appeal appears to have been allowed in open court, and it was perfected during the term at which the decree was rendered. This was a sufficient notice of the appeal. Jacobs v. George, 150 U. S. 415, 14 Sup. Ct. 159, 37 L. Ed. 1127; Taylor v. Leesnitzer, 220 U. S. 91, 93, 31 Sup. Ct. 371, 55 L. Ed. 382.

[4] 2. The action is to have the defendant, to whom a patent has been issued by the Land Department of the government for a certain described tract of land originally within a reclamation reservation declared a trustee holding the title to such land for the benefit of the plaintiff. The motion admitted the truth of the material allegations of the complaint, and we must now read them as established facts, and determine whether or not they state a cause of action calling for equitable relief. Many of the allegations contained in the bill are irrelevant and immaterial to the questions to be determined, and will be so treated in our final conclusions.

The complaint is not a model of legal composition, but is an example of the difficulty to which judicial inquiry is sometimes subjected in getting at the real merits of a case, where the relevant and material facts are not fully or succinctly and plainly stated. In this respect the complaint in this case is exceptionally defective, and requires a restatement of the facts in an orderly sequence and with due regard to their logical and legal import.

The act of June 17, 1902 (32 Stat. 388, c. 1093 [Comp. St. 1916, §§ 4700–4708]), authorized the Secretary of the Interior to withdraw certain public lands of an arid or semiarid character from entry for irrigation purposes. The withdrawals provided in section 3 of the act were to embrace two distinct classes: First, public land required for any irrigation works contemplated under the provisions of the

act; second, public lands believed to be susceptible of irrigation from said works.

The first class has been designated by the Land Department as "withdrawals under the first form," and the second class as "withdrawals under the second form." In the withdrawal of lands under the first form there was no exception. All the lands described were withdrawn from public entry. In the withdrawal of lands under the second form there was an exception in favor of homesteads; that is to say, such lands were not withdrawn from public entry under the homestead laws, but were continued to be open to such entry, "subject to all the provisions, limitations, charges, terms and conditions" of the act.

On July 17, 1902, the Secretary of the Interior withdrew certain public lands in Southern California under the provisions of the act of June 17, 1902. The withdrawal was of the class of lands designated as "second form"; that is to say, lands believed to be susceptible of irrigation under the reclamation system provided by the act. These lands continued to be open to homestead settlement and entry, notwithstanding their withdrawal, and included, among others, the N. E. ¼ of section 11, township 7 S., range 2 E., S. B. M.

On December 1, 1902, and within six months after the passage of the act, the plaintiff made entry of this tract of land under the homestead and reclamation laws of the United States. He was at the time qualified in every way to make and perfect such entry, and the land entered was then unappropriated public lands of the United States and subject to such entry. Thereafter plaintiff complied with all of the requirements of the homestead and reclamation laws, made final proof of such compliance before the United States land office for that land district, proved such compliance by two creditable witnesses, who made oath to all the items required by law to be made, paid all the fees required by law to be paid prior to receiving a patent for the land, published in due form notice to all persons having or claiming to have a better right to such land than the plaintiff, and required such persons to appear and exhibit such claim of right. No person appeared at the time and place and offered evidence of a better or of any right adverse to plaintiff; nor was notice ever given to plaintiff by the land office that the proof submitted was defective in any way as to the special or any of the conditions under which the entry was made. But the Land Department, without regard to the premises, refused to consider such proof and to issue a patent to plaintiff for the land described. After making the proof required, the plaintiff continued to reside upon the land, to cultivate and improve it in accordance with the purpose he had in making the entry, and kept his claim for a patent continually before the Land Department as a claim of legal right.

From a map attached to the complaint it appears that the land entered by the plaintiff as a homestead is about 5 miles due west from the Colorado river. Between this land and the river is a tract of land of about 4,000 acres, stretching along the west bank of the river, north and south, for a distance of 14 or 15 miles, and about 4

miles in width at a point between plaintiff's land and the river. This large tract of land is designated on the map as the "Blythe Rancho," and it is owned in private estate. From a point on the Colorado river where the northern boundary of the rancho touches the river runs a canal in a southerly and westerly direction, across the rancho and the public lands, terminating in public lands about a mile north of plaintiff's land. This canal is called the "Blythe Canal." When plaintiff entered his homestead, this canal only required opening and extending to reclaim all the public lands withdrawn for that purpose in that locality. The public lands immediately to the west of the lands of the Blythe Rancho susceptible of reclamation by irrigation comprise about 6,000 acres, but the water for their irrigation must be carried from the Colorado river across the private lands mentioned to reach the public lands. Within 30 days after plaintiff had entered his homestead he established his residence on the land, taking work stock and tools to the land, and improving, clearing, and preparing the land for cultivation; but plaintiff was not then able or prepared, or had occasion to believe he would be required, to reside upon and cultivate the land continuously until some form of reclamation had been devised and installed for use.

On September 12, 1903, the Secretary of the Interior withdrew a tract of land under the first form which included plaintiff's homestead entry. This withdrawal, under the act of June 7, 1902, excluded homestead entries, and provided that the Secretary of the Interior should restore to public entry any of the lands so withdrawn when in his judgment such lands were not required for the purposes of the act. The facts stated in the complaint indicate that nothing was done by the government in perfecting a system of irrigation for these lands under either the first or second form of withdrawal, but the lands were held as withdrawn for nearly nine years, and during that time left open for the work of a private corporation called the "Land & Water Company," which had succeeded to the ownership of the lands of the Blythe Rancho, and contemplated a system of irrigation for the private lands of the corporation and the adjoining public lands in which plaintiff's homestead entry was located. In this situation plaintiff purchased from the owners of the Blythe Canal the right to connect with that canal, and he dug a ditch over the government land to do so. Thereafter he cultivated and improved the land, never intending to abandon the same.

[5] On May 5, 1908, the defendant served a notice of contest upon the plaintiff, in which it was charged that the plaintiff had never established a residence upon the land, had made no improvements thereon, and that he had abandoned the same for more than six months. The defendant, in support of this contest, made oath that he did not know and had no means of knowing the facts. This was insufficient to initiate a contest. Schofield v. Cole, 1 Land Dec. 140. And at the hearing of the contest it was proven, and conceded without dispute, that plaintiff had established a residence upon the land in controversy, had made improvements thereon, and that any lack of cultivation or absence from the land was due to its character and its dependence upon a system of irrigation to be provided by the govern-

ment under the Reclamation Act or some other system; that, instead of abandoning the land, plaintiff was residing on, reclaiming, cultivating, and improving it when he was served with the notice of contest.

[6] With respect to the defendant's charge that the plaintiff had abandoned the entry, we may not inquire into this question as a question of fact, although we may believe it was erroneously determined, but we may inquire into it as a question of law. Stark v. Starr, 6 Wall. 402, 419, 18 L. Ed. 925; Silver v. Ladd, 7 Wall. 219, 228, 19 L. Ed. 138; Cornelius v. Kessel, 128 U. S. 456, 461, 9 Sup. Ct. 122, 32 L. Ed. 482; Johnson v. Towsley, 13 Wall. 72, 84, 20 L. Ed. 485; Moore v. Robbins, 96 U. S. 530, 535, 24 L. Ed. 848; Smelting Co. v. Kemp, 104 U. S. 636, 641, 26 L. Ed. 875; Steel v. Smelting Co., 106 U. S. 447, 450, 1 Sup. Ct. 389, 27 L. Ed. 226.

[7] In this aspect we find that under section 5 of the act of June 27, 1906 (34 Stat. 519, 520, c. 3559 [Comp. St. 1916, § 4724]), a charge of abandonment of an entry cannot be successfully maintained against an entryman whose failure to make improvements and reclaim the land entered by him was during a time when he was hindered, delayed, or prevented from making such improvements and from reclaiming the land by reason of the withdrawal of the land from public entry for irrigation contemplated by the Reclamation Act.

In Gustave Gilbertson, 38 Land Dec. 474 (1910), the Assistant Secretary of the Interior, referring to a withdrawal of lands under the Reclamation Act, and the extension of time provided for under the act of June 27, 1906, said:

"Irrigation projects of such extent are necessarily co-operative. If such events happen by act of the government, that continuance of co-operation of the original projectors is prevented; the case comes within the act of June 27, 1906, as a case of active interference by the United States, preventing success of a private co-operative project."

In John H. Haynes, 40 Land Dec. 291 (1911), the Assistant Secretary of the Interior, upon a rehearing upheld an entry that had been recommended for cancellation by the local land office, affirmed by the Commissioner of the General Land Office, and affirmed by the Department of the Interior; but upon rehearing the Assistant Secretary, referring to the requirements of the Reclamation Act added to the Homestead Act, said:

"These added requirements cannot be performed by the entryman, or even definitely known, until the project is completed. More than seven years after the date of entry may elapse before a reclamation project is completed, water available, and charges known. Until water is available, cultivation is impossible. Any earlier attempt to cultivate would necessarily result in total loss of seed and labor. It would be irrational and unreasonable to subject the entryman to such loss in merely pretentious compliance with form of performance known to be useless and hopeless of fruitful return."

We assume that the act of June 27, 1906, was overlooked, or its meaning misunderstood, when the officers of the Land Department held that the plaintiff had abandoned his homestead entry while he was in fact residing upon the land and holding it, pending a final determination of the Secretary of the Interior as to whether or not the land would be required for irrigation works under the first form

of withdrawal. This was clearly a mistake of law, and authorizes a review of the proceedings in a court of equity. We might stop here, but for the fact that it is contended on behalf of the defendant that his contest resulted in his securing an absolute preference right to the land under the provisions of the act of May 14, 1880 (21 Stat. 140, c. 89 [Comp. St. 1916, § 4536]), and that this preference right was also extended until the land was restored to public entry. But it appears that in the final proceedings for a patent the defendant abandoned this claim of a preference right to enter the land, substituted a lieu land selection, and obtained his patent upon that claim. To understand this feature of the case it is necessary to follow the proceedings to the end.

[8, 9] The act of May 14, 1880, provides, among other things, as follows:

"Sec. 2. In all cases where any person has contested, paid the land office fees, and procured the cancellation of any pre-emption, homestead, or timber culture entry, he shall be notified by the register of the land office of the district in which such land is situated of such cancellation, and shall be allowed thirty days from date of such notice to enter said lands."

On June 6, 1905, the Commissioner of the General Land Office, upon the approval of the Secretary of the Interior, issued instructions to the registers and receivers of the land office concerning the withdrawal of lands under the Reclamation Act (33 Land Dec. 607). In these instructions it was said:

"Seventh. When any entry for lands embraced within a withdrawal under the first form is canceled by reason of contest, or for any other reason, such lands become subject immediately to such withdrawal, and cannot thereafter, so long as they remain so withdrawn, be entered or otherwise appropriated, either by a successful contestant or any other person; but any contestant who gains a preference right to enter any such lands may exercise that right * * * within thirty days from notice *that the lands involved have been released from such withdrawal and made subject to entry.*"

There are at least two objections to the application of these regulations to the defendant's contest. We do not find in the Reclamation Act any authority conferred upon the Secretary of the Interior to so extend the limitation of the act of May 14, 1880. It is true he was authorized by section 10 of the Reclamation Act "to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this act [Act June 17, 1902] into full force and effect." But he was not authorized to amend, modify, or change the act of May 14, 1880, under which the defendant claims his preferential right. But assuming, without so deciding, that this last-named act, construed in the light of the extension of time provided for in the act of June 27, 1906, authorized the Secretary of the Interior to give such instructions and to make such regulations, we are at once confronted with the second objection, based upon the fact that the regulations of June 6, 1905, relating to contested entries, were vacated before the defendant even attempted to make an entry under his supposed preferential right. The regulations of the Secretary of the Interior vacating the regulations of June 6, 1905, were issued January 19, 1909, and provided (37 Land Dec. 365):

"Sixth. No contest will be allowed against any entry embracing land included within the area of any first form withdrawal, and in all cases where a contest has been allowed prior to such withdrawal, the withdrawal, if made before the termination of the contest, or before entry by the successful contestant, will, ipso facto, terminate all right that was acquired by reason of such contest."

These regulations went into immediate effect. If we hold that the Secretary of the Interior had the authority to make the regulations of June 6, 1905, we must also hold that he had the authority to make the regulations of January 19, 1909. If he had the authority to make, he had the authority to unmake. If he could amend or modify the statute in one case, he could do so in the other.

When the regulations of January 19, 1909, were issued, no entry of the land had been made by the defendant. The withdrawal had been made before the termination of the contest and before entry by the defendant. The defendant had acquired no vested right to enter the land, but merely a preferred right of entry against every one except the United States, and this right, extended by regulation, might be terminated at any time. This was the decision of the Assistant Secretary of the Interior on February 17, 1909, in the case of David A. Cameron, 37 Land Dec. 450. We are of opinion that whatever preferential right the defendant had secured by his contest was terminated by the regulations of January 19, 1909.

If it should be conceded that defendant did obtain a preferential right to enter the land while the land was completely withdrawn from entry under the first form, it was a right which, based upon a regulation, might be terminated by the Secretary of the Interior before entry, and in our opinion was so terminated by the regulations of January 19, 1909. In Edwards v. United States, 223 Fed. 309, 138 C. C. A. 551, the appellant in that case (the plaintiff in this case) was indicted and convicted for resisting the entry of defendant upon the land in controversy on November 25, 1912. On appeal to this court an effort was made to raise the questions involved in the present case, but the record in that case did not present them for decision, and they were not decided. The court in affirming the judgment, said:

"The same questions may arise in future litigation between the different claimants, and, if they do, the parties should not be embarrassed by the decision of unnecessary questions at this time."

The defendant asserted his preference right to enter the land up to the final proceedings under which his right to a patent was to be determined by the officers of the Land Department, when he suddenly abandoned his entry and claim of a preferential right, and presented to the Land Department a scrip selection for the land, and secured the patent and title which is the subject-matter of this suit.

[10] With respect to the scrip location finally made upon the land by the defendant, we are unable to determine from the complaint precisely what proceedings were had in the Land Office under which the defendant was permitted to substitute a location of this character for the entry made under a claim of a preferred right. Presumably the scrip was issued under the law and regulations relating to sol-

diers' additional homestead rights. If it was so issued, it was subject to the regulations of the Land Department upon the subject, found in the regulations dated February 21, 1908 (36 Land Dec. 278), March 26, 1908 (36 Land Dec. 346), and June 16, 1908 (John M. Rankin, 36 Land Dec. 522). It was also subject to the equitable rule stated in Moore v. Northern Pacific Ry. Co., 43 Land Dec. 173, 175, where the Assistant Secretary of the Interior says:

"Our whole public land system is based upon the fundamental consideration that the settler is to be preferred over claimants who seek to assert scrip or other rights to the public domain. Lands settled upon and claimed under the homestead law do not fall within the designation of public lands open to sale or other disposition under general laws other than those relating to settlement. This department is not robbed of its jurisdiction and duty to give equitable consideration to asserted settlement claims by the tender of a scrip application for the land by one having no claim to equitable consideration."

The Assistant Secretary refers to a former decision of the Land Department to the same effect (Dakota v. Thomas, 35 Land Dec. 171), where the decision of the Supreme Court in Ard v. Brandon, 156 U. S. 537, 543, 15 Sup. Ct. 406, 39 L. Ed. 524, is cited as declaring that:

As repeatedly held by the courts, "the law deals tenderly with the one who in good faith goes upon the public lands, with a view of making a home thereon."

The court says further:

"If he [the homestead settler] does all that the statute prescribes as the condition of acquiring rights, the law protects him in those rights, and does not make their continued existence depend alone upon the question whether or no he takes an appeal from an adverse decision of the officers charged with the duty of acting upon his application."

[11] This last statement of the equitable consideration to be given to the claim of a homestead settler is applicable to this case. Plaintiff alleges that he protested against the acceptance of defendant's lieu land selection, and his application for hearing upon his protest was denied by the officers of the Land Department for the reason that the plaintiff had not served the defendant with a copy of the appeal. We infer from the allegations of the complaint that the protest against the defendant's lieu land selection was because the defendant had not complied with the regulations of the department governing such a proceeding. If this was the protest, and its denial was for the reason stated, we are of the opinion that the department was in error in not granting the hearing. He did not have a hearing upon his protest, although it was before the department for consideration. "The decision of the department is final, but that is on the presupposition that the decision was after a hearing in good faith, however summary in form." Chin Yow v. United States, 208 U. S. 8, 28 Sup. Ct. 201, 52 L. Ed. 369.

The motion to dismiss was made on the ground that the complaint does not state facts sufficient to constitute a cause of action. We think the complaint is not so defective as to justify its dismissal. It

does state facts sufficient to constitute a cause of action, but the facts are imperfectly stated, and with respect to the proceedings in regard to the defendant's lieu land selection are not fully stated.

The judgment is reversed, with direction to deny the motion to dismiss, and with leave to plaintiff to amend his complaint, if so advised.

STUBBS v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. March 7, 1918. Rehearing Denied June 3, 1918.)

No. 3054.

CONSPIRACY ⟸47—POST OFFICE ⟸49—TO DEFRAUD BY USING MAILS—OFFENSE—EVIDENCE—SUFFICIENCY.

In a prosecution under Criminal Code (Act March 4, 1909, c. 321) §§ 37, 215, 35 Stat. 1096, 1130 (Comp. St. 1916, §§ 10201, 10385), for a conspiracy to devise a scheme to defraud by using the mails, and of devising a scheme to defraud, evidence *held* insufficient to show that defendant, who negotiated an exchange of property between the complaining witness and another, entered into any conspiracy to use the mails in connection with a scheme to defraud the complaining witness, or devised a scheme to defraud; it not appearing that defendant, who was guilty of trickery in effecting the exchange agreed upon, combined with others to defraud by use of the mails, or devised a scheme to defraud the complaining witness.

In Error to the District Court of the United States for the Southern Division of the Southern District of California.

Ira H. Stubbs was convicted under count 1 of an indictment charging conspiracy to devise a scheme to defraud by using the mails of the United States (sections 37 and 215 of the Criminal Code of the United States [Comp. St. 1916, §§ 10201, 10385]), and under count 2, which charged violation of section 215, and he brings error. Reversed, and new trial granted.

Albert H. Elliott, of San Francisco, 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.

HUNT, Circuit Judge. The important questions presented are: (1) Was a conspiracy proved? or (2) was it established that there was a scheme to defraud, in the execution of which the mails were used? The first count of the indictment charges that Stubbs, Jones, Margaret Turner, and E. Brown, about August 1, 1915, at Los Angeles, Cal., conspired to use the mails in a scheme and artifice to defraud such persons as would enter into negotiations with the defendants for the purchase, sale, or exchange of real estate pursuant to an advertisement put in the Los Angeles Examiner, a newspaper at Los Angeles. The scheme charged was substantially as follows:

Defendants advertised that Stubbs had for sale or exchange a bunga-

low and certain lots, and intended that any person who should inquire about the property should be told that the original owner was a railroad man, who had left Los Angeles, and left the matter of selling, exchanging, or transferring to his wife; that his wife was the defendant Margaret Turner, and that she would sell or exchange the property to any inquirer, so as to realize out of it about $2,000; that it was agreed by the defendants that Stubbs would so state to any person inquiring about the bungalow described in their advertisement, and as agent for Margaret Turner would offer to sell and procure title to the bungalow and lots to be conveyed, subject only to a mortgage of $1,450, whereas Margaret Turner was not the owner of the bungalow or lots, and not the wife of a railroad man, or any other man, but was a pretender, to be used by defendants in obtaining conveyance of any title that the proposed purchasers of the bungalow should convey in exchange for the bungalow and lots. It is charged that the intention of the defendants was that by fraud and misrepresentation any inquirer should be led to believe that Margaret Turner was the owner and could convey title, and was to procure the inquirer to pay money offered for the bungalow, and to convey any property offered in exchange therefor to Margaret Turner, and not to convey to any such purchaser of the bungalow and lots any title in exchange for the money or property thus procured to be paid or conveyed to Margaret Turner; that Margaret Turner was thereafter to transfer the property to be conveyed to defendant Jones, and Jones would convey it to defendant Brown.

An overt act charged is that Stubbs, about August 15th, caused an advertisement to be placed in the Los Angeles Examiner, stating that he had for sale or exchange a five-room bungalow, and that the equity for sale or exchange was worth about $2,100. Another overt act charged is that in the office of Stubbs, in Los Angeles, in September, 1915, Stubbs and Jones and Turner had a conference with Mary Abercrombie, and agreed to exchange and transfer the bungalow and lots to her for certain lots at Culver City, Cal., then owned by Mary Abercrombie, and which she agreed to convey to Margaret Turner in consideration of the bungalow and lots and $300 to be paid by Margaret Turner to Mary Abercrombie. Another overt act charged is that Stubbs and other defendants fraudulently obtained possession of a deed executed by Mary Abercrombie preparatory to making the exchange of property, and caused the deed executed by Mary Abercrombie to be put on record in the county recorder's office in Los Angeles county, Cal.

The second count charges that defendants devised a scheme and artifice to defraud Mary Abercrombie and any other persons who might by them be defrauded pursuant to such scheme. It is alleged that they put an advertisement in the Los Angeles Examiner, a newspaper transmitted through the post office, that Stubbs had for sale or exchange the bungalow and lots referred to in count 1. It is not necessary to set forth in detail the substance of this count, inasmuch as it is predicated upon the same facts alleged in the first count. The overt act charged is that on September 11, 1915, the defendants mailed

a letter at Los Angeles, addressed to Mrs. Abercrombie, in Pomona, Cal., wherein defendant Stubbs, as the writer of the letter, among other things, told Mrs. Abercrombie that the parties who owned the $1,200 mortgage are out of the city, and that the "deal" cannot be closed until a later date, when all will be ready.

The evidence of Mrs. Abercrombie is substantially as follows:

About September 1, 1915, in answer to the advertisement concerning the sale or exchange of a bungalow and lots, she saw Stubbs, who told her that the bungalow would rent for about $35 a month and was a very good buy; that the equity was $2,100, with two outstanding mortgages, one for $1,200 and the other for $250. Mrs. Abercrombie told Stubbs that she valued her property at Culver City at from $2,300 to $2,500; that she might exchange for the bungalow, but wanted some cash. Stubbs told her that the parties were in a hurry; that the lady who was there, Mrs. Turner, had come to Los Angeles and bought the cottage after her husband had lost his position in Seattle, but that he had been reinstated and left the property in his wife's hands to dispose of. Mrs. Abercrombie saw the property, but declined to consider the matter unless the house was rented for a year. A few days thereafter it was agreed between Stubbs and Mrs. Abercrombie that she was to give her Culver City lot clear for the equity in the bungalow and $300 cash. A few days later Stubbs telephoned Mrs. Abercrombie that he had leased the property, and asked her to come and sign the contract and "close the deal." She helped to make the contract of exchange which she signed. Stubbs took it, telling her that, when Margaret Turner signed it, he would give her a copy; but he never did. The contract, as recalled by Mrs. Abercrombie, was that Margaret Turner was to give her a deed for the bungalow property clear of all incumbrances, except $1,450, and $300 in cash, in exchange for the Culver City property. Stubbs wanted her to sign a deed that day, but she declined. Stubbs said that Mrs. Turner had not raised the $300, but that he would lend it to her if she did not get it very soon. A few days later Stubbs showed her a check for $300, but said Margaret Turner had not closed the deal; the check was not indorsed. Negotiations not being carried through, Mrs. Abercrombie returned, and later received a letter, dated September 11th, telling her to come in to "close the deal." Mrs. Abercrombie went to Stubbs' office on the 16th and found Margaret Turner there. Stubbs told her that he was not ready to close the deal, but had $25 to advance to her on the deal, and if it was not closed by the 20th that sum would be a forfeit. He asked her to sign the deed for the Culver City property to Mrs. Turner, which was ready and dated September 3d. Mrs. Abercrombie signed it and acknowledged it, was paid $25, but kept the deed, with the understanding that they were to "go into escrow" the next day at the Title Insurance offices.

On September 17th she saw Stubbs in the Title Insurance & Trust Building in Los Angeles, and also met defendant Jones and a Mr. Ogden. Mrs. Abercrombie told Stubbs in that interview that the matter was not being carried out as she understood it, inasmuch as

Stubbs had told her that, if she would bring a certificate of title and leave it with him, he would look up the title without cost, and that his client would do the same with the property he was going to show her, and that, if he could satisfy himself, there need be no money spent for continuing title certificates. Stubbs was to show her a certificate of title held by the man who held the mortgage upon the bungalow, and the certificate was not to be brought down to date by the title company. Stubbs then told Merrill that the $250 incumbrance was past due. Jones said he was "in on this deal, and I am buying your lot, Mrs. Abercrombie, from Mrs. Stubbs, so we can go on and talk it over." Merrill did not like the form of deed, and Jones got a grant form which Merrill liked better. Jones said it made no difference to him, and then said to Merrill, "Why not let Mrs. Abercrombie make this delivery direct to Brown, and not use the bargain and sale form of deed?" Mrs. Abercrombie said she was indifferent as to the grantee, Turner or Brown, provided she got what was due her. Thereupon, at Stubbs' office, Stubbs gave back to Mrs. Abercrombie the deed she had first made, and she put it in her pocketbook, and then made a new deed and went back to the Title Insurance office and "entered into escrow." She then gave both the original deed and the deed to Brown to Merrill. Later she met defendant Jones and told him she did not think she would go on with the deal. Jones told her that he, not Stubbs, was the cause of the delay, and that he thought it was all right for her to go on without a certificate of title; but Mrs. Abercrombie declined to go on unless Margaret Turner signed a statement that there was nothing against the property except the $1,450. Stubbs then telephoned to Margaret Turner and left. Thereafter, at Stubbs' office, Margaret Turner signed a statement that there was nothing against the property but the $1,450, and Mrs. Abercrombie then signed and duly acknowledged a new deed, conveying her property to Brown, and put it in her pocketbook. She then went back to the Title Insurance Company's office and tore the name off the deed which was there.

The witness said that, when in the office of the Title Insurance Company, Mr. Merrill asked her if she was satisfied as to the title of the bungalow. She replied, "No," and claimed the privilege of having certificate of title come through that company, to which Stubbs said, "You will have to pay $7.50 for continuing the abstract;" that she agreed. She then passed both deeds over to Mr. Merrill, and Stubbs handed to Mr. Merrill the Margaret Turner deed. Mrs. Abercrombie designated Mr. Merrill as her agent, with authority to stamp the instrument. Stubbs was to leave the $300 cash due her, and she was to satisfy herself as to the title, and Stubbs was to aid her by lending her the documents. Merrill then laid the Turner deed before her, and put the bargain and sale deed closer to Stubbs. Stubbs picked up the original deed to Turner and said, "This is worthless now," and went through the motions of tearing it up and putting it in the waste paper basket. The next time she saw the deed to Margaret Turner was in the recorder's office, about September 30th; the deed having been put in the recorder's possession with-

out her knowledge or consent. She saw Stubbs again about the 25th of September in his office, and demanded that he reconvey the property included in the Turner deed, to which Stubbs replied, "They accepted it." A few days before this Stubbs had told her that he would give her a $5,000 bond assuring the title to the property, but she had replied, "No," that she wanted a certificate through the Title Insurance Company. About September 21st Jones telephoned her to the effect that by her request for a certificate of title the deal had been tied up, and wanted to know if there was anything he could do to further the matter, and Mrs. Abercrombie replied, "No." Mrs. Abercrombie and Jones had a talk in the presence of Stubbs, and she charged him with complicity with Stubbs in defrauding her of her property. Jones said that he came in to buy a lot and did not know anything about it. After some accusations she consulted her counsel, and told him that according to the record W. L. Moody owned the bungalow and lot (15 Bittle Tract). Mrs. Abercrombie's attorney then gave Jones and Stubbs until Monday to make a reconveyance of the Culver City property. Stubbs admitted that he ought not to have taken the deed, and was sorry that he had recorded it, and said he thought Brown would deed the property back, and that Jones had a deed from Brown, conveying the property back to her, but that it was not properly acknowledged. Thereafter Mrs. Abercrombie received her deed to Brown from the Title Insurance & Trust Company and tore it up.

On cross-examination Mrs. Abercrombie said she was perfectly satisfied if all the stipulations were lived up to, and that the $300 "boot money" was deposited on the 29th; that she had written to Stubbs on the 27th of September, telling him that she did not want to go through with her contract, and that before that date she knew that Stubbs had sold the lot he was getting from her for Mrs. Turner to a Mr. Brown through the real estate agent, Jones; that she made no objection, provided they did what they agreed to do; that she did not deliver to Stubbs a bargain and sale deed, and did not receive from him a deed executed by Margaret Turner; that the two deeds were on the table when Mr. Merrill was present, and that Stubbs told her she could take the deed and satisfy herself as to the title; that on the next day she took it back and offered it to Merrell, who told her to send it to Stubbs, but that she did not do so, and turned it over to the Title Insurance Company on the 24th of September. She says that on the 17th of September she had a talk with Stubbs and Jones and Merrill, when Merrill placed the bargain and sale deed in front of Stubbs and the Turner deed in front of her, and she signed an escrow instruction, which was put in the Title Insurance & Trust Company, regarding the Culver City lot to Brown, but does not remember that the instruction called for a payment to her of the sum of $275; that Stubbs paid her $25 as part of the payment of $300, and that she was to receive $275 through escrow; that her main object was to get the $300, and that she was satisfied with the property she was to get from Margaret Turner in exchange for her property.

George Stelle, called by the government, testified that he was employed in the escrow department of the Title Insurance & Trust Company of Los Angeles, and had charge of the escrow between Mrs. Abercrombie and Stubbs; that on September 22, 1915, the company delivered to Stubbs the certificate of title to the Culver City lot, and he receipted for it, and on September 29th $275 was deposited by Mr. Clanton to the credit of Mrs. Abercrombie on the escrow involving the exchange of properties between Margaret Turner and Mrs. Abercrombie. Clanton testified that he had made the $275 deposit in the interest of Mr. Jones, and deposited it with instructions to the Title Insurance & Trust Company to pay the same to Mrs. Abercrombie.

C. L. Brewer testified that in September, 1915, he was employed by the Los Angeles Title Insurance Company; that he had an escrow dated September 22, 1915, to which Stubbs and Jones were related. This escrow was signed by Jones, and called for $635 to be used for guaranty of title for lot 10, block 19, tract 2444, Culver City property, to show title vested in A. W. Brown. Brewer further said that, when Stubbs and Jones left the escrow, they handed to him the deed from Mrs. Abercrombie to Margaret Turner, and on the same day Stubbs advised the witness to deliver the deed to Miss Betty Richards; that thereafter they received a deed from Margaret Turner to Brown, which was used in place of the prior deed, owing to a defect in the power of attorney in the first deed; that the $641 cash placed in escrow by Jones was on hand; that papers were signed for recording and the money disbursed on the 25th; that a check was delivered in favor of Nellie Stubbs for $1,615.50. The deed, which was part of the escrow from Turner to Brown, was signed by Stubbs, as attorney in fact for Margaret Turner. This deed, as stated, was not used, because of a defect in the power of attorney. In the deed, Margaret Turner, described as a single woman, granted to A. W. Brown, a single man, lot 10, block 19, tract 2444, etc.

Albert Chapelle, an employé of the district attorney's office in Los Angeles county, testified that he had a talk with Stubbs about October 2, 1915, concerning the transaction between Stubbs and Mrs. Abercrombie; that Stubbs said he had received the deed from Mrs. Abercrombie to Margaret Turner, and that it had been put in escrow with the Title Insurance & Trust Company; that Jones objected to the deed, whereupon it had been arranged between Jones, acting for Brown, Mrs. Abercrombie, and himself that this deed should be withdrawn, and a deed directly from Mrs. Abercrombie to Brown should be substituted for it in escrow at the Title Insurance & Trust Company; that Stubbs said he had recorded the deed because Jones was pushing him to close the transaction and that the deal would be lost if the matter was not hurried up.

On the part of the defendants one witness was called, Baker, who said that he had a lien on the property located at 1307 Myra street (evidently the Margaret Turner lots), a trust deed, which he had since foreclosed, and when foreclosed, in May, 1916, that he served parties by the names of Moody, Abercrombie, and Turner with notice of foreclosure.

We cannot gather from all this evidence substantial proof of a conspiracy (section 37, 35 Stat. 1096) to commit a violation of section 215 of the Criminal Code, or of a violation of section 215. The advertisement was not a misrepresentation. Stubbs had the property for exchange, and Mrs. Abercrombie, who is evidently a very intelligent and capable woman, examined it and then concluded it was worth the price set upon it by Stubbs, and advised Stubbs that she was ready to make the exchange if her terms were complied with. There was no evidence to sustain the charge in the indictment that Stubbs or any one else told Mrs. Abercrombie that the original owner of the property was a railroad man and the husband of Mrs. Turner, or that Mrs. Turner wanted to realize about $2,000 from the property. In the preliminaries, certainly, Mrs. Abercrombie was not misled in any way, but, on the contrary, was perfectly satisfied to make the exchange. There appears to have been no unfairness in the matter of values, and no evidence of any criminal combination between Stubbs and Mrs. Turner or Jones in any of the preliminary talks, relating to the sale or exchange of the property. It may be that there was some cause for suspicion in the statements made by Stubbs in excusing himself for delay in not procuring the $300 from Mrs. Turner; but, assuming there was, still there is lack of evidence of any concert of action between Stubbs and any one with intent to devise a scheme to defraud and to defraud by using the mails.

The evidence shows that Mrs. Turner owned the property, subject to two mortgages, amounting to $1,450. If, as a fact, at the time of the negotiations or execution of the papers, Mrs. Turner was not the owner, the prosecution could have easily proved the state of title; and, if it were not in Mrs. Turner, a strong case against the defendant would have been made. But in the absence of such evidence the presumption of innocence stands in defendant's favor. Again, there was the payment of $25 to Mrs. Abercrombie, which was accepted by her after statements by Stubbs of the inability of Mrs. Turner to make the further payment until a later date, and the evidence of the prosecution is that at a later date the $275 was deposited for the credit of Mrs. Abercrombie. There was, on Mrs. Abercrombie's part, dissatisfaction over the evidence of title to the Turner property and some parleying between her and Stubbs; but the conversations constituted no sufficient evidence of conspiracy to defraud between Stubbs and any one else.

Coming now to the fact that there was a third person interested, we find that Mrs. Abercrombie was told, in the presence of Mr. Merrill, of the Title Insurance & Trust Company, that there was another person interested; but she frankly says that she made no objections "as to the deal being a three-cornered one," and that it was satisfactory if they did what they stipulated to.

The connection of Jones with the transaction is also important. The indictment charges that Margaret Turner would cause the lots to be conveyed by the purchaser to Jones, and that Jones would thereafter convey or cause the lots to be conveyed to Brown, as part of the fraudulent scheme. But, as it was explained to Mrs. Abercrombie before

she concluded the transaction that Jones was not the real buyer, and that Brown was to be the purchaser of the property, and as Mrs. Abercrombie was "perfectly satisfied," provided she received the $300 agreed to be paid to her, we cannot see how it can be said that there was proof, beyond a reasonable doubt, of a combination between Stubbs and Jones, or Brown or Turner, with purpose to defraud. The transaction was, as explained by Mrs. Abercrombie, a "three-cornered deal." She said:

"I knew * * * that he [Stubbs] sold the lot he was getting from me for Mrs. Turner to a Mr. Brown through the real estate agent named Jones. I knew Mr. Jones expected to get my Culver City lot from Mr. Stubbs."

Furthermore, the transaction was carried through in the office of an escrow agent, the Title Insurance & Trust Company. It comes, then, to this: If there was a conspiracy to defraud, as charged, or a scheme devised, it must have been in relation to what happened on the 17th of September, when Mrs. Abercrombie and Stubbs and a Mr. Ogden met in the Title Insurance & Trust Company Building in Los Angeles. There the matter of the exchange was talked over between Stubbs and Mr. Merrill. Jones said he was buying the lot from Stubbs, and that it made no difference to him what form of deed was used. Mr. Merrill objected to one form, and Jones suggested that Mrs. Abercrombie could make delivery direct to Brown, who appears to have been exchanging an equity in some acreage for a lot in Culver City, which was the lot Mrs. Abercrombie was conveying to Margaret Turner. But Mrs. Abercrombie distinctly says that she was asked by Mr. Merrill if she was willing to deed directly to Brown, and replied that she was, if she got what was agreed to be paid to her; that she did not care who got the property, and would deed to Brown, or Margaret Turner, "whichever one you all decide on, if I get what is due me." The only reason, apparently, why the deeds were not made then and there was the desire to save the expense of having them made out by the Title Insurance Company. Mr. Merrill at that time gave to Mrs. Abercrombie the deed she had made to Margaret Turner. New deeds were made and put in escrow in the Title Insurance office, Mrs. Abercrombie also giving to Mr. Merrill the original deed. Again, thereafter, Mrs. Abercrombie went over the whole transaction with Jones.

There remains the circumstance of the action of Stubbs in going through "the motion of tearing up the original deed" in the presence of Mr. Merrill and Mrs. Abercrombie. It is not contended that Stubbs did destroy the deed; his fault was in allowing Mrs. Abercrombie to think he had destroyed it, and in putting the deed upon record and not frankly telling Mrs. Abercrombie the whole truth, or making known to her or to Mr. Merrill what his purpose was. Of course, Stubbs was wrong in this, and afterwards admitted his error. But, after all, the material question for decision is whether he was one of a conspiracy to devise a scheme to defraud by using the mails of the United States; and, granting that his conduct in and about the recording of the deed was deception, nevertheless, if there is no evidence of conspiracy or of a scheme to defraud and use of the mails,

the conviction of the charges against him cannot stand. Farmer v. United States, 223 Fed. 903, 139 C. C. A. 341.

It is to be emphasized that the contract of exchange between the parties called for certain things, which were done. There was a deed to the Turner property, subject to a total secured indebtedness of $1,224, delivered to Mrs. Abercrombie through the escrow agent. Mrs. Abercrombie was to be paid $300 by Margaret Turner; $25 was paid to her at the signing of the contract, and the balance was delivered to the escrow agent for her. Before she transferred to Brown, she knew that there was a third party, Brown, in the matter, and made no objection whatsoever. Mrs. Abercrombie was not injured by the recording of the deed, and assuming that there was chicane on the part of the defendant Stubbs in not telling her of his purpose, and in having the deed recorded, it does not prove that he was in fraudulent combination with Jones, or Brown, or Margaret Turner, or that he had devised a scheme to defraud any one, and in carrying it out used the mails, as charged in the first and second count of the indictment. The explanation of counsel for Stubbs is that Stubbs feared Mrs. Abercrombie would try to get out of her contract, and, as he was bound in the three-cornered deal to sell, his possession of the deed was a kind of guaranty that Mrs. Abercrombie would stand by her bargain, and that Stubbs expected to get the balance of the $300 wherewith to pay Mrs. Abercrombie out of the sale to Brown, to whom she made the deed already referred to. This may or may not be correct, but it is compatible with innocence of alleged criminality. It is to be remembered that the Turner deed to Mrs. Abercrombie had already been delivered to the escrow agent by Stubbs, and the $25 of the $300 had been paid. Stubbs should have acted with candor and waited; but, confining our opinion to the evidence of the charge made against him, we cannot deduce the criminality alleged by reason of the fact that he kept the first deed and put in on record, or wrote the letter of September 11th to Mrs. Abercrombie. Trickiness of method in carrying out the agreed-upon exchange is not to be confused with a scheme to defraud as charged.

Judgment is reversed, and a new trial granted.

FARMERS' STATE BANK v. FREEMAN.

In re JONES BROS. & CO.

(Circuit Court of Appeals, Eighth Circuit. February 23, 1918.)

No. 4907.

1. APPEAL AND ERROR ⟸1008(1)—REVIEW—FINDINGS OF TRIAL COURT.
Findings by the trial judge, who heard the evidence and saw the witnesses when testifying, will not be disturbed, unless clearly against the weight of the evidence, or induced by a mistaken view of the law.

2. BANKRUPTCY ⟸163—PREFERENCES—WHAT CONSTITUTES.
Where, within four months of adjudication, a bankrupt whose indebtedness to a bank was overdue, gave a bill of sale conveying certain prop-

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

erty to the bank's attorney, who transferred to the bankrupt funds lent by the bank on security of the bill of sale, and the bank thereupon applied to its indebtedness such funds, which were deposited to the credit of the bankrupt, the transaction must be deemed a scheme to prefer the bank, and the application of such moneys cannot be justified as a banking transaction.

3. BANKRUPTCY ⟸303(3)—PREFERENCES—INSOLVENCY—EVIDENCE.
In a suit to set aside an alleged preferential payment to a bank, evidence *held* to show that at the time of the payment the corporate debtor, which was subsequently adjudicated bankrupt, was insolvent.

4. BANKRUPTCY ⟸166(5)—PREFERENTIAL PAYMENT—KNOWLEDGE OF ATTORNEY.
Knowledge of an attorney, who acted in the transaction which culminated in a preferential payment to his client, a creditor of the bankrupt, is imputable to the client.

5. BANKRUPTCY ⟸166(4)—PREFERENTIAL PAYMENT—KNOWLEDGE.
Under Bankruptcy Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 (Comp. St. 1916, § 9644), declaring that, if a transfer, etc., shall operate as a preference, and the person receiving it or to be benefited thereby, or his agent, shall have reasonable cause to believe that the transfer would effect a preference, it shall be voidable, notice of facts which would invite a person of reasonable prudence to inquiry is notice of all the facts which a reasonably diligent inquiry would develop.

Appeal from the District Court of the United States for the Western District of Arkansas; F. A. Youmans, Judge.

Suit by F. F. Freeman, as trustee in bankruptcy of Jones Bros. & Co., a corporation, against the Farmers' State Bank and another. From decree for plaintiff, the named defendant appeals. Affirmed.

W. N. Ivie, of Rogers, Ark., for appellant.

L. H. McGill, of Bentonville, Ark., and E. H. Thomas, of Kansas City, Mo., for appellee.

Before SANBORN and SMITH, Circuit Judges, and TRIEBER, District Judge.

TRIEBER, District Judge. This is an appeal from a decree in favor of the appellee. The action was against the appellant and one E. M. Fowler to recover an alleged preferential payment made to the bank by the bankrupt within four months prior to its adjudication as a bankrupt. The material facts charged in the complaint are that on February 6, 1915, an involuntary petition in bankruptcy was filed against Jones Bros. & Co., a corporation, upon the ground of having made preferential payments while insolvent. Among the preferential payments alleged to have been made was that to the appellant for the recovery of which this action was instituted. The bankrupt filed an answer denying the insolvency and the acts of bankruptcy charged. Upon a hearing the court adjudicated the company a bankrupt, and the appellee was duly elected and qualified as trustee.

It was charged in the complaint: That on January 13, 1915, the bankrupt was indebted to the appellant bank in the sum of $3,196 and interest thereon, evidenced by its promissory note. The note had been overdue since October, 1914, and was unsecured. That on that

day the defendant, E. M. Fowler, Mr. Clark, the cashier of the appellant bank, and the president of the Jones Company agreed upon and carried out the following scheme: The bankrupt executed to E. M. Fowler a bill of sale, whereby it conveyed to him 8,000 gallons of apple juice, belonging to it, for the expressed consideration of $3,500. That the said Fowler, not being possessed of the money, borrowed it from the appellant, executing his note for said sum of money, and as security for the loan pledged the bill of sale executed to him by the bankrupt. That the bank gave Fowler credit on its books for that sum of money, and Fowler immediately thereafter gave his check on the bank to the bankrupt for the $3,500. The check was thereupon deposited by the bankrupt with the appellant, and that evening, after banking hours, the bank charged the bankrupt with the amount of the note. That Mr. Fowler was the attorney for the bank, as well as of the bankrupt at the time. That for a long time prior to this transaction the bankrupt had kept its account with the appellant bank, which showed that for a considerable time the bankrupt was overdrawn at the bank, and when it had balances they were for very small sums. That at the time this transaction took place the bankrupt was insolvent, which was known to the appellant, as well as Mr. Fowler, its attorney. That the application of the money thus deposited to the credit of the bankrupt was not made in good faith in the usual course of business, but for the purpose of enabling the appellant to secure an unlawful preference, in violation of the provisions of the Bankruptcy Act.

Defendants filed separate answers, denying that the bankrupt was insolvent at the time, and alleging, if it was insolvent, that neither of the defendants knew it or had reasonable cause to know it, that the transaction was made in good faith, and not for the purpose of obtaining thereby the apple juice as a security for the bankrupt's indebtedness to appellant, and that the payment was not an unlawful preference, but a set-off, as the bank had a right to make. The hearing was upon oral evidence, and the court found that the bankrupt, at the time this transaction took place, was insolvent, and that the transaction was in pursuance of an understanding between the officers and attorney of the bank and of the bankrupt, for the purpose of giving the bank a preference in the collection of its note, and rendered a decree against the bank for the amount claimed, but no decree was rendered against the defendant Fowler. From this decree the appellant prosecutes this appeal.

[1, 2] The findings of the trial judge, who heard the evidence and saw the witnesses, when testifying, will not be disturbed by the appellate court, unless it is clearly against the weight of the evidence, or was induced by a mistaken view of the law. A careful reading of the evidence convinces that the entire transaction was merely a scheme for the purpose of enabling the appellant bank to secure payment of its debt in full, and enable it to bring the transaction within the rule laid down in N. Y. County Bank v. Massey, 192 U. S. 138, 24 Sup. Ct. 199, 48 L. Ed. 380. Mr. Fowler had no money of his own to lend; the bank advanced it to him; he loaned it to the bankrupt, taking as

security therefor the bill of sale of the apple juice; the check he gave to the bankrupt was on the appellant bank, and was deposited immediately by it with the bank; and on the same day, after banking hours, the note was charged by the bank to Jones Bros. & Co.

[3-5] But it is earnestly contended that the evidence does not justify the finding that Jones Bros. & Co. was insolvent at the time, within the meaning of the Bankruptcy Act, and, if it was, that the appellant or its attorney knew it, or had knowledge of facts sufficient to put it upon notice of the insolvency. The evidence establishes that the assets of the bankrupt at that time, at the most liberal estimate, did not exceed in value at a fair valuation, $104,229.41. The property was appraised by experienced appraisers, one of them the secretary of the bankrupt company, and whenever the records or bills, showing the cost of each article, could be found, they were accepted by the appraisers as the fair value of the property. The appraisements of the real estate and buildings were based upon the careful estimate of an experienced architect as to their actual value and cost of reproduction. It showed the values as follows: Springdale plant, $11,302.32; Centerton plant, $7,262.30; Rogers vinegar plant, $26,094.98; Rogers preserving plant, $5,955.91; the St. Joseph property, taking all the merchandise at actual value, if in perfect condition, $9,400; the merchandise at Rogers was found to be worth $2,100. The accounts due the bankrupt were mostly uncollectable, and, as the trustee testified, that although he had made extraordinary efforts to collect them, he has been able to collect but very little, as the debtors have no property subject to execution, and that at the outside they were worth not more than $1,000. The property in the state of Texas belonging to the bankrupt estate, as shown by the testimony of the manager, who had charge of it, was $33,712.46; but allowing therefor the value claimed for it by the bankrupt, $41,113.90, makes the full value of all the assets $104.229.41. The debts which have been proved against the estate, and are in process of proof, leaving out of consideration the disputed claims, amount to $118,941.28. The real value of the assets was considerably less; but, allowing the full value therefor, there was a deficiency of nearly $15,000.

On behalf of appellant it is claimed that the statements of the bankrupt's assets and liabilities, furnished it by the bankrupt, show that its assets exceed its liabilities by a very large amount. But these statements are of little value, as appears from the face of them. Great reliance was placed upon the statement of September 30, 1914, made by an auditing accountant, and which was furnished to the bank. This statement by the auditor was simply what the books showed. Of how little value this statement is, is shown by the fact that among the assets is listed $500,000 for good will. The real estate, buildings, and equipment appear on this statement as of the value of $249,468.43. Among the real estate was included some property in Texas, listed as of great value, which did not belong to the bankrupt, but for which they only held a lease, and it had been forfeited at the time the bankruptcy proceedings were instituted.

The state of the bankrupt's account with the bank, and the fact that

this note had been overdue for three months, would clearly indicate to any business man that the company was insolvent. Mr. Fowler, who was the attorney for the bank in this transaction, and also the attorney of the bankrupt, certainly knew of the company's insolvency, and his knowledge was the knowledge of the bank. Section 60b of the Bankruptcy Act. Notice of facts, which would incite a person of reasonable prudence to an inquiry under similar circumstances is notice of all the facts which a reasonably diligent inquiry would develop. Coder v. McPherson, 152 Fed. 951, 82 C. C. A. 99; Huttig Mfg. Co. v. Edwards, 160 Fed. 619, 87 C. C. A. 521.

The findings made by the trial judge are clearly supported by the weight of the evidence, and there was no mistaken view of the law; therefore the decree is affirmed.

SHAWNEE NAT. BANK v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. March 4, 1918.)

No. 5000.

1. JURY ⟸19(15)—FORFEITURES—NATURE OF PROCEEDINGS.
   A proceeding to forfeit, under Rev. St. § 2140 (Comp. St. 1916, § 4141), an automobile seized on land, on the ground that it was used as a means for the introduction of intoxicating liquor into the Indian country, is one at law, and the parties are entitled to the usual rights and remedies incident to such an action, including the right to trial by jury.

2. APPEAL AND ERROR ⟸907(2)—PROCEEDINGS TO FORFEIT VEHICLE—PRESUMPTIONS.
   Where, in a proceeding under Rev. St. § 2140 (Comp. St. 1916, § 4141), to forfeit an automobile on the ground that it was used as a means for the introduction of intoxicating liquor into Indian country, the court found that a chattel mortgagee had a valid lien, but that it was inferior to the rights of the United States under the forfeiture proceeding, it must be presumed, in absence of evidence, that the mortgagee had nothing to do with the introduction of the liquor into Indian country.

3. STATUTES ⟸241(2)—CONSTRUCTION—FORFEITURE.
   It is a principle of natural law and justice that statutes will not be held to forfeit property, except for the fault of the owner or his agents, unless such a construction is unavoidable.

4. INDIANS ⟸35—INTRODUCTION OF LIQUORS INTO INDIAN COUNTRY—FORFEITURES.
   Rev. St. § 2140 (Comp. St. 1916, § 4141), providing for a search of the boats, stores, packages, wagons, sleds, and places of deposit of one suspected of introducing intoxicants into Indian country, and declaring that, if such liquor is found therein, the same, together with the boats, teams, wagons, and sleds used in conveying the same, and also the goods, packages, and peltries of such person, shall be seized and forfeited, does not warrant a forfeiture of the interest of an innocent chattel mortgagee in an automobile used by the mortgagor, who was in possession, to convey intoxicants into Indian country, this being particularly true, as Act March 2, 1917, c. 146, 39 Stat. 969, subsequently passed, expressly declares that automobiles or other vehicles or conveyances used in introducing intoxicants into Indian country, whether used by the owner or other person, shall be subject to forfeiture as provided in section 2140, for the language of the section, as well as the congressional construction placed thereon,

indicates that no forfeiture should be allowed of any of the articles mentioned, except those owned by the guilty person.

5. INDIANS ⊜35—INTRODUCTION OF LIQUOR INTO INDIAN COUNTRY—FORFEITURES—"WAGONS"—"AUTOMOBILE."
Section 2140 (Comp. St. 1916, § 4141), by specifying boats, teams, wagons, and sleds, excluded automobiles, as those vehicles were unknown when the section was enacted, and a wagon is drawn by force outside of itself, while an automobile, as its name suggests, is a self-propeller, and Congress, had it intended to include all means of conveyance, might properly have used the word "vehicles" or "conveyances," as it did in Act March 2, 1917, which extended the forfeiture provisions to automobiles, etc., instead of specifying certain ones.

6. APPEAL AND ERROR ⊜671(1)—REVIEW—RECORD—QUESTION PRESENTED.
Where the trial court found that a chattel mortgagee had a valid lien on an automobile, sought to be forfeited under Rev. St. § 2140 (Comp. St. 1916, § 4141), because used by the mortgagor to carry intoxicating liquors into Indian country, but declared the lien inferior to the claim of the United States, the mortgagee was entitled to raise on such record the question whether the automobile was subject to forfeiture, as well as whether its interest could be forfeited, as the findings did not support the judgment.

In Error to the District Court of the United States for the Western District of Oklahoma; John H. Cotteral, Judge.

Libel by the United States against one automobile in which the Shawnee National Bank filed an interplea, asserting its ownership of the machine under a chattel mortgage. The lien of the bank was held inferior to the claim of the United States under the forfeiture proceedings, and the Bank brings error. Reversed and remanded, with directions.

Joe M. Adams and W. L. Chapman, both of Shawnee, Okl., for plaintiff in error.

John A. Fain, U. S. Atty., of Lawton, Okl., and F. E. Ransdell, Asst. U. S. Atty., of Oklahoma City, Okl.

Before SANBORN, CARLAND, and STONE, Circuit Judges.

CARLAND, Circuit Judge. Under the provisions of section 2140, Revised Statutes of United States, as amended by Act March 1, 1907, c. 2285, 34 Stat. 1017 (Comp. St. 1916, § 4142), on August 22, 1916, a special agent of the Indian Bureau for suppression of the liquor traffic among Indians, being informed that two white persons by the names of Frank Cole and Rufus H. London, had introduced or were about to introduce spirituous liquors into the Indian country, to wit, the Shawnee Indian allotment of one Irene Whitehead, situated in the state of Oklahoma, searched an automobile then in the possession of said Cole and London, and found therein spirituous liquor which had been introduced into said Indian country by said Cole and London by means of said automobile. The automobile was thereupon seized and proceeded against by libel in the court below, and, no owner appearing to claim the same, a judgment of forfeiture was entered. Prior to the judgment of forfeiture, however, plaintiff in error, hereafter called the bank, by leave of court interpleaded in the forfeiture proceedings and alleged that it was the owner of a chattel mortgage

on said automobile, given by said Cole April 11, 1916, to secure the payment of a promissory note for the sum of $636, due October 11, 1916; that said chattel mortgage provided that Cole should remain in possession of the automobile until default should be made in the payment of the note, provided, always, that if, at any time, the bank should deem itself insecure, the debt and interest should become due, and the bank should have the right to take possession of the automobile and sell the same at public auction in order to satisfy the amount of the debt. It was also alleged that the mortgage was duly recorded in the proper office on April 13, 1916. The bank prayed that the automobile be delivered to it under the terms of the mortgage for the purpose of foreclosure and sale. The judgment of forfeiture reserved a decision as to the claim of the bank, the proceeds arising from the sale of the automobile in the forfeiture proceedings; amounting to the sum of $551, being ordered paid into court to await a decision on said claim.

Subsequently the court decided that the bank had a valid lien by virtue of its mortgage on the automobile to the amount of its debt at the time the same was seized, but that said lien was inferior to the claim of the United States under the forfeiture proceedings. The bank was therefore denied any relief, and the proceeds arising from the sale of the automobile, less costs, were ordered distributed, one-half to the United States and one-half to the informer.

[1] In view of the proceedings in the court below, it is proper to state that, the seizure in this case being on land and not within the admiralty jurisdiction of the United States, the action in the court below was properly an action at law, in which the parties were entitled to such rights and remedies as are incident to such an action in the federal courts, including the right to trial by jury. The Sarah, 8 Wheat. 391, 5 L. Ed. 644; Morris's Cotton, 8 Wall. 507, 19 L. Ed. 481; Confiscation Cases, 20 Wall. 92, 22 L. Ed. 320; Armstrong's Foundry, 6 Wall. 766, 18 L. Ed. 882; Confiscation Cases, 7 Wall. 454, 19 L. Ed. 196; Henderson's Distilled Spirits, 14 Wall. 44, 20 L. Ed. 815. There seems, however, to have been no disputed question of fact in issue at the trial, and, as no objection was made to the form of the proceeding or the manner of trial, nothing more need be said.

[2-4] Section 2140, under which the automobile was forfeited, reads as follows:

"If any * * * has reason to suspect or is informed that any white person or Indian is about to introduce or has introduced any spirituous liquor or wine into the Indian country in violation of law, * * * may cause the boats, stores, packages, wagons, sleds, and places of deposit *of such person* to be searched; and if any such liquor is found therein, the same, together with the boats, teams, wagons, and sleds used in conveying the same, and also the goods, packages, and peltries *of such person*, shall be seized and delivered to the proper officer, and shall be proceeded against by libel in the proper court, and forfeited, one-half to the informer and the other half to the use of the United States." Comp. St. 1916, § 4141.

It is claimed by counsel for the United States that the above statute treats the automobile in this case as the offender, without any regard whatsoever to the personal misconduct or responsibility of the owner

thereof, and therefore, as the automobile was found guilty, forfeiture followed as a matter of course, regardless of the rights of the bank under its mortgage, and that, if this position is not correct, still, as the trial court forfeited the automobile and the evidence is not in the record, we must presume that there was evidence that the bank knew or had good reason to know the use to which the automobile was being put. This last contention, of course, is inadmissible, for the reason that the court found that the bank had a valid lien upon the automobile, and, if we indulge in any presumption as to the connection of the bank with the introduction of the liquor into the Indian country, we must presume, in the absence of any evidence or finding to the contrary, that the bank had nothing to do with it.

Counsel for the bank claim that the statute above quoted simply forfeits the interest of the introducer of the spirituous liquor in the automobile; therefore, it not appearing that the bank had anything to do with the introduction of the liquor, its interest could not be forfeited. The United States District Court for the District of Montana in the case of United States v. Two Gallons of Whisky et al., 213 Fed. 986, decided that the above statute could not be held to forfeit property which had been borrowed by the person who introduced the liquor into the Indian country; the owner of the property not having any knowledge or information as to the use to which the property was to be put. United States v. 246 Pounds of Tobacco (D. C.) 103 Fed. 791.

In cases under revenue statutes a mortgagee is regarded with greater favor than the owner. United States v. Two Barrels Whisky, 96 Fed. 497, 37 C. C. A. 518. Where a smuggling statute authorized the forfeiture of any vessel "whose master should knowingly violate the act," it was held that a master of a vessel, who was appointed by less than a majority of the ownership of the vessel, could not, by violating the law, subject the majority interest to forfeiture. The Calypso, 230 Fed. 962, 145 C. C. A. 156. In United States v. 372 Pipes of Spirits, 5 Sawyer, 421, Fed. Cas. No. 16,505, under a statute which authorized the forfeiture of "spirits owned by such person," it was decided that a mortgagee would be protected to the extent of his debt. In United States v. Stowell, 133 U. S. 1, 10 Sup. Ct. 244, 33 L. Ed. 555, it was decided that the interest of the mortgagee on realty upon which an illicit still had been established would not be forfeited, where the mortgage was taken prior to the establishment of the still. It is also a principle of law and natural justice that statutes will not be held to forfeit property, except for the fault of the owner or his agents, unless such a construction is unavoidable. Peisch v. Ware, 4 Cranch, 347, 2 L. Ed. 643; United States v. 33 Barrels of Spirits, 1 Abb. U. S. 311, Fed. Cas. No. 16,470; Clinkenbeard v. United States, 21 Wall. 65, 22 L. Ed. 477.

There are cases cited upon other statutes which seem to support the contention of counsel of the United States, but we think justice requires us to adopt the view presented by counsel for the bank. An examination of the decisions under different statutes of the United States providing for the forfeiture of property shows that there are

two classes of statutes, one authorizing forfeiture irrespective of ownership, and the other making ownership of the wrongdoer a necessary element. Heidritter v. Elizabeth Oil Cloth Company (C. C.) 6 Fed. 138, affirmed 112 U. S. 294, 5 Sup. Ct. 135, 28 L. Ed. 729.

It is contended by counsel for the United States that the words "of such person" in the above statute, occurring after the word "peltries," by all rules of grammatical construction relate to the last antecedents, which are "goods," "packages," and "peltries," and do not relate back to boats, teams, wagons, and sleds; therefore the statute, so far as the words "boats," "teams," "wagons," and "sleds" are concerned, does not limit the forfeiture to the interest therein of the introducer of the spirituous liquor; while counsel for the bank claim that the words "of such person," where they appear after the word "peltries," have the same significance as they do in the previous part of the law following the words "places of deposit," and therefore the law only provides for the forfeiture of the property of the person who has introduced or is about to introduce spirituous liquor into the Indian country, and that when this meaning is given to the statute it excludes from forfeiture the special interest of the bank under its mortgage.

The decision of the question presented is not free from difficulty, but, taking into consideration the fact that the law is highly penal, and that before the property of a citizen may be confiscated a case clearly within the letter and spirit of the law must be made, we do not think it was the intention of the law to forfeit the interest of the bank in the automobile. We also are of the opinion that the words "of such person," where they occur in the law after the word "peltries," relate as well to the words, "boats, teams, wagons, and sleds" as to the words "goods, packages, and peltries." We are confirmed in this construction of the law, we think, by a paragraph in the law making appropriations for the current contingent expenses of the Bureau of Indian Affairs, approved March 2, 1917 (39 Stat. 969, c. 146) which reads as follows:

"For the suppression of the traffic in intoxicating liquors among Indians, $150,000: Provided, that *automobiles or any other vehicles or conveyances* used in introducing, or attempting to introduce, intoxicants into the Indian country, or where the introduction is prohibited by treaty or federal statute, whether used by the *owner thereof or other person*, shall be subject to seizure, libel, and forfeiture provided in section 2140 of the Revised Statutes of the United States."

The enactment of this law by Congress was a legislative declaration that in the opinion of Congress section 2140, as it read when the seizure in this case was made, did not authorize the seizure and forfeiture of any of the articles mentioned in section 2140, except those owned by the guilty party.

[5] There is another view of the law, not discussed by counsel, which makes it doubtful if an automobile comes within the language of the statute wherein it specifies those articles which may be forfeited. As we have said before, the statute is highly penal, and not in aid of the revenues. It must be, therefore, strictly construed, and all doubts resolved in favor of those against whom it is invoked. The statute specifies that boats, teams, wagons, and sleds may be forfeited. An

automobile is not a boat, a team, or a sled. Is it a wagon? The statute was enacted March 15, 1864 (13 Stat. 29, c. 33 [Comp. St. 1916, § 4136a]). At that time automobiles as a means of transporting passengers or freight were unknown; hence there can be no claim that Congress intended to include automobiles when it used the word "wagons." Automobiles have not been denominated, either by the public or lexicographers, as wagons. A wagon is drawn by a force outside of itself. An automobile, as its name suggests, is its own propeller. According to the letter of the law, an automobile is not within its terms. It was evidently to remedy this defect that the language above quoted from the act of March 2, 1917, was enacted. It makes the law read so as to include automobiles or any other vehicles or conveyances. Congress, when it enacted section 2140, could have used the word "vehicles," or conveyances, in general terms, so as to include all means of transportation. It did not choose to do so, but specified certain vehicles by name, and thereby, we think, excluded other kinds of conveyances.

[6] We are of the opinion that the bank is entitled to raise this question on the present record, as the findings do not support the judgment. Carrying out the theory on which the action was tried below, it results that the judgment rendered against the bank must be reversed, and the case remanded, with directions to pay over the proceeds resulting from the sale of the automobile to the bank in partial satisfaction of its mortgage; and it is so ordered.

THE SAN GUGLIELMO.

(Circuit Court of Appeals, Second Circuit. March 13, 1918.)

Nos. 199–201.

1. SHIPPING ⊂=142—DAMAGE TO CARGO—NOTICE OF CLAIM.
   Where a bill of lading declared that the steamship owner should not be liable for any loss or damage or claim of which notice was not given before removal of the goods, it was not sufficient that the attention of the captain in one case, and of persons on the wharves directing or supervising the discharge of the cargo in another, was called to the fact that goods were damaged, for, if that were allowed, loose talk of truckmen would be enough to defeat the exception.

2. SHIPPING ⊂=142—DAMAGE TO CARGO—NOTICE OF CLAIM.
   Though a bill of lading declared that the steamship owner should not be liable for any claim of which notice was not given before removal of the goods, consignees, who removed part of the goods without notice, may recover for damage to other goods, which were left on the wharf and later were destroyed by the board of health.

3. SHIPPING ⊂=132(5)—ACTIONS—EVIDENCE—SUFFICIENCY.
   Evidence *held* insufficient to show that one of several libelants, who asserted injuries to a shipment of goods, gave detailed particulars of his claim as required by the bill of lading, but to warrant a finding that no such particulars were given.

Hough, Circuit Judge, dissenting.

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

Libel by Jacob A. Kirsch against the steamship San Guglielmo, etc., claimed by Pierce Bros., Incorporated, together with libels by Nathan Kronman & Co. and P. Pastene & Co., Incorporated, against the same vessel. From decrees for libelants (241 Fed. 969), claimant appeals. Modification of decrees directed.

Kirlin, Woolsey & Hickox, of New York City (M. W. Maclay, Jr., and John M. Woolsey, both of New York City, of counsel), for appellant.

Henry L. Franklin, of New York City (Frank V. Barns, of New York City, of counsel), for appellees.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

WARD, Circuit Judge. These are suits in admiralty by consignees of various shipments of garlic, peppers, and oregano in baskets and tomatoes in cans by the steamer San Guglielmo from Naples to New York, receipted for in the bill of lading as in apparent good order and condition, but delivered damaged. The libel alleged that the damage was due, not to perils excepted in the bill of lading, viz. heating, * * * decay, * * * sweat, * * * or any loss arising from the nature of the goods," but to negligent stowage, and particularly to want of proper ventilation for the large quantity of the goods carried in deep tank No. 4.

[1, 2] The answer denied these allegations and attributed the damage to vice propre and also relied upon the following clause in the bill of lading:

"5. Also that the steamship owner shall not be liable * * * for any claim, however arising, of which notice is not given before removal of the goods and amount and particulars of claim given within eight days after receipt of goods."

Libelants removed some of the goods and left some on the wharf, which were afterwards destroyed by the board of health. Kirsch and Pastene made detailed claim within eight days after removal upon the managers and general agents of the steamer, but Kronman failed to prove any detailed claim. Judge Mayer found that the libelants had sustained the burden which lay upon them, in view of the exceptions in the bill of lading, of proving that the damage had been caused by negligent stowage and lack of proper ventilation, and we agree with him.

He also held that the libelants Kirsch and Pastene had made claim before removal of the goods, because the attention of the captain in one case, and of persons on the wharf directing or supervising the discharge of cargo in the other, was called to the fact that the goods were damaged. We think this no proof of making claim. Loose talk of truckmen would be enough to defeat the exception. It seemed to the District Judge, however, to satisfy our ruling in the case of The Persiana, 185 Fed. 396, 107 C. C. A. 416. The provision in that case was weaker than the one under consideration, in that it only called for notice of damage, viz. that the owners should not be liable "for any

damage to any goods * * * notice of which is not given before the removal of the goods." The District Judge held (156 Fed. 1019, 1021) that the libelants "gave notice as soon as they learned of the damage and of the damage which was already known to the claimants or their agents, and did this while the vessel was still unloading." The bill of lading in this case expressly requires notice of claim for the damage which necessarily extends and goes beyond notice of damage. Still we held in The Persiana that it must be given before removal, even if the carrier already had knowledge of the damage. The stipulation was a part of the contract and the libelants could not recover without showing compliance with it. The fact that the carrier knew of the damage did not alter the case.

The District Judge applied to this case the reasoning which was overruled in The Persiana. He said:

"It would certainly involve a technical construction beyond all reasonable limits to say that this provision in the bill of lading placed upon the consignee the duty of giving some kind of formal notice in formal language to the appropriate representatives of the vessel or its owners. Of course, there may be many instances where it may be claimed that a few boxes or bales of a shipment were damaged, while the great bulk of the shipment is in good condition, and, in such cases, a casual observation by a consignee or his agents or employés to some minor employé of the steamship owners would not be compliance with this provision of the bill of lading. That, however, is not this case. The talks of Kirsch and the drivers of Kronman and Pastene were respectively with the captain of the vessel and the superintendent of the steamship company, and concerning goods known without question by these men to be in bad condition. The fact that the captain and the superintendent answered indifferently is a matter of no consequence. It seems to me that the conversations, as related in the record in all the circumstances there disclosed, constituted the notice required by the bill of lading, and any other conclusion would make a mockery of this provision and torture it into an instrument for the most indefensible kind of evasion by technicality, instead of a fair and reasonable protection to the shipowner."

The Circuit Court of Appeals for the Third Circuit in The St. Hubert, 107 Fed. 727, 46 C. C. A. 603, and The Westminster, 127 Fed. 680, 62 C. C. A. 406, and for the Fifth Circuit in Unione Austriaca, etc., v. Leon G., 231 Fed. 427, 145 C. C. A. 421, has construed this precise clause in exactly the same way as we have done, viz., as a condition precedent requiring notice of claim, failure to comply with which defeats recovery. In the case of The Queen of the Pacific, 180 U. S. 49, 21 Sup. Ct. 278, 45 L. Ed. 419, decided before any of the foregoing cases, a similar construction was applied to a stipulation in a bill of lading that claims for damage to merchandise must be presented within thirty days from the date of the bill of lading. There the vessel within 2 days from that date filled, sank, and lay in a helpless condition for 3 days, so that the fact of damage must have been known to the owners. The court observed that the provision might not reasonably apply to foreign voyages because the damage could well occur more than 30 days after the date of the bill of lading, and, whether it did or not, without knowledge of the goods owner of the fact until after that time.

We cannot alter the contract of the parties because the result seems to be hard, but we should construe it strictly in favor of the goods.

owner. For this reason we agree with the District Judge that it only applies when he removes the goods. For such of the goods left by the libelants on the wharf as were destroyed by the board of health, and for such only, they are entitled to recover.

[3] The libelant Kronman attempted to prove detailed notice of his claim by a carbon copy of a letter addressed to the claimant's agents and the course of business in his office as to the mailing of letters. The clerk whose duty it was to mail letters was not in libelant's employment at the time of trial, and her address was not known. On the other hand, the claimant produced the detailed claim of the other libelants, proved the course of business as to opening and filing letters received, and proved that no such letter was in its files. The District Judge quite correctly held that this proof was more convincing than was the libelant's.

The court below is directed to modify the decrees in accordance with this opinion.

HOUGH, Circuit Judge (dissenting). The point insisted on by the majority seems to me most frankly put in The Westminster, 127 Fed. 681, 62 C. C. A. 406, where it is said:

"The notice stipulated for is not of the fact of damage, * * * but of the intent to hold the carrier liable for it, which, on failure to give notice, the latter, in view of the stipulation, may well regard as being waived."

Taking cognizance of the methods, and the only possible methods, of receiving most cargo from most ships (and the San Guglielmo in particular), the majority hold in substance that a shipper's right to recover for obviously damaged cargo depends on whether a carter or driver is able nicely to distinguish between notice of fact of damage, and notice of claim for damage. If he takes away the goods without using the correct legal formula, his employer's rights are gone.

From this doctrine and the decision applying it I dissent, believing that the only justification for the attempted limitation of carrier's liability is that the carrier is reasonably entitled to knowledge of demands that may be made; more than that is unreasonable. Nor do I think that The Queen of the Pacific, supra, requires or supports the present ruling. The test of reasonableness is there laid down, and that criterion, if applied here, would result in affirmance of decree.

OKLAHOMA, K. & M. I. RY. CO. v. BOWLING.

(Circuit Court of Appeals, Eighth Circuit. March 9, 1918.)

No. 5026.

1. STATES ⟸9—TERRITORIES ⟸11—AUTHORITY OF CONGRESS—EFFECT OF ADMISSION.
   Before territories are admitted to statehood, Congress exercises as to them the combined powers of the national and state governments; but, when a territory is admitted to the Union as a state, it stands on the same footing as the original 13 states, with supreme authority as to all matters of internal government and local concern, subject only to the limitations of the federal Constitution, and statutes enacted for the territory upon subjects of state cognizance are automatically abrogated.
2. STATES ⟸9—STATUTES—INDIAN TERRITORY.
   Act Feb. 28, 1902, c. 134, 32 Stat. 43, authorizes any railroad company to take and condemn a right of way in or through any lands held by any Indian tribe or nation, person, individual, or municipality in the Indian Territory, or in and through any lands which have been or may hereafter be allotted in severalty, whether the same have or have not been conveyed with full power of alienation. Oklahoma was in 1907 admitted as a state. Act May 27, 1908, c. 199, 35 Stat. 312, relating to the removal of restrictions on the lands of Indian allottees, declares in section 1 that "no restriction of alienation shall be construed to prevent the exercise of the right of eminent domain in condemning rights of way for public purposes over allotted lands, and for such purposes" the sections of the 1902 act on that subject "are hereby continued in force in the state of Oklahoma." *Held*, that the admission of Oklahoma as a state abrogated the act of 1902 as to lands in the Indian Territory, which had been conveyed by the Indian allottees after the restrictions on alienation had expired, and by the 1908 act the procedure prescribed by the 1902 act for the exercise of the right of eminent domain was preserved only so far as it affected Indian lands, including those allotted, but still subject to restrictions against alienation.
3. EMINENT DOMAIN ⟸20(1)—INTERSTATE COMMERCE.
   Act Feb. 28, 1902, and Act May 27, 1908, relating to Indian lands, are not a grant of authority to railroads, engaged, or organized to engage, in interstate commerce, to appropriate private property in the state of Oklahoma, but are limited to Indian lands.
4. APPEAL AND ERROR ⟸70(5)—ORDERS APPEALABLE.
   An order denying a motion to dismiss plaintiff's petition, not followed by decree disposing of the case, is not appealable.

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

Suit by George E. Bowling against the Oklahoma, Kansas & Missouri Interurban Railway Company. From an order of temporary injunction, defendant appeals. Affirmed.

Edward R. Jones, of Muskogee, Okl., and Ephraim H. Foster, of Oklahoma City, Okl., for appellant.

H. H. McCluer and Roland Hughes, both of Kansas City, Mo. (Vern E. Thompson, of Miami, Okl., on the brief), for appellee.

Before HOOK, CARLAND, and STONE, Circuit Judges.

HOOK, Circuit Judge. This is an appeal by the railway company from an order of temporary injunction at the suit of George E. Bowl-

ing. It involves the validity of condemnation proceedings to take lands for railroad purposes under Act Feb. 28, 1902, c. 134, 32 Stat. 43, commonly called the Enid & Anadarko Act. The lands are in that part of the state of Oklahoma that was formerly Indian Territory. The proceedings were begun by the company after the admission of the state, in the United States District Court for the Eastern Judicial District, as successor to the jurisdiction of the United States Courts in the Indian Territory. The precise question is whether the act of 1902, aided by a later act to which reference will be made, continued to apply to lands like those of the plaintiff after the territory became a part of the state.

The lands had been tribal property of the confederated Wea, Peoria, and other tribes of Indians, had been allotted in severalty, and after the expiration of all restrictions upon alienation had been conveyed to and become the property of the plaintiff, a citizen of Missouri. The Indian title and interest had wholly ceased. The act of 1902 authorized any railroad company to take and condemn a right of way, etc., "in or through any lands held by any Indian tribe or nation, person, individual, or municipality in said territory, or in or through any lands in said territory which have been or may hereafter be allotted in severalty to any individual Indian or other person under any law or treaty, whether the same have or have not been conveyed to the allottee, with full power of alienation." Section 13. After Oklahoma was admitted as a state, in 1907, Congress adopted Act May 27, 1908, c. 199, 35 Stat. 312, relating to removal of restrictions from part of the lands of Indian allottees. The railway company points to the following provision of that act:

"No restriction of alienation shall be construed to prevent the exercise of the right of eminent domain in condemning rights of way for public purposes over allotted lands, and for such purposes" the sections of the act of 1902 on that subject "are hereby continued in force in the state of Oklahoma." Section 1.

Upon this it is argued that all lands in what was formerly the Indian Territory were either allotted or unallotted, that the lands of plaintiff fell in the former class, and that Congress not only had the power, but manifested its intention, to continue the condemnation provisions of the act of 1902 as to them, notwithstanding the fact that the Constitution and laws of the state of Oklahoma contained full provisions regarding the condemnation of lands for railroad purposes and subjected such proceedings to the jurisdiction of the state courts.

[1] The authority of Congress over the territories of the United States is a familiar feature of our history. Before they are admitted to statehood it exercises as to them the combined powers of the national and state governments by direct legislation, and also through local legislative bodies whose acts are subject to its supervision, or, as was the case with the Indian Territory, by extending thereto certain of the laws of an organized state. But when a territory is admitted into the Union as a state it stands in every respect upon the same footing as the original 13 states, with supreme authority as to all matters of

internal government and local concern subject only to the limitations of the federal Constitution. Coyle v. Oklahoma, 221 U. S. 559, 31 Sup. Ct. 688, 55 L. Ed. 853. Upon attaining statehood the statutes enacted for the territory upon subjects of state, as distinguished from federal, cognizance are automatically abrogated, except so far as they may be affirmatively continued to prevent an interregnum or hiatus. Benner v. Porter, 9 How. 235, 13 L. Ed. 119; Escanaba Co. v. Chicago, 107 U. S. 678, 688, 2 Sup. Ct. 185, 27 L. Ed. 442. An instance of legislation for a territory that took on a double aspect is presented by Act March 1, 1895, c. 145, 28 Stat. 693, prohibiting the carrying of intoxicating liquor into the Indian Territory. The subsequent Oklahoma Enabling Act and the admission of the state operated by implication to repeal it as to such commerce wholly within the boundaries of the new state, but left it in force as to the commerce that was interstate. The authority for the survival of the latter phase of the statute rested in the power of Congress over commerce among the states and with the Indian tribes and in the peculiar relation and continuing responsibilities of the federal government towards the Indians and their lands. Ex parte Webb, 225 U. S. 663, 32 Sup. Ct. 769, 56 L. Ed. 1248; United States v. Wright, 229 U. S. 226, 33 Sup. Ct. 630, 57 L. Ed. 1160. But, as already observed, as to those things that were within the power of the sovereign state the statute fell.

[2] The act of 1902 prescribed a procedure for the exercise of the right of eminent domain and by its terms applied to all lands in the Indian Territory, regardless of Indian title. This was naturally so, because there was then no other competent legislative authority than Congress. But the comprehensive scope of the legislation did not survive the admission of the state. By the act of 1908 Congress merely sought to preserve it so far as it affected Indian lands including those that had been allotted but were still subject to restrictions against alienation. That was the extent of its interest during statehood. The power of Congress to legislate ends when the transitory character of the subject-matter ceases to be of federal concern.

[3] It is also urged by the railway company that the application of the statute to the plaintiff's lands should be sustained as a regulation of interstate commerce. Assuming, without consideration, that Congress might under the power indicated authorize railroads engaged or organized to engage in such commerce to appropriate private property within the states, prescribe a procedure therefor, and confer jurisdiction of the proceedings upon the courts of the United States, it would take a plainer case than the one here to indicate its intention to do so. The obvious, apparent reason for the continuance of the legislation in question during statehood is in the peculiar character of the tenure of a particular class of lands, and when that ceases the laws of the state attach and are exclusive.

[4] An appeal has also been taken from an order denying a motion to dismiss the plaintiff's petition. The order was not followed by a decree disposing of the case, and is not appealable.

The order of injunction is affirmed.

COUTS v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. March 4, 1918.)

No. 4992.

1. CONTEMPT ⊜66(3) — REVIEW — PRESENTATION OF QUESTIONS IN COURT BELOW.
   Where not raised in the lower court, the objection that the evidence was insufficient to warrant a finding that defendant was guilty of contempt cannot be raised on writ of error.

2. CONTEMPT ⊜66(6½)—REVIEW—ERRORS NOT ASSIGNED.
   Where an information charging contempt was not attacked in the court below, and there was no assignment of error that it did not state facts sufficient to constitute a contempt, objections to the information, which are not plain, but are of a technical character, cannot be considered under rule 11 (150 Fed. xxvii, 79 C. C. A. xxvii), allowing the Circuit Court of Appeals to consider a plain error not assigned.

3. JURY ⊜25(2)—CONTEMPT—PROCEEDINGS—DEMAND FOR JURY TRIAL.
   Act Cong. Oct. 15, 1914, c. 323, § 21, 38 Stat. 738 (Comp. St. 1916, § 1245a), declares that any person who shall willfully disobey any lawful writ, process, order, decree, or command of the District Court, if the act or thing so done by him shall be of such character as to constitute a criminal offense under any statute of the United States or laws of the state in which the act was committed, shall be proceeded against for contempt. Section 22 (Comp. St. 1916, § 1245b) declares that in all cases within the act trial may be by the court, or upon demand of the accused by a jury, while section 24 (Comp. St. 1916, § 1245d) declares that nothing in the act shall be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice. Defendant, for an attempt to influence a juror as to his verdict, was punished under Judicial Code (Act March 3, 1911, c. 231) § 268, 36 Stat. 1163 (Comp. St. 1916, § 1245), making misbehavior so near the court as to obstruct the administration of justice a contempt, although his act was a criminal offense both under Penal Code (Act March 4, 1909, c. 321) § 135, 35 Stat. 1113 (Comp. St. 1916, § 10305), as well as the laws of the state in which the court was sitting. *Held* that, though defendant was adjudged guilty on hearing to the court without a jury, he cannot complain that he was denied a jury trial on the theory that section 24, Act of 1914, was invalid as class legislation, for sections 21 and 22 do not cover contempts of the class of which defendant was found guilty, and further the record showed no demand by defendant for jury trial.

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

James F. Couts was found guilty of contempt under Judicial Code, § 268, on an information filed by the United States attorney upon leave granted, and brings error. Affirmed.

Battle McCardle, of Kansas City, Mo. (Frank L. Barry, of Kansas City, Mo., on the brief), for plaintiff in error.

Sam O. Hargus, Asst. U. S. Atty., of Kansas City, Mo. (Francis M. Wilson, U. S. Atty., of Kansas City, Mo., on the brief), for the United States.

Before SANBORN, CARLAND, and STONE, Circuit Judges.

CARLAND, Circuit Judge. Upon leave granted, the United States attorney for the Western district of Missouri filed an information in the court below charging the plaintiff in error, hereafter called defendant, with the commission of certain acts which it was alleged constituted a contempt of said court. Without making any objection to the information filed against him, the defendant entered a plea of not guilty. After a hearing by the court he was found guilty of the contempt charged and sentenced to imprisonment for the period of 60 days in the common jail of Jackson county, Mo.

[1, 2] Assignments of error Nos. 1, 2, 3, 4, and 5 present the question as to whether the evidence was sufficient to justify the finding and judgment of the court. As this question was in no wise raised during the trial, it may not be considered. The information was not attacked in the court below, and there is no assignment of error that it does not state facts sufficient to constitute a contempt. We are asked, however, to consider objections made here to the information under rule 11 of this court, providing that we may at our option notice a plain error not assigned. There are two reasons why we should not do this in the present case: First, the alleged errors are not plain; and, second, they are of a technical character.

[3] The defendant further alleges that he was found guilty and punished for misbehavior so near the court as to obstruct the administration of justice under section 268 of the Judicial Code; that the act for which he was punished (attempt to influence a juror as to his verdict in a case on trial) is a criminal offense under section 4356, Revised Statutes of Missouri, and section 135 of the Penal Code of the United States; that by sections 21, 22, and 24 of the Act of Congress of October 15, 1914 (38 Stat. 730, c. 323), it is provided as follows:

"Sec. 21. That any person who shall willfully disobey any lawful writ, process, order, rule, decree, or command of any District Court of the United States, or any court of the District of Columbia by doing any act or thing therein, or thereby forbidden to be done by him, if the act or thing so done by him be of such character as to constitute also a criminal offense under any statute of the United States, or under the laws of any state in which the act was committed, shall be proceeded against for his said contempt as hereinafter provided.

"Sec. 22. [Paragraph 2] In all cases within the purview of this act such trial may be by the court, or, upon demand of the accused, by a jury; in which latter event the court may impanel a jury from the jurors then in attendance, or the court or the judge thereof in chambers may cause a sufficient number of jurors to be selected and summoned, as provided by law, to attend at the time and place of trial, at which time a jury shall be selected and impaneled as upon a trial for misdemeanor; and such trial shall conform, as near as may be, to the practice in criminal cases prosecuted by indictment or upon information. * * *

"Sec. 24. That nothing herein contained shall be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced within section 21 of this act, may be punished in conformity to the usages at law and in equity now prevailing."

On this state of the record, in connection with the act of Congress above quoted, counsel for defendant contends that he was, in some way not easily understood, deprived of a trial by jury. The argument in support of the contention is this: A person proceeded against for contempt under sections 21 and 22, above quoted, is entitled upon demand to a trial by jury. By section 24, above quoted, a person prosecuted for a contempt such as was charged against defendant, is not entitled to a jury trial; therefore the law contained in the above three sections is void, as class legislation and discriminatory against defendant, the classification being arbitrary, and not based upon any reasonable ground.

Assuming, but not deciding, that there is in the Constitution of the United States provisions which would strike down the sections above quoted for the reasons stated, it would not help the defendant, as it is conceded that there then would be no law providing for a jury trial in contempt cases; but counsel ask us to strike down section 24, above quoted, as that is the section which causes the discrimination, and then elevate him into sections 21 and 22. If this were done, however, still the defendant would not be benefited for two reasons. Sections 21 and 22, without section 24, do not cover the kind of contempt charged against him, and, if they did, a jury trial is only granted upon demand, and the record does not show that any such demand was made. It thus appears that the constitutional question is a mirage; nothing more.

The judgment below is affirmed.

NULOMOLINE CO. v. STROMEYER.

(Circuit Court of Appeals, Third Circuit. March 4, 1918. Rehearing Denied April 9, 1918.)

No. 2305.

INJUNCTION ⊂=56—SUBJECTS OF PROTECTION—USE OF TRADE SECRETS.

A complainant *held* entitled on the evidence to an injunction to restrain defendant, a competing manufacturer of invert sugar, from using in his business the secret process of complainant, disclosed to him by a former employé of complainant in violation of his contract of employment.

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

Suit in equity by the Nulomoline Company against Julius Stromeyer. Decree for defendant, and complainant appeals. Reversed and remanded.

For opinion below, see 245 Fed. 195.

Leo Levy, of New York City, and Chester N. Farr, Jr., of Philadelphia, Pa., for appellant.

James F. Ryan and Michael J. Ryan, both of Philadelphia, Pa., for appellee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. Our examination of this voluminous record, containing more than 1,000 printed pages, has convinced us that the bill should not have been dismissed. The opinion of the District Judge is reported in 245 Fed. at page 195, and we agree that the controversy is one of fact. Moreover, it seems to us to lie within narrow limits, and we think what is now relevant may be fairly summarized as follows:

In November, 1910, Maxwell Tausek entered the direct employment of the Nulomoline Company, a manufacturer of invert sugar, and agreed, inter alia, that he would not—

"* * * engage in any other business whatsoever; that he will perform such duties as may be assigned to him during the course of the employment herein provided for. [He] covenants and agrees that any and all knowledge or information that may be obtained by him in the course of the employment with respect to the conduct and details of the business and with respect to the secret processes, formulas, machinery, utensils, and arts used by the employer in manufacturing its products, will be by him forever kept inviolate and be by him concealed from any competitor and all other persons, and that he will not engage as employer, employé, principal, agent, or otherwise, directly or indirectly, at any time hereinafter in a similar business, and that he will not impart the knowledge by him acquired of the said secret processes, formulas, machinery, utensils, and arts of manufacture of the employer to anybody whomsoever, and that, should he at any time leave the employ of the employer, he hereby covenants and agrees that he will not in violation of its terms enter into the employ or service or otherwise act in aid of the business of any rival company or concern or individual engaged in the same or in similar lines of business; and, if he does so in violation hereof, the employer shall be entitled to an injunction by any competent court of equity enjoining and restraining [him] and each and every other person concerned thereby from continuance of such employment, service, or other act in aid of the business of such rival company or concern. Nothing herein contained shall prevent [him] upon the termination of the employment, in engaging in any occupation in which the processes, formulas, and other secrets of the employer will not be directly or indirectly involved."

Early in 1915 Tausek was discharged, and later in the year he entered into business relations with Julius Stromeyer, the defendant; these relations continuing for a number of months thereafter. The plaintiff charges that during this period Tausek disclosed to Stromeyer the secret process by which Nulomoline was made, and that Stromeyer used the knowledge so obtained in order to make and sell Nulomoline (although under another name), thereby seriously injuring the plaintiff's trade and inducing a number of its former customers to transfer their business either wholly or in part. The charge that Tausek made the disclosure has been sustained by the District Court, and in our opinion upon sufficient evidence. The learned judge finds as a fact (page 199) that:

"* * * Tausek did send to the defendant the names and addresses of buyers of products who had been customers of the plaintiff, and did inform the defendant of how the plaintiff made the product which these customers had been receiving."

Upon the other charge—that Stromeyer used this information and made Nulomoline by the plaintiff's process—the finding of the court below is in favor of Stromeyer:

"There is nothing beyond the fact that Tausek disclosed information to implicate the defendant in either its disclosure or its use. There is nothing to indicate that the defendant invited it and evidence that he somewhat testily repulsed Tausek's attempt to teach him the art."

But, without discussing the circumstantial evidence that indicates strongly an opposite conclusion, we are satisfied that such a conclusion should have been reached, and accordingly we find that Stromeyer was not only ready and willing to accept the disclosure offered by Tausek, but that he did act thereon and did employ the plaintiff's process by making the plaintiff's product. Just how far this improper conduct went, and to what extent Stromeyer should account, we cannot determine accurately on the evidence before us, but this matter may be left for future consideration upon such other evidence as may be offered. The decree to be entered should carefully preserve Stromeyer's right to make invert sugar in accordance with his own process—which he has apparently been using for many years—and also to preserve his right to promote the sale of his distinctive product in competition with Nulomoline. But he should be enjoined from making any future use of the information unlawfully obtained from Tausek concerning the manufacture of invert sugar by the plaintiff's process; and he should be compelled to account in respect of the Nulomoline (by whatever name) that he has already made and sold in the use of the information thus obtained. There may perhaps be difficulties in framing a decree that will preserve the defendant's right to his own product while protecting the right of the plaintiff, but this is not a sufficient reason for denying to the plaintiff the relief to which it is entitled.

We regard this record as unduly swollen by the appellant, both by its disregard of the equity rules, and by the inclusion of unnecessary matter, and we therefore direct that all the costs on this appeal be equally divided between the parties.

The decree is reversed, and the cause is remanded for further proceedings in accordance with this opinion.

THE C. R. SHEFFER.

Appeal of SCHOONMAKER et al.

(Circuit Court of Appeals, Second Circuit. January 16, 1918.)

No. 105.

1. SHIPPING ⊂⊃101—CHARTERS—COMMON OR "PRIVATE CARRIER."
A scow, contracting to carry a cargo to her full capacity, is not a common, but a private, carrier, and is bound only to the exercise of ordinary care and skill.

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

2. SHIPPING ⊂⊃120—CHARTER OF SCOW—LIABILITY FOR INJURY TO CARGO.
A scow contracted to carry a cargo of brick to be delivered in shallow waters, in which she was liable to lie aground at low tide, but where, as a rule, the bottom was reasonably level and soft. She was shown to be in good condition and seaworthy, and had previously discharged cargoes in the same vicinity without injury. On the trip in question, owing to a gale, the water was at least two feet lower than usual, and where she discharged there was some obstruction, on which she settled, and which broke a hole in her bottom, causing her to fill and injure the cargo. *Held*, that such fact did not establish negligence which rendered her liable for the damage.

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

Petition in admiralty of John D. Schoonmaker and Jacob Rice, as owners of the barge C. R. Sheffer, for limitation of liability. From a decree holding the vessel liable for injury to a cargo, petitioners appeal. Reversed.

It is assumed without finding it as a fact, that the petitioners, Schoonmaker and Rice, as owners of the brick scow Sheffer, agreed with the Richmond Brick Company (claimant) to transport a full cargo of brick from Staten Island to the vicinity of Meserole street, Brooklyn (Newtown creek). It is not uncommon, if not ordinarily expected, that vessels frequenting shallow waters in this kind of harbor service will often lie aground while receiving and discharging cargo. The Sheffer was not old, and was well built and entirely seaworthy, when agreement made. During either loading or waiting to unload the Sheffer grounded at least once before January 6th and developed a leak, which was repaired. Beginning on January 5th a violent northwesterly gale prevailed over the harbor of New York, causing very low tides, and we consider it shown that the shallow waters of Newtown creek were by reason of this gale two or three feet lower than would ordinarily be the case. At about 4 o'clock on the afternoon of January 6th the Sheffer was examined and found to be free of water, except "four or five inches in her lowest corner," which for a wooden vessel of her class would not be "any water to figure on." The tide was then falling, the boat was aground or nearly so, and some hours later she was obviously as full of water as the tide permitted her to be. She was later discovered to have her bottom broken or pushed in over a considerable area, the wound displaying such characteristics that we find she must have rested upon a hard object while aground. Of course, the heavier the load and the shallower the water, the greater the likelihood that such injury would occur.

The Richmond Brick Company brought suit at law against Schoonmaker et al., for injury to their brick cargo whereupon the scow owners began this

proceeding, wherein the Brick Company appeared as answering claimant. The court below denied the right to limit, and awarded the claimant damages as upon a libel for breach of contact of carriage.

Hyland & Zabriskie, of New York City (Nelson Zabriskie, of New York City, of counsel), for appellants.

Charles E. Lydecker, of New York City, for appellee.

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

HOUGH, Circuit Judge (after stating the facts as above). [1] Assuming an agreement of carriage between scow owners and freighters, the appellants were not common carriers, for the Brick Company was given and used the full capacity of the scow, and therefore her owners were not common, but private, carriers; i. e., bailees to transport for hire. The Fri, 154 Fed. 333, 83 C. C. A. 205, certiorari denied 210 U. S. 431, 28 Sup. Ct. 761, 52 L. Ed. 1135; The Wildenfels, 161 Fed. 864, 89 C. C. A. 58.

[2] Therefore claimant was obliged when the original seaworthiness of the Sheffer was shown to prove some act of negligence, by which those private carriers became liable for cargo damage. It is claimant's contention that it was sufficient proof of negligence that the Sheffer lay upon the ground to her injury, or that, since brick scows often do lie aground, it was negligence not to provide a scow that could so rest on the bottom without injury to her cargo wherever she was lawfully sent. This in substance asserts that no brick scow is seaworthy—i. e., reasonably fit for her intended occupation—unless she can lie aground everywhere. This is going much too far. A private carrier, like other bailees for hire, is only bound to the exercise of ordinary care and skill—the reasonable skill of his calling.

It may be admitted that any vessel expected to lie aground must be reasonably fit for the contingencies of such an occupation; but it does not follow that she must therefore be strong enough to hold up a heavy cargo when an extraordinary January gale sweeps out at least two feet of water from accustomed mooring places, or that owners are bound to anticipate that in bottoms reasonably level and soft there may not be embedded hard objects that will puncture vessels resting against them. We consider it proven that the cause of damage to this vessel and her cargo was an unusual storm, which lowered the scanty waters of Newtown creek and caused the Sheffer to lie aground on a bottom for the most part notoriously soft and oozy, but which at the place where she lay contained some substance (possibly an old wreck or a dumped cargo) that broke in her bottom in an unusual and not to be anticipated manner. Therefore claimant has failed to show negligence, and petitioners have shown that they offered a seaworthy vessel for the service and exercised due diligence to keep her so.

The decree below is reversed, and cause remanded, with instructions to grant the prayer of the petition. Appellants will have costs in this court.

MOLLER v. HERRING.

(Circuit Court of Appeals, Fifth Circuit. March 11, 1918.)

No. 3059.

CONTRACTS ⟸108(2)—CONSTRUCTION—VALIDITY.

Where, in the Galveston storm of 1915, a great quantity of cotton was washed from the island of Galveston to the mainland, an agreement entered into by defendant, who was the owner of 1,000 bales of cotton to pay plaintiff $10 per bale for each bale reclaimed, is not unlawful and void, as against good morals and public policy, or as tending to interfere with public justice, no suit having been instituted for the appointment of a receiver to take charge of all of the cotton, for any person having an interest in any of the cotton was at liberty to collect any part of it in order to conserve that interest.

Foster, District Judge, dissenting.

In Error to the District Court of the United States for the Southern District of Texas; Waller T. Burns, Judge.

Action by A. L. Moller against F. E. Herring. There was a judgment for defendant, and plaintiff brings error. Reversed and remanded.

Maco Stewart and Barret Gibson, both of Galveston, Tex., for plaintiff in error.

B. B. Stone, of Ft. Worth, Tex., for defendant in error.

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

BATTS, Circuit Judge. Plaintiff in error, plaintiff below, alleged that about September 2, 1915, the defendant represented to him that on August 16, 1915, he had stored in the Galveston Cotton Compress and Warehouse at Galveston, more than 1,000 bales of cotton, which were washed away and lost in the storm of August 16–17, 1915, and that this cotton, together with a great deal of other cotton, had been carried from its place of storage and deposited on the prairie of the mainland; that the marks and brands had been obliterated and the identity of the cotton lost; that the defendant contracted with him to save and gather for the defendant as much as possible of the cotton, not to exceed 1,000 bales, and represented to him that he was entitled to regain possession of that amount of cotton, and agreed in writing that for each and every bale of cotton plaintiff might recover defendant would pay him $10 "f. o. b. cars." The plaintiff alleges that at the time the contract was made many persons were engaged in recovering and buying this lost and storm-damaged cotton. He further alleges that, upon the making of the contract, he hired teams and laborers, and began to gather up and haul to a safe place all the bales of cotton he could, and that he had so saved 578 bales, and placed them on board cars at Alta Loma. He alleges that, out of the 578 bales of cotton, 68 were delivered to and received by the defendant, and shipped by him away from Alta Loma. He further alleges that on September 3d a suit was instituted in the district court, wherein a receiver

was appointed to gather up and collect all unidentified storm-damaged cotton which had been deposited on the mainland in Galveston county, and that the receiver, on the 4th of September, demanded of this plaintiff the 510 bales of cotton collected by him for defendant. He refused to deliver this cotton to the receiver, whereupon he and the defendant Herring were impleaded, and the court directed that he and the defendant deliver the cotton to the receiver, which was thereupon done.

The defendant Herring filed a general demurrer and special exceptions to this petition, which the court sustained, and in the final judgment expressed the opinion "that the contract sued upon is unlawful and void, as against good morals and public policy, and as against the laws of the land, and as being and tending to be an interference with public justice and with this court." The cause was dismissed.

The statutes of Texas provide for compensation to persons who gather cotton under the conditions existing as the result of a storm. At the time this contract was entered into, a large quantity of cotton, perhaps in excess of 20,000 bales, had been swept from the places of storage on Galveston Island to the mainland. No action had been taken by any court with reference to the collection and preservation of this property. Any person having an interest in any of the cotton was certainly at liberty to collect any part of it, or all of it, in order to conserve this interest. The contract stipulated for a greater compensation than was provided by law; but it might, nevertheless, have been to the interest of Herring to pay for the collection of the cotton a sum in excess of what he would be allowed upon an adjustment of the rights of the parties. The rights of the other owners in the cotton could in no way be affected by the contract between Moller and Herring, but it was for Herring to determine what he was willing to pay that his property and rights might be preserved, and for Moller to determine whether he would accept this amount as compensation for his labor and expense. It is difficult to understand how this contract, entered into as it was before any suit had been instituted, could constitute an interference with public justice and with the court. It is also difficult to understand how this private arrangement between Moller and Herring could be, in any sense, against good morals and public policy. The contract could not have affected the rights of other owners in the cotton, and did not purport or undertake to affect these rights. Moller continued to carry out his contract, until he and Herring were compelled by the court to desist. He collected "as much as possible," and became entitled, for all collected under the terms of the contract, to $10 per bale. For the amount paid under the direction of the court in the receivership, defendant is entitled to a credit.

It may be that some of the special exceptions should have been sustained. But the ruling of the court was based upon the proposition that the contract was against "good morals and public policy." No possible amendment could have met the objection of the court. The judgment is reversed, and the cause remanded for proceedings not inconsistent herewith.

Reversed and remanded.

FOSTER, District Judge, dissents.

ODELL et al. v. BARTON et al.

(Circuit Court of Appeals, Eighth Circuit. February 28, 1918.)

No. 4930.

FRAUDS, STATUTE OF ⊂=119(1)—AGREEMENTS WITHIN—ENFORCEMENT UNDER THEORY OF DURESS.

Where purchasers of Arkansas lands contracted to resell the same, relying on the vendors' oral agreement to modify the original contract of sale, which was in writing, and the vendors declined to carry out the modification, whereupon the purchasers made a different agreement as to the lands resold, the latter agreement cannot be canceled and the oral agreement enforced on the theory of duress of property, for that would result in an indirect evasion of the statute of frauds.

Appeal from the District Court of the United States for the Eastern District of Arkansas; Jacob Trieber, Judge.

Suit by C. H. Odell and Arnold Kleiner against W. W. Barton and another. From a decree dismissing the complaint, plaintiffs appeal. Affirmed.

M. J. Manning, G. W. Emerson, and W. H. Donham, all of Little Rock, Ark., for appellants.

Thomas S. Buzbee, George B. Pugh, and H. T. Harrison, all of Little Rock, Ark., and George C. Lewis, of Stuttgart, Ark., for appellees.

Before HOOK and SMITH, Circuit Judges.

HOOK, Circuit Judge. Odell and Kleiner sued the Bartons for the enforcement of a credit on a contract for the purchase of property, to be effected by the vacation of a subsequent agreement between them, upon the ground that the agreement was obtained from plaintiffs by compulsion or duress of property. The trial court dismissed the complaint as insufficient, and the plaintiffs appealed.

The complaint states that the defendants Barton contracted in writing to sell plaintiffs about 3,680 acres of land and some personal property in Arkansas for $42,000, payable in five annual installments; defendants to retain possession until the first installment was paid. About four months afterwards, and before any payment was made, plaintiffs sought to sell a fourth of the lands to one Herman for other property, taken at $10,000, and Herman's installment notes for $22,000. Herman was to have a deed for his part of the land and was to secure his installment notes by a deed of trust thereon. Plaintiffs charge that, before executing the contract with Herman, defendants approved the transaction, agreed to make a deed direct to Herman, to accept $12,000 of his installment notes and $2,000 in cash, and to credit plaintiffs with the aggregate of $14,000; that plaintiffs and Herman then executed their contract, but that subsequently defendants refused to abide by the agreement, and would not deed to Herman on the conditions stipulated; that plaintiffs, having in the meantime bound themselves to Herman, were forced to make a second agree-

ment with defendants, much less advantageous to themselves. This second agreement plaintiffs now seek to have vacated. The constraint or duress is charged as arising from defendants' violation of the first agreement and plaintiffs' situation with respect to Herman. The damage charged, so far as need be noted, was $11,000 in Herman's installment notes, which, by the second agreement, defendants exacted as a bonus for their consent, and which was not to be credited plaintiffs on the original purchase price of the land.

The rule invoked by plaintiffs, as expressed by the Supreme Court in Radich v. Hutchins, 95 U. S. 210, 24 L. Ed. 409, and applied in Lonergan v. Buford, 148 U. S. 581, 13 Sup. Ct. 684, 37 L. Ed. 569, is as follows:

"To constitute the coercion or duress which will be regarded as sufficient to make the payment involuntary, * * * there must be some actual or threatened exercise of power possessed, or believed to be possessed, by the party exacting or receiving the payment over the person or property of another, from which the latter has no other means of immediate relief than by making the payment. As stated by the Court of Appeals of Maryland, the doctrine established by the authorities is that 'a payment is not to be regarded as compulsory, unless made to emancipate the person or property from an actual and existing duress imposed upon it by the party to whom the money is paid.' Mayor and City Council of Baltimore v. Lefferman, 4 Gill (Md.) 425 [45 Am. Dec. 145]."

But there is a short and sufficient answer to plaintiffs' complaint. Their contract to sell Herman a part of the land, to which they seek to commit defendants, called for a deed from defendants to him, and for immediate possession. To neither of these were plaintiffs or Herman entitled under any written contract or engagement of the defendants. The first agreement regarding the sale to Herman, which plaintiffs say defendants made and then repudiated, and which they seek to have enforced, does not appear to have been in writing. It is not valid or enforceable against defendants under the Arkansas statute of frauds (Kirby's Dig. 1904, § 3654), and effect cannot be given it by applying the rule of compulsion or duress of property to the second agreement that was made and carried out. We do not say that, aside from the Arkansas statute, there is equity in plaintiffs' case. No payments other than promises have ever been made to defendants, either by plaintiffs or by Herman. The latter defaulted on his notes, and defendants have had to resort to foreclosure against all of them to regain their title.

The decree is affirmed.

In re DITTMAR.

Petition of SCHULTZ.

(Circuit Court of Appeals, Third Circuit. March 29, 1918.)

No. 2332.

1. BANKRUPTCY ⊂⊃400(1)—EXEMPTIONS—ALLOWANCE.
As a claim for exemption is sufficient, if made generally under the exemption laws of the state, an order allowing a Pennsylvania bankrupt shares of corporate stock as part of his exemption will not be reversed, because the bankrupt claimed the same under Act Pa. April 9, 1849 (P. L. 533), although the act really allowing the exemption was that of April 8, 1859 (P. L. 425); it being common to refer to exemptions under act of 1849, though amendments and supplements be intended.

2. BANKRUPTCY ⊂⊃400(1)—EXEMPTIONS—EFFECT.
Where a voluntary bankrupt claimed as exempt property which had been attached in proceedings in the state court brought by the judgment creditor before the filing of the petition, it is proper for the bankruptcy court, the state statute declaring the property exempt, to set it apart to the bankrupt; the order not affecting the attachment, but leaving the property subject to the lien of the attachment, if any.

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

In the matter of the bankruptcy of Frederick Dittmar. On petition by Howard M. Schultz to revise an order setting aside certain corporate stock to the bankrupt as part of his exemptions. Order affirmed.

Jacob Weinstein, of Philadelphia, Pa., for petitioner.

Samuel Galt Birnie, of Philadelphia, Pa., for respondent.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. In March, 1916, the petitioner, Howard M. Schultz, obtained a judgment against Frederick Dittmar in the common pleas of Philadelphia county, and in July issued an attachment execution thereon and summoned the Penn Surgical Manufacturing Company, as garnishee. On September 14, in response to interrogatories, the company admitted that Dittmar was the apparent owner of two shares of its capital stock, but the attachment still remains undetermined, there being no final judgment or execution therein.

[1] On February 9, 1917, more than four months after the attachment was issued, Dittmar filed a voluntary petition in bankruptcy, and as part of his schedules presented a claim for the debtor's exemption of $300 allowed by the Pennsylvania law. Among the articles he desired, he specified the two shares of stock that had then been attached, and the trustee afterward allowed his claim. It is true that both the bankrupt and the trustee refer to the Pennsylvania Act of 1849 (P. L. 533) as the basis of the claim and of the allowance, while it is really the act of 1859 (P. L. 425), that permits shares of stock to

be claimed as part of a debtor's exemption. But this oversight or mistake, which is relied on as a reason for reversal, is hardly important enough to require discussion. In Pennsylvania it is common to speak loosely of the exemption as "under the act of 1849," although the speaker means the act of 1849 and also its supplements and amendments. But in any event it was not essential to refer precisely to a particular statute. The claim would have been sufficient, if made generally under the exemption laws of the state; nothing in the act or in the general orders imposes a penalty for failure to point out in exact terms the statute relied on.

[2] Schultz filed other objections to the trustee's action in setting these shares aside, but the exemption was approved both by the referee and the District Court. In spite of the argument that was addressed to us in support of the petition to revise, we think the approval was right. Of necessity the bankruptcy court is called upon to supervise the process of setting aside the exemption under the local law; but, after this duty has been performed, the property set aside continues to belong to the bankrupt, just as it belonged before the bankruptcy. If it were then affected by liens, it continues to be so affected; the bankruptcy court has no authority to decide upon their validity, but simply retires from the temporary control of the property and leaves other questions to be determined by the proper tribunal. Lockwood v. Bank, 190 U. S. 294, 23 Sup. Ct. 751, 47 L. Ed. 1061; Black, Bankruptcy, § 252; Collier, Bankruptcy, pp. 205–207. In the case before us the District Court did not attempt to meddle with the attachment proceeding; this is a matter for the common pleas, and of course nothing that we have said is intended to have any bearing upon the questions that may be in dispute before that tribunal.

The order is affirmed.

BURKE BRICK CO. et al. v. FIRST NAT. BANK OF CAPE GIRARDEAU, MO. BURKE BROS. v. SAME. BURKE et al. v. SAME.*

(Circuit Court of Appeals, Eighth Circuit. February 28, 1918.)

Nos. 4945–4947.

CORPORATIONS ⇐487(2)—ULTRA VIRES NOTE—RIGHT TO URGE DEFENSE.

In an action by a bank on a note of a corporation indorsed by another, where it was contended that the note was ultra vires, the corporation, having received from the original and primary debtors, who used the note, full satisfaction of the amount, is not entitled to urge the defense of ultra vires.

Appeal from the District Court of the United States for the Western District of Arkansas; F. A. Youmans, Judge.

Actions by the First National Bank of Cape Girardeau, Mo., against the Burke Brick Company and M. C. Burke, against Burke Bros., a firm consisting of M. C. Burke and J. A. Burke, and against J. A. Burke and M. C. Burke, which were consolidated and transferred to the equity docket. From decrees for plaintiff, defendants appeal. Affirmed.

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

*Rehearing denied July 8, 1918.

Joseph M. Hill, Henry L. Fitzhugh, John Brizzolara, and John H. Vaughn, all of Ft. Smith, Ark., for appellants.

James F. Read and James B. McDonough, both of Ft. Smith, Ark., and Benjamin F. Davis and Benson C. Hardesty, both of Cape Girardeau, Mo., for appellee.

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

HOOK, Circuit Judge. The First National Bank of Cape Girardeau, Mo., commenced three actions at law against the makers and the indorser of three notes—one upon a note of the Burke Brick Company, a corporation, for $6,000; another upon a note of Burke Bros., a firm composed of M. C. and James A. Burke, for $5,000; and the third upon a note of James A. Burke, for $5,000. Each note bore the indorsement of M. C. Burke. At the instance of one of the defendants, and because of the assertion of equitable defenses, the cases were transferred to the equity docket, and by stipulation were consolidated for trial. Upon final hearing the trial court decided for the plaintiff. The defendants appealed.

The defenses were that the notes were without consideration to the Brick Company, Burke Bros., and James A. Burke; that the first two were executed in the names of the company and the firm by M. C. Burke, without their knowledge or authority, and for a purpose in which they had no interest; that all of the notes were given upon an agreement with the plaintiff that the latter was to hold them temporarily to deceive a national bank examiner, who had criticized the amount of certain loans, and were then to be returned; that the note of the company was not authorized by its charter, and was therefore void.

No useful purpose will be served by reciting the evidence or by an extended discussion of it. We are of the opinion that the questions involved were purely of fact, and were correctly decided by the trial court. The efforts of defendants to bring themselves within the range of the principles of law announced in Atlantic Cotton Mills v. Indian Orchard Mills, 147 Mass. 268, 17 N. E. 496, 9 Am. St. Rep. 698, failed. The groundwork for the consideration or application of that case and others like it was not established. The only defense at all debatable was that the note of the Brick Company was ultra vires, and it is sufficient to say of it that the evidence showed that the company received from the original and primary debtors who used the note full satisfaction of the amount. It was compensated and stood to lose nothing. The situation was as if it had purchased the property turned over to it, and paid therefor with its note transferred to the plaintiff. It is in no position to urge a want of corporate power.

The decrees are affirmed.

UNITED STATES v. BREWER-ELLIOTT OIL & GAS CO. et al.

(District Court, W. D. Oklahoma. February 21, 1918.)

No. 75.

1. NAVIGABLE WATERS ⟸37(4)—INDIAN RESERVATIONS—NAVIGABLE STREAMS.
In view of Act March 3, 1811, c. 46, § 12, 2 Stat. 666 (Comp. St. 1916, § 9846), declaring navigable waters in the former territory of Louisiana and Orleans to be public highways, and declarations in the Treaty with France, the Cherokee Nation when by patent dated December 31, 1838, it secured lands in the Louisiana Purchase territory on both sides of the Arkansas river, did not acquire title to the bed of the stream if it was navigable.

2. NAVIGABLE WATERS ⟸37(4)—RESERVATIONS—TITLE TO NAVIGABLE STREAM.
The Osage Indians having by treaty of September 29, 1865, 14 Stat. 687, and Act July 15, 1870, c. 296, 16 Stat. 362, and Treaty with the Cherokee Nation of July 19, 1866, 14 Stat. 799, and Act June 5, 1872, c. 310, 17 Stat. 228, been removed from their Kansas lands and given a reservation bounded by the Arkansas river in lands previously granted to the Cherokee Nation, did not acquire title to the bed of that stream if it was navigable; this conclusion being strengthened by the fact that the reservation was included in the territory of Oklahoma by Organic Act May 2, 1890, and it was provided in the Enabling Act, § 21, that the reservation should become an organized county.

3. NAVIGABLE WATERS ⟸37(4)—DEEDS—CONSTRUCTION—LIMITATIONS.
As the Osage Indians by Act June 5, 1872, acquired from the Cherokee Nation a reservation bounded by the main channel of the Arkansas river, a deed subsequently executed by the Nation, which described the reservation as bounded by the left bank of the river, did not limit any rights of the Osage Indians in the river already acquired.

4. DEEDS ⟸112(2)—PLATS—INCORPORATION BY REFERENCE.
Where a deed referred to a plat annexed thereto as illustrative of the lands conveyed, the plat is by reference incorporated in the instrument.

5. STATUTES ⟸55—TERRITORIAL LEGISLATURE—SUBJECT OF LEGISLATION.
St. Okl. 1890, § 4173, continued in Rev. Laws 1910, § 6639, in so far as it attempted to prescribe the rights of riparian owners on navigable streams, is invalid, being in excess of the power of the territorial Legislature as restricted by Organic Act May 2, 1890, § 6, which limited the power of the Legislature to matters not inconsistent with the federal Constitution and laws.

6. STATUTES ⟸55—TERRITORIAL LEGISLATURE—AUTHORITY.
In view of similar congressional legislation, St. Okl. 1890, § 4173, continued after statehood as Rev. Laws 1910, § 6639, in so far as it declared that the bed of nonnavigable streams shall belong to the opposite owners in common, is valid, being within the power of the territorial Legislature, as limited by Organic Act May 2, 1890, § 6.

7. WATERS AND WATER COURSES ⟸89—NONNAVIGABLE STREAMS—RIGHT OF RIPARIAN OWNERS.
At common law, a riparian owner took title to the middle of an adjacent nonnavigable stream.

8. WATERS AND WATER COURSES ⟸89—RIPARIAN PROPRIETORS—RIGHTS OF.
Minerals in the bed of the Arkansas river which bounded the Osage Reservation, under the Osage Allotment Act of June 28, 1906, belong to the tribe alone, if the river at that point is nonnavigable, so that title to the bed would pass to the riparian owners.

9. NAVIGABLE WATERS ⊂=36(1)—STREAMS—AUTHORITY OF STATE.
A state takes title to the bed of navigable streams in its borders, and, subject to the paramount authority of Congress to control navigation in the regulating of interstate and foreign commerce, may appropriate and dispose of minerals found in the beds of such streams.

10. NAVIGABLE WATERS ⊂=1(3)—NAVIGABILITY OF STREAM—TEST—"NAVIGABLE."
The issue of the navigability of a stream is one of fact, and, when used or susceptible of use in its ordinary condition as a highway of trade and travel in the customary modes on water, a stream will be deemed "navigable."

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

11. COURTS ⊂=365—PRECEDENTS—FEDERAL COURTS.
While recognizing the importance of harmony in judicial decisions, the federal courts on questions of general law are not bound by the decisions of the state courts, though leaning to agreement with the state courts if the question is doubtful.

12. EVIDENCE ⊂=10(5)—JUDICIAL NOTICE—NAVIGABILITY OF STREAM.
While courts should take judicial notice that an important river is navigable, the point where navigability ceases, unless within general knowledge, requires proof, and the federal courts will not take judicial notice that the Arkansas river is navigable above the mouth of the Grand river.

13. NAVIGABLE WATERS ⊂=1(7)—EVIDENCE OF NAVIGABILITY—MEANDERING OF BANKS.
That the banks of the Arkansas river above the mouth of the Grand river were meandered does not establish the navigability of the stream, but is mere evidence that it is navigable in view of the practice of public surveyors to meander the banks of navigable streams to define fractional areas of land.

14. NAVIGABLE WATERS ⊂=1(3)—CONGRESSIONAL APPROPRIATIONS—EFFECT.
While congressional appropriations for the improvement of a river should be assigned weight in determining whether it is navigable, their force is not to declare a river navigable in its natural state, for the improvement might be intended to render it navigable.

15. EVIDENCE ⊂=48—JUDICIAL NOTICE—OFFICIAL STATEMENTS.
The federal courts will take judicial notice of official statements of the heads of executive departments, such as the War Department.

16. NAVIGABLE WATERS ⊂=1(6)—NAVIGABILITY—EVIDENCE.
The Arkansas river at a point above the mouth of the Grand river where it bounded the Osage Reservation *held* not navigable, so that title to the bed of the stream to the middle of the main channel passed to the tribe.

In Equity. Suit by the United States, as trustee for the Osage Tribe of Indians and for itself, against the Brewer-Elliott Oil & Gas Company and others, in which the State of Oklahoma intervened. On final hearing. Decree for complainant, and cause retained for further proceeding.

Francis J. Kearful, Asst. Atty. Gen., John A. Fain, U. S. Atty., of Lawton, Okl., and Isaac D. Taylor, of Oklahoma City, Okl., for plaintiff.

S. P. Freeling, Atty. Gen., and Ledbetter, Stuart & Bell, Burwell, Crockett & Johnson, and Blake & Boys, all of Oklahoma City, Okl., for defendants and interveners.

COTTERAL, District Judge. This suit was brought by the United States, as trustee for the Osage Tribe of Indians and for itself, against several companies holding oil and gas leases from the state of Oklahoma of the bed of the Arkansas river, below high-water marks, near Cleveland, Okl., and located in sections 1, 12, and 13, range 7 east; sections 6, 7, 24, and 25, range 8 east; and section 30, range 9 east—all in township 21 north, in this district. A decree is sought canceling the leases, enjoining operations and obstructions under them, and quieting title to the premises.

As a basis for relief in behalf of the Indians, it is alleged in the bill that the title to the river bed, limited in this case to the middle of the main channel, with the underlying oil and gas claimed adversely by the defendants, was granted and conveyed to the tribe, as a part of the Osage Reservation, pursuant to law and treaty, regardless of the navigability of the river; and that, as the river was then and still is nonnavigable at the above locations, such tribal title also arose from the ownership of the adjacent lands. The further complaint that the derricks and structures maintained by the defendants constitute and should be abated as obstructions to navigation of the river, if navigable, has not been pressed, and is without merit. The suit stands therefore as prosecuted solely in the interest of the tribe.

The state of Oklahoma and the Commissioners of the State Land Office intervened in the suit. They deny title in the tribe, and claim that the river is and always was navigable, that the title to the bed below high-water marks was not subject to disposal by the United States, but was held in trust for the state, and that the state, on admission in 1907, by virtue of its sovereignty, became invested with the title and the right to make the leases, as was done, conformably to the state Constitution and laws. The lessees similarly plead their rights under the leases.

At the outset, upon stipulation of counsel, a receiver was appointed with authority to collect and preserve all royalties and bonuses arising from the production of oil and gas, under the terms of the leases and the regulations of the State Land Office, assisted by a supervisory committee, representing the conflicting interests. Later, the Gypsy Oil Company, a lessee of adjacent lands, was made a party defendant, because of controversy over a division line with the Scioto Oil Company, a defendant lessee, and the receivership was extended to the operation of its lease, but was later terminated upon adjustment between the parties, and operation was restored to the company. From an order construing that lease and directing the receiver as to the bonus payable from his funds by that lessee, an appeal has been allowed. Other orders have been passed in the course of the receivership, not essential to the controversy now before the court.

The case was tried and submitted at a full hearing; and counsel have presented their contentions in oral arguments and briefs, with a thoroughness and ability quite in keeping with the importance of the questions involved.

The main questions for decision are whether, before the inception of any claim of title by the state, there was an effective grant of title

to the tribe of the bed of the Arkansas river, even if navigable, and, if not, then whether the river is navigable or not, whereby the title to the disputed portion was vested in the state or the tribe.

The claim of an antecedent grant is rested on the supposed exercise of a power vested in Congress thus to carry out a public purpose for which the lands were held. Shively v. Bowlby, 152 U. S. 1, 14 Sup. Ct. 548, 38 L. Ed. 331; United States v. Winans, 198 U. S. 371, 25 Sup. Ct. 662, 49 L. Ed. 1089; McGilvra v. Ross, 215 U. S. 70, 30 Sup. Ct. 27, 54 L. Ed. 95.

[1] The Osage Reservation was purchased from the Cherokee Nation and was a part of the lands the Cherokees acquired out of the domain of the Louisiana Purchase, the object of which was expressed in the treaty with France to be the formation of new states. 8 Stat. 200, art. 3. That policy was not, however, adhered to in providing for the settlement of the Cherokees west of the Mississippi river. As the lands described in their patent of December 31, 1838, lie on both sides of the Arkansas river here involved, the first inquiry is, naturally, whether they had a title to the bed of the river, if navigable.

The treaties and acts affecting their title are reviewed in the case of Heckman v. United States, 224 U. S. 413, 32 Sup. Ct. 424, 56 L. Ed. 820. The stipulations made in their favor that they were to be secured a permanent home, not embarrassed by state lines or jurisdiction, and a free and unmolested outlet on the west, and were authorized with limitations to make local laws concerning persons and property, did not exclude but implied the need of federal control over navigable streams, if any, in their country. It would remain not only consistent with the rights of the Indians, but important to their advancement, that any avenue of transportation be kept open for their benefit. A similar policy toward the Indians is found in the congressional grants for the construction of railroads through Indian Territory. And the Act of March 3, 1811 (Act March 3, 1811, c. 46, § 12, 2 Stat. 666 [Comp. St. 1916, § 9846]) still applied in providing that "all the navigable rivers and waters in the former territories of Orleans and Louisiana shall be and forever remain public highways." Conceding full force to the laws and treaties applicable, it is clear that the Cherokees had no title to any navigable stream in their country. As a result, they could convey none in any event to the bed of the Arkansas river, at the Osage boundary, if there navigable.

[2-4] The next question is with reference to the title acquired by the Osage Tribe. By treaty and law, provision was made for the sale of their lands in Kansas, payments to them, and their removal to Indian Territory. Treaty Sept. 29, 1865, 14 Stat. 687; Act July 15, 1870, c. 296, 16 Stat. 362. The Cherokees stipulated in the treaty of July 19, 1866 (14 Stat. 799), for the settlement of friendly Indians in their country west of the Ninety-Sixth Meridian, with terms of payment left to future agreement, etc. As the early settlements occurred east of that meridian, by the Act of June 5, 1872 (c. 310, 17 Stat. 228), selections west of it were confirmed as their reservation, within which they were to permit the settlement of the Kansas Tribe, which was to make payment from the proceeds of lands in Kansas, and the lower

boundary of the reservation was defined as the north line of the Creek Country and the main channel of the Arkansas river. The Act of March 3, 1873 (c. 228, 17 Stat. 538), provided for payment to the Cherokees out of the funds of the Osages for the lands purchased by them. By the Act of March 3, 1883 (c. 143, 22 Stat. 624), a further payment was appropriated out of funds due under appraisement of Cherokee lands west of the Arkansas river, and the Cherokee Nation was to execute conveyances satisfactory to the Secretary of the Interior to the United States in trust for the Pawnees, Poncas, Nez Perces, Otoes, and Missourias, and Osages "now occupying said tract, as they respectively occupy the same before payment of said sum of money."

A formal deed was executed on June 14, 1893, by the Cherokee Nation to the United States in trust for the Osage and Kansas Indians. Certain whole and fractional townships were described, and the latter as being on "the left bank of the Arkansas river," according to a plat annexed and made a part of the conveyance. It was also recited that a part of said lands had been set apart for the Kansas Indians, consisting of townships whole and fractional, then described and indicated on the plat.

On the plat is a note, reciting that all the islands opposite the lands described in the deed, except Beaver and Turkey, in township 23 north, range 3 east, conveyed of even date for the Otoe and Missouria Indians, are "a part and parcel of the lands set apart for the Osage and Kansas Indians, and are covered by and embraced in this plat and the foregoing deed of conveyance." In addition, an island, apparently illustrative, is shown as the west boundary of the Osage Reservation.

The deed did not limit the area of the Osage lands, as confirmed by the act of 1872. As it was but a fulfillment of treaty and law, the authority of the Secretary of the Interior was to require conformity with them. The designation of the river boundary as "the main channel" in the act and "the left bank" in the deed are therefore held equivalent. A sufficient reason for holding that there was no limitation by the deed is that the title was vested in the tribe by the act of 1872, without a deed. Jones v. Meehan, 175 U. S. 1, 20 Sup. Ct. 1, 44 L. Ed. 49; Francis v. Francis, 203 U. S. 233, 27 Sup. Ct. 129, 51 L. Ed. 165; Chase v. United States, 222 Fed. 593, 138 C. C. A. 117.

The plat and note were effectively incorporated in the deed by reference. Cragin v. Powell, 128 U. S. 691, 9 Sup. Ct. 203, 32 L. Ed. 566; Jeffries v. East Omaha Land Co., 134 U. S. 178, 10 Sup. Ct. 518, 33 L. Ed. 872; Beach Front Hotel Co. v. Sooy, 197 Fed. 881, 118 C. C. A. 579. The authenticity of the note, which has been questioned, is presumed, as a part of the official records of the Indian Department, and it is confirmed by the letter of March 20, 1883, from the Commissioner to the Secretary of the Interior, in which he furnished descriptions for the deed, and stated that all the islands above the north boundary of the Creek Country, except Beaver and Turkey, belonged to the Osage and Kansas Tribes. But the inclusion of the islands in the deed can be relevant in this case only if it tends to throw light on the title to the bed of the river. Assuming that the deed in that

respect has a permissible bearing, the inference would be that the bed was not meant to be conveyed, although a resultant title would attach to it, as far as the middle of the main channel of the river, if it was not navigable.

No purpose is disclosed in the transactions relative to the Osage lands to invest them with such an extraordinary right as title to a navigable stream. The policy of the government has been to advance them speedily for the duties of state citizenship. As manifesting this, their reservation was by the Organic Act of May 2, 1890 (26 Stat. 81), included in the territory of Oklahoma, the initial step toward statehood in Indian Territory; and in the Enabling Act (Act June 16, 1906, c. 3335, 34 Stat. 277, § 21) it was provided that their reservation should become an organized county of the state.

The conclusion best sustained is that there was not any grant or conveyance to the Osages of title to the bed of the Arkansas river, if in fact navigable at the boundary of their reservation.

[5] A question arises whether title was vested in the tribe to a portion of the bed of the river by section 4173 of the laws of Oklahoma Territory, passed in 1890, appearing in section 6639 of the Revised Laws of 1910, and apparently continued in force by the Schedule of the state Constitution, providing in substance that, except where the grant indicates a different intent, riparian proprietors take to the edge of navigable streams and lakes at low-water mark, and the bed of those not navigable belong to the opposite owners in common. The adoption of that section into the Laws of 1910 was withdrawn as to owners of land on navigable waters, saving vested rights, by an Act approved March 22, 1913 (Sess. Laws, p. 117).

It was held by Judge Campbell, in the Mackey Case (D. C.) 214 Fed. 137, that, as the legislative power of the territory was limited by the Organic Act (section 6) to rightful subjects of legislation not inconsistent with the federal Constitution and laws, the provision as to lands on navigable streams was in excess of its power and invalid, and was not therefore adopted by the state. Further discussion is unnecessary, as the ruling is deemed to be sound, and to be concluded by the approval of the state Supreme Court, in State v. Nolegs, 40 Okl. 479, 139 Pac. 943.

[6, 7] No reason appears, however, for holding that the other provision of the section relating to lands on nonnavigable streams was not competent legislation or was not legally adopted by the state; and it is, accordingly, held to be valid from its enactment. Congress had long before declared to the same effect as to streams in the public lands. Section 2476, Rev. Stat. (Comp. St. 1916, § 4918). And by the common law, doubtless applicable in the absence of a statute, a riparian owner takes title to the middle of the adjacent stream. Railroad Co. v. Schurmeir, 7 Wall. 272, 19 L. Ed. 74; Hardin v. Jordan, 140 U. S. 371, 11 Sup. Ct. 808, 838, 35 L. Ed. 428; Scott v. Lattig, 227 U. S. 229, 33 Sup. Ct. 242, 57 L. Ed. 490, 44 L. R. A. (N. S.) 107.

[8, 9] The remaining and all-important question is with respect to the character of the river at the locations of the leases, presented more broadly by the contention for the tribe that it is not navigable in this

state above the mouth of Grand river, and for the intervener and lessees that it is navigable throughout the state.

If the river is not navigable at these locations, then the tribe, as riparian proprietor, owns the bed to the middle of the main channel, and by the terms of the Osage allotment act of June 28, 1906 (c. 3572, 34 Stat. 539), the minerals therein belong solely to the tribe, and are subject to lease only for its benefit. But if the river is there navigable, then by the general rule invoked by the interveners and defendants, as broadened in this country and in force in Oklahoma, the title to the bed was held in trust for the state, and inured to it when admitted, on an equality with the others, subject to the paramount authority of Congress in the control of navigation to the end of regulating interstate and foreign commerce. Martin v. Waddell, 16 Pet. 367, 10 L. Ed. 997; Pollard v. Hagan, 3 How. 212, 11 L. Ed. 565; The Genesee Chief, 12 How. 443, 13 L. Ed. 1058; Shively v. Bowlby, 152 U. S. 1, 14 Sup. Ct. 548, 38 L. Ed. 331; McGilvra v. Ross, 215 U. S. 70, 30 Sup. Ct. 27, 54 L. Ed. 95; Scott v. Lattig, 227 U. S. 229, 33 Sup. Ct. 242, 57 L. Ed. 490, 44 L. R. A. (N. S.) 107; United States v. Cress, 243 U. S. 316, 37 Sup. Ct. 380, 61 L. Ed. 746. And the power of the state would then arise to appropriate and dispose of the oil and gas found in such lands, consistently with the above limitation. Weber v. State Harbor Com'rs, 18 Wall. (85 U. S.) 57, 21 L. Ed. 798; Hardin v. Jordan, 140 U. S. 371, 11 Sup. Ct. 808, 838, 35 L. Ed. 428; Wood v. Fowler, 26 Kan. 682, 40 Am. Rep. 330; State v. Akers, 92 Kan. 169, 140 Pac. 637, Ann. Cas. 1916B, 543; State v. Nolegs, 40 Okl. 479, 139 Pac. 943.

[10] The issue of navigability is one of fact. The purely "legal test" cannot be accepted. A river is not navigable, unless so in fact. It will be deemed navigable, when used or susceptible of use, in its ordinary condition, as a highway of trade and travel in the customary modes on water. The Daniel Ball, 10 Wall. 557, 19 L. Ed. 999; The Montello, 20 Wall. 441, 22 L. Ed. 391; United States v. Cress, 243 U. S. 316, 37 Sup. Ct. 380, 61 L. Ed. 746. The exceptional use of a a stream for purposes of transportation in times of temporary high water, or "the mere fact that logs, poles and rafts are floated down the stream occasionally * * * in * * * high water does not make it a navigable river." United States v. Rio Grande Irrigation Co., 174 U. S. 690, 19 Sup. Ct. 770, 43 L. Ed. 1136. "To meet the test, * * * a water course should be susceptible of use for purposes of commerce or possess a capacity for valuable floatage in the transportation to market of the products of the country through which it runs. It should be of practical usefulness to the public as a public highway in its natural state and without the aid of artificial means. A theoretical or potential navigability, or one that is temporary, precarious, and unprofitable, is not sufficient." Harrison v. Fite, 148 Fed. 781, 78 C. C. A. 447.

[11, 12] This river has been the subject of decision in several cases. Dana v. Hurst, 86 Kan. 947, 122 Pac. 1041; United States v. Mackey (D. C.) 214 Fed. 137; Id., 216 Fed. 126, 132 C. C. A. 370; State v. Nolegs, 40 Okl. 479, 139 Pac. 943.

In the Dana-Hurst Case, where the title to an island near Hutchinson, Kan., was involved, and a trial was had to a jury as to present navigability of the river, the judgment was reversed, and the Supreme Court held the river to be there navigable, on the ground of former navigability, of which judicial notice was taken.

In United States v. Mackey (D. C.) 214 Fed. 137, the navigability of the river near Tulsa, Okl., was treated as practically conceded at the oral argument, and the decision in the Dana-Hurst Case was approved. The decree was reversed, with leave to answer, because rendered upon motions to dismiss, and without evidence, the Creek Nation being held to have sufficiently alleged ownership of the disputed premises, the agreement as to the facts not being of record, and a clear case for judicial notice not being warranted. 216 Fed. 126, 132 C. C. A. 370.

In State v. Nolegs, supra, the state had sued to quiet title to the bed of the river and an island, at the location here involved. The adverse parties were adjacent landowners and grantees, and Nolegs, an Osage Indian allottee of the island. A main question was whether the court would take judicial notice of the navigability of the river, in the sense of vesting title to the bed in the state. The Dana-Hurst Case and the Mackey Case in 214 Fed. 137, were cited and approved. In addition, reference was made to the Eleventh Census Report of 1890; to a letter dated in March, 1908, from the Commissioner of Indian affairs, approved by the head of the Interior Department, holding the river to be navigable through the Cherokee Nation, and that Nation not entitled to royalty for sand and gravel in the river bed after statehood, and conceding the title of the state to the beds of navigable streams in the Five Tribes; to the Act of February 17, 1897 (c. 238, 29 Stat. 531), authorizing a bridge near Cleveland, Okl.; to the Act of January 29, 1897 (c. 108, 29 Stat. 503), granting a franchise for a railroad through Indian and Oklahoma Territories; and to the Act of February 24, 1902 (c. 28, 32 Stat. 37), authorizing a bridge at Ft. Gibson. The river was held navigable in its entire course through the state, the title to the bed below high-water marks to be in the state, and the title to the island above those marks not in the state and to concern only the United States (not a party) and the allottee, and it was not determined.

Harmony in judicial decisions is recognized to be important, especially in the same state. But upon a question of general law, this court will exercise an independent judgment, although leaning to agreement with the state court, if the question presented is balanced in doubt. Sim v. Edenborn, 242 U. S. 131, 37 Sup. Ct. 36, 61 L. Ed. 199. In the case of United States v. Rio Grande Irrigation Co., 174 U. S. 690, 19 Sup. Ct. 770, 43 L. Ed. 1136, involving the Rio Grande river (notably similar to the Arkansas river), it was held that, while the court should take judicial notice that an important river is navigable, the point where navigability ceases, unless it is or ought to be within general knowledge, requires proof, and upon the affidavits and other evidence the Rio Grande river was found not navigable in New Mexico. In the present case, giving to all matters within general knowl-

edge full weight, no sufficient reason is found to sustain a holding that the Arkansas river above the mouth of Grand river in this state is or ever has been navigable, as a matter of judicial notice; and the soundness of that view has been well demonstrated by proof.

In the Mackey Case, 216 Fed. 126, 132 C. C. A. 370, decided two years after the Dana-Hurst Case, and more than four months after the Nolegs Case, the court declined to hold the Arkansas river navigable near Tulsa, where the Creek Nation had alleged title to the bed, but sent the case back for answer, whereby the issue of navigability might be tried. The same view is shown in Producers' Oil Co. v. United States, 245 Fed. 651, — C. C. A. —, where the character of the Cimarron river was held subject to proof.

This court is therefore bound to hold that the issue as to the navigability of the Arkansas river is dependent upon proof in fact by evidence and other proper sources of information.

The case of Wear v. Kansas, 245 U. S. 154, 38 Sup. Ct. 55, 62 L. Ed. — (November 26, 1917), is not authority to the contrary in holding that, "if a state court takes upon itself to know without evidence whether the principal river of the state is navigable at the capital of the state, we certainly cannot pronounce it error," that "in this aspect it is a question of state law," that "the fact is of a kind that should be established once for all, not perpetually retried," and that the state court had, in favor of its decision legislation, averments in pleading, former decisions of that court, and the assent of the Supreme Court. The Arkansas river is not so located, its navigability is not so aided by legislation, pleading, or decisions; and the Nolegs Case was decided during the pendency of the present litigation.

[13] The effect of meandering the Arkansas river, cited as supporting navigability, upon authorities, is overestimated. In navigable streams, it defines the sinuosities of the banks and the fractional areas of lands sold. Railroad v. Schurmeir, 7 Wall. 272, 19 L. Ed. 74; Hardin v. Jordan, 140 U. S. 371, 11 Sup. Ct. 808, 838, 35 L. Ed. 428. The government surveyors may not thereby determine the title to adjacent lands. Iowa v. Rood, 187 U. S. 87, 23 Sup. Ct. 49, 47 L. Ed. 86. Such lines are not deemed of certain significance. Kean v. Calument Co., 190 U. S. 452, 23 Sup. Ct. 651, 47 L. Ed. 1134. The Land Department employs them to denote streams of more than three chains in width, but only under special instructions in the case of nonnavigable streams, and at times they have been run when not thus authorized. Hattie Fuhrer, 12 Land Dec. 556; James Smith, 18 Land Dec. 135. Doubtless all navigable streams are meandered, and the fact in this case should be taken merely as some evidence of navigability. Harrison v. Fite, 148 Fed. 781, 78 C. C. A. 447.

[14] Acts of Congress making appropriations for the improvement of the Arkansas river and bridge grants have been noticed as specially importing navigability. The former may be summarized as beginning in 1879, being available as far as Wichita up to 1894, in Arkansas and Indian Territory until 1899, then limited to Arkansas until 1912, and next generally to Arkansas and Oklahoma until 1916. It was shown that no expenditures were required above Grand river,

and all except the first were made below that point. In general, such acts should be assigned weight, in view of the power of legislative inquiry and judgment. But their force is not to declare a river navigable in its natural state (United States v. Cress, 243 U. S. 316, 37 Sup. Ct. 380, 61 L. Ed. 746), and none of these acts purport to do so. A project for river improvement may be to create navigability, or, however prudently formed, may be necessarily experimental, and result in practical abandonment at a given section. When these acts are considered together and in the light of the engineers' reports and the fact that improvement of consequence was withheld above Grand river, the inference is justified that the river was ultimately not deemed navigable at the upper locations in the state. The bridge grants, while implying a state of navigability, may be due to prior appropriation acts, the holding of the War Department, or precaution in a doubtful case. Instances are cited of grants for bridges upon the South Canadian river, said to be nonnavigable, at Noble, Lexington, and in Blaine county, in this state. Act July 16, 1894, c. 136, 28 Stat. 103; Act Aug. 4, 1894, c. 206, 28 Stat. 225; Act Feb. 8, 1895, c. 62, 28 Stat. 644. While the acts are proper for consideration, they are in any event inconclusive, and leave the fact of actual navigability quite open to proof.

The Interior Department has not held, as supposed, to the navigability of this river at the Osage boundary. On the contrary, with the exception of the approved letter of March 27, 1908, from the Indian office, its position was defined in a letter of the Secretary, dated April 20, 1915, to the Attorney General, to be as stated by the court in Kansas v. Colorado, 206 U. S. 46, 27 Sup. Ct. 655, 51 L. Ed. 956:

"That the Arkansas river is not now and never was practically navigable beyond Ft. Gibson in the Indian Territory."

Explanation was given that the letter of the Indian office referred to the river in the Cherokee Nation only, and was erroneous, "being based on a misconception as to the facts and misinterpretation of the views of the Supreme Court as expressed in its decision in the case of Shively v. Bowlby (152 U. S. 1 [14 Sup. Ct. 548, 38 L. Ed. 331])," and "not in accord with the views of the Department as to the status of the bed of the Arkansas river, or as to the title thereto." It was added that when the Creek Nation acquired its lands on August 11, 1852, the river was considered not navigable therein, from a report of Col. Long, of the Corps of Topographical Engineers, partly embodied in the report of Col. Abert, transmitted on January 27, 1854, by the Secretary of War to the Senate, from which it appeared that the river is navigable only to the junction of the Verdigris and Neosho rivers, and that such navigability is potential rather than actual.

The War Department formerly took a different position. In a letter of October 11, 1911, quoted in another of May 16, 1914, Acting Secretary Oliver informed the Attorney General that the navigability of the river in Osage county, Okl., appeared from a report of the engineer authorities "within the purview of laws enacted by Congress for the preservation and protection of such waters and of decisions by the Supreme Court," as the Department had uniformly held. In a mem-

orandum of September 16, 1914, justification was given for the attitude of the Department. Extended correspondence resulted from efforts of the Attorney General to obtain evidence from the Department in the pending litigation, which was tendered as to records, etc., but declined as to witnesses, the President being appealed to meantime, whereby the views of the Department were elicited more fully and its duty pointed out, and later, after a reconsideration, opinions supporting its position were furnished by the Judge Advocate General (Crowder) and the Chief of Engineers (Kingman). Finally, on request for the detail of witnesses, P. R. Van Frank, Jr., of the Little Rock office, was directed to make examinations and give his testimony.

[15, 16] But the Department is now committed against that view. In the letters of November 24, 1916, responding to a request of the Attorney General for a revocation of the letter of October 11, 1911, the present Secretary stated that in his judgment the records of the Department show the head of navigation on the Arkansas river to be at the mouth of Grand river, and that the Arkansas river is not navigable above that point, although formal revocation was withheld as a course less orderly and less advisable from an administrative viewpoint. The objections urged to these letters, written after the trial of this case, and submitted on service of copies, are held not tenable, as judicial notice should be taken of them. Heath v. Wallace, 138 U. S. 573, 11 Sup. Ct. 380, 34 L. Ed. 1063.

The testimony of Gen. Growder and Gen. Kingman identified the opinions furnished by them to the Secretary, and the latter gave his views in detail. The testimony of Maj. Kelly was to the effect that three bridge permits were granted from 1901 to 1912, at Ft. Gibson, Muskogee, and Tulsa, and that another was refused at Tulsa; and his views were given. These witnesses did not testify from personal knowledge of the river in Oklahoma. Their testimony tends to sustain and reflects the former holding of the War Department.

Valuable evidence is found in the reports of engineers in the War Department, chiefly printed in various executive documents. They cannot be given fully, or in respect of measurements and tests; but sufficient reference to them may be made to show their weight in the case.

From an account of Capt. Bell, as early as 1820, Ft. Gibson was noticed as situated at the head of navigation. It was said that the current of the river was much less rapid than that of the Platte, but the character of both, "in a considerable degree, corresponds in their widely spreading waters of but little depth, running over a bed of yielding sand." Prof. Papers, War Dept. No. 13. And in Long's expedition, the same year (Thwaites, 1905), the river was said to be navigable to the mouth of the Neosho, or Grand, a distance of about 600 miles. According to the report of Col. J. J. Abert, in 1854, the river was navigable only to the junction with the Neosho and Verdigris, and the report of Col. S. T. Abert, in 1870, it could not be navigated above its junction with the Verdigris.

In February, 1879, Maj. Suter reported from a hurried reconnoissance of an assistant that the river from Wichita to Ft. Smith had a navigable depth the first 70 miles of 6 inches and the remainder of 12 inches, with a channel much obstructed by snags. He was of opinion that by removing snags and constructing slight dams at Shoals—the extent of advisable work before general improvement—navigation would equal that between Little Rock and Ft. Smith. The next year, the chief of engineers reported little progress with a snagboat due to low water and late season, proposed a renewal of operations as beneficial to flatboat navigation, and recommended appropriations. In 1881, Engineer Curtis reported his efforts to examine and clear

the river from Wichita to Ft. Smith, under difficulties indicative of nonnavigable conditions.

The only other and the chief improvement entered upon above Grand river was in that year by Capt. Evins, with the snagboat Wichita, which was well equipped and drew 15 inches. In his experience covering seven months, under a plan of work up to Arkansas City and return, he was able only to reach Pawnee Agency Landing, about 75 miles below Arkansas City, and was detained from fall to spring in returning by low water, sand, and rock. In his letter to Capt. Handbury, in June, 1882, it was said from observations that a good channel depth of 3 feet could be made to Arkansas City. In the annual report for that year, concentration of the channel was indispensable above Grand river, a survey and study of conditions advisable, the improvement feasible, and the benefit to a productive section cited. The work, however, was never resumed on the upper portion of the river.

The report for 1883 refers to work between Ft. Smith and Ft. Gibson, and that for 1884 to the operations below Ft. Gibson, and to a survey in progress from Wichita to Tulsa. The report for 1885 states that the original plan of improvement was the removal of snags and trees and the contraction of the channel at Shoals; that the expenditure of $59,000 resulted in practical value to navigation; and that the river was in excellent navigable condition up to Ft. Gibson, but above that point a large outlay would be requisite to make it navigable, as shown by a survey. It was added that a steel steamer with a fleet of five steel barges, none drawing over 12 inches, had been put on the river from Arkansas City to Ft. Gibson, on which data were being secured, thought portending a revolution in navigating upper reaches of shallow rivers, that an enormous commerce awaited this southern outlet, that the notes were being worked up, and "a full report with plans and estimates will be submitted in time for the action of the next Congress."

In November, 1884, Engineer Burrows, reporting to Capt. Taber a survey of the river from Wichita to Grand river, stated that no portion was or had been considered navigable, and that the mouth of the Grand river was considered the head of navigation, commerce for 40 miles below being practically nil, adding that a small boat of light draft had made the trip from Little Rock to Arkansas City on the crest of a short rise, carrying no freight of consequence, and of no practical benefit in demonstrating navigability. His opinion was that the river could be made navigable by dams, dikes, and confined channels, ranging from 200 to 500 feet, in different sections. In transmitting that report, in 1886, Capt. Taber reported that a two-foot channel could be provided and "the river should be, for all purposes of law, rated as navigable to Wichita." He proposed plans for permanent improvements by placing wing dams on shoals, employing dikes to protect banks, cause deposits and contract the water, and by temporary snagboat work. He adverted to the arrival of a steel steamer and barges as making a change in conditions of the problem of improvements, quoting an article from the Globe Democrat which described a small towboat built for shallow waters and its departure for Arkansas City.

In March, 1888, a permanent board of engineers on improvement of the river from Wichita to the mouth of the Canadian river reported that the commerce over that section is and always has been practically nothing, estimated the cost by contraction works of a navigable depth of two feet at low water as exceeding their value, expressed grave doubts as to maintaining it, and designated movable dams or a canal as a proper means of obtaining steady navigation, if justifying the expense.

In the annual report for 1890, Capt. Taber again refers to Wichita as the head of navigation on the river, and it is cited along with other cities in the valley demanding a river outlet to cheapen over a million tons of freight, etc. This report probably was the foundation for a similar account in the Eleventh Census Report, and it is practically repeated in the report of the same officer for 1891.

After the incumbency of Capt. Taber (1884 to 1893), the succeeding engineers point with certainty to the nonnavigability of the upper river in the state. In 1894, no navigation was reported above Webbers Falls. From

the report of Gen. Sibert for 1895, it appears that there was only one trip, by a small boat, to Ft. Gibson during the year. In 1898, the estimate for completing the project of improvement from Wichita to the mouth of the river was called "indefinite." The next year, the statistics showed no navigation above Little Rock.

A board of three engineers appointed by the President, pursuant to an act of Congress, to thoroughly examine the river, with a view to permanent improvement, reported in 1899 that the mouth of the Grand river had always been considered the head of navigation, that attempts at navigation above that point had been of rare occurrence and soon abandoned, and that the river between Wichita and the Grand is crossed by 19 fixed bridges and 2 fixed dams.

In 1902, with the exception of a trip by the Carrie Clyde from the mouth to Grand river, no navigation appeared above Shoal creek, 88 miles below Ft. Smith. In 1903, Ft. Gibson was named as the head of navigation, and the statistics showed no commerce above Webbers Falls, and in 1904 Ft. Gibson was noted as the head of steamboat navigation. And except in 1906, this was repeated in the reports for the next ten years.

In 1909, Maj. Walker reported upon the section between Tulsa and Grand river that the steep slope, low water, and shifting sands and gravel precluded improvement of worth for navigation purposes by regulation works. and submitted estimates only for locks and dams, but deemed it unworthy of improvement. He stated that the mouth of Grand river had always been considered as the head of navigation, and that his office (Little Rock) had no information of any commercial navigation above that point.

The reports were directly supplemented by the testimony of Gen. Sibert, Maj. Walker, P. R. Van Frank, Jr., and Capt. Evins.

Gen. Sibert was for 30 years an officer in the engineer corps, and from 1894 to 1898 had supervision at the Little Rock office over the Arkansas river. He observed and acquired data as to its character, and was assisted by Van Frank, a competent engineer. No record was recalled of commerce above Grand river, which was considered by the steamboat operators and accepted by practically all of the engineers as the head of navigation, although there was an account of one or two boats going above it. In addition to explaining by measurements and tests the difficulty and cost of regulating or "canalizing" the stream, he was of opinion that from the small amount of water, and the character of the channel, bed, and banks, the result in practical utility would not warrant improvement from Tulsa to Grand river. It was thought loose logs or rafts would ordinarily be landed on sand bars, and that the shifting channel and violent changes within rendered navigation impossible. In an elaborate report, with citation to authorities and data, to the chief of engineers in April, 1898, he said:

"No constant diminution of the water supply in the navigable part of the Arkansas river is shown by the records so far as I can see. Tradition and history seem to establish the fact that the navigable depth of the Arkansas river was as small at times prior to 1860 as it has been since. There is nothing in the records of the last 20 years to show that these periods of extreme low water are of more frequent occurrence since 1888 than in the ten years prior to 1888."

And "summing up the records and testimony," he could not state definitely that irrigation had decreased the navigable capacity of the river, although the length of the dry bed in the upper portion had increased and the periods were more frequent.

Maj. Walker, of the corps of engineers, long in service, had supervision at the Little Rock office of the Arkansas and other rivers, from 1908 to 1910. He gave the project as being for the improvement of the Arkansas river from Wichita to the mouth, with discretion in the War Department as to expenditure of the appropriations. Under the Act of March 3, 1909, he was directed to make an examination between Tulsa and Ft. Smith with a view to recommendation for improvement. He examined the office records, observed the river at Ft. Gibson, and examined it at Muskogee and Tulsa, aided by Van Frank, commended as fully capable for the work. His opinion was that

the river could be made navigable from Tulsa down, and that from the appropriation bills contemplating the improvement the river was presumed to be navigable from Wichita to the mouth.

The mouth of Grand river was regarded by him as the head of actual not potential navigation. No expenditures were considered above that point. He had no information as to commercial navigation above it, except from the report of Capt. Taber, containing the account of steamboat and barges. Various reports were referred to, and notwithstanding his own for 1909, approved by the board of engineers and the chief, he deemed the river was navigable above the Grand river, based on the feasibility of floating logs (of which or its commercial value, however, he had no personal knowledge), which he considered practical at the time from data in the Little Rock office as to the flow of water. He knew of no one more familiar with the subject than Van Frank. There was further reference to the estimates in his report of dams ranging in cost from $3,781,500 to $10,044,000, and annual maintenance ranging from $340,630 to $541,880, contemplating transportation by boats and barges. The witness was unable to answer whether the river could be made navigable to Wichita. A cause given for his recommendation against improvement was the effect of railroad facilities in decreasing river transportation.

P. R. Van Frank, Jr., was principal assistant in the Little Rock district since 1891, engaging in field work on the Arkansas, St. Francis, and White rivers until the fall of 1913, and afterward in the Little Rock office, which was established in 1881. His duties were the preparation of plans, supervision of examinations, approval of reports, and other work. He assisted in the report of Gen. Sibert in 1908 on the question of diminution of the Arkansas river by irrigation. In his opinion, there was no subsequent change. He took part in the examination of the river at points between Wichita and the mouth, and the compilation of the data for the report of engineers in 1899, and assisted by Engineer Parkin prepared the draft of the report by Maj. Walker in 1909, on the river from Tulsa to Ft. Smith. He defined the elements for determining the capacity of a stream as volume of flow, nature of the bed, general slope, and general nature of obstructions in the channel; and prior use of the stream was regarded as a self-evident index. From a special examination of the river, he gave the water flow of the Arkansas as practically the same at Tulsa and above the Verdigris, and showing an abrupt increase below the Grand river. He explained that it was not possible to make a channel of worth above that point by contraction works due to lack of water and to steep slope, but practical to "canalize" it; movable dams being preferable. His opinion was that above Muskogee a dependable two-foot channel could not be obtained, except in April or probably May or June. He also referred to boats operating in the lower river, one of them going 20 or 21 miles above Muskogee and not returning.

Capt. Evins began "steamboating" in 1852, and came to the Arkansas river in 1860. He built the Wichita, which was lighter than the other boats known to him, and reported to Capt. Handbury, at Little Rock. In going upstream, it was necessary to take advantage of rises, and resort to spars and a capstan, at sand bars. He was at Pawnee Agency Landing almost four months, on account of low water, returning with delays, on high water, and thereafter the boat was not used in that section, because not feasible. The water was about the same as in other late seasons. He made no further attempt to go above Ft. Gibson, and had no knowledge of business on the river, but heard of a couple of boats going up. The boats would stop at Grand river, which they ascended a couple of miles to Ft. Gibson. His estimate was that the Grand river furnishes four times the low-water flow in the Arkansas, as it is a clear stream, is narrower, and has a gravel and clay bed. Since familiarity with the Arkansas river in 1860, there has been no great change in the water volume, but it has constantly increased in width from erosion of banks, affording almost one-half less navigable water. He named the boats operating at lower portions. The Kansas Millers, afterward renamed the Cleveland, made one trip above, was taken over by the government, and used by him. The Mary D was run from Ft. Smith to Ft. Gibson.

The City of Muskogee also went above Ft. Smith. His report to the chief that a navigable depth of three feet could be had to Arkansas City was attributed to his clerk and was unauthorized and incorrect.

Charles H. Miller, another engineer of practical experience in river work, also gave his testimony. His acquaintance with the Arkansas river began in 1905. He examined it at Wichita and Oxford, Kan., in 1907, and from Cleveland to Tulsa in 1915, and was familiar with the reports and documents in evidence, from which he gave measurements and tests. He thought it not practicable to contract the channel above Grand river, so as to furnish a channel depth, that the feasibility of "canalization" was uncertain, that fixed dams were useless but movable dams possible, with dredging work, for maintenance of the channel in all seasons. He prepared a hydrograph of the river at Tulsa and Webbers Falls from gauge readings of the Weather Bureau, between 1905 and 1915, and at the latter place between 1904 and 1911. In his opinion, the river did not have a navigable capacity for trade and traffic in the customary modes above the mouth of Grand river, and could not be made useful for transportation of freight, and a canal could not be built in the river. Skiffs could be used at any time, but not naphtha launches. He disagreed with the engineering estimates of 1909 that the river could be made navigable between Ft. Smith and Tulsa by locks and dams, at a cost of over $10,000,000. He and Van Frank took part in an experiment with two boats in the river between Cleveland and Tulsa, meeting difficulty in finding the deep water, frequently landing on sand bars from which they had to pull the boats. At that time, when there were 10 or 15 times the ordinary low-water flow, a flatboat could have been taken over it carrying a couple of tons, if small enough to get through the channels.

There was further testimony of witnesses, who had resided at or near Little Rock, Muskogee, Tulsa, Cleveland, Arkansas City, Wichita, and other points. [The summary of testimony which follows is by direction of the judge omitted to reduce length of opinion.]

This river has certain known characteristics. It is 2,000 miles long, second in importance as a tributary of the Mississippi, an outlet for a great area, and it is navigable probably 600 miles from its mouth. But it has a winding course, broad channel, and a bed of sand which moves and lodges with the currents. There are accounts, not free of conflict with others, of its use to an extent for transportation in Kansas and south from Arkansas City. But whatever weight may be due to known facts or reputed matters, tending to show that the river is or ever was navigable in fact above the mouth of Grand river in this state, it is certainly overcome by explicit proof.

The prevailing and ultimate opinions of the engineers present a strong showing of expert evidence from an accurate source against the navigability of the river in fact at any time above that point. It is substantially confirmed by the pilots, boatmen, and others from observation and experience. The use of that portion of the river for transportation boats has been exceptional and necessarily on high water, was found impractical, and was abandoned. The rafting of logs or freight has been attended with difficulties precluding utility. There was no practical susceptibility to use as a highway of trade or travel. The legislation and public acts are deemed insufficient to make out navigability. The Departments of War and the Interior concur in a holding against it. To conclude upon the record and the relevant facts entitled to consideration that the Arkansas river is or ever has been navigable above Grand river in Oklahoma would be to sustain a theory against a fact.

By the tests given in controlling authority, but one finding is justified in this case, and that is that it is clearly established that such portion of the Arkansas river is not and has not been navigable, and hence that it is not and has not been navigable along the south boundary of the Osage Reservation and at the particular locations here in controversy.

Such finding will be made. It follows, as a matter of law, that the Osage Tribe acquired the title to the river bed to the middle of the main channel along the south boundary of its reservation, now Osage county, and at the locations in controversy, and thereby became and is the sole owner of the underlying oil, gas, and other minerals, and that the United States holds the title to such portion of the river bed and said minerals in trust for the tribe, subject to lease only for its benefit, and as provided by law, and that the defendant lessees and the interveners have no right, title, or interest in or to said portion of the river bed or the minerals therein.

A decree will be entered to that effect, and quieting the title of the tribe and the plaintiff, as its trustee, to said portion of the river bed and minerals, and further that the receiver be ordered to pay to the United States in trust for the tribe the net funds heretofore and hereafter realized by him from the oil and gas therefrom, and that the lessees and interveners be denied any portion of said funds and be perpetually enjoined from prospecting for or taking oil, gas, or other minerals from such portion of the river bed, and that the leases here in question to that extent be canceled and held for naught.

The cause will be retained for the purpose of settling and paying the costs and charges of the receivership and apportioning to the plaintiff for the tribe its interest in the funds of the receiver, and for the ascertainment of the rightful claimants and owners of the residue thereof, and the apportionment and payment to them of the same, and further for the purpose of taxing all costs herein, and the making of all proper future orders; and in the meantime, and during the pendency of any and all appeals in this cause, the receiver will be continued as heretofore directed, subject to future orders.

DE LACEY et al. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. May 6, 1918. Rehearing Denied July 1, 1918.)

No. 3071.

1. CONSPIRACY ⟸43(6)—RESCUE—INDICTMENT—SUFFICIENCY.
Under Criminal Code (Act March 4, 1909, c. 321) § 141, 35 Stat. 1114 (Comp. St. 1916, § 10311), declaring that whoever shall rescue or attempt to rescue any person arrested upon a warrant or other process issued under any law of the United States, or shall directly or indirectly aid, abet, or assist any person so arrested to escape, shall be punished, an indictment charging that defendants conspired to aid and abet certain persons held in custody as enemy aliens by virtue of an order for their arrest and confinement issued by the President under Rev. St. §§ 4067–4070 (Comp. St. 1916, §§ 7615–7618), and the public proclamation of a state of war between Germany and the United States, is sufficient, though not alleging that the persons in custody were alien enemies.

2. CONSTITUTIONAL LAW ⟸252—WAR ⟸4—ALIEN ENEMIES—RIGHTS OF.
Alien enemies have no rights and no privileges, unless by special favor, during time of war; so Alien Enemy Act July 6, 1798, c. 66, 1 Stat. 577 (Rev. St. §§ 4067, 4068, 4069, and 4070), authorizing the restraint and the removal of alien enemies, is not invalid, as depriving such persons of liberty without due process of law; the constitutional safeguards not extending to enemy aliens.

3. CONSPIRACY ⟸43(5)—INDICTMENT—SUFFICIENCY—OVERT ACTS.
An indictment for conspiring to aid enemy aliens to escape from custody, into which they had been taken under the President's order for their arrest and confinement, which alleged several overt acts, is not defective because it did not set forth, verbatim or in substance, letters alleged as overt acts.

4. CONSPIRACY ⟸43(5)—INDICTMENT—OVERT ACTS.
In an indictment for conspiracy, it is not necessary to show how the act charged to be an overt act would effect the objects of the conspiracy.

5. CONSPIRACY ⟸43(5, 12)—PROOF—OVERT ACTS.
An indictment for conspiracy is sufficient, if some of the overt acts are properly pleaded; and, where several overt acts are charged, it is not necessary to prove all.

In Error to the District Court of the United States for the Southern Division of the Northern District of California; Wm. C. Van Fleet, Judge.

Lawrence De Lacey and others were convicted under Criminal Code, § 141, of conspiracy to aid and abet enemy aliens to escape from custody, and they bring error. Affirmed.

Nathan C. Coghlan, of San Francisco, Cal., for plaintiffs in error.

John W. Preston, U. S. Atty., and Annette Abbott Adams, Asst. U. S. Atty., both of San Francisco, Cal.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. The plaintiffs in error were convicted and sentenced under an indictment which charged them with a conspiracy to aid and abet E. H. Von Schack and Franz Bopp to escape from the custody of Col. George R. McGunnegle, an officer of the

United States Army, who was in command of the military reserve of Ft. McDowell, Cal., and who was holding said Von Schack and Bopp in his custody by virtue of an order for their arrest and confinement issued by the President on April 6, 1917, under the provisions of sections 4067, 4068, 4069, and 4070, Rev. Stats., and the public proclamation of a state of war between Germany and the United States, promulgated by the President on April 6, 1917; the said Von Schack and Bopp having been arrested on April 7, 1917, as alien enemies by the United States marshal at San Francisco, acting under the authority of the said order of the President, and having been turned over to the custody of said Col. McGunnegle and held by him.

[1] A demurrer was interposed to the indictment, one of the grounds of which was that it was not alleged therein that said Von Schack and Bopp were alien enemies of the United States, and it is now contended that for the omission of that allegation the indictment is fatally defective. The contention cannot be sustained. In charging a conspiracy to accomplish an unlawful rescue, it is not necessary that the charge go further than the language of the statute which defines the offense. Section 141 of the Criminal Code provides for the punishment of any one who shall rescue or attempt to rescue from the custody of any officer any person arrested upon a warrant or other process issued under the provisions of any law of the United States, or who shall aid, abet, or assist any person so arrested to escape from the custody of such officer. The indictment charges, in the language of this section, that Von Schack and Bopp were arrested and confined by virtue of an order issued by the President under the provisions of Rev. Stats. § 4067 et seq., and that they were arrested as alien enemies. Commonwealth v. Malloy, 119 Mass. 347; Commonwealth v. Lee, 107 Mass. 207; Houpt v. State, 100 Ark. 409, 140 S. W. 294, Ann. Cas. 1913C, 690; People v. Murray, 57 Mich. 396, 24 N. W. 118; State v. Sutton, 170 Ind. 473, 84 N. E. 824; Smith v. State, 76 Ala. 69.

[2] We find no merit in the contention that the law under which Von Schack and Bopp were held is unconstitutional, in that it deprives them of liberty without due process of law. The sections under which these alien enemies were held were originally enacted as the Alien Enemy Act of July 6, 1798, and from that date to this, although occasion has seldom arisen to enforce the statute, no question has been made of its constitutionality. While, as to property rights and life and liberty, all aliens domiciled in the United States, or temporarily therein, are accorded the equal protection of the law, and due process of law, such is not the case as to alien enemies. "Alien enemies have no rights and no privileges, unless by special favor, during time of war." 2 C. J. 1047. Such was the common law. "Alien enemies have no rights, no privileges, unless by the king's special favor, during time of war." 1 Blackstone, 372. There is nothing in the Constitution or laws of the United States which in any way has changed the common-law rule, or restricted the power of Congress to enact the alien enemy law. Power to enact such a law may at times be essential to the preservation of the government, and the right of all nations to exercise it is recognized in international law. In Brown

v. United States, 8 Cranch, 110, 121 (3 L. Ed. 504), Chief Justice Marshall said:

"Respecting the power of government, no doubt is entertained. That war gives to the sovereign full right to take the persons and confiscate the property of the enemy, wherever found, is conceded. The mitigations of this rigid rule, which the humane and wise policy of modern times has introduced into practice, will more or less affect the exercise of this right, but cannot impair the right itself."

Even in times of peace the admission of aliens to the United States and their presence here are not of right, but of favor. In Turner v. Williams, 194 U. S. 279, 289, 24 Sup. Ct. 719, 722 (48 L. Ed. 979) it was said:

"Repeated decisions of this court have determined that Congress has the power to exclude aliens from the United States, to prescribe the terms and conditions on which they may come in, to establish regulations for sending out of the country such aliens as have entered in violation of law, and to commit the enforcement of such conditions and regulations to executive officers; that the deportation of an alien who is found to be here in violation of law is not a deprivation of liberty without due process of law."

The first reported case arising under the Alien Enemy Act is Lockington's Case, Brightly, N. P. (Pa.) 269. Lockington, an alien enemy, had refused to comply with the executive order of February 23, 1813, requiring alien enemies who were within 40 miles of tidewater to retire to such places beyond that distance from tidewater as should be designated by the marshals. He was arrested, and on petition for habeas corpus attempted to test the legality of his imprisonment. Chief Justice Tilghman said of the act:

"It is a provision for the public safety, which may require that the alien should not be removed, but kept in the country under proper restraints. * * * It is never to be forgotten that the main object of the law is to provide for the safety of the country from enemies who are suffered to remain within it. In order to effect this safety, it might be necessary to act on sudden emergencies. * * * The President, being best acquainted with the danger to be apprehended, is best able to judge of the emergency which might render such measures necessary. Accordingly, we find that the powers vested in him are expressed in the most comprehensive terms."

On the second petition for habeas corpus Judge Yeates said:

"When the vessel of the commonwealth is in danger, partial evils must be submitted to, in order to guard against a general wreck. Aliens who have come among us before a declaration of war against their sovereign, and continue to reside among us after it, cannot expect an exemption from such evils."

And Judge Brackenridge said:

"Alien enemies, remaining in our country after a declaration of war, are to be treated according to the law of nations, and it has been so argued in this case. Shall, then, the judicial power constitute itself a judge between the executive of the general government and the nation with whom we are at war, and say whether the proceeding in the case of their subjects remaining in our country has been according to the law of nations?"

In Lockington v. Smith, 1 Pet. C. C. 466, Fed. Cas. No. 8,448, Washington, Circuit Justice, said:

"It seems perfectly clear, that the power to remove was vested in the President, because, under certain circumstances, he might deem that measure most effectual to guard the public safety. But he might also cause the alien to be restrained or confined, if in his opinion the public good should forbid his removal."

And answering the contention that judicial authority must be resorted to to enforce the regulations so established by the President under the law, he said:

"Such a construction would, in my opinion, be at variance with the spirit as well as with the letter of the law, the great object of which was to provide for the public safety by imposing such restraints upon alien enemies as the chief executive magistrate of the United States might think necessary, and of which his particular situation enabled him best to judge."

In the Case of Fries, 9 Fed. Cas. No. 5,126, Circuit Justice Iredell, charging the jury concerning the provisions of the Alien Enemy Act, said:

"In cases like this it is ridiculous to talk of the crime, because perhaps the only crime that a man can then be charged with is his being born in another country and having a strong attachment to it. He is not punished for a crime that he has committed, but deprived of the power of committing one hereafter, to which even a sense of patriotism may tempt a warm and misguided mind. * * * The opportunities during a war of making use of men of such a description are so numerous and so dangerous that no prudent nation would ever trust to the possible good behavior of many of them."

[3] Without merit, also, is the contention that the indictment is defective for its failure to set forth the contents of two letters, the sending of which by the plaintiffs in error were alleged as overt acts to accomplish the conspiracy. It is asserted that by the rules of criminal pleading, if a written document is relied upon to sustain the prosecution, it must be set forth, either verbatim or in substance, citing United States v. Watson (D. C.) 17 Fed. 145. That was a case in which the defendants were charged, under section 5511, Rev. Stats., with a conspiracy to accomplish a specified result by force, threat, intimidation, etc., or "by any other unlawful means," and, as the information alleged that the unlawful means used was a certain written instrument, it was held that the instrument should be set forth, in order that the court might know whether an offense was charged. But here the offense charged is an unlawful conspiracy, and the sending of the letters are but two of the overt acts pleaded.

[4, 5] Another overt act is the procurement of money to carry out the conspiracy, and still another is the giving of a certain sum of money to effect the conspiracy. In an indictment for conspiracy it is not necessary to show how the act charged to be an overt act would tend to effect the objects of the conspiracy. United States v. Benson, 70 Fed. 591, 17 C. C. A. 293; Houston v. United States, 217 Fed. 852, 133 C. C. A. 562. An indictment for conspiracy is sufficient, if some of the overt acts are sufficiently pleaded; and, where several overt acts are charged, it is not necessary to prove them all. 12 C. J. 627.

The judgment is affirmed.

HART-PARR CO. v. BARTH MFG. CO.

(Circuit Court of Appeals, Eighth Circuit. March 9, 1918.)

No. 4899.

1. EVIDENCE ⟸318(1)—HEARSAY—DOCUMENTARY EVIDENCE.
In an action for the reasonable value of labor and materials, which plaintiff bestowed, at the request of defendant, upon certain metal patterns and accessories, a written statement of the number of hours of labor expended and the materials furnished is self-serving, and should not be admitted in connection with the testimony of a witness as to the number of hours expended on the job, as shown from the time slips which were produced in court.

2. WORK AND LABOR ⟸30(2)—ACTIONS—EVIDENCE—JURY QUESTIONS.
In an action for the reasonable value of labor and materials bestowed upon certain metal patterns at the request of defendant, evidence as to the hours of labor necessary and the value of materials furnished *held* to raise a question for the jury.

3. SALES ⟸418(8)—BREACH BY SELLER—DAMAGES—REMOTENESS.
Where the delivery of metal patterns ordered for use in casting farm tractor engines, was unreasonably delayed, the maker, in the absence of a prior notice, is not liable for remote and inconsequential damages resulting to the buyer by reason of the use of wooden patterns during the delay.

In Error to the District Court of the United States for the Northern District of Iowa; Henry T. Reed, Judge.

Action by the Barth Manufacturing Company against the Hart-Parr Company, which counterclaimed. There was a judgment for plaintiff, and defendant brings error. Reversed and remanded for new trial.

Edwards, Longley, Ransier & Smith, of Waterloo, Iowa, and J. P. Gregg, of Charles City, Iowa, for plaintiff in error.

Jackson B. Kemper and Albert K. Stebbins, both of Milwaukee, Wis., for defendant in error.

Before SANBORN and SMITH, Circuit Judges, and TRIEBER, District Judge.

SANBORN, Circuit Judge. The Barth Manufacturing Company, a corporation, doing business at Milwaukee, Wis., sued the Hart-Parr Company, a corporation, engaged in business in Charles City, Iowa, for $3,581.16 which it alleged was the reasonable value of labor and materials which it bestowed, at the request of the Hart-Parr Company, upon certain metal patterns and their accessories, made by it to be used by the Hart-Parr Company in the manufacture of castings for the engines of tractors. In this litigation these patterns are known as No. 4096, crank case; No. 4099, right cylinder; and No. 4100, left cylinder. The Barth Company attached to its complaint a statement, which it called Exhibit C, of the number of hours of labor, the prices thereof per hour, the number of pounds of iron, the prices thereof per pound, the amount of other materials, and the prices thereof, which it alleged it had expended upon each of these patterns and their accessories, alleged that it had completed and delivered the crank case and the right

cylinder, and had been prevented from completing the left cylinder by a notice from the Hart Company that it would not accept it. It averred in its complaint that the prices and cost of the work and material furnished in the manufacture of the patterns for the Hart Company, as set out in Exhibit C, were fair and reasonable prices, and were the prices and costs therefor which were agreed to by the Hart Company. This last averment, if standing alone, might raise some doubt whether the action was for a quantum meruit or for a contract price; but counsel for the Barth Company insist in their brief that it is upon a quantum meruit, and the record of the trial sustains that position.

The Hart Company by its answer admitted that it had ordered the patterns, for the value of which the action was brought, and that the Barth Company had agreed to manufacture them. But it denied that the Barth Company furnished the work or material set forth in Exhibit C, that the cost or prices of the work there stated were fair, reasonable, or just, and that they were agreed to by it. It averred that the crank case and accessories were furnished under a written contract evidenced by letters of July 20 and 25, 1912, by which the Barth Company agreed to make the master pattern complete for the crank case job, including material, for $290, by which the Barth Company estimated the cost of the crank case and other accessories to be $365, and guaranteed that it should not require more than 912½ hours of labor, nor cost more than $456.25 plus the cost of material as billed to it. The amount charged for the master pattern by the Barth Company, in its Exhibit C to its complaint, was $319, and the price charged therein for the crank case and other accessories was $1,798.45. The Hart Company alleged in its answer that the Barth Company agreed that the labor cost for the right cylinder and its accessories should not exceed $456.25. The labor cost charged for this cylinder and its accessories in the Barth Company's Exhibit C was $878.24. The Hart Company averred in its answer that the Barth Company agreed that the labor cost of the left cylinder should not exceed $187.50. The labor cost charged for this cylinder by the Barth Company in its Exhibit C was $348.59. The Hart Company pleaded in its answer that the Barth Company failed to deliver either of the cylinders or their accessories within the time it agreed to furnish them, and that for that reason it had declined to accept them. It also set forth a counterclaim for $112.05 expended by it to make the crank case and core box conform to the order for them, for $93.70 it overpaid by mistake for the master pattern for the crank case, for $222.90 expenses incurred sending its shop superintendent and pattern foreman to Milwaukee, because the Barth Company had failed to construct the cylinders according to the plans and specifications in due time, and for $17,162 loss and damage which it alleged were inflicted upon it in the conduct of its business by the unreasonable delay of the Barth Company in the delivery of the metal patterns, in that the Hart Company was compelled to use wooden patterns, instead of the expected metal patterns, during this delay.

The issues presented by these pleadings were tried out before the court and a jury, and at the close of the evidence the court instructed

the jury to return a verdict for the Barth Company for $4,142.02. The Hart Company excepted to this instruction, and to many other rulings in the progress of the trial; but the main question in this court is: Was the evidence in support of the plaintiff's case so conclusive and free from substantial evidence to the contrary at the close of the trial that there was no question of fact which it was the duty of the court to submit to the jury?

In making up the amount of the verdict the court allowed the Barth Company, on account of the labor expended by it on the crank case and its accessories, other than the master pattern, $1,325.20 for 2,650.4 hours of labor at 50 cents an hour, and $296.06 for the value of iron, sheet metal, packing boxes, and lumber, making in all $1,621.26. In support of this conclusion there was evidence tending to show that in July, 1912, the Barth Company in writing estimated the labor on this crank case and accessories, excluding the master pattern, at 730 hours, costing $365, and guaranteed that it would not be more than 912½ hours, costing $456; that subsequent changes were made in the work as it proceeded, and in December, 1912, the manager of the Barth Company, in answer to an inquiry by the shop manager and pattern foreman of the Hart Company, told the latter that it looked as though the crank case job plus the master pattern, which it will be remembered the Barth Company had agreed to make, before the slight change was made in the plan of it, for $290, was very likely to cost between $1,600 and $1,800.

[1] The plaintiff introduced in evidence a statement, Exhibit YY, of the alleged number of hours of work it claimed to have expended upon the crank case job, and the testimony of Mr. Wangerin to the effect that he had found, from the time slips which were produced in court, that the number of hours thus used by the Barth Company amounted to 2,650.4 hours. There was also upon this Exhibit YY a statement of the number of pounds of iron and steel and the amount of the lumber alleged to have been used upon this job, and of its alleged value, $296.06. Counsel for the defendant objected to the introduction of this exhibit as incompetent and as a self-serving statement; the objection was overruled, and an exception noted. It goes without saying that this exhibit had no probative value. It proved no more than the denied averments of the complaint. It merely stated the number of hours the Barth Company claimed to have used; but Wangerin's testimony was the only evidence of the number actually used. It stated the amount and value of the material the Barth Company claimed to have used in this crank case job; but it proved neither that this material was used nor that its cost or value was as there set forth. In this exhibit, and in Exhibit C attached to the complaint, 3,636 pounds of iron are charged against the Hart Company at 6 cents per pound, 80½ pounds at 5½ cents per pound, 199 pounds of sheet metal, at 3½ cents per pound, packing boxes, at $10.91, and crating lumber, at $16.23. The use and the alleged price and value of these materials were denied by the answer. No evidence has been discovered in the record of the amount of those materials, if any, that were used, and no evidence has been found in the record that they were of the

value charged in this exhibit and allowed by the court. On the other hand, witnesses for the Hart Company testified that the iron used in the crank case job was not worth more than from 2.5 to 3.5 cents per pound.

[2] The number of hours which Mr. Wangerin testified were used on the crank case job was 2650.4. Witnesses who qualified as experts testified on behalf of the Hart Company that the crank case job could have been done and completed with the use of much less time, Hart of not more than 500 hours, Rishel of not more than 896 hours, Brady of not more than 950 hours, while the Barth Company in July, 1912, agreed that the cost of the master pattern would not exceed $290, nor the labor cost of the crank case and the other accessories more than $456.25 for 912½ hours. The fact is not overlooked that there was evidence at the trial that substantial changes were made in the work of manufacturing the master pattern and in the work of manufacturing the metal patterns for the crank case after the guaranty of July, 1912. But the evidence upon this subject was contradictory as to the nature and character of those changes; the witnesses for the plaintiff testifying that they were large and expensive, and the witnesses for the defendant that they were slight and of little consequence.

In this state of the evidence the conclusion is unavoidable that the answers to the questions, what was the reasonable number of hours for which the Barth Company was lawfully entitled to recover on account of the crank case job and its accessories, other than the master pattern? what was the amount and character of the material necessarily used by the Barth Company in that job? and what was the reasonable value of that material? were conditioned by substantial evidence so clearly in conflict that the Hart Company was entitled to the finding of a jury upon them.

[3] There was a similar condition of the testimony regarding the amounts which the Barth Company was entitled to recover on account of the work and material it furnished upon the right cylinder, especially upon the amount, character, and value of the materials furnished upon the right cylinder and upon the left cylinder, which forbid judgment for the amounts allowed by the court without a verdict of the jury. These conclusions compel a reversal of the judgments below and a new trial, and render it unnecessary to discuss other alleged errors. The court is, however, unanimous in the opinion that there was no error in the exclusion of the evidence offered to prove that part of the counterclaim of the Hart Company consisting of the $17,162 for alleged loss and damage to that company. That alleged injury was too remote and inconsequential, in the absence of prior notice to the Barth Company of its imminence, to form the basis of a valid claim or a just recovery.

Let the judgments below be reversed, and let the case be remanded to the court below for a new trial.

In re VELER.

In re HUFFMAN TRACTION ENGINE CO.

(Circuit Court of Appeals, Sixth Circuit. March 5, 1918.)

No. 2996.

1. BANKRUPTCY ⟸76(1)—PETITIONING "CREDITOR."

In view of Bankruptcy Act July 1, 1898, c. 541, § 1, par. 9, 30 Stat. 544 (Comp. St. 1916, § 9585), declaring that the word "creditor" shall include any one who owns a demand or claim provable in bankruptcy, and may include his authorized agent, attorney, or proxy, one holding a note of an alleged bankrupt, either as agent or trustee for the true owner, is, particularly where the debt was admitted by the bankrupt, and there was no question of set-off against the true owner, competent to join as a petitioning creditor, and the jurisdiction of the bankruptcy court, based on a petition in which he joined, is not open to attack on the ground that such petitioner was not the real party in interest.

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

2. COURTS ⟸340—BANKRUPTCY—PRACTICE—CONFORMITY ACT.

The Conformity Act (U. S. Comp. St. 1916, § 1537) does not make the state rules of procedure applicable to the bankruptcy courts, the practice and procedure of those courts being prescribed by the Bankruptcy Act and the general orders and regulations pursuant thereto; hence one who was a creditor within the definition of the Bankruptcy Act may join in an involuntary petition, though he be not the real party in interest according to the local state practice.

3. BANKRUPTCY ⟸100(1)—ADJUDICATION—ATTACK.

Where an involuntary petition averred that the alleged bankrupt had admitted in writing its inability to pay its debts and its willingness to be adjudged a bankrupt, and the alleged bankrupt consented to the adjudication, filing an answer admitting the allegations of the petition, the adjudication is not open to attack on the ground that the written admission of inability to pay debts had not been made at the time the petition was filed.

4. RECEIVERS ⟸58—SETTING ASIDE APPOINTMENT.

Though under the circumstances the appointment of a receiver to carry on the business of a bankrupt corporation formed to manufacture tractors appeared to have been justified, as necessary for the preservation of the property and for the best interests of the estate, the trial court is entitled to know all the facts in the case, and where the appointment was induced by misrepresentations, the receivership may be set aside.

5. BANKRUPTCY ⟸474—RECEIVERS—APPOINTMENT—COSTS.

While those creditors procuring the appointment of a receiver must pay his compensation and expenses, where the receiver never acquired possession of the estate, or there was no fund in court excepting that which was the property of those who had successfully resisted the appointment, yet in view of Bankruptcy Act, § 3e (Comp. St. 1916, § 9587), requiring a bond on the appointment of a receiver prior to adjudication, the petitioning creditors cannot, where the receiver took possession of the entire estate of the bankrupt, without objection by the bankrupt or any creditor or lien holder, be held liable for the costs and expenses of the receivership, although, if it was wrongfully procured, the trustee has the right to recover from them for injuries to the estate resulting from such receivership.

6. BANKRUPTCY ⊂=145(1)—TRUSTEES—RIGHTS OF ACTION.
The right to recover for the injuries to the estate of a bankrupt resulting from the wrongful appointment of a receiver vests in the trustee when he is appointed.

7. BANKRUPTCY ⊂=474—EXPENSES OF RECEIVERSHIP.
In view of Bankruptcy Act, § 64 (Comp. St. 1916, § 9648), giving priority to those expenses which are necessary for the preservation of the estate, when a receivership ends and the assets are turned over to the trustee, the expenses of the receivership, which include the lawful debts of the receiver, are a charge on the assets, for no receiver can be appointed, excepting as a step in what is necessary for the preservation of the property.

8. BANKRUPTCY ⊂=345—SECURED CLAIMS—PRIORITY—RECEIVER'S CERTIFICATES.
Where a secured creditor accepted a receiver's certificate as a partial payment on its debt, it cannot, having accepted the certificate, assert that its lien was prior to that of the receiver's certificate.

9. BANKRUPTCY ⊂=347—RECEIVER'S CERTIFICATES—LIENS.
Where it was to the interest of secured creditors, who held liens on the property of the bankrupt, that its manufacturing plant should be put into successful operation, and they acquiesced in the appointment of a receiver to carry on the business, and in the sale of the property by the trustee free from their liens, the receiver's certificates, lawfully issued, are entitled to priority in payment out of the proceeds of the property over the liens of the secured creditors.

10. BANKRUPTCY ⊂=474—RECEIVER'S DEBTS.
Where a receiver, appointed to carry on the business of a bankrupt and authorized to issue certain receiver's certificates, incurred other debts without authority, the fund derived from the sale of the bankrupt's property is not liable for such unauthorized debts, and the only recourse of such creditors is against the receiver personally, and perhaps against his bond.

11. RECEIVERS ⊂=58—VACATING APPOINTMENT—IMPOSITION ON COURT.
Where the District Judge, after adjudicating a corporation a bankrupt and appointing a receiver, became suspicious that he had been imposed upon, two courses were open to him, to direct some procedure for the framing of issues by which the parties charged with misconduct might know the charge and have an opportunity to try the fact, or to satisfy himself by a summary inquiry as to whether such proceeding should be instituted, so a summary determination that the court had been imposed upon, without framing any issues, was improper.

12. BANKRUPTCY ⊂=287(3)—JURY ⊂=31(4)—AUTHORITY OF COURT.
A complaint or petition by a trustee, addressed to the bankruptcy court in the exercise of its equity powers, praying an accounting for damages resulting from the appointment of a receiver, which was secured through imposition on the court, is not beyond the equitable jurisdiction of a court of bankruptcy, or objectionable as violative of the right to a jury trial.

13. EVIDENCE ⊂=383(3)—CERTIFICATE OF TRIAL COURT—EFFECT.
In view of the imperfections of the human memory, a statement or certificate of the District Judge with respect to the appointment of a receiver, which it was asserted was secured through imposition on the court, does not, where made in a summary proceeding in which no issues to determine the liability of the petitioning creditors were framed, import verity, as would a record of judicial proceedings required to be certified by the court.

14. BANKRUPTCY ⊂=440—APPEAL OR REVISION.
The question of the liability of petitioning creditors for the costs of a receivership had in a bankruptcy proceeding is a controversy arising in

bankruptcy between such creditors and the adverse interests; so an appeal, and not petition for revision. is the proper remedy to review an order relating thereto.

15. BANKRUPTCY ⊂⇒444—PROCEEDINGS—PETITION TO REVISE.
Where questions as to the distribution of a fund derived from a sale of all of the bankrupt's property free from liens are involved, petitions to revise orders made therein disclose jurisdiction.

Appeal from and Petition for Revision of Proceedings of the District Court of the United States for the Western Division of the Northern District of Ohio; John M. Killitts, Judge.

In the matter of the bankruptcy of the Huffman Traction Engine Company. Edward Veler appeals from, and files sundry petitions to revise, orders of the District Court. Orders set aside and vacated, and cause remanded.

The Huffman Traction Engine Company was an Ohio corporation, located at Kenton, organized and managed by Mr. Huffman, and its purpose was to manufacture and sell farm tractors containing a certain invention by him. It raised a scanty capital by selling stock. It made a contract with the Kenton Commercial Club whereby the Traction Company was to erect on the Commercial Club's land a $15,000 building, of which price the Commercial Club would contribute $3,000, and after the company had operated the factory to a specified extent for five years, the Commercial Club was to convey the land, which had been worth $1,200. The building was erected, the $3,000 paid, and the deed delivered in escrow. The development of the tractor into commercial form was delayed, the working capital was exhausted, and debts accumulated. Upon much of the factory equipment only partial payments were made, and liens were reserved by the vendors. Huffman had raised money upon his notes in several different banks, and had loaned these sums and others to the company on open account. It had come about that Huffman's attorney, Mr. B. F. James (who, apparently, then had no pecuniary interest in the company or its success) had recommended Huffman for credit at banks where James was known and had thought proper to indorse Huffman's paper. Thus it resulted that, on November 20, 1912, the company owed Huffman $3,397; and on that day it executed to him its six promissory notes for $500 each, and one for $397, each due in three months. He indorsed these over to James, in part to be used by James to take up outstanding Huffman paper and (perhaps) in part for what he owed James. It is claimed that it was then expected to carry the business along successfully, but that the insistence of certain lien creditors upon immediate payment upset the plan.

However that may be, a petition in bankruptcy was filed in the court below on November 27th; the three petitioning creditors being the Bowling Green Bank, the Tontogany Bank, and Edward Veler. Each alleged that it was a creditor holding one of these November 20th notes. The petition alleged a transfer with intent to prefer and with intent to defraud, and also alleged that the company had admitted in writing its inability, etc. The fact was that James had indorsed and transferred one of these notes to the Tontogany Bank in exchange for its formerly held Huffman note, had discounted one, for credit to himself or Huffman, at the Bowling Green Bank, and had turned over the third one, without consideration, to Veler, his office clerk, to be handled for James and as he might direct. James doubtless did this, instead of using his own name, because he was an attorney, and expected to be the attorney in the case, and preferred not to be a party on the record. The petition was verified by James, as attorney for the Bowling Green Bank, by Mr. E. D. Bloom, as attorney for the Tontogany Bank, and by Veler himself. On the same day, an oral application was made to the District Judge for the appointment of a receiver. James and Bloom and Huffman joined in appearing before the judge, and in stating the pecuniary

condition of the alleged bankrupt and its reasonable expectations of being greatly benefited, if it could raise money enough to continue its business to the point of completing ready for sale the four tractors that were then in process of construction. Thereupon an order was made reciting that the three petitioning creditors had asked for the appointment of a receiver, that it appeared such appointment was "absolutely necessary for the protection of the estate," and that it would be "for the best interests of all creditors, and other persons interested," and directing that Mr. Bloom be appointed receiver, "clothed with all the power and authority of receivers in bankruptcy in like cases"; that he file a $1,000 bond as receiver; "that he continue to conduct the business of said alleged bankrupt until the further order of this court." At the same time, a bond was filed in the sum of $1,000, signed by the banks, per their attorneys, and by Veler, as principals, and by a surety company, conditioned to indemnify the alleged bankrupt for such damages as it should sustain in the event that the seizure by the receiver should prove to have been wrongfully obtained. On the same day, Bloom filed his bond as receiver, with a penalty of $1,000, with a surety company as surety, with the usual conditions, summarized as the faithful performance of all his official duties as such receiver.

On December 2d, the receiver filed his petition, setting up the reasons therefor, and asking an order for $5,000 receiver's certificates. Thereupon an order was made, authorizing ten certificates, of $500 each, which should be "a charge upon the income of the receivership and upon the body of the property prior to all other liens existing upon said property, except taxes upon the property and the costs of this proceeding"; but the order directed that only two of such certificates should be negotiated without further order. Further orders were later made, so that, eventually, four such certificates were issued, aggregating $2,000; and of these one was delivered to a machinery lienholder as a payment upon the lien and to postpone seizure, and three were sold to banks for cash. The business of finishing the tractors, etc., continued in various ways some two months. In June there was an order of adjudication, followed by election of a trustee.

The receivership was disastrous. The three or four machines, which were partly or wholly finished, realized but very little. The receiver obtained practically no money from any source, save from the sale of the certificates, and about $500, payment on one tractor, and, after paying operating disbursements and about $200 fees for himself and his attorney, Mr. James, had on hand for the trustee $8.84. In addition, several hundred dollars of debts, incurred by the receiver for materials and labor, remained unpaid. After a further interval the trustee sold, free from liens, all the property, including the real estate and all the remaining machinery covered by the mortgages or liens. The total of these prior liens upon the property, including the $4,200 claim of the Commercial Club, was $7,600. The total realized from the sale was $4,790, of which only $430 came from unincumbered property. The lienholders and the certificate holders and the receiver's other creditors all claimed priority upon most of this fund. The referee made certain awards and ordered distribution. Upon review, this order was confirmed by the District Court. Before it was executed, and upon the special application of an interested party, the District Court sent it back to the referee, as master, and his later report duly came up on petitions to review or exceptions. Thereupon the District Judge, on his own motion, instituted an open court inquiry, summoned witnesses, and made what seemed to him the necessary thorough inquiry into all the history of the transaction. He reached and announced the conclusions that there had been no jurisdiction, because there were not three real petitioning creditors, Veler having no actual interest, and that the District Judge had been grossly misled into the appointment of a receiver, the issue of the certificates, and such approval as he had given to the transaction. He also found that the original petitioning creditors were liable for the receiver's certificates and the receiver's debts and all later costs. An order was then made directing that the petitioning creditors pay to the trustee these sums of money, or else upon a day fixed show cause why they had not done so. Later, upon the hearing of such order, it was made final,

and various matters of distribution were determined, and another order, still later, made complete final distribution. An appeal and three different petitions to revise bring all the chief aspects of the matter to this court.

Clyde R. Painter, of Bowling Green, Ohio, Marshall & Fraser and Denman & Wilson, all of Toledo, Ohio, and Edward Beverstock, of Bowling Green, Ohio, for appellants.

Taber & Daniells and Doyle, Lewis, Lewis & Emery, all of Toledo, Ohio, and C. M. Cessna and C. W. Faulkner, both of Kenton, Ohio, for respondents.

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

DENISON, Circuit Judge (after stating the facts as above). [1, 2] 1. The fact that Veler, one of the petitioning creditors, held the legal title to his note merely as agent or trustee for James, is not important, in any aspect now involved. The note represented a valid debt from the company to Huffman; Huffman had indorsed and transferred it to James; whether James held it under any trust for Huffman, or with only a personal interest, is not material, because he had the full legal title; James delivered the note, indorsed in blank, to Veler, directing him to take proceedings thereon in his own name, and the legal title thereby passed. Whether Veler held this as agent and trustee for James, or for Huffman, was a matter of no concern to any one except James and Huffman. So far as appears, the company had no offset or other claim against Huffman or James which would make it important that the claim should be presented in the name of either, and the company has never made any objection to Veler's action; nor has James nor Huffman. Under these conditions, we think it clear that Veler must be considered a competent and qualified petitioning creditor, and that no fraud or misleading of the court, affecting its original jurisdiction in the bankruptcy matter, can be predicated upon the fact that Veler was acting for some one else.

Indeed, it seems that Veler's action in this respect would not have been criticised, save for the Ohio statute (Gen. Code, § 11241), which provides that an action must be prosecuted in the name of the real party in interest, and an opinion of the Supreme Court of that state (Brown v. Ginn, 66 Ohio St. 316, 64 N. E. 123), which holds that the defendant, in an action brought upon an assigned claim by one who holds it only for collection, may defeat the action on that ground. Even if this were a subject upon which the federal courts were bound to follow the Ohio decisions, we would observe that in Coal Co. v. Bank, 74 Ohio St. 463, 78 N. E. 1128, it was held that the holder of such claim has, prima facie, the right to bring suit thereon and may maintain an action until his lack of interest is shown. It would follow that, while such right remained unchallenged by any party entitled to dispute it, the jurisdiction of the court in such action could not be affected.

With the same condition, we would further observe that the Uniform Negotiable Instruments Law, adopted in Ohio to be in effect

January 1, 1903 (95 Ohio Laws, 162), after the Ohio decision first cited, expressly provides that the holder of a negotiable instrument may sue thereon in his own name, and defines "holder" so as to include Veler (Ohio Gen. Code, §§ 8156, 8295, 8139). This is inconsistent with the rule of Brown v. Ginn, if that case extended to negotiable paper, as it seemingly does not. See 66 Ohio St. 324, 64 N. E. 123.

However, the Conformity Act (U. S. Comp. St. 1916, § 1537), does not make the state rules of procedure apply to bankruptcy courts. The practice and procedure of those courts are prescribed exclusively by the Bankruptcy Act and the general orders and regulations pursuant thereto. We think the bankruptcy court should follow the rule most generally prevailing, and to the contrary of that stated in Brown v. Ginn (see In re Kenney [D. C.] 136 Fed. 451, 455, and cases cited in R. C. L. tit. Bills and Notes, §§ 190, 198, 199); and the express language of the Bankruptcy Act gives support to this view. Those who file a petition must be creditors, and the definition of "creditor," given in paragraph 9 of section 1, includes the duly authorized agent or attorney of the one who "owns" the claim, even if "owner" necessarily means "equitable owner." This provision has no force, unless it means that the agent or attorney—at least, when holding such a claim as this—may proceed in his own name as creditor. He is answerable to his principal, and obviously his principal may raise the question whether "duly authorized"; probably the debtor may; but, until and unless some such meritorious question is raised, the right of the agent, who is the legal holder of negotiable paper, to proceed in his own name, and the power and duty of the court to recognize this right of the agent, must be clear. We draw this conclusion from the cumulative effect of all the considerations we have stated.

A case might arise where a single creditor had caused his claim to be divided into several notes, with the intention of scattering them for the purpose of creating two or more creditors, so as to give bankruptcy jurisdiction; but that is not this case. Huffman's good faith in taking the series of notes and distributing them in the course of paying his own several debts is not questioned.

[3] 2. It is said that the only transfer to prefer or defraud creditors which had been made by the company was one for the benefit of these notes, and hence it was a fraud to rest jurisdiction upon such an allegation. However that might be, the petition also alleged another sufficient act of bankruptcy, viz. that the company had admitted in writing its inability to pay its debts and its willingness to be adjudged a bankrupt. Whether such written admission had been at that time actually executed does not appear by this record;[1] but, if it had not been, its absence was merely an oversight. The company was doing anything which these creditors desired done; and we can find nothing here to defeat the jurisdiction of the court. Indeed, in due course, by its written answer, the company did consent to the adjudication.

[1] Except by the answer, which admits all the allegations of the petition.

[4] 3. It is most unfortunate that there was no written application for the appointment of a receiver, nor any record of the representations then made to the court. There are definite statements to be found in the petition for the allowance of receiver's certificates, and this, doubtless, reflects the substance of the original application. Since the judgment against the petitioning creditors rests upon the theory that their counsel misled the court into the appointment of a receiver and the carrying on of the business and issuing the certificates, it becomes important to examine the stated elements of that misleading.

(a) It is suggested that the representations substantially were to the effect that the assets of the company largely exceeded its liabilities, that the embarrassment was temporary, and that, with the aid of a short receivership, the company would be able to satisfy its creditors and demonstrate its solvency. It is quite evident that no later remedial proceedings can rest upon the supposition that the bankruptcy court accepted such a claim and appointed a receiver on such a theory, presented by the same creditors who were the petitioners for bankruptcy adjudication. To do so would be deliberately to apply bankruptcy remedies in a case where, in truth, the most essential element of bankruptcy was conceded to be absent.

(b) Either directly or because of indorsements, James was then, in substance, among the largest of the unsecured creditors—perhaps the chief one. The bankruptcy proceeding and the receivership were planned by him in part because he thought them the best remedy for his own protection. If, appearing as counsel for petitioning creditors and in effect for the company, he advised the court that a receivership was necessary, he ought to have disclosed his personal interest. Complete good faith with the court required this degree of frankness. The court might not give the same force to the advice from counsel who was a creditor as from counsel who was disinterested. At the same time, it is not easy to see the great materiality of this lack of frankness as applied to obtaining the receivership and the order continuing the business; its prejudicial effect at later stages is much more probable. James was not a preferred creditor (except by lien on the patents, which were worthless); his personal interests and those of general creditors and those of the Huffman Company were, probably, really identical. There seems scant room for supposing that he made any statements or gave any advice which would not have been made or given if he had not been a creditor; however, we do not doubt that the presence of this undisclosed personal interest is one of the circumstances to be considered upon the main issue here involved.

(c) It was not disclosed by the petition for certificates, and it is said not to have been disclosed at all, that the Commercial Club had either a claim of $4,200 or title to the real estate, and that various machinery and equipment vendors held purchase-price liens well towards (as it turned out, beyond) the full value. The claim of the Commercial Club for $4,200 had been entered on the books of the

Huffman Company and has been proved and allowed, so that it is now too late for it to be questioned; but we do not understand upon what theory any such claim existed. The contract made no provision for the repayment of the $4,200 in any event, and since the contract neither preserved any lien for the $4,200 to secure the performance of the five-year maintenance contract nor provided liquidated damages for a breach (see Board of Commerce v. Security Co. [C. C. A. 6] 225 Fed. 454, 140 C. C. A. 486), counsel might well have believed that no such claim existed, and might later have been glad to accept the Commercial Club's theory of lien. However, the right of the Commercial Club to forfeit the title, if the business did not continue as agreed, was clear, and the right of the machinery and equipment vendors to take back their property was of the same character. It is obvious that the existence of these rights and the imminent danger of their exercise constituted persuasive reasons for receivership—the best reasons there were. While this consideration bears on the question whether the applicants for the receivership intended fraudulently to mislead the court into the appointment, by keeping back facts which constituted good reasons, and putting forward falsehoods constituting less sufficient grounds, yet the court was, of course, entitled to full disclosure of the truth, so far as known; and if the amount of the liabilities was fraudulently understated, or the assets similarly overstated, in material extent, for the purpose of inducing an appointment which it was feared would be denied if the truth were told, it is clear that a wrong was done.

(d) Representations as to the nearly finished condition of the tractors and the certainty of a profitable market will, of course, support the theory of fraud only if they pertained to known facts or to opinions given so recklessly as to be equivalent to fraudulent statements of fact. This specific feature was not much considered below, and it will require further attention, and we now pass it by without other comment.

Upon review of the whole record, there must be grave doubt whether there was anything improvident in the conclusion to appoint a receiver, or whether the appointment would not have been made just the same if the full and exact facts then existing had been stated to the court. The vital trouble with the situation, as it turned out, was not that the debts were larger than supposed, or that there were so many vendor's liens, but was rather that the tractor, upon which the whole enterprise was based, proved to be a failure; and it seems entirely probable that in December, 1912, Huffman and James, and everybody concerned, believed that the tractor, when finished, would work and would sell. The situation, in December, 1912, as we now know it, was that $10,000 or $15,000 in cash, and an equal amount in debts, had been invested in the enterprise, and that, if it stopped at that stage, the plant and the machinery were of minimum value, and the materials and unfinished machines on hand were mostly junk; while, if the business could be continued long enough to demonstrate that it could be profitable, all the assets would greatly increase in salable

value. In that situation, the investment of $2,000 in continuing the business up to the point of demonstration one way or the other, and under the belief that it would succeed, would seem the prudent thing to do, and to be fairly within the definition of what was "absolutely necessary for the preservation of the property" (section 2 [3]), and "necessary in the best interests of the estate" (section 2 [5], Comp. St. 1916, § 9586). Nevertheless the court might not have taken that view, and was entitled to know the truth.

What has been said applies to three of the receiver's certificates, which were issued as the direct and normal consequence of the creation of the receivership. The fourth certificate (issued as 3) requires separate consideration. Its issue is claimed to have been secured by an express false representation that an attorney for one creditor consented. The record suggests the possibility of confusion and mistake on this subject rather than the supposed express intent to deceive, because this attorney for one creditor obviously had no power to consent generally to the issue of this certificate, and the false representation that he had consented would have been so far futile that it would hardly have been worth deliberate making; yet, in view of the proceedings which we later approve, we do not attempt to foreclose this question. If this certificate was fraudulently procured, and if thereby the burden upon the estate was increased $500 beyond what it otherwise would have been, damages to that amount must follow.

[5, 6] In cases where the receiver had never come into possession of the estate, or where there was no fund in court, excepting that which was the property of those who had always and successfully resisted the appointment of a receiver, it has been held that those who procure his appointment must pay his compensation and expenses. These cases were discussed in our opinion in Re National Carbon Co., 241 Fed. 330, 333, 154 C. C. A. 210. They apparently rest upon the rule of necessity. Since there is no estate or fund which can rightly be charged, and since the expenses must be paid by some one, those causing the receivership must respond. The present case is one where the entire estate of the bankrupt came into the hands of the receiver, remained there until it was turned over to the trustee, and is now in court for final distribution. The bankrupt practically consented to the appointment; no creditor or lienholder ever objected. The court authorized the incurring of the debts by the receiver, to become a charge upon the property, and credit was given on the faith of this authority. When, in such a situation, it develops that the order appointing a receiver should be and is vacated, or otherwise appears that the order was improvident, we find no principle upon which the creditors petitioning for receivership can be held directly liable for the debts which the receiver incurs. Those who became creditors of the receiver did not know the petitioning creditors and did not give credit to them; the receiver has acted as an officer of the court; and we cannot satisfactorily work out any theory of liability by an undisclosed principal. We think the true rule in such cases must be that, where the appointment of a receiver was procured wrongfully and

an injury results to the estate, the later appointed trustee is entitled to have, for the benefit of the estate, the damages consequent on such injury. This is the theory of the bond which the statute requires petitioning creditors to give (Bankruptcy Act, § 3e); it is the alleged bankrupt which must be indemnified for damages "in the event such seizure shall prove to have been wrongfully obtained"; and we have held that the right to recover for injuries to the estate pending the receivership vests in the trustee when he is appointed (Arnold v. Horrigan, 238 Fed. 39, 44, 151 C. C. A. 115). Obviously, this damage may or may not be the same in amount as the valid debts of the receivership.

[7] Ordinarily, when the receivership ends and the assets are turned over to the trustee, the current expenses of the receiver have been paid out of the current receipts and any lawful indebtedness may be deducted from the assets which go to the trustee. There can be no doubt that such debts are a charge on those assets at that time, and if they are not paid, the assets clearly remain subject to that charge. Not only does this charge result from the nature of the case, but it is expressly recognized by the distribution section (section 64) which gives priority to those expenses which were necessary for the preservation of the property; and the expenses of the receivership fall under this class by the very language which is used with reference to the creation of the receivership. No receiver can be appointed excepting as a step in what is absolutely necessary for the preservation of the property. It follows that, in this case, the lawful debts of the receiver must be paid out of the assets in the hands of the trustee, excepting so far as claims with priority may prevail.

[8, 9] It is not claimed that the action of the court, in 1916, in vacating the order for a receiver made in 1912, would affect the validity of the receiver's certificates issued and sold pursuant to the express order of the court while the receivership was in operation. The only question considered below or to be decided here is: From what persons or fund shall payment be exacted? Neither are we concerned with the inquiry whether a bankruptcy court may lack the usual power of courts of equity to authorize receiver's certificates or whether such certificates may lawfully be given priority over existing liens without the consent of existing lienors. The certificates represent valid debts of the receiver, and, holding as we do that such valid debts are part of the expenses of administering the estate or preserving the property, the priority attempted to be given by the form of the order and of the certificates is of practical importance only as evidence as to whether prior lienholders consented to be subordinated. We conclude that any degree of consent which is necessary to accomplish such subordination sufficiently appears. The two largest secured creditors are the Supply Company and the Commercial Club. The Supply Company accepted one of these certificates as a partial payment on its debts, and thereby had full notice of and the benefit of the provision that the certificates should be prior to all existing liens. Obviously it cannot take such certificate and then claim that its own lien is alone

not affected by this provision.[2] The Commercial Club was to be directly benefited by the operation of the plant, for successful operation alone could accomplish the underlying purpose of the Commercial Club's interest. So, also, each of the other secured creditors was to be benefited by such operation. One creditor held a reservation of title to a generator and switchboard installed in the plant. It was, of course, worth less if dismantled and taken out, and any attempt to make the plant a going concern was intended to be for the benefit of this creditor. The three other creditors, whose liens were allowed, held mortgage or other liens upon the tractors in process of construction, and the money represented by the receiver's certificates, put in the form of materials and labor, was very largely added to these tractors, so that there was direct benefit to these creditors. All the time it must be remembered that the amount of unincumbered property was negligible, and that unsecured creditors had no interest in the property covered by liens, since, both separately and collectively, the property covered by mortgage or liens was insufficient to pay the secured debts. The secured creditors were therefore the ones primarily interested in preserving the property through the operation by receiver. It seems probable that they would have known of the priority given to the certificates upon their issue; but, however that may be, we find that each of these secured creditors (except the Supply Company) acquiesced in the operation by the receiver, made no effort to enforce his lien by withdrawal of his property or otherwise, acquiesced in the sale of the entire property by the trustee free from liens, and in no form or manner attempted to make any reservation or preservation of his lien as superior to the expenses of operation or the other expenses of administration. Under these conditions, we think it clear that the receiver's debts represented by the certificates are entitled to priority in the fund derived from the property covered by liens; and though the pro rata contribution, as directed by the referee, is not wholly satisfactory, no other practicable method appears.

It appears that there is a small fund ($430) coming from the sale of unincumbered property. The considerations which give the receiver's certificates priority in the proceeds of the property covered by liens do not apply, or apply with less force, to the ordinary administration expenses after the trustee was appointed. As to these, it may well be that they were incurred only in the expectation that they would be paid out of the general fund and should be confined thereto. This we do not undertake to consider.

[10] The receiver's debts, other than evidenced by the certificates,

[2] We do not overlook the fact that the Supply Company took this certificate "without prejudice to all the rights and liens which [it] holds under its said chattel mortgage." This proviso cannot reasonably operate to permit the Supply Company to attack the declared basis of the series of certificates, one of which it was accepting; the proviso is given due effect by treating it as intended to meet any claim that acceptance of partial payment or extension of time would be a waiver of the existing chattel mortgage rights or the initiated foreclosure rights. The Supply Company's liens upon machinery and proceeds continued unimpaired, save by the practical concession that the receiver's certificates were rightly part of the expenses of administration.

and except for labor, stand upon a different footing. In Haines, Receiver, v. Buckeye Wheel Co., 224 Fed. 289, 139 C. C. A. 525, where, also, the court had authorized the business to be continued by the receiver, and where the intention of the court not to permit the receiver to incur any obligation except the certificates, was, if anything, less clear than in the present case, this court held that the receiver's other debts were unauthorized. That was not a bankruptcy receivership, but there seems to be no difference in principle. It necessarily follows, from the Haines Case and from the general rule that the fund is not liable for receiver's debts incurred without authority, that the only recourse of these other creditors is against the receiver personally, and perhaps (a question not decided in that case) against his bond. The labor debts, however, were given priority over the lienholding creditors by the first referee's report and it is not clear that any objection was ever made. If not, their right thereto must be taken as conceded, and is not to be disturbed.

[11, 12] It remains to decide whether the issues, whether there had been a wrongful procurement of the receivership and whether the petitioning creditors were liable therefor, were rightly tried. We cannot escape the conclusion that there has been a mistrial thereon, and this conclusion necessarily requires a determination of what the right method may be. The District Judge became suspicious that he had been imposed upon. It was not only his clear right, but his duty, to proceed upon his own motion into a thorough inquiry upon the subject. In such a situation, we think two courses open to the trial judge: The first is to direct some procedure for the framing of issues, by which the parties charged with misconduct or liability may know the charge and have suitable opportunity to try the fact. The second is to proceed with a summary, more or less ex parte, inquiry, in order to satisfy himself whether a proceeding of the first class should be instituted. We think the court below failed to preserve the necessary vital distinction between these two methods. An ex parte inquiry, undertaken upon the motion of the court and pursued without the formulation or service of any charges or issues, resulted in a formal finding of facts to the effect that the misconduct had occurred and had been committed by the authorized agents of the petitioning creditors. Thereupon these creditors (under the construction of the order most favorable to them) were ordered to show cause why judgment should not be rendered against them accordingly; but it is evident that the court had reached conclusions which, to say the least, would not be readily changed, and which seem to have been practically regarded as unassailable, unless by new and additional evidence. We cannot think that the parties charged had that kind and degree of hearing to which they were entitled.

It is said that the only alternative to the practice here pursued is a plenary action at law before a jury. This does not follow. The whole matter is ancillary to the bankruptcy proceedings, and the bankruptcy court has, in a broad sense, the power of a court of equity. A complaint or petition by the trustee, addressed to the bankruptcy court in the exercise of its equity powers, asking an accounting for the damages caused to the estate by the wrongful acts committed after

the filing of the petition and asking for judgment against those responsible therefor, would not, in a case like this, go beyond the jurisdiction of the court of bankruptcy, according to the familiar principles of ancillary proceedings in equity; nor would it violate anybody's right to a jury trial, and it would enable the issues to be decided by the court personally familiar with the whole situation—unless, indeed, his personal knowledge and participation in the matter involved might appear to the judge sufficiently embarrassing to justify him in asking that another judge take charge.[3]

[13] How much, if any, question there may be as to what actually occurred on the presentation to the District Judge of the oral application for a receiver, does not appear. The District Judge made a statement of such matters, and neither James nor Huffman nor Bloom put in any testimony, although an opportunity was given them to do so. However, this opportunity was in the course of what they then must have supposed to be an inquiry merely preliminary to some proceeding in which they or the petitioning creditors could be fully heard, and they were under no obligation to accept the offer to give testimony in this preliminary inquiry. It is argued that this statement or certificate by the District Judge may not be disputed. This proposition cannot be accepted in its full sense. Such a statement is entitled to the highest respect and credence; under all ordinary circumstances, it would be accepted without question; but we cannot think that it imports verity in the sense in which that is true of some judicial proceedings and records. To preserve a record of what occurs before him in chambers, and to certify the same to a reviewing court are not among the duties imperatively imposed upon a trial judge; and the imperfections of human memory are too great to permit the theory of importing verity to apply to all such proceedings under all circumstances.

[14, 15] It is evident that we regard the liability of the petitioning creditors in this case as presenting a controversy arising in bankruptcy between them and the adverse interests rather than a step in the administration of the estate, and that, therefore, an appeal is the proper remedy. See In re Martin (C. C. A. 6) 201 Fed. 31, 36, 119 C. C. A. 363. This is not to say that there might not be cases in which a petition to revise would properly present an analogous question, but only that, in this case, the issue is so far outside the ordinary administration of the estate and so far between adversary parties in interest as to constitute a real controversy. However, questions as to the distribution of the fund are necessarily involved as collateral to the other issue, and each of the petitions to revise discloses jurisdiction. All motions to dismiss are therefore denied.

It would have been possible to dispose of this matter by deciding only that the necessary procedure had not been followed; but both the record and the argument have been very full in all directions, and the results which we reach as to the certificates and the unauthorized

[3] It should be stated that the District Judge who appointed the receiver did refer the present issues to another judge, and later assumed the decision himself reluctantly and because the reference had to be abandoned.

debts affect the basis of the proceedings below, and for these reasons, and to aid in bringing an end to this complicated controversy, we have gone further in indicating our views of some collateral matters than we usually do, and we think it better to set aside wholly the orders in question, rather than to reverse only parts. This will leave the court below at liberty to repeat any action which we have not disapproved, or to modify it as the changed basis may require.

Our direction, therefore, is that the orders made by the District Court on November 2 and November 11, 1916, and January 17 and June 25, 1917, be set aside and vacated, and that the case be remanded for further proceedings in accordance with the views herein expressed. This will leave matters standing upon the second report of the master and the exceptions, objections, and motions made thereto. This disposition of the matter implies no liability to refund to any appellant any amount that it may have paid pursuant to the order appealed from; neither is it intended to disapprove the action of the court below in refusing any compensation to James or Bloom as counsel or receiver. That action was, upon this record, within the court's discretion. This is also without prejudice to such proceeding as may be thought necessary to protect the estate from loss which might result if the certificates held by the Bowling Green Bank were paid while the liability of that bank as petitioning creditor was alleged and undecided.

The costs of this court, including one docket fee for the appeal and all petitions and the cost of printing the appeal record, except pages 189 to 282, and the petition records filed January 26th, March 14th, and October 2d, will be paid by the trustee from the fund, first, out of any balance there may be of the $430 not exhausted by previous costs; and, second, at the expense of the secured creditors pro rata.

GRAND RAPIDS & I. RY. CO. v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. March 5, 1918.)

No. 3060.

MASTER AND SERVANT ⊂⊃13—RAILROADS—OPERATION—HOURS OF SERVICE ACT.

Hours of Service Act (Act March 4, 1907, c. 2939) § 2, 34 Stat. 1416 (Comp. St. 1916, § 8678), provides that no telegraph operator transmitting, receiving, or delivering orders affecting train movements shall be required or permitted to be on duty more than nine hours in any 24-hour period in towers, offices, and stations continuously operated night and day. A tower office used continuously by three operators burned, and thereafter an office at an adjacent station was used for some time; three operators being provided. The railroad company then placed a box car about the site of the old tower in the yards some distance from the station. The station then was operated only in the day; the agent operator being on duty more than 12 hours, while the operator in the box car was on duty more than 12 hours at night. *Held*, that the railroad company could not escape the provisions of the statute on the theory that the box car and station were separate offices, particularly as the station had been used as night and day office for more than a year previously, and the business conducted through the station and box car was unitary in its character.

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

In Error to the District Court of the United States for the Northern Division of the Eastern District of Michigan; Arthur J. Tuttle, Judge.

Action by the United States against the Grand Rapids & Indiana Railway Company. There was a judgment for the United States, and defendant brings error. Affirmed.

James H. Campbell, of Grand Rapids, Mich., for plaintiff in error.

John E. Kinnane, U. S. Atty., of Detroit, Mich., and Philip J. Doherty and Roscoe F. Walter, Sp. Asst. U. S. Attys., both of Washington, D. C.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge. The railway company seeks reversal of judgment entered against it in the District Court upon a verdict directed in favor of the United States. The action was to recover penalties for alleged violations of the first proviso to section 2 of the federal Hours of Service Act (34 Stat. 1416). The services were rendered by two of the company's telegraph operators in 1916, on March 13 to March 17, inclusive, in telegraph and telephone offices maintained by the company at Elmira station and K. S. tower, and within its yard located there. Elmira station is about three-eighths of a mile south of K. S. tower, and both are upon the main line. Upon the admitted facts the only question presented is whether, in view of the manner in which the services had been and at the times in question were performed, those places are to be regarded as two distinct offices, or as one office, within the meaning of the Hours of Service Act.

Prior to the Hours of Service Act, and until the K. S. tower was constructed and put in operation, February 25, 1906, the company used the Elmira office continuously through one agent operator from 7 a. m. to 7 p. m., and another operator from 7 p. m. to 7 a. m. From the opening of K. S. tower until May 25, 1914, when it burned down, the Elmira office was used only as a day office and by one agent operator from 7 a. m. to 7 p. m. The K. S. office was used continuously by two operators, one during the day and the other during the night, until the Hours of Service Act went into effect, March 4, 1908; it was then used continuously by three operators, each working 8 hours in the 24; this practice was continued until May 24, 1914, though, by overlapping, the hours of each operator were increased to nine. By reason of the fire the K. S. office was temporarily abolished, and during this period—that is, from May 25, 1914, to April 21, 1915—the Elmira office was again used continuously though by three operators, each working 9 hours. On April 21, 1915, day service alone was resumed at the Elmira office through an agent operator from 7 a. m. to 7:30 p. m.; and this was continued until and including the dates now in question, March 13 to 17, inclusive, 1916. When the day service was so renewed at the Elmira office, the company, through the use of a box

car, re-established a telegraph and telephone office at the site of the K. S. tower; and from that time on, and including the dates in issue herein, this box car office was used as follows: One operator served regularly from 7 p. m. to 7:30 a. m., though this was not all the service rendered there. The operator at the Elmira office, in addition to his duties there as a station agent, was compelled to keep in touch with the box car office daily, by going there himself to look after waybills, and by giving orders over the telephone from the Elmira office to conductors and engineers, as well as receiving necessary information from them, at the box car office; the conductors and engineers, as well as the agent operator at the Elmira office, having been supplied with pass-keys to enter and use the box car office. When necessary, the train employés, such as conductors, would go from the box car office to the Elmira office to communicate personally with the agent operator in regard to orders concerning the movements of cars or trains.

Without further pursuing details, it is plain that the situation comes to this: Three operators were employed to do the work at both offices prior to the Hours of Service Act, four were required thereafter until the burning of the K. S. tower, and three were found necessary at the Elmira office alone until the box car office was put into service; but these forces were then reduced to two men, who were each required to work 12½ hours in every 24-hour period. Despite these facts, there is not the slightest showing that the work to be performed had in any respect been reduced. It is to be borne in mind, moreover, that during the time the K. S. office was abolished on account of the fire—that is, from May 25, 1914, to April 21, 1915—all the work was performed at the Elmira office alone, though with three operators. It is not explained why this plan might not have been continued.

It is certainly difficult to understand how the restoration of the K. S. tower in the form of a box car could justify the reduction made in operators and the imposition of the consequent extra service upon two men. This was not to change the service in kind, nor, as already stated, to reduce it in amount, but only to require it to be performed at points relatively in close proximity, indeed, at the old places and in the same yard, though by a force materially reduced. If, then, we consider the régime existing before the fire at K. S. tower, we find a continuous "night and day" service necessary and a suitable force to perform it; and if, on the other hand, we consider the Elmira office service alone from the date of the fire to that of the resort to the box car, we again find a continuous "night and day" service required and a force sufficient to discharge it. In the face of these conditions, it is argued for the railroad that "the stations at Elmira and K. S. tower did not constitute a single station, but were distinct stations, and that it was lawful to keep the men (man) at each station who operated the telegraph, in addition to other duties, on duty not exceeding 13 hours in the 24-hour periods." We are not impressed by this contention; its claims are in disregard of the real situation. This is shown by what is offered in support of the contention. It is said, for instance, that Elmira station is an ordinary passenger and freight depot, and the

K. S. tower is a terminal of one of the freight divisions.[1] The difference between a passenger-freight depot and a division terminal is not helpful, since it does not show how train orders and the like were distributed between the two offices; and it is obviously important to observe and bear in mind what proportion of the orders was sent to the Elmira office. The train dispatcher was stationed at Grand Rapids, and all telegraphic orders concerning train movements on the road between Grand Rapids and Mackinaw City originated with him; it need not be said that both of the offices in question were between these points. It will be remembered that, from the time of the fire until the opening of the box car office, all orders affecting train movements to and from either Elmira station or the freight terminal in question were necessarily sent to the Elmira office, since no telegraph office was maintained at the site of the K. S. tower during that period, and, further, that no person was kept at the box car office at any period in question here to receive telegraph orders during the daytime. Thus counsel overlooks conditions which restricted the sending of telegraphic train orders through the Elmira office alone for nearly a year, and indeed thereafter as to all daytime orders of that character throughout the period of the present controversy. It is said, moreover, that the work of handling train orders at either of these stations was negligible; but here, again, the facts are ignored concerning the number of telegraph operators that had been employed for years, even at the Elmira office during the time between the fire and the opening of the box car office, to do the train order work arising through train movements at these two points.

Further, counsel insists that the K. S. tower was part of the facilities embraced in the freight terminal at that place; but this does not meet the situation. The K. S. tower was not in fact restored as a structure, nor as a "night and day" telegraph office was it possessed of an adequate force; the box car office cannot in any just sense be said to be a substitute. It is also urged that the work at each office was distinct from the work at the other. This may be conceded as to the time before the fire; the concession, however, cannot aid the defense, since we have seen that for nearly a year after the fire the entire train order services for these two points were carried on at the Elmira office alone, and that afterwards the daytime services required in respect of the box car office were conducted by the Elmira operator; and it is to be added that nothing more certainly than these facts could show the nature of the train order services. They were evidently unitary in character and susceptible of performance in one office. Considered in their entirety, the services related to the same train movements and demand-

[1] True, counsel states, with seeming support of the agent operator at Elmira, that this terminal includes a railroad yard extending southwardly from Boyne Hill to a point 500 feet north of Elmira; but, while there is no practical difference in a case like this between the joint use of two contiguous yards and the use of a single yard, we feel bound to accept the statement of the division superintendent, who testified in detail in respect of the yard limits, stating among other things that "the yard limit boards are placed south of Elmira and north of K. S. tower," and that "K. S. tower and the [Elmira] depot are between the yard limit boards both of them."

ed adoption of the statutory "night and day" system, with an adequate force of operators, after the introduction of the box car office as well as before. In truth, the services possessed the essential attributes of a "night and day" system (United States v. Grand Rapids & I. Ry. Co., 224 Fed. 667, 671 to 673, 140 C. C. A. 177 [C. C. A. 6]), which unerringly characterized the work performed at the two offices as in reality belonging to a single office. This feature cannot be suppressed and the "night and day" clause frustrated, simply by severance of the work and by calling the two places of performance "distinct stations"; these places are to all intents and purposes but one office—a "night and day" office. As Judge Tuttle said in the course of his charge:

"It is plain * * * that by the transfer of an operator from the depot down to the box car three-eighths of a mile away they were not creating a new tower, or two towers, or two offices, or two places or two stations," within the true intendment of the Hours of Service Act.

Furthermore, the fact that the services were for a substantial length of time all performed at the Elmira office brings the instant case well within the reason of the decision in Atchison, T. & S. F. Ry. Co. v. United States, 236 Fed. 906, 907, 908, 150 C. C. A. 168 (C. C. A. 8), which is opposed to the scheme here resorted to. That case was followed by the same court in Illinois Cent. R. Co. v. United States, 241 Fed. 667, 670, 154 C. C. A. 425, affirming decision below in the same case, 234 Fed. 433, 435; and see, in the case last cited, apposite conference ruling of the Interstate Commerce Commission.

Judgment affirmed.

GRAND RAPIDS & I. RY. CO. v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. February 16, 1918.)

No. 3059.

1. RAILROADS ⟸229—OPERATION—SAFETY APPLIANCE ACT.
   The main purpose of Safety Appliance Act March 2, 1893, c. 196, 27 Stat. 531 (Comp. St. 1916, §§ 8605–8612), requiring the equipment of freight trains with power and train brakes, was to protect brakemen, who theretofore had been required to go on the tops of moving trains to set the hand brakes.
2. MASTER AND SERVANT ⟸142—RAILROADS—OPERATION—SAFETY APPLIANCE ACT.
   In view of the purpose of the Safety Appliance Act to protect brakemen by obviating the necessity of their going on the top of trains to use hand brakes, the fact that it was necessary to manipulate levers on top of trains for retainers, which were part of the power brake mechanism, does not justify an order of the railroad company requiring freight brakemen to use hand brakes on the descent of a long grade; it appearing that the railroad company directed that all trains should be brought to a full stop before commencement of the descent of the grade, at which time the levers on the retainers could be set.
3. MASTER AND SERVANT ⟸142—RAILROADS—OPERATION—SAFETY APPLIANCE ACT.
   As Hand Brake Act April 14, 1910, c. 160, § 5, 36 Stat. 298 (Comp. St. 1916, § 8622), declares that nothing therein shall be held or construed to relieve any common carrier from any of the provisions of the original

Safety Appliance Act, as amended by Act April 1, 1896, c. 87, 29 Stat. 85, and Act March 2, 1903, c. 976, 32 Stat. 943 (Comp. St. 1916, §§ 8605–8615), the requirement that freight cars should be equipped with hand brakes does not justify railroad company in directing brakemen to use the same on the descent of a long grade.

In Error to the District Court of the United States for the Northern Division of the Eastern District of Michigan; Arthur J. Tuttle, Judge.

Action by the United States of America against the Grand Rapids & Indiana Railway Company. There was a judgment for plaintiff (244 Fed. 609), and defendant brings error. Affirmed.

James H. Campbell, of Grand Rapids, Mich., for plaintiff in error.
Roscoe F. Walter, Sp. Asst. U. S. Atty., of Washington, D. C.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge. This is an action to recover penalties for alleged violations of the Safety Appliance Act. The controlling issue arising upon the pleadings and the evidence is whether, as respects freight trains of ten or more cars, while descending a particular grade known as Boyne Hill and upwards of eight miles in length on its main line, the railroad company could rightfully adopt and enforce a general order in terms requiring these trains to be controlled by hand brakes, and forbidding the use of air brakes unless it was evident that the trains could not be controlled by the hand brakes, or unless necessary to use the air brakes to make stops. The case was heard below upon an agreed statement of facts and certain testimony, and a directed verdict was rendered in favor of the United States. The agreed facts and the effect of the testimony, together with the charge of the trial judge, appear in 244 Fed. 609. Judgment was entered on the verdict for the amount claimed, $100, in each of five counts embraced in the declaration; and the present complaints of error relate to the rulings upon these counts.

[1, 2] We are convinced that the judgment is right, and that it is not necessary to discuss the claims of counsel, except in one respect. Counsel for the railroad urges that the contrivances, called retainers, constitute an essential part of the air brake system, that it is necessary for the brakemen to operate the retainer valves, and to do so on top of the cars in the course of their descent upon a grade, and that this presents a question which has not been considered in any reported case. The particular feature of the contention is that, since the brakemen are at such times required to go on top of the moving train, independently of any necessity arising from the use of hand brakes, there is no sufficient reason to hold, under the statutory provision requiring all cars to be equipped with efficient hand brakes, that their use was intended to be limited to the switching of cars in the yards.

It is true that the retainers are part of the air brake system. The retainer is a pipe connected with a triple valve (which, with the brake cylinder and auxiliary reservoir, is centrally located underneath the car) and extending from such valve along the bottom and the end of the car to the top, where a retaining valve with an operating lever

is mounted upon the end of the pipe; and the retention or escape of the air through the retainer may to some extent be regulated by manipulation of this lever. However, if it be assumed that testimony is admissible to question the efficiency of a statutory air brake system admittedly, as here, in good order and condition, we think it safe to say under the present record that a suitable number of these levers could be so placed when the train is at a full stop, and just before commencing to descend Boyne Hill, as to enable the locomotive engineer, while descending the hill, to control the speed of the train through the use alone of the air brake system. It is to be noted, moreover, that the general order requires "all freight trains" to "come to a dead stop just before commencing to descend Boyne Hill" (244 Fed. at page 610), and the trains here in dispute were all stopped at this point. Hence this is not a case, for instance, of a sudden failure of an air brake system to operate and the use of hand brakes to meet the resultant emergency; it is a case of deliberate substitution of hand brakes for a prescribed air brake system, founded at most on a belief of the railroad company that hand brakes are safer than the air brake system for descending the hill, and in practical effect is scarcely less than an attempt through a general railroad order to nullify the statute. It would therefore seem clear that the railroad order relied on is not sustainable upon the theory urged that the use of the retainers while descending a grade requires brakemen to go on the tops of trains.

Further, it is universally understood that the primary object of the Safety Appliance Act includes the protection of railroad employés against the old method of braking. Johnson v. Southern Pacific Co., 196 U. S. 1, 17, 19, 25 Sup. Ct. 158, 49 L. Ed. 363. This was declared as early as 1897 by the Interstate Commerce Commission (11 Ann. Rep. I. C. C. 130, 131); and in 1900, speaking of men falling from trains and of a time "when the train brake comes into general use," the Commission expressed its understanding of the act thus:

"The men will not then be obliged to use the tops of cars for braking, nor to walk on the running boards. The freight train will be as completely under the control of the engineer as passenger trains are at the present time." 13 Ann. Rep. I. C. C. 55; and see 14 Ann. Rep. I. C. C. 78, 79.

Judge Gilbert has shown that, when the safety appliance bill was pending in Congress, the House committee on interstate commerce stated in its report that the measure would "dispense with the use of men on the tops of the cars," and that the chairman of the committee having charge of the bill in the Senate explained that "the men who are on top of the cars to-day will be taken off and thereby relieved from the danger of such positions." United States v. Great Northern Ry. Co., 229 Fed. 927, 929, 144 C. C. A. 209 (C. C. A. 9). And Judge Knapp, who is possessed of special knowledge and experience as to this class of legislation, speaking for the Court of Appeals for the Fourth Circuit in Virginian Ry. Co. v. United States, 223 Fed. 748, 751, 139 C. C. A. 278, said:

"It was the evident purpose of the train brake provision to prevent the danger resulting from the operation of hand brakes on the tops of cars in moving trains. Just as the object of the automatic coupler is to keep em-

ployés from going between cars, so the object of the train brake is to keep employés from going on top of cars to set and release the hand brakes. The purpose of the law is the guide to its interpretation. * * *"

[3] In view, then, of the purpose of imposing and exacting the use of the air brake system, it cannot be that an essential portion of the system itself, like the retainers, may be employed to frustrate the act.

We, of course, have in mind counsel's view, already stated, of the provision in the act of 1910, requiring all freight cars to be equipped with efficient hand brakes; but we cannot think this provision was intended to defeat the design of the original act to release brakemen from the danger of going on the tops of trains moving upon the main lines; indeed, there is a plain inconsistency in the provisions themselves, the one exacting the air brake system and the other the hand brakes, which forbids a railroad company, upon its own idea of safe operation along its main line, to displace the air brake system in favor of the hand brake. This inconsistency is both recognized and provided for by section 5 of the Hand Brake Act (36 Stat. pt. 1, p. 299), which enacts among other things that "nothing in this act shall be held or construed to relieve any common carrier * * * from any of the provisions * * * or requirements" of the original Safety Appliance Act (27 Stat. 531), as amended by the acts of April 1, 1896 (29 Stat. 85), and March 2, 1903 (32 Stat. pt. 1, p. 943). The effect of this provision is particularly applicable to the instant case by reason of the admitted facts, before alluded to, that defendant's air brake system was "at the time in good order and repair and in efficient condition and properly connected for use." 244 Fed. 610. It must result that the requirement to equip all cars with efficient hand brakes was designed for purposes distinct from the use to which they were put in descending Boyne Hill; and it is sufficient here to say that the act concerning hand brake equipment finds abundant reason for its existence and application in places where the use of the air brake system is impracticable, as, for instance, in railroad yards. As Mr. Justice Van Devanter said when pointing out the distinction between train movements on main lines and movements in railroad yards:

"These [yard movements] are not train movements, but mere switching operations, and so are not within the air brake provision." United States v. Erie R. R., 237 U. S. 402, 408, 409, 35 Sup. Ct. 621, 624 (59 L. Ed. 1019).

And as was said in United States v. Great Northern Ry. Co., supra, 229 Fed. 930, 144 C. C. A. 209 (C. C. A. 9):

"The language of the act was equivalent to declaring that after the date named freight trains should not only be equipped to run, but should actually be run without requiring brakemen to use the common hand brake. No implication to the contrary is to be found in the provision in section 2 that all cars must be equipped with 'efficient hand brakes,' a provision which is ascribable to the necessity of controlling the movement of cars in yards and elsewhere, when trains have been broken up or are being made up."

To the same effect, United States v. Chicago, Burlington & Quincy R. R., 237 U. S. 410, 412, 35 Sup. Ct. 621, 59 L. Ed. 1019; United States v. Pere Marquette R. Co., 211 Fed. 220, 222 (D. C.).

We therefore hold that neither the retainers, nor the hand brakes, nor both, justified the order or the acts of the railroad; accordingly the judgment will be affirmed.

TURNER v. SCHAEFFER (three cases).

In re LOWES.

(Circuit Court of Appeals. Sixth Circuit. February 11, 1918.)

Nos. 3006–3008.

1. BANKRUPTCY ⟸306—ACTIONS—MODE OF REVIEW.
A plenary action by trustee in bankruptcy to recover money only, alleged to have been paid as a preference in favor of a surety and his principal, is an action at law, reviewable on writ of error, instead of appeal.

2. APPEAL AND ERROR ⟸1008(2)—REVIEW—FINDING—WAIVER OF JURY.
Both under the decisions and Rev. St. § 649 (Comp. St. 1916, § 1587), providing for waiver of a jury, a finding of fact by the trial court, whether general or special, has the effect of a verdict.

3. APPEAL AND ERROR ⟸859—REVIEW—WRIT OF ERROR.
On writ of error to review a judgment rendered in an action where jury was waived, the only inquiries open are, in view of Rev. St. §§ 700, 1011 (Comp. St. 1916, §§ 1668, 1672), whether the evidence tends to support the ultimate finding, and whether the finding, in turn, is sufficient to sustain the judgment.

4. APPEAL AND ERROR ⟸994(3)—REVIEW—SCOPE.
On writ of error to review an action tried to the court without a jury, credibility of witnesses cannot be weighed.

5. APPEAL AND ERROR ⟸169—REVIEW—SCOPE.
On writ of error, a judgment cannot be reversed on account of alleged newly discovered evidence, never called to the attention of the trial court, for in actions at law an appellate court can only correct errors of the lower court.

6. NEW TRIAL ⟸108(1)—NEWLY DISCOVERED EVIDENCE.
On writ of error to review judgments in plenary actions by a trustee in bankruptcy, attacking as preferential payments by bankrupt, evidence alleged to have been newly discovered since the judgments were entered, if susceptible of consideration, *held* no ground for reversal, not being of such a character as would probably produce a different result.

7. BANKRUPTCY ⟸303(1)—PREFERENTIAL TRANSFERS—ACTION.
A trustee in bankruptcy, alleging that transfers were preferential, has the burden of proof, and judgment in his favor cannot be based merely on suspicion.

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

Actions by Wellmore B. Turner, as trustee in bankruptcy of Joseph E. Lowes, against Harry F. Schaeffer and the City National Bank, against Harry F. Schaeffer and the Third National Bank, and against Harry F. Schaeffer and the First Savings & Banking Company. The actions having been dismissed as to the several banks, there were judgments for the individual defendant, and plaintiff brings error and appeals. Appeals dismissed, and judgments affirmed.

January 6, 1912, Turner, as trustee in bankruptcy of Lowes, filed three petitions in the court below for the recovery of money only, one against Schaeffer and the City National Bank of Dayton, Ohio, for $30,550, another against Schaeffer and the Third National Bank of Dayton, for $25,190.16, and the other against Schaeffer and the First Savings & Banking Company of Dayton, for $13,156.93, with interest upon these sums from specified dates. Defendants in each case demurred to the petition, which in each instance resulted in the filing of an amended petition, the sums of money sought to be recovered and the defendants remaining the same; the allegations of the amended petitions were in other respects substantially alike. It is charged that Lowes, doing business as a general contractor under the name of Luyster & Lowes, was by the court below adjudged a bankrupt December 11, 1911; that plaintiff was appointed trustee December 27th, and is still acting in that capacity; that Lowes was indebted to these banks in the sums above mentioned, and that Schaeffer, who is the father-in-law of the bankrupt, had been in charge of the bankrupt's offices and business in Dayton, and had become surety for the bankrupt on his indebtedness to these banks; that on dates named within the four-months period the bankrupt, well knowing that he was insolvent and with intent to prefer the defendant banks and Schaeffer, as creditors, and in violation of the Bankruptcy Act, withdrew from his funds and through Schaeffer paid the sums stated to the several banks; that the banks and Schaeffer then had reason to believe that Lowes was insolvent, and that the payments were so made for the purpose of preferring defendants as his creditors; further, in substance, that these payments were made pursuant to an agreement and a conspiracy between Lowes and Schaeffer and the several banks to deprive the bankrupt's other creditors of power to collect their claims, and so to appropriate the bankrupt's assets to the payment of the obligations of Lowes and Schaeffer to the banks.

Issue was joined in each case by separate answers of the defendants, specifically denying each of the allegations tending to charge a preference. May 4, 1915, the causes were brought to a hearing together under an agreement to waive a jury and to try them to the court. The plaintiff called as witnesses only Lowes and Schaeffer and W. W. Smart, the bookkeeper of Luyster & Lowes, and submitted exhibits showing creditors other than the banks, who had not been paid in full, and the sums due to them, etc. At the close of the plaintiff's evidence motions were made to dismiss the actions as against the banks, on the ground that there was no testimony to sustain the alleged "scheme or conspiracy, or any intent, or knowledge on the part of the banks as to the condition of Mr. Lowes at any time." The motions were not resisted on the part of plaintiff, and were sustained. The cases were brought to this court, both upon appeals and writs of error.

O. F. Davisson and Lee Warren James, both of Dayton, Ohio, for plaintiff in error and appellant.

McMahon & McMahon and R. G. Corwin, all of Dayton, Ohio, for defendant in error and appellee.

Before WARRINGTON and DENISON, Circuit Judges, and SESSIONS, District Judge.

PER CURIAM. [1] Since the cases were plenary actions to recover money only, which was alleged to have been paid as a preference in favor of the banks, respectively, as principal, and Schaeffer, as surety, we think it clear that each was an action at law; and so properly brought here on writ of error. Warmath v. O'Daniel, 159 Fed. 87, 88, 90, 86 C. C. A. 277, 16 L. R. A. (N. S.) 414 (C. C. A. 6); Wm. Edwards Co. v. La Dow, 230 Fed. 378, 381, 144 C. C. A. 520 (C. C. A. 6); First State Bank v. Spencer, 219 Fed. 503, 505, 135 C. C. A. 253

(C. C. A. 8); Simpson v. Western Hardware & Metal Co., 227 Fed. 304, 307, et seq. (D. C.); Grant v. National Bank of Auburn, 197 Fed. 581, 591 (D. C.); Whitehead v. Shattuck, 138 U. S. 146, 151, 11 Sup. Ct. 276, 34 L. Ed. 873; Detroit Trust Co. v. Old National Bank, 155 Mich. 61, 64, 118 N. W. 729; Allen v. Gray, 201 N. Y. 504, 508, 94 N. E. 652, Ann. Cas. 1912B, 123; Maxwell v. Davis Trust Co., 69 W. Va. 276, 279, 71 S. E. 270. The appeals will therefore be dismissed.

[2, 3] In the agreement to waive a jury and to try the issues to the court, it was provided that in deciding each case the court should state its findings of fact and conclusions of law, and this was in effect carried out. The cases, however, each turned at last upon the issue whether, at the times the payments in dispute were made to the banks Schaeffer knew or had reasonable cause to believe that Lowes was insolvent; and the ultimate fact found in substance was that Schaeffer did not have such knowledge or any reason for such belief. We are disposed to treat this as a special finding, though, whether general or special, it has the effect of the verdict of a jury. Hence the only inquiries open in this court under the assignments of error are whether the evidence tends to support the ultimate finding and the finding in turn is sufficient to sustain the respective judgments. This results alike from the statutes and the decisions. Sections 649, 700, and 1011, Rev. Stat. (Comp. St. 1916, §§ 1587, 1668, 1672); Norris v. Jackson, 76 U. S. 125, 127, 19 L. Ed. 608; Runkle v. Burnham, 153 U. S. 216, 225, 14 Sup. Ct. 837, 38 L. Ed. 694; United States v. U. S. Fidelity Co., 236 U. S. 512, 527, 35 Sup. Ct. 298, 59 L. Ed. 696; Chicago, R. I. & P. R. R. Co. v. Barrett, 190 Fed. 118, 123, 124, 111 C. C. A. 158 (C. C. A. 6); Mason v. Smith, 191 Fed. 502, 503, 112 C. C. A. 146 (C. C. A. 6); Nashville Interurban Ry. Co. v. Barnum, 212 Fed. 634, 638, 639, 129 C. C. A. 170 (C. C. A. 2); United States Fidelity & G. Co. v. Board of Com'rs, 145 Fed. 144, 150, 151, 76 C. C. A. 114 (C. C. A. 8); American Sales Book Co. v. Bullivant, 117 Fed. 255, 260, 54 C. C. A. 287 (C. C. A. 9); Maryland Casualty Co. v. Orchard Land & Timber Co., 240 Fed. 364, 366, 153 C. C. A. 290 (C. C. A. 9).

[4] It cannot be doubted that there is evidence tending to support the ultimate finding. The finding rests upon the credibility of the witnesses, especially that of Schaeffer, all of whom testified in open court. Upon most careful consideration of Schaeffer's testimony, particularly in connection with his demeanor and candor while testifying, the trial judge believed him. It is virtually conceded that, if Schaeffer's testimony at the hearing below is to be believed, the finding is correct; in these circumstances we are bound to conclude, as we should be in respect of a special verdict of a jury, that the trial judge's finding is supported by the evidence. And we approve his conclusion of law that the fact so found is plainly sufficient to support the several judgments.

[5] It is, however, earnestly insisted on behalf of plaintiff that evidence has been discovered since the judgments were entered which in itself would justify, if not require, reversals. This claim and part of the evidence so discovered appear only in plaintiff's reply brief,

though they were discussed in the oral argument here. The most obvious answer to the contention is that in such circumstances we have no power to reverse, since in actions at law this court can only correct errors of the court below; and it is not pretended that the claim of newly discovered evidence has ever been called to the attention of that court. The general rule of course is, as was stated in Mexico International Land Co. v. Larkin, 195 Fed. 495, 496, 115 C. C. A. 405, 406 (C. C. A. 8):

"In an action at law the burden is on the plaintiff in error to establish the existence of those errors of which he complains, and in the absence of proof by the record that a question of law arose, and that it was presented to and ruled upon by the court below, no error is established, because none could arise concerning a question which was not presented, considered, or decided by the trial court. Southern Pacific Company v. Arnett, 126 Fed. 75, 77 [61 C. C. A. 131]," and citations.

[6, 7] Assuming, however, that where matters arising after proceedings in error have been perfected may justly call for resubmission to the trial court, reversal for that purpose would be warranted, still, apart from the question of plaintiff's lack of diligence as urged in defendant's behalf, in our judgment the evidence so far as shown or indicated is not material. Copies of six letters are shown, bearing dates in October and November, 1911, all addressed to creditors of Lowes, one located in Cincinnati (to whom two of the letters were sent), one in Indianapolis, one in St. Louis, and two in Dayton, and representing claims amounting to $24,226.50; upwards of $18,000 of this amount was held by the two Dayton creditors; and all the letters were signed in the name of Luyster & Lowes, while only one seems to have been so signed by Schaeffer. True, they contain explanations for delaying payment of these creditors, but they do not appear to relate to the real sources of Lowes' financial troubles. Those troubles mainly arose through failure to ascertain and meet liabilities due to subcontractors and materialmen connected with Lowes' government work at Ft. Sill, Okl., and with his work on a public building in Mercer county, Pa. These features were abundantly explained by the trial judge.

Counsel say in their reply brief that they found many letters, at least 100, written by Schaeffer, and, further, that this correspondence "is along the line of his letters heretofore made a part of this brief." We cannot think that letters along the same line as those copied into the brief are inconsistent with the explanations made by Schaeffer in his last testimony. It is quite conceivable that he might have written many letters, stating reasons for Lowes' delays in meeting payments, and still have been totally ignorant of Lowes' real financial condition at the times the payments in dispute were made to the banks. Hence we are not impressed with the insistence of counsel that reversals of the judgments would lead to different results. The difficulty with these cases is that plaintiff has been under the burden of proving his charges, and he has not done this; nor does the evidence proffered afford any substantial ground for believing that he can do so. Judgments cannot be founded on suspicion.

The judgments will be affirmed, with costs.

MISSOURI PHONOGRAPH CO. v. TOMLINSON et al.

(Circuit Court of Appeals, Second Circuit. January 16, 1918.)

No. 109.

FRAUD ⇐20—ACTION FOR DECEIT—GROUNDS.

To maintain an action for deceit, the fraud alleged must have been perpetrated by defendants and must have actually deceived plaintiff.

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

Action at law by the Missouri Phonograph Company against John C. Tomlinson and Millard F. Tompkins. Judgment for defendants, and plaintiff brings error. Affirmed.

Before the occurrences directly involved in this suit, and about 1890, numerous corporations were formed in divers parts of the United States for the purpose of exploiting the phonograph, then still a novelty. These companies were severally territorial licensees under certain patents, and the exclusive territory of each corporation was usually one state. The plaintiff here and below is such a corporation, and another was the New York Phonograph Company. They did not flourish, for reasons immaterial to this suit, and all seem to have gone out of business; certainly this plaintiff did, and so did the corresponding New York concern. But the use of phonographs and trade in them did not diminish, and some time prior to 1900 one Andem and others conceived the idea that the National Phonograph Company, and other persons and corporations interested in or affiliated with that company, were unjustly and unlawfully enjoying in the several states covered by the territorial licenses aforesaid the profits derived from phonograph sales.

Andem then procured powers of attorney from many of these local and discouraged, if not financially defunct, corporations, under which he was authorized to begin and prosecute, in the name (among others) of the Missouri and New York Phonograph Companies, such suits for the establishment of their respective rights as he might be advised, but at his own expense, and to terminate, settle, and compromise such suits and give releases on behalf of his principals as and when he thought best, provided, however (in the case of the Missouri Company), that he did not settle for less than $40,000. Andem began numerous actions. It does not appear whether the rights of all Andem's plaintiffs were the same or rested on identical legal principles; it is so alleged (in substance) in the complaint, was denied in the answer, and not proven at the trial. The case of the New York Phonograph Company was most vigorously pressed, and its history is recorded at large in the reports. (C. C.) 112 Fed. 822; (C. C.) 119 Fed. 544; (C. C.) 136 Fed. 600; 144 Fed. 404, 75 C. C. A. 382; (C. C.) 163 Fed. 534.

In 1909 the persons and corporations who were defendants in all of Andem's suits offered settlement, and by a written agreement Andem on behalf of all the companies that he represented (including of course this plaintiff) received $405,000, discontinued all his actions (including that in the name of this plaintiff), and covenanted to give a general release for the New York Phonograph Company executed by that company itself, and a general release on behalf of other plaintiffs (including Missouri Company) executed by himself. Andem's release on behalf of the Missouri Company was clearly invalid, unless he allotted to that corporation, out of the moneys by him received, at least $40,000, subject to payment of his interest (established in his power of attorney) of 60 per cent., or procured from Missouri Company a general release, either to the defendants or to Andem himself, for a smaller sum. After the $405,000 aforesaid had been secured to Andem, the defendants herein, who are members of the bar and had with other counsel pressed the cases aforesaid, wrote (on April 22, 1909) the following letter to Missouri Phonograph Company:

"Mr. Andem has requested us to inform the various local phonograph companies in regard to the settlement affected through us as counsel for the New York Phonograph Company, in their suit against the National Phonograph Company. This litigation has been in the courts, with varied success, for a number of years, and was finally settled. Mr. Andem, as a feature of the settlement, succeeded in compelling a recognition of the claims of seven local companies which had authorized Mr. Andem to represent them. None of these companies, in our opinion, would have been able to successfully prosecute any claim against the National Phonograph Company, or Mr. Edison, as they were not in the same position as the New York Company. But, following Mr. Andem's instructions, we insisted upon some recognition by the Edison interests of the rights of the outside local companies, before consenting to a settlement of the New York cases, and finally, after a most earnest effort, we compelled the payment of $50,000 on their behalf. After deducting Mr. Andem's percentages, there remains $20,000 for distribution among these seven local companies, and Mr. Andem desires us to inform you that, as soon as instructions are received as to whom this money should be paid over, this amount will be distributed in proper proportions to the several companies concerned."

For all purposes of settlement with Andem or with the National Phonograph Company et al., one Clancy was the Missouri Phonograph Company. He received this letter of defendants, and saw also a sort of circular letter sent out by Andem himself to all his principals (other than New York Phonograph Company), in which he gave some history of the New York Company's litigation, said that he had finally settled that case alone for $375,000, pointed out that in his opinion the other corporations represented by him had not the same grounds for successful suit as had New York Company, and stated that he had compelled, as a sort of pendent to the New York Company's settlement, delivery to him of $50,000 to cover all the other plaintiffs on whose behalf he had sued. He specifically admitted that in the case of several plaintiffs (including Missouri Company) he had exceeded his authority, but in order to get anything had been compelled "to ignore these requirements," and concluded by inviting (among others) Missouri Company to accept an allotment out of said $50,000.

This brought Clancy to New York, and he "talked the matter over" with Andem, and went to defendant's office and talked with some members of the firm; but he exhausted memory of that interview by saying he was told "that they had had a difficult time in getting any money for" plaintiffs such as Missouri Company, meaning apparently all Andem's plaintiffs except New York Phonograph Company. Subsequently and in August, 1909, Missouri Company formally released Andem in consideration of $2,177, or (apparently) 40 per cent. of $5,000, with some accumulations of interest. A year or more later Clancy discovered that the written agreement of settlement between the parties whom Andem had sued so frequently and Andem himself had not specified or declared in any way how the $405,000 paid was allotted or should be distributed, whereupon this action was brought, alleging in substance that Andem had received (by receipt of said large sum of money) at least $40,000 for the settlement of Missouri Company's suit, therefore he owed plaintiff 40 per cent. thereof, or $16,000, and that the settlement aforesaid between Andem and plaintiff had been produced by the fraud and deceit of Andem and his counsel, viz., the present defendants.

Andem was made a party defendant herein, but no service was effected. As to one member of the defendant firm the complaint was dismissed, on behalf of the others a verdict was directed at the close of plaintiff's case, and to the judgment entered accordingly plaintiff took this writ.

Carroll Sprigg, of New York City (Charles E. Le Barbier, of New York City, of counsel), for plaintiff in error.

Guthrie, Bangs & Van Sinderen, of New York City (Francis S. Bangs, of New York City, of counsel), for defendants in error.

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

HOUGH, Circuit Judge (after stating the facts as above). This action is not against Andem; it must stand or fall as against his counsel; and it rests on alleged deceit, concerning which the general principles have been sufficiently stated in Farrar v. Churchill, 135 U. S. 615, 10 Sup. Ct. 771, 34 L. Ed. 246. We have pointed out in Varley, etc., Co. v. Ostheimer, 159 Fed. 657, 86 C. C. A. at 525, that in such suits "fraud is alleged and must be proved; fraud involves deception; if the plaintiffs were not deceived, they cannot recover"; and, it may be added, there can be no recovery if the plaintiffs were not deceived by the defendants whom they sue.

Upon the trial below the deception relied on, the reason for suit, was stated thus by Clancy when on the witness stand—that he had relied on Andem's letter, and that Andem had made a false statement as to the terms of settlement in that letter, because "I [Clancy] have learned since that the [settling defendants] did not designate the companies as to the amount they should have." This means that he had never been informed that the written settlement agreement with Andem did not allocate the amount to be paid as between all the plaintiffs in the various suits pending and to be discontinued.

But by his circular letter Andem had stated what New York Company was getting, and told all his other principals that he had exceeded his authority, in that he had in fact settled all the suits, except that of the New York Phonograph Company, for $50,000; he admitted that he had no right to give a release for the Missouri Company for less than $40,000, and then Clancy came to New York to investigate the matter, saw and talked with Andem, and settled on the basis that Andem suggested. But Andem's powers undoubtedly extended to complete control of the suits that he had brought; he could press them or abandon them as he saw fit, though doubtless he remained responsible for abuse of his authority; but with him we are not concerned, otherwise than to note that he boldly said he had settled all the suits, except that of New York Company, for $50,000, and that he had perfect right to do this, so far as the parties he sued were concerned.

In this situation, the present plaintiff was at liberty to go on, and sue as best it could, either Andem for fraud, or money had and received, or the original defendants on the original causes of action; but we wholly fail to see that, under the circumstances shown, anything contained in counsel's letter was untrue, or that any duty lay upon them to state just how much Andem was allocating to the New York Company, or any other party in interest, or that the plaintiff in this case relied to its disadvantage upon anything that these defendants wrote or said. The language of their letter, and their talk as related by Clancy, amount to this; that it had been hard work to force any settlement, and difficult to get anything for the companies in the position of this plaintiff. There is nothing in this record to impugn

the truth of these statements, and the reports above noted, which any one may read, certainly substantiate one part thereof.

Judgment affirmed, with costs.

THIRD AVE. RY. CO. v. MILLS.

(Circuit Court of Appeals, Second Circuit. February 13, 1918.)

No. 138.

1. CARRIERS ⊜318(7)—INJURY TO PASSENGER—COLLISION OF STREET CAR WITH VEHICLE—NEGLIGENCE.

Plaintiff, while a passenger on defendant's street car, going at moderate speed, was injured by a collision with a motor truck, which was suddenly and negligently turned upon the track from 20 to 25 feet in front of the car. Plaintiff's evidence did not show within what distance the car could have been stopped; but his counsel, by a question not germane to the cross-examination, brought out testimony from a witness for defendant, which was uncontradicted, that it could not have been stopped within less than 35 or 40 feet. *Held*, that there was no evidence of negligence on the part of defendant which would sustain a verdict for plaintiff.

2. TRIAL ⊜296(3)—INSTRUCTIONS—CURE OF ERROR.

An instruction, in an action by a passenger against a street railroad company to recover for a personal injury, that if the injury could have been avoided by the motorman by "the exercise of the highest degree of care" defendant was chargeable with negligence, *held* not reversible error, where it was also stated that what constituted the highest degree of care must be determined from all the facts and circumstances of the case.

3. TRIAL ⊜120(3)—MISCONDUCT OF COUNSEL.

The conduct of counsel for plaintiff, in an action against a street railroad company for injury to a passenger, in repeatedly referring to the matter of an existing strike, after the court had excluded any evidence on the subject as irrelevant, showed disrespect to the court, discredits any verdict in favor of his client, and might have been ground for reversal of the judgment based thereon.

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

Action at law by Edward T. Mills against the Third Avenue Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

The action is to recover for personal injuries received by plaintiff below while a passenger on one of defendant's street cars, which collided with a motor truck on Third avenue, between Twenty-Third and Twenty-Second streets. The avenue at this point contains the north and south bound tracks of the street railway, which lie between the two rows of pillars supporting the elevated railway structure. The space between pillars in same line is 42 feet, and each line of pillars is 3½ feet from the nearest street car rail.

Plaintiff's car, south bound (i. e., on westerly track) had stopped at Twenty-Third street, and had regained a speed characterized as moderate, and estimated at 5 or 6 miles an hour. At same time the motor truck, 20 feet long, was traveling south, on west side of avenue between elevated pillars and curb, at a slightly faster rate, estimated at 7 miles per hour. In order to avoid a coal-laden vehicle, the truck turned to the east, between the railway pillars, still continuing its speed, and, when its front wheels were on the railway

track, the street car ran into it. This occurred in broad daylight, and plaintiff, seeing contact probable, if not certain, rose from his seat, and on collision was thrown against a railing, receiving a blow said to have caused a hernia.

Whether the truck gave any signal of intent to go on railway track, was not proved. One witness said a man on the left of truck seat, not the chauffeur, "put out his hand"; but the only evidence from the truck was that it had a left-hand drive, and the witness (and only person on the truck other than the chauffeur) said he did nothing, sat on the right, and knew not what the chauffeur (who did not testify) did, if anything. Plaintiff noticed the truck on the roadway between curb and pillars, and about 30 feet ahead of car, saw it "turn right in between the pillars," and reach the street car track, when the car was 20 or 25 feet away. Collision happened almost instantly. The owner of truck was not sued in this action.

The foregoing summary is taken wholly from evidence adduced for plaintiff, who had a verdict. We notice the following assignments of error: (1) Plaintiff should have been nonsuited; (2) the court erred in charging that, if defendant's motorman by "the exercise of the highest degree of care" could have stopped the car in time to avoid collision, the jury could find defendant "guilty of negligence"; and (3) counsel for plaintiff, by improper conduct, prevented a fair trial.

Alfred T. Davison, of Brooklyn, N. Y., for plaintiff in error.

Louis Boehm, of New York City, for defendant in error.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [1] The testimony for plaintiff proved a plain case of negligent driving by the motor truck; the only negligence suggested against the street car was that it did not stop as soon as it could. As to how soon it could stop there was no evidence at all, until defendant's witnesses were produced, when questions by plaintiff's counsel elicited testimony that even the emergency brake could not stop a car going at the rate stated by plaintiff in less than 35 to 40 feet. The questions so asked were not germane to anything the witness had said on direct examination. Deutschmann v. Third Ave. R. R., 78 App. Div. at page 414, 79 N. Y. Supp. 1073.

It is true (nearly always) that a jury is not bound to believe any particular witness, but they must believe some witness, or reach conclusion by comparison of divers and different statements. Here there were no differing statements on the point under consideration. Any verdict must rest on evidence, and plaintiff's evidence did not prove nor tend to show that the car could have stopped within 20 to 25 feet, or any other definite distance; while testimony deliberately sought by his counsel on cross-examination tended to show the impossibility of the hypothesis (it was no more when plaintiff rested) on which his case was founded.

Therefore the complaint should have been dismissed; a conclusion reached without any attention paid to witnesses for defendant, who testified to conduct by the motor truck even more wanton than that above indicated.

[2] That there must be a new trial, justifies notice of the other assignments. The exception to charge as to degree of care must be considered in connection with the charge as a whole, and the learned judge carefully pointed out that while the highest degree of care was

due, "what the highest degree of care is must be determined by all the facts and circumstances of the case"; that is, negligence is the lack of care under the circumstances shown, and care is the absence of negligence under the same circumstances. The circumstances vary, and they measure the care due, and therefore the negligence. It would be more accurate to apply descriptive adjectives (if they are necessary at all) to the circumstances, rather than to their result; but, since the jury were plainly told that the facts measured the care, we discover no error in the statement.

On this point we have been favored with abundant citations from many courts, but none from those whose decisions are ruling with us. Milwaukee, etc., R. R. v. Arms, 91 U. S. at page 489, 23 L. Ed. 374, and Grand Trunk R. R. v. Ives, 144 U. S. at page 417, 12 Sup. Ct. 679, 36 L. Ed. 485, sufficiently cover the unnecessary use of adjectives characterizing either negligence or care. Railroad Co. v. Varnell, 98 U. S. at page 480, 25 L. Ed. 233, is especially applicable to street conveyance; Memphis Ry. v. Bobo (C. C. A., 6) 232 Fed. at page 711, 146 C. C. A. 634 (affirmed on another point as Memphis Ry. v. Moore, 243 U. S. 299, 37 Sup. Ct. 273, 61 L. Ed. 733), is a recent statement of the rule, substantially as put in the court below, though with more numerous adjectives, of which error cannot be asserted, if and when the jury is well instructed that negligence and care are present or absent according to the facts proved.

[3] The conduct of plaintiff's trial counsel requires comment. He was evidently determined to get before the jury the fact that a strike (by whom does not appear) was at the time affecting the street car service. To that end he asked a question in cross-examination which implied that the witness was a "strike breaker." The question was excluded, and counsel told that the case had "not anything to do with the strike," and thereafter he repeatedly referred to the matter; defendant not repeating objection. There existed at the close of all the evidence nothing connecting accident and strike, and no denial or doubt of the statement of defendant's motorman that his employment antedated the strike referred to.

Whether this proceeding alone would have required reversal we do not decide; to show the importance of the matter, or its triviality, would require further exposition of facts; but we point out that defendant was not under any obligation to call attention to the matter more than once, that merely asking the questions constituted the prejudice to defendant, that repeating the suggestion or insinuation after one correction from the court was disrespect to that court, and that such a course of proceeding, in a matter sufficiently grave, discredits any verdict, and may in the appellate court vitiate the judgment rested thereon. Cosselmon v. Dunfee, 172 N. Y. 507, 65 N. E. 494; Simpson v. Foundation Co., 201 N. Y. at page 490, 95 N. E. 10. Cf. Williams v. Brooklyn, etc., Co., 126 N. Y. at page 103, 26 N. E. 1048.

Judgment reversed, and new trial ordered.

CHICAGO GREAT WESTERN R. CO. v. POSTAL TELEGRAPH-CABLE CO.

(Circuit Court of Appeals, Seventh Circuit. February 28, 1918.)

No. 2548.

TELEGRAPHS AND TELEPHONES ⊜11—CONTRACT BETWEEN RAILROAD AND TELEGRAPH COMPANIES—"EXCHANGE" OF SERVICES.

In 1888, complainant, a railroad company, and defendant, a telegraph company, entered into an elaborate contract to continue for 50 years, with the privilege of renewals for like successive terms by either party, for the joint operation and maintenance of telegraph lines along the railroad right of way and the exchange of services, which provided, inter alia, that defendant should transmit over its lines on the railroad line all messages relating to railroad business free, and all such messages over its lines off the railroad line free to an amount not exceeding $10,000 per year, at its regular rates, and all messages over that amount at half rates. A corresponding provision required complainant to transport men and materials for defendant for use on its line of road free, and for use off its line of road to an amount not exceeding $10,000 per year free, and above that amount at half rates. The Interstate Commerce Commission having ruled that such contracts with respect to exchange of "off line" services were in violation of the Interstate Commerce Acts, Congress by the amendatory act of June 18, 1910 (36 Stat. 544, c. 309, § 7 [Comp. St. 1916, § 8563]), extended the act to telegraph, telephone, and cable companies, and made it unlawful to charge unjust or unreasonable rates, but provided that "nothing in this act shall be construed to prevent telegraph, telephone and cable companies from entering into contracts with common carriers for the exchange of services," and further that it should not be construed to prevent the exchange of passes and franks between telegraph, telephone, and cable companies and other common carriers for the use of their officers, agents, and employés. *Held:* (1) That such legislation was enacted in the light of public history, showing the interdependent relations between railroads and telegraphs as commercial agencies, and that similar contracts, covering practically all of the railroads in the country, had been in force almost from the beginning, and with intent to legalize the same; (2) that "exchange" of services did not mean that services rendered must be equal in value to those received at established rates, otherwise the provisions were unnecessary and without practical meaning; (3) that there is no basis for distinction between "on line" and "off line" services, especially in view of the fact that cable companies, as to which there could be no exchange of "on line" services, were expressly included.

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

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

Suit in equity by the Chicago Great Western Railroad Company against the Postal Telegraph-Cable Company. Decree for defendant, and complainant appeals. Reversed.

For opinion below, see 245 Fed. 592.

Ralph M. Shaw, of Chicago, Ill., for appellant.

Jacob Dittus, of Chicago, Ill., for appellee.

Before BAKER, KOHLSAAT, and ALSCHULER, Circuit Judges.

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

BAKER, Circuit Judge. In 1888 the parties entered into a railroad-telegraph contract for exchange of services. They renewed it after the 1910 amendment of the Interstate Commerce Act and faithfully observed its terms until after the Interstate Commerce Commission's conference ruling of March 28, 1916. In essential scope the contract in suit is the same as one set forth in Baltimore & O. Rld. Co. v. Western Union Tel. Co. (D. C.) 241 Fed. 162. That case (affirmed, same title, 242 Fed. 914, 155 C. C. A. 502) is also referred to for a recital of amendments of the Interstate Commerce Act and of various pronouncements of the Interstate Commerce Commission.

Appellant unsuccessfully prosecuted this suit to enjoin appellee's repeated actions at law to collect full rates for "off line" telegrams and to compel appellee to accept railroad service in exchange under the contract.

As the Western Union Case is pending in the Supreme Court, we have taken this case now only on the representations of the Postal Company that there are important facts in this record which were not adduced in the Western Union Case and that it would be advantageous to have both records before the Supreme Court at the same time.

We find no additional facts that in our judgment enlarge or change the questions for decision. They arise from the following provisions in the Interstate Commerce Act:

"Nothing in this act shall be construed to prevent telephone, telegraph, and cable companies from entering into contracts with common carriers for the exchange of services."

"This provision [against passes and free transportation] shall not be construed to prohibit the privilege of passes or franks, or the exchange thereof with each other, for the officers, agents, employés and their families of such telegraph, telephone, and cable lines, and the officers, agents, employés and their families of other common carriers subject to the provisions of this act." Comp. St. 1916, § 8563.

We approve and adopt the propositions declared in the Western Union Case, substantially as follows:

(a) "Exchange" means the giving of one thing for another. It excludes the idea of first measuring the respective things in money value and then settling or paying any difference. To construe the act in its entirety as requiring a reference to monetary scales is to render the proviso meaningless. "Exchange" and "services" are without any limitation or qualification put upon them by the language employed by Congress; and therefore the companies may lawfully give, each to the other, any service of the kinds they perform for the public. As the language is clear, direct and unambiguous, there is no warrant for the interpolation of a distinction between "on line" and "off line" services.

(b) Congress adopted the amendment of 1910 in the light of public history, showing that generations ago the railroad and the telegraph started and have since continued hand in hand as coservitors of the public under the well-known reciprocal contracts which were first challenged a few years prior to 1910. Congressional purpose in the 1910 amendment, therefore, was to end the challenge.

Additionally we suggest:

(c) Emphasis may be given to "contract" as well as to "exchange" and "service." Full and unrestricted right to contract with each other is what the plain language of the proviso gives. If one may deal with the other for "off line" service only as the Interstate Commerce Act compels carriers to deal with the public, then no contract rights, as distinguished from legislatively declared legal obligations, can exist, and the grant of power is in that respect emasculated.

(d) So entwined and interdependent are the reciprocal obligations and undertakings that no part of the contract is separable from the others. Inasmuch as Congress supposedly was aware of this situation, a confession by appellee that Congress intended to legitimatize the exchange of "on line" services is a confession, in our judgment, that Congress had the intent to approve the known exchange of services rather than the intent to split the unsplittable and from the fragments to make for the parties a new contract.

(e) Telegraph companies were not brought under control to the same extent as railroad companies. For the latter, rates may be fixed; respecting the former, there was only the bringing into national law of the common law requirement that rates be reasonable. If a telegraph company should believe that a published railroad rate for "off line" service was unreasonable, it could go before the Interstate Commerce Commission and that body could fix a reasonable rate. But, places changed, the railroad company could only contest in court the reasonableness of a particular rate for services already rendered, with the telegraph company free to promulgate new rates according to its own judgment of reasonableness. Did Congress intend that this inequality of situation should control? Or did not Congress rather intend that their mutual agreements for exchange of services should prevail?

(f) "Evils to be remedied," as a part of "the history of the times," may be looked to in confirmation of the unambiguous language of the proviso. We perceive no evils in the contracts, no injury to the public; appellee suggests none; and the Interstate Commerce Commission in 1906 reported that:

> "So far as we can now see, the full performance of such contracts by the carriers with whom they are made would not affect any public or private interest adversely." 12 Interst. Com. Com'n R. 10.

(g) Appellee is a telegraph company. But cable companies are included in the same terms. Appellee enumerates "on line" services it renders for appellant; but so far has failed to state how an undersea cable could be of "on line" service to a railroad, or how a railroad could be of "on line" service to a cable. Appellee's contention that the proviso authorizes nothing but contracts for exchange of "on line" services (services on a common or joint right of way) therefore comes to this: Railroad and cable companies are authorized to contract with each other, but only for the performance of unperformable conditions.

(h) Appellee's contest arose wholly over compensation for telegraphic messages. Under the second proviso hereinabove quoted ap-

pellee could lawfully issue telegraphic franks to the officers and agents of appellant. But is it unlawful to do under contract and for compensation what may lawfully be done without contract and without compensation?

Decree reversed, with direction to grant the prayers of the bill.

PITTSBURGH & SOUTHERN COAL CO. v. OTIS MFG. CO.

(Circuit Court of Appeals, Fifth Circuit. March 16, 1918.)

No. 3110.

1. NAVIGABLE WATERS ⟸36(3)—RIPARIAN OWNERS—RIGHTS OF.
Under Civ. Code La. arts. 455, 457, land between a levee and a navigable river is the property of a riparian proprietor, though subject to public use.

2. NAVIGABLE WATERS ⟸33—RIPARIAN PROPRIETOR—RIGHTS OF PUBLIC.
The right which the public in Louisiana has to use the banks of navigable rivers does not enable one other than a riparian proprietor to appropriate part of such bank to his private use, and a riparian proprietor has such an interest, distinct from that of the public, as entitles him to recover for another's appropriation of a part of the bank to a private use.

3. NAVIGABLE WATERS ⟸33—RIPARIAN PROPRIETOR—RIGHTS OF.
Const. La. art. 290, enabling riparian owners whose property is bounded by a navigable stream, subject to stated conditions, to become the agency for making public use of the batture or banks owned by them, does not limit the right of a riparian proprietor to complain of an unauthorized private use of his property by another.

In Error to the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

Action by the Pittsburgh & Southern Coal Company against the Otis Manufacturing Company. There was a judgment for defendant, dismissing the petition, and plaintiff brings error. Reversed.

R. C. Milling, of New Orleans, La. (Foster, Milling, Saal & Milling, of New Orleans, La., on the brief), for plaintiff in error.

H. C. Cage, of New Orleans, La. (Cage, Baldwin & Crabites, of New Orleans, La., on the brief), for defendant in error.

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

WALKER, Circuit Judge. This writ of error presents for review a judgment sustaining an exception of no cause of action to the petition of the plaintiff in error (which will be called the plaintiff) and dismissing the same. The petition as amended showed the following state of facts:

The plaintiff now is, and for many years has been, the owner of described land in the city of New Orleans which fronts on the Mississippi river, together with the batture and batture rights appertaining thereto, a portion of which land it leased for several years to the defendant in error (which will be called the defendant), which occupied

it under such lease until 1915, when the lease was annulled. After defendant's rights as lessee ceased, it continued, without plaintiff's consent, to occupy and use the part of the formerly leased land which is between the levee and the river, drove piling thereon, built a wharf and a pen for its logs, and used the property for its own private purposes. The relief sought included a judgment ejecting the defendant and enjoining and prohibiting it from further trespassing upon or attempting to use or convert to its own private use the part of the plaintiff's land between the levee and the water's edge, and an award of compensation for the occupation and use by the defendant since the lease expired.

The ground upon which the trial court's action was based is disclosed by the following statement found in the opinion rendered by the presiding judge:

"It is evident that the piling complained of is driven in the Mississippi river, and that, if the defendant is occupying any portion of the batture belonging to the plaintiff, it is entirely outside the levee. As this portion of the property is within the jurisdiction of the board of commissioners of the port of New Orleans, and not under the control of the plaintiff, the exception will be maintained and the suit dismissed."

[1, 2] What is shown and complained of is the unauthorized occupation and use by the defendant for its own private purposes of property belonging to the plaintiff. That the plaintiff's rights in the land in question are subject to public uses is not questioned. The use complained of is a private one, not a public one. That the land between a levee and the river is the property of the riparian proprietor, subject to public use, is a proposition well settled in the law of Louisiana. Mathis v. Board of Assessors, 46 La. Ann. 1570, 16 South. 454; Civil Code of Louisiana, arts. 455, 457. That another's unauthorized use of that space for a private purpose gives rise to a right of action in favor of the riparian proprietor has been authoritatively decided. Carrollton R. Co. v. Winthrop, 5 La. Ann. 36. That the right which the public has to use the banks of navigable rivers does not enable one other than the riparian proprietor to appropriate a part of such bank to his private use is a proposition not fairly open to question. Lyons v. Hinckley, 12 La. Ann. 655; Duverge v. Salter, 6 La. Ann. 450; Cochran v. Dry-Dock Co., 30 La. Ann. 1365.

Nothing said or decided in the case of Warriner v. Board of Commissioners, 132 La. 1098, 62 South. 157, is in conflict with either of the above-stated propositions. That suit was an attempt to prevent the continuance of the public use to which a batture or accretion to the bank of a navigable river was put by the public agency intrusted with the exercise and regulation of such use. In the instant case the use complained of is a purely private one, and no claim is made the recognition and enforcement of which could impair or interfere with the public use to which the property in question is subject. The alleged use by the defendant is inconsistent with the enjoyment by the public of the use of the bank to which it is entitled. The plaintiff as the riparian proprietor has such an interest, separate and distinct

from that of the public at large, as entitles it to complain of the appropriation of the land in question to a private use to which it is not subject to be put without its consent. The petition does not assert the claim that the plaintiff itself, without the permission of the official body intrusted with the regulation of the public use of the land in question, could use it as the defendant does without any rightful authority whatever.

[3] We have been referred to article 290 of the Constitution of Louisiana as having some bearing on the question presented for decision. That article reads as follows:

"Riparian owners of property on navigable rivers, lakes, and streams, within any city or town in this state having a population in excess of five thousand shall have the right to erect and maintain on the batture or banks owned by them, such wharves, buildings and improvements as may be required for the purposes of commerce and navigation, subject to the following conditions, and not otherwise, to wit: Such owners shall first obtain the consent of the council, or other governing authority, and of the board of levee commissioners, within whose municipal or levee district jurisdiction such wharves, buildings, and improvements are to be erected, and such consent having been obtained, shall erect the same in conformity to plans and specifications which shall have been first submitted to, and approved by, the engineer of such council, or other governing authority; and when so erected, such wharves, buildings, and improvements shall be, and remain, subject to the administration and control of such council, or other governing authority, with respect to their maintenance and to the fees and charges to be exacted for their use by the public, whenever any fee or charge is authorized to be and is made; and shall be and remain subject to the control of such board of levee commissioners, in so far as may be necessary for the maintenance and administration of the levees in its jurisdiction. The council, or other governing authority, shall have the right to expropriate such wharves, buildings, and improvements, whenever necessary for public purposes, upon reimbursing the owner the cost of construction, less such depreciation as may have resulted from time and decay; such reimbursement, however, in no case to exceed the actual market value of the property: Provided, that nothing in this article shall be construed as affecting the rights of the state, or of any political subdivision thereof, or of the several boards of levee commissioners to appropriate without compensation such wharves, buildings, and improvements, when necessary for levee purposes."

That provision enables riparian owners of a described class, subject to stated conditions and qualifications, to become the agency for making a public use of the batture or banks owned by them. Nothing in it indicates a purpose to limit or qualify the right of a riparian proprietor to complain of an unauthorized private use of his property by another. The conclusion is that the court was in error in sustaining the exception and dismissing the petition.

The judgment to that effect is reversed.

CAMPBELL v. KRAUSS.

(Circuit Court of Appeals, Third Circuit. May 10, 1918.)

No. 2352.

1. APPEAL AND ERROR ⟸231(9)—PRESENTATION OF GROUNDS OF ERROR—SPECIFIC OBJECTIONS—NECESSITY.

In a suit to set aside a preference, based on Bankruptcy Act July 1, 1898, c. 541, § 60b, 30 Stat. 562, as amended by Act June 25, 1910, c. 412, § 11, 36 Stat. 842 (Comp. St. 1916, § 9644), providing for the vacation of preferential transfers, etc., made in four months of bankruptcy, providing the person receiving same, etc., shall then have reasonable cause to believe that the transfer would effect a preference, the failure of the trial court to use the word "reasonable" in connection with the statutory definition, while erroneous, furnishes no ground for complaint on appeal, where the objection to the court's charge was general, and did not point out the omission, which would otherwise have been corrected, as rule 10 (224 Fed. vii, 137 C. C. A. vii) requires objections to the charge to be specific and not general.

2. TRIAL ⟸217—INSTRUCTIONS—PROPRIETY.

Where the court, in connection with a charge cautioning the jury to stick to the real issue in the case, used the phrase "to draw a red herring across the trail," but there was nothing to show that the phrase was directed against defendant any more than against plaintiff, defendant cannot complain of the use of the phrase.

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

Action by Sidney L. Krauss, as trustee in bankruptcy, against William J. Campbell. There was a judgment for the trustee, and defendant brings error. Affirmed.

William B. Linn, J. F. Shrader, and H. B. Gill, all of Philadelphia, Pa., for plaintiff in error.

James S. Rogers, of Philadelphia, Pa., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below Krauss, trustee in bankruptcy of Mrs. Minnie Glatterer, recovered a verdict against William J. Campbell, for the amount of an alleged preferential payment made by the bankrupt to the latter within the four months preceding bankruptcy. On entry of judgment on such verdict Campbell sued out this writ.

[1] The suit was based on clause "b," section 60, of the Bankruptcy Act, which as amended June 25, 1910, provides:

"*b*. If a bankrupt shall have procured or suffered a judgment to be entered against him in favor of any person or have made a transfer of any of his property, and if, at the time of the transfer, or of the entry of the judgment, or of the recording or registering of the transfer if by law recording or registering thereof is required, and being within four months before the filing of the petition in bankruptcy or after the filing thereof and before the adjudication, the bankrupt be insolvent and the judgment or transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his

agent acting therein, shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person. And, for the purpose of such recovery, any court of bankruptcy, as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

Under four of the five assignments of error it is now contended the cause should be reversed because the court in its charge omitted to use the word "reasonable" in connection with cause, in other words, to use the words of the statute quoted, viz. "shall have had reasonable cause to believe." Of the propriety of employing on its own motion the statutory language of "reasonable cause," the court itself was well aware; its opinion on the motion for a new trial showing that the omission was an inadvertence and disclosing the court's surprise upon discovering it. Of the obligation of the court to quote the statutory language, if requested by counsel, there can be no question. But assuming, as we do, the court's duty to follow the words of the statute, and the litigant's right to compel it to do so by timely and proper request, are we now, in view of the atmosphere of the trial, compelled to reverse this case, which has already been tried once before, and send it back for a new trial by reason of the court's omission to use the word "reasonable" in connection with cause? After an examination of the record we hold we are not. That record shows all the proofs the defendant produced were received; those proofs were fully discussed, and the cause was submitted to the jury so fully and fairly in the charge that, with the exception of the omission of the word "reasonable" and the use by the court of an illustration, no complaint was made to such charge. At the conclusion of the charge the counsel for defendant took an exception, as follows:

"I except, if the court please, to the definition of the cause as your honor described it in the charge."

What was meant by this exception? What was said, or omitted to be said, by the judge? What had counsel in view? If it was the omission of the word "reasonable," which is now complained of, why was the omission not then and there called to the attention of the court? If it had been, the omission would undoubtedly have been rectified. And the fact that the attention of the court was not then and there called to the omission shows that, if noticed, the omission was not regarded as material and important, or, if not noticed, the omission was of such inconsequential moment as not to then challenge attention. That in point of fact the exception was of a general, abstract nature, and not a specific objection to the omission of the statutory word "reasonable," "reasonable cause" is indicated by the fact that when the assignment of error was drawn counsel quoted almost six pages of the court's charge as the basis of its exception, viz. "to the definition of cause as your honor described it in the charge." An examination of these six pages shows so wide a range of discussion and such various phases of the testimony as to constitute a correspondingly wide field of possible objection. But that is precisely the situation to which our rule 10 (224 Fed. vii, 137 C. C. A. vii) is addressed,

which requires that "exceptions to the charge * * * shall be specific and not general."

It suffices to say that the exception in this case was not specific, it did not call the attention of the judge to the omission now complained of, and to reverse this case now would be a reversal for that which the defendant could have had righted, had he called attention to the desired correction, but which he evidently did not then regard as of sufficient importance to specifically call to the attention of the court as our rule requires. We are not inclined to countenance a departure from this rule by either court or counsel. It forbids general exceptions, and courts should decline to allow exceptions of that nature, but should insist that, if exceptions are allowed, they should, as the rule provides, be specific. Such specifications challenge the attention of the court and give it an opportunity to at once correct those omissions, misstatements, and missteps which naturally occur in charges. Such particularity of exception also insures the atmosphere of the trial in reference to alleged error will be grasped by an appellate court, for it is quite clear that, if the trial judge insists on a specific statement of error, that specific ground and that specific error will alone be reviewed by the appellate court. On the other hand, a general and nonspecific exception makes it possible for an appellate court to be led to inadvertently reverse a case on a question which was not raised or decided in the court below.

[2] Little need be added as to the remaining assignment, which complains of the court's use of the phrase "to draw a red herring across the trail." Read in its context, it is not clear that this was addressed to the defendant, his witnesses, or his theory of the case. It applied equally to plaintiff and defendant, and was used simply, as the court stated, to caution the jury to stick to the real issue in the case, or, as the trial judge put it:

"Now I don't mean to imply that there has been resort to any effort of that kind by anybody in this case, but I emphasize it to illustrate the importance of your keeping your minds right down to the one question in this case to which I have called your attention, because as you decide that so should your verdict be."

Finding no error in the record, the judgment below is affirmed.

GARRISON v. KURT.

In re FLAHERTY et ux.

(Circuit Court of Appeals, Eighth Circuit. February 28, 1918.)

No. 5018.

1. COURTS ⊂=359—LOCAL LAW—CHATTEL MORTGAGES.
The question of the validity of a chattel mortgage given by the bankrupts is one of local law.

2. CHATTEL MORTGAGES ⊂=190(2)—VALIDITY.
Where the owner of a stock of goods sold the same to the bankrupts, taking a chattel mortgage, which he promptly placed on record and

reported to the commercial agencies, the mortgage, which provided for certain monthly payments to the owner, must be deemed valid as against subsequent creditors of the bankrupts; it appearing that the owner at all times asserted and protected his rights.

3. BANKRUPTCY ⊂=213—CHATTEL MORTGAGES—ENFORCEMENT.

Where, as part of an exchange and sale, claimant transferred a stock of goods and real property to the bankrupts, taking a chattel mortgage on the goods and a mortgage on the real property, as well as a mortgage on unthreshed grain, claimant, being under no greater duty than the trustee, could not, on bankruptcy proceedings against his transferees, be required to pursue the grain, which one of the bankrupts had threshed, absconding with the proceeds, or, on a bare assertion that it was overvalued, to take the real property and give credit for the amount at which it was valued, before enforcing his chattel mortgage on the stock of goods.

Appeal from and Petition to Revise Order of the District Court of the United States for the District of Kansas; John C. Pollock, Judge.

In the matter of the bankruptcy of Frank A. and Ella Flaherty. From an order awarding Charles R. Kurt a secured claim on the proceeds of a stock of merchandise by virtue of a chattel mortgage given him by the bankrupt, M. E. Garrison, trustee in bankruptcy, appeals, and also petitions to revise. Petition to revise dismissed, and order affirmed.

E. L. Foulke, of Wichita, Kan. (Jesse D. Wall, of Wichita, Kan., on the brief), for appellant.

C. G. Yankey, of Wichita, Kan. (R. L. Holmes and W. E. Holmes, both of Wichita, Kan., and C. C. Calkin, of Kingman, Kan., on the brief), for appellee.

Before HOOK, CARLAND, and STONE, Circuit Judges.

HOOK, Circuit Judge. This is an appeal by the trustee in bankruptcy from an order awarding Charles R. Kurt a secured claim on the proceeds of a stock of merchandise, etc., at Cheney, Kan., by virtue of a chattel mortgage given him by the bankrupts, Frank A. and Ella Flaherty, husband and wife, to secure their note for $9,855.42. The property was sold by the trustee, and the proceeds substituted. The principal contention of the trustee is that the mortgage was void. It contained these provisions:

"This mortgage to cover all of the merchandise or fixtures with and a part of said stock now and all merchandise or fixtures acquired during the life of the mortgage. Fifty per cent. of the gross receipts from the sale of said stock is to be applied weekly as part payment of the note secured by this mortgage."

The evidence at the hearing disclosed the following: The claimant had owned the stock, and the note was for a balance the bankrupts owed him on a sale and exchange of it and other properties. The stock was then free from commercial debts incurred by the claimant. The mortgage was given August 30, 1915, and was promptly placed of record and reported to the commercial agencies. The bankrupts took possession, conducted the business in the usual retail way, and made purchases to keep the stock in condition. The traveling

salesmen, through whom the purchases were made, were verbally informed of the mortgage. Pains were taken to do this. According to an agreement that was part of the transaction a brother of the claimant was employed by the bankrupts as a salesman, and also to act as claimant's personal representative, to see that half of the gross receipts was applied to the mortgage debt. The bankrupts discharged him October 2, 1915. Thereafter for a couple of months the claimant himself frequently visited the store to look after his interests. In these two periods payments aggregating $1,350 were made on the mortgage debt from the store receipts. On December 3d Frank A. Flaherty, one of the bankrupts, having recently absconded with the proceeds of other property mortgaged to the claimant, the latter went into the store and remained there until December 29th, when Mrs. Flaherty had the locks changed and ousted him. Shortly afterwards the proceedings in bankruptcy were begun. The creditors of the bankrupts, excepting one with a small claim, had both actual and constructive notice of the mortgage when they extended credit. The claimant's demand is a just one, and in the transaction and his subsequent conduct he acted in the utmost good faith and without intention to hinder, delay, or defraud any one.

Upon the foregoing facts, the referee, after an exhaustive review of the statutes and the decisions of the Supreme Court of Kansas, held the mortgage valid and allowed the claimant a secured claim on the proceeds of the mortgaged property for the balance due him. The trial court affirmed the order of the referee.

[1, 2] The question of the validity of the mortgage is one of local law. We think the case is fairly within Frankhouser v. Ellett, 22 Kan. 127, 31 Am. Rep. 171, Howard v. Rohlfing & Co., 36 Kan. 357, 13 Pac. 566, Whitson v. Griffis, 39 Kan. 211, 17 Pac. 801, 7 Am. St. Rep. 546, Sedgwick City Bank v. Mercantile Co., 45 Kan. 346, 25 Pac. 888, and Atchison Saddlery Co. v. Gray, 63 Kan. 79, 64 Pac. 987, and that the trial court and the referee were right. All the features relied on to invalidate the mortgage—retention of possession by the mortgagors and their authority to make sales and to retain receipts—have been held insufficient, when qualified by conditions like those here. The case at bar is distinguishable from Rathbun v. Berry, 49 Kan. 735, 31 Pac. 679, 33 Am. St. Rep. 389, and Humphrey v. Mayfield, 63 Kan. 208, 65 Pac. 234. Here the authority to sell was not without limitation or provision with respect to the proceeds. The terms of the mortgage and the conduct of the parties show that the sales were to be in the usual course of the retail trade from day to day, and not in bulk or at some distant, indefinite time, at the will of the bankrupts; also that the proportion of the gross receipts to be paid the claimant and applied on the mortgage debt was not left to their decision, but was definitely fixed, and further that the proportion to be retained was not unreasonable for the costs and expenses of the business. Moreover, the times when the receipts were to be applied on the debt was agreed to be weekly, and were not calculated, as in Humphrey v. Mayfield, to "fence off * * * creditors for a period of four years." There was no fraud or illegality in the mortgage, the supplemental agree-

ment, and the conduct of the claimant. The default of the bankrupts was contrary to their undertakings to the claimant, who did the best he could to protect his rights, and, as we have seen, acted in good faith.

[3] The note above referred to was also secured by a mortgage upon a piece of real property and by a second mortgage upon some unthreshed grain in another county. In the sale and exchange the bankrupts had taken the real property at a valuation of $4,000, which is said to be more than it was worth. Flaherty, one of the bankrupts, went and threshed the grain, sold it without claimant's consent, paid the first mortgage, and absconded with the balance of the proceeds. On this it is urged that, before enforcing his mortgage on the stock of goods, claimant should take the real property and give credit for $4,000, and should also follow the grain and exhaust the equity in it. No ground was shown for disturbing the original transaction between the parties, or the basis of the valuations on which it was made, other than the bare assertion of a less actual value of the particular item; nor did it appear that the claimant interfered with the right of the trustee in the grain or was under a greater duty to seek it. Manifestly these contentions are without merit.

There is also a petition to revise. It will be dismissed.

The order is affirmed.

RAYDURE v. LINDLEY et al.

TIPTON v. SAME.

(Circuit Court of Appeals, Sixth Circuit. April 2, 1918.)

Nos. 3067, 3069.

1. MINES AND MINERALS ⟸58—OIL AND GAS LEASE—VALIDITY.
An oil and gas lease, granted in consideration of $1 actually paid, under which the lessee covenanted to complete a well within one year or to pay 10 cents per acre yearly in advance for each additional year that such completion was delayed, and further covenanted to pay the lessor one-eighth of all oil produced, is not invalid, during the first year or within a reasonable time during which an implied covenant to commence operations under penalty of forfeiture may be enforced, either by reason of the smallness of the consideration or the reservation of a right to the lessee to surrender the lease for cancellation on payment of $1.

2. DEEDS ⟸49—EXECUTION—VALIDITY.
A deed calling for execution by three persons as grantors, and deposited, together with the purchase price, with a third party, after its execution by two of them, to await the other signature, is incomplete as to all, and a later deed to another person, executed and delivered by the three grantors, will have priority.

3. DEEDS ⟸49—EXECUTION—VALIDITY—WAIVER OF CONDITION.
Where the condition that a deed should be executed by three persons as grantors was imposed, not merely by the grantee, but by the two grantors who executed the instrument, the grantee cannot complete his title by waiving execution by the third grantor or taking possession of the land, though such third grantor had no legal interest in the property.

Appeals from the District Court of the United States for the Eastern District of Kentucky; Andrew M. J. Cochran, Judge.

Suit by John W. Lindley and others against W. S. Raydure, in which Thomas Tipton intervened. There was a decree for complainants (239 Fed. 928), and defendant and Thomas Tipton severally appeal. Affirmed.

F. A. Baldwin, of Bowling Green, Ohio, Hugh Riddell, of Irvine, Ky., and Ed. C. O'Rear, of Frankfort, Ky., for appellants.

A. R. Burnam, Jr., of Richmond, Ky., O. B. Harris, of Sullivan, Ind., and R. W. Smith, of Irvine, Ky., for appellees.

Before KNAPPEN, MACK, and DENISON, Circuit Judges.

MACK, Circuit Judge. The facts in this case are fully set forth in the opinion of Judge Cochran (D. C.) 239 Fed. 928. We add thereto but one additional fact; that, while the certificates of the record of the Raydure leases postdated those of appellees, Raydure's leases were the first to be lodged for record. The evidence establishes, however, that Raydure had actual knowledge of the Huntsman leases when the leases to him were executed.

[1] 1. We concur in Judge Cochran's conclusion on the principal legal question before us, that in Kentucky an oil and gas lease, granted in consideration of $1 actually paid, under which the lessee covenants to complete a well within one year or to pay 10 cents per acre yearly in advance for each additional year that such completion is delayed, and further covenants to pay to the lessor one-eighth of all oil produced, is not invalid during the first year or within the reasonable time during which an implied covenant to commence operations under penalty of forfeiture may be enforced, either by reason of the smallness of the consideration or the reservation of the right of the lessee on payment of $1 to surrender the lease for cancellation.

His able and exhaustive exposition of the reasons therefor, and his critical analysis of the cases in Kentucky and elsewhere bearing thereon, render any further discussion superfluous. We add only that the very recent opinion in Dinsmoor v. Combs, 177 Ky. 740, 198 S. W. 58, does not touch the questions before us.

2. Judge Cochran's opinion on questions of facts was oral; it suffices to say that we concur in his conclusions, based on an examination of the witnesses in open court, that the provision in appellees' lease from Tipton for a royalty of 8 per cent. as printed in the form lease, instead of one-eighth of the oil produced, as verbally agreed upon, was due, not to any fraud, but to a mutual mistake of fact based upon Huntsman's honest belief that the provisions were equivalent, and that reformation of the instrument, as decreed, is the proper relief.

[2, 3] 3. We concur, too, in Judge Cochran's conclusion that title to the surface of the Pitts property is in appellees. A deed calling for execution by three persons as grantors and deposited together with the purchase price, with a third party after its execution by two of them, to await the other signature, is incomplete as to all of them; a later deed to another person, executed and delivered by the three grantors, will have priority. The evidence justifies the conclusion that this

condition was imposed, not merely by the grantee, but by the two grantors who executed the instrument; that they did not intend the deed to be complete until the third grantor, by executing it, indicated his assent to the transaction. Under these circumstances, the grantee could not complete his title by waiving execution by the third grantor or taking possession of the land, even though this third grantor had no legal interest in the property.

Decree affirmed.

ATCHISON, T. & S. F. RY. CO. et al. v. SPILLER.

(Circuit Court of Appeals, Eighth Circuit. March 11, 1918.)

No. 4819, with Nos. 4820–4827.

CARRIERS ⊂⊃202—UNREASONABLE RATES—DAMAGES.

Where a shipper has paid a rate afterwards declared by the Interstate Commerce Commission to be excessive, he may recover as damages the difference between the excessive rate and the rate declared to be just and reasonable by the Commission, without proof of actual injury.

On motion for rehearing. Former opinion modified, but motion for rehearing denied.

For former opinion, see 246 Fed. 1, 158 C. C. A. 227.

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

CARLAND, Circuit Judge. Since the opinion of this court in the above case was filed, the Supreme Court has decided in Southern Pacific Company et al. v. Darnell-Taenzer Lumber Company et al., 245 U. S. 531, 38 Sup. Ct. 186, 62 L. Ed. —— (January 21, 1918), that, where a shipper has paid a rate afterwards declared to be excessive by the Interstate Commerce Commission, he may recover as damages the difference between the excessive rate and the rate declared to be just and reasonable by the Commission, without proof of actual injury. It results that anything said in the opinion of this court contrary to the above decision is overruled. Our judgment, however, was not based alone upon our opinion as to what was the lawful measure of damages, but on other grounds mentioned in the opinion to which we still adhere.

The motion for a rehearing is therefore denied.

UNITED STATES v. NASHVILLE, C. & ST. L. RY.

(Circuit Court of Appeals, Sixth Circuit. April 2, 1918.)

No. 3086.

1. INTERNAL REVENUE ⟸25—CORPORATIONS—TAXES—"FALSE."
Under Act Aug. 5, 1909, c. 6, § 38, 36 Stat. 112, imposing an excise tax of 1 per cent. on the net income of corporations, and providing for a new assessment in case of false and fraudulent reports, and for recovery of additional taxes, the word "false" means untrue or incorrect, and does not necessarily mean "intentionally" or "fraudulently false."
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, False.]

2. INTERNAL REVENUE ⟸28—PAYMENT—ACTION.
It is the general rule, applicable, not only to customs duties, but to internal revenue taxes, that a common-law action of debt lies in favor of the government whenever, by accident, mistake, or fraud, the government has not received full payment of duties and excise taxes.

3. INTERNAL REVENUE ⟸28—REMEDIES—STATUTORY REMEDIES.
In an action to recover internal revenue taxes, such as an excise tax on corporations, the rule which denies the use of any but the statutory remedy has no application to the general government, unless clearly and specifically so declared.

4. INTERNAL REVENUE ⟸28—EXCISE TAXATION—ACTIONS.
Excise taxes, under Act Aug. 5, 1909, differ from state ad valorem taxes, in that in the former the law itself imposes the specific tax, while in the latter there is no tax imposed until the officers act, and no suit for any tax will lie until after such action.

5. INTERNAL REVENUE ⟸28—CORPORATE EXCISE TAXES—ACTION.
Act Aug. 5, 1909, § 38, imposing on corporations an excise tax of 1 per cent. of their net income, to be determined by deducting from the gross income operating expenses and losses, including a reasonable allowance for depreciation of property, and requiring the corporation to make an annual sworn return, by subdivision 5 authorizes the Commissioner of Internal Revenue to amend a return, or make a return where none has been made, while subdivision 8 expressly extends and makes applicable to the tax all laws relating to the collection, remission, and refund of internal revenue taxes so far as applicable. Rev. St. § 3213 (Comp. St. 1916, § 5937), declares that taxes may be sued for and recovered in the name of the United States in any proper form of action. *Held* that, regardless of whether the failure to make a reassessment would preclude imposition of penalties, yet, as the act itself imposes the tax, an action may be maintained against a corporation for the 1 per cent. excise tax, based on items of income omitted, after the expiration of the period in which the Commissioner was authorized to amend the return.

6. INTERNAL REVENUE ⟸28—CORPORATE EXCISE TAXES—ACTION—DECLARATION.
A declaration in an action by the United States against a railroad corporation, which after alleging the filing of returns of net income by the corporation, averred that the returns were incorrect, because including deductions from gross income of alleged charges to expenses which were not necessary expenses, as well as charges to depreciation which were not reasonable allowances, and which were not charged against the capital valuation of the roadway on the railroad corporation's books, is a sufficient averment that the deductions were not authorized within Act Aug. 5, 1909, § 38, it being specifically alleged that the first deductions were not necessary expenses, and that the latter were not reason-

able allowances for depreciation; and hence the declaration is not subject to attack on the ground that the act did not require items claimed property depreciation to be charged against the capital valuation on the corporate books.

In Error to the District Court of the United States for the Middle District of Tennessee; Edward T. Sanford, Judge.

Action by the United States against the Nashville, Chattanooga & St. Louis Railway. A demurrer to the declaration was sustained, and the actions dismissed, and plaintiff brings error. Reversed and remanded, with directions.

Lee Douglas, U. S. Atty., and Marvin Campen, Asst. U. S. Atty., both of Nashville, Tenn., for the United States.

Claude Waller and Fitzgerald Hall, both of Nashville, Tenn., for defendant in error.

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

KNAPPEN, Circuit Judge. In June, 1916, the United States, under the direction of its Commissioner of Internal Revenue, brought suit to recover from defendant an excise tax of 1 per cent., claimed to be due from it for each of the years 1909 and 1910, respectively, under section 38 of the Revenue Act of August 5, 1909 (36 Stat. 11, 112, c. 6). The declaration alleged the filing by defendant with the Commissioner of Internal Revenue on February 25, 1910, and February 21, 1911, of returns of its net income for the years 1909 and 1910, respectively; that both returns were incorrect as to the amount of defendant's income; that the return for 1909 was incorrect, in that it included, as an item of deduction from gross income, an alleged charge of $26,000 to expenses which was not a necessary expense actually paid out of income in the maintenance and operation of its business and properties; that the returns for both years were incorrect, in that they included charges to depreciation of roadway, amounting to $249,024.54 for the year 1909 and $239,229.70 for the year 1910, which were not charged against the capital valuation of the roadway on its books, and were not a reasonable allowance for depreciation of the roadway within the meaning of the act; that the three items named were disallowed by the Commissioner of Internal Revenue and held by him to be incorrectly charged, and that they were in fact not correct and proper deductions from gross income, and that the total amounts so deducted, which should have been included as net income in said returns, were for the year 1909 $275,024.54 and for 1910 $239,229.70; that the defendant was thus indebted to the United States, and subject to pay an excise tax of 1 per cent. upon the amounts stated; that it had failed and refused to make payment, and that the alleged taxes were thus due from defendant and payable by it to the United States.

The Revenue Act in question (section 38) makes every corporation to which it applies "subject to pay annually" a special excise tax of 1 per cent. on its net income, to be determined by deducting from gross income, among other things, operating expenses, losses sustained, "in-

cluding a reasonable allowance for depreciation of property," interest on indebtedness, and taxes. It requires from the corporation annual sworn returns covering the items of claimed deduction named, as well as others, with provision for further information, if no returns are made, or if those made are incorrect, with authority to the Commissioner (through his agent) to examine the corporation's books, and with authority (subdivision 5) to amend a return, or make a return where none has been made, and in the case of false or fraudulent reports, upon the discovery thereof, at any time within three years after the tax is due, to make a new assessment, accompanied by penalties for failure to make prompt payment, with further provision for criminal punishment in case of fraudulent returns, and for addition of 100 per cent. of the original tax in case of return made with false or fraudulent intent.

Defendant demurred to the declaration upon several grounds, which we thus summarize: (1) As to each of the three items in question—that the declaration fails to show that within three years from March 1, 1910, and March 1, 1911, respectively, the Commissioner disallowed the deductions so shown in its returns or held them to be incorrectly charged, or that the commissioner within such three years discovered any false, fraudulent, or erroneous returns, or that the Commissioner has made any return upon information or any assessment thereon, or any assessment against defendant of the amount sued for, and that without such assessment no recovery can be had; (2) as to the three classes of items—because no fact is averred tending to show that they were not necessary expenses of operation, actually paid out in the year in question, or reasonable allowances for depreciation, as the case may be, or that the deductions or allowances were not reasonable or legally made; (3) as to the items of alleged depreciation—because the Excise Act does not require that the items shall be charged against the capital valuation on defendant's books in order to justify its deduction from gross income in arriving at net income, but only requires that the amount so deducted shall be a reasonable allowance.

The trial judge sustained the grounds of demurrer which we have included in Nos. 1 and 2 above, and dismissed the suit without passing upon the remaining ground, resting his action upon the propositions that the Excise Act does not fix a specific charge of a sum certain to be paid without an assessment, and which can be collected as a debt owing to the United States, nor does it assess any definite tax, but merely subjects the corporation to the payment of a tax to be ascertained and assessed as specifically provided by the act; such assessment involving a determination of the amounts to be allowed as expenses of maintenance and operation, as well as reasonable allowance for depreciation of property; that no assessment can be made by the Commissioner, except upon a return by the corporation, or, in its default, by the Commissioner; that a reassessment, in case of an untrue return, can validly be made only within three years after the return is due by law; that such assessment is a legislative act, and cannot be performed by a court; and that, inasmuch as the declaration fails to show the making by the Commissioner of corrected returns of defendant's net income within three years after due, or the making of a

new assessment, upon corrected returns or otherwise, the United States is without remedy.

[1, 2] The declaration clearly seeks recovery of taxes on the ground that they are owing the United States by reason of untrue returns by the defendant with respect to expenses and depreciation. The word "false," when used in this connection in the statute, means "untrue" or "incorrect," and does not necessarily mean intentionally or fraudulently false. Eliot Nat. Bank v. Gill (D. C.) 210 Fed. 933, 939; Id., 218 Fed. 600, 602, 134 C. C. A. 358 (C. C. A. 1); National Bank v. Allen (C. C. A. 8) 223 Fed. 472, 478, 139 C. C. A. 20. It is the general rule, applicable, not only to customs duties, but to internal revenue taxes, that a common-law action of debt lies in favor of the government whenever, by accident, mistake, or fraud, no duties or short duties have been paid (Meredith v. United States, 13 Pet. 486, 493, 10 L. Ed. 258; Dollar Savings Bank v. United States, 19 Wall. 227, 22 L. Ed. 80; United States v. Tilden, 9 Ben. 368, Fed. Cas. No. 16,519; United States v. Chamberlin, 219 U. S. 250, 260, 31 Sup. Ct. 155, 55 L. Ed. 204); and thus that the government may recover a personal judgment for a tax, either in a sum certain or when readily reducible to certainty, whenever there exists a duty to pay, provided always another remedy has not been made exclusive (United States v. Chamberlin, supra, 219 U. S. at page 262, 31 Sup. Ct. 155, 55 L. Ed. 204; Stockwell v. United States, 13 Wall. 531, 542, et seq., 20 L. Ed. 491; and see Alaska Mining Co. v. Alaska [C. C. A. 9] 236 Fed. 64, 149 C. C. A. 274).

Assuming, then, for the moment, that the excise statute in question does not make the remedy by reassessment exclusive, the defendant's duty to pay lawful taxes omitted because of its default in making an untrue return, and the government's right to personal action therefor are obvious.

[3] The question of first importance thus is whether the statute makes the remedy by way of another assessment on the part of the Commissioner, exclusive of all other remedies. We approach the decision of this question, having in mind that the rule which denies the use of any but the statutory remedy has no application to the general government, unless clearly and specifically so declared. Dollar Savings Bank v. United States, 19 Wall. 227, 238, 239, 22 L. Ed. 80; United States v. Stevenson, 215 U. S. 190, 197, 30 Sup. Ct. 35, 54 L. Ed. 153; United States v. Chamberlin, supra, 219 U. S. at page 261, 31 Sup. Ct. 155, 55 L. Ed. 204.

[4, 5] The Excise Act in question does not expressly make such declaration, and the argument of necessary implication to that effect must reckon not only with the general principles we have referred to, but to the provision (section 38, subd. 8) which expressly extends and makes applicable to the tax in question "all laws relating to the collection, remission and refund of internal revenue taxes so far as applicable to and not inconsistent with the provisions of this section"; and the Internal Revenue Act then and now in force expressly declares that "taxes may be sued for and recovered in the name of the United States, in any proper form of action, before any Circuit or District Court of the United States for the district within which liability to

such tax is incurred, or where the party from whom such tax is due resides at the time of the commencement of the said action." Rev. St. § 3213, U. S. Comp. St. 1916, § 5937. The provision of the following section, requiring the sanction of the Commissioner to suits for taxes, was complied with in the instant case. We thus come to the question whether the provision just quoted is inconsistent with the assessment and administrative provisions of the act of 1909.

Upon careful consideration of the provisions of the act and the pertinent decisions, we are of opinion that there is no such inconsistency. The reassessment provisions, so far as requiring statement, are these:

By the fourth subdivision it is provided that:

"Whenever evidence shall be produced before the Commissioner of Internal Revenue which in the opinion of the Commissioner justifies the belief that the return made by any corporation * * * is incorrect, * * * the Commissioner of Internal Revenue may require from the corporation * * * such further information * * * as he may deem expedient, * * * and for the purpose of ascertaining the correctness of such return * * * is hereby authorized * * * to examine any books and papers bearing upon the matters required to be included in the return of such corporation, * * * and upon the information so acquired the Commissioner of Internal Revenue may amend any return or make a return where none has been made."

By the fifth subdivision, to which we have already referred, the reassessment made by the Commissioner is required to be paid by the corporation immediately upon notification of its amount. There seems no room for doubt that, had actual reassessment been made by the Commissioner, to correct an untrue return discovered within the three-year period, personal action at law would lie in favor of the United States. The actual making of reassessment within three years has been held not necessary. National Bank v. Gill (D. C.) supra, 210 Fed. at page 940; Id., 218 Fed. at page 602, 134 C. C. A. 358.

But, assuming that administrative reassessment, including its incidents of possibly added penalties in substantial amounts and its summary method of enforcement (against which a corporation has no effective remedy save by suit to recover back), cannot be made after the three-year period, it by no means follows that the act intended to take from the government power to enforce the payment of a tax to which a corporation is subject, through judicial process and without addition of penalty, whereby the corporation is given full opportunity to be heard in its defense in advance of enforcement—merely because the untrue return was not discovered and corrected within the three-year period—especially in view of the express provision of subdivision 8 above quoted, the general policy of the law to promote, rather than to obstruct, the collection of public revenue, and the commonplace proposition that, in the absence of statute otherwise, time does not run against the government.

We think the adjudicated cases opposed to such construction. In Dollar Savings Bank v. United States, supra, the right of the government to maintain an action of debt for the recovery of certain taxes for several previous years which had not been returned or assessed as required by law, by reason of the Commissioner's construction of

the Revenue Act, as not making such taxes payable, was sustained as against a dissent by two members of the court on the ground that action would not lie for the tax unless first entered on the assessment roll. Express authority to sue was found in the statute we have already quoted as section 3213 of the Revised Statutes.

In United States v. Chamberlin, supra, the government sued for the amount of a stamp tax upon execution of conveyances under War Revenue Act June 13, 1898, c. 448 (30 Stat. 448–470), as amended by Act March 2, 1901, c. 806 (31 Stat. 941), which required the assessment levy, and collection of a percentage tax upon the "consideration *or value*" [1] of the property conveyed, and upon the claim by the government that the actual consideration for the conveyance *and the value of the lands* was a certain sum in excess of the consideration recited in the conveyance and upon which the payment by stamp was made. In sustaining the right of action it was said that the penalties provided by the act for its violation did not constitute the exclusive remedy of the government, and were "without application where, for any other reason, the tax has not been paid and thereby the government has lost its revenue" (219 U. S. 265, 31 Sup. Ct. 160 [55 L. Ed. 204]), and that an action for a personal judgment for the tax lies "whenever there is due a sum either certain or readily reduced to certainty" (219 U. S. 262, 263, 31 Sup. Ct. 159 [55 L. Ed. 204]). Here again express authority to sue at law was found in section 3213 of the Revised Statutes. See comment on this decision in Billings v. United States, 232 U. S. 261, at page 287, 34 Sup. Ct. 421, 58 L. Ed. 596, involving action for tonnage tax on foreign-built yachts, under section 37 of the Revenue Act here in question.

If these comprehensive decisions are not conclusive of the instant case, it can only be because the ascertainment of the taxes under consideration did not involve the exercise of judgment and administrative discretion, as is alleged to be the case here with respect to the allowance of items both of operating expense and depreciation—a subject to which we shall later refer.

In United States v. Tilden, 9 Ben. 368, Fed. Cas. No. 16,519, the government sued for collection of income taxes assessed under the act of July 1, 1862 (12 Stat. 473–475, c. 119), the joint resolution of July 4, 1864 (13 Stat. 417), the act of June 30, 1864 (13 Stat. 281–285), as amended by the acts of March 3, 1865 (13 Stat. 479–481, c. 78), July 13, 1866 (14 Stat. 137–140, c. 183), March 2, 1867 (14 Stat. 477–480, c. 169), and July 14, 1870 (16 Stat. 257–261, c. 255). As against some of the taxes it was urged that they were barred by the facts that a return had been made for the years in question, taxes assessed thereon and paid, and no imperfection discovered until some time later; as to others, that no return had been made, and the amount of the tax and the penalty, or only an amount of tax, had been assessed against and paid by defendant. Judge Blatchford (later Justice of the Supreme Court of the United States), in a carefully reasoned opinion, in which the Dollar Savings Bank and other pertinent cases were discussed, held that neither of the facts just stated barred the suit, and

[1] All italics in this opinion are ours.

that the United States had a right of action for the income tax without a prior assessment in the mode specified in the act creating the tax, using this language:

"The extent of the liability of the individual for income tax is defined by the statute, equally with the extent of the liability of the bank for the tax on undistributed earnings. In each case it is necessary, in an action of debt for the tax, to resort to sources of information outside of the statute, to ascertain the amount on which the per centum of tax fixed by the statute is to be calculated. In the case of the bank, its books and the testimony of its officers, and perhaps other means of information, may and must be resorted to. In the case of a suit for income tax, the books and accounts of the individual, and his testimony, and perhaps other means of information, may and must be resorted to. The difference between the two cases, in that respect, if there be any, will be, in every case, one of degree merely, not of principle. The statute, in imposing the per centum of tax on the income of the individual, makes a charge on him of a sum which is certain for the purposes of an action of debt, because it can be made certain through the action of a judicial tribunal, by following the rules laid down in the statute. That is the principle of the decision in the case of the bank, and it controls the present case."

In the Chamberlin Case, supra (219 U. S. 263, 264, 31 Sup. Ct. 155, 55 L. Ed. 204), this language of Judge Blatchford was quoted with complete approval. In one of the income tax statutes involved in the Tilden Case, provision was made for deducting from gross income, in ascertaining taxable income, "losses on sales of real estate purchased within the year for which income is estimated." In another of the acts, deduction was provided for of "all his losses actually sustained during the year arising from fires, floods, shipwreck, or incurred in trade, and debts ascertained to be worthless, but excluding all estimated depreciation of values."

In our opinion the cases cited are directly opposed to the proposition that an assessment by the Commissioner is a prerequisite to the right to sue. The declaration of the excise act, that every corporation subject to its terms "shall be subject to pay annually a special excise tax" there defined and described, as effectually denotes a duty to pay and a corresponding right of recovery by suit as do the words "there shall be levied, collected and paid" in the Customs Act of 1816 (considered in the Meredith Case, supra) and in the War Revenue Act of 1898 (considered in the Chamberlin Case).

We have not overlooked the argument that the ascertainment of the amount of net income, including items deductible for operating expenses, and for losses by property depreciation, involves questions of fact, to be determined upon testimony and inferences therefrom, as to which reasonable minds may well differ. But this does not make their determination exclusively a legislative, as distinguished from a judicial, act. What is a necessary expense of operation and what is a reasonable allowance for property depreciation are ultimately questions of fact, and of no different kind than those which courts are trying every day. The fact that their determination involves personal judgment does not make to the contrary; courts and juries are constantly deciding kindred questions of reasonable care, reasonable cause, reasonable delay, reasonable compensation, and reasonable disbursements, all of which involve the personal judgment

of the triers. Such questions are essentially judicial; so far as they involve legal questions, they are absolutely so. Indeed in the normal suit to recover back taxes, paid under protest, questions of fact concerning the propriety and amount of the assessment not infrequently are litigated, and of a nature nowise different from those involved here. Whatever differences there may be between deciding questions of "necessary operating expenses" and "reasonable allowance for depreciation," on the one hand, and, on the other, the value of the land conveyed in a suit for the stamp tax "or losses on real estate purchased" and "losses incurred in trade" in an income tax suit are "of degree merely, not of principle." As said in the Tilden Case, supra, 9 Ben. at page 391, Fed. Cas. No. 16,519:

"Whether the tax be one on income, or on undistributed earnings of a bank added to its contingent fund, or on a legacy or a succession, or on any other subject of tax, where a tax of a fixed percentage is imposed by the statute on a subject or object which is so definitely described in the statute that its amount or value, on which the fixed per centum is to be calculated, can be ascertained and determined, on evidence, by a court, a suit for the tax will lie, without an assessment."

The excise tax system in question differs radically in principle from state ad valorem taxation systems. "There no tax is imposed until the officers act, and no suit for any tax will lie until after such action by the officers." Tilden Case, 9 Ben. 391, Fed. Cas. No. 16,519. Here the law itself imposes the specific tax.

Had there been true return, and an assessment based thereon, it may be assumed that no right of action would accrue to the government to recover an additional amount because of an original error on the part of the Commissioner, or his subsequent change of mind as to the propriety of the amount assessed. But such case is fundamentally distinguished from the case we have here, in which, under the averments in the declaration, the defendant was, as matter of law, liable to a tax in excess of that presumably paid by precisely the amount of the statutory tax on the items erroneously returned by way of deduction.

We think it clear that one who, through erroneous return, has made it impossible for the Commissioner to exercise his judgment upon the items affected thereby cannot be heard to object that the only remedy open to the government is invoked. Indeed, the declaration avers that the Commissioner has "disallowed" the deduction of the items in question, and the natural inference therefrom is that, so far as he can, he has held the defendant liable for the excise tax thereon. It results from these views that the learned district judge was in error in holding that this suit was barred by the Commissioner's failure to reassess. The conclusion we have arrived at has been reached in two cases in district courts: United States v. Threshing Co. (D. C.) 229 Fed. 1019; United States v. Grand Rapids & Indiana Ry. Co. (D. C.) 239 Fed. 153.

[6] As to the criticism that the declaration avers no fact tending to show that the expenses alleged to have been erroneously returned were not necessary expenses, or that the claimed amounts of deduction for depreciation are not reasonable allowances, we need only

say that erroneous or untrue return of the operating expenses and deductions for depreciation is sufficiently averred, and that evidence sustaining the allegations of incorrectness need not be set out.

Of the criticism that the act does not require that items of claimed property depreciation be charged against the capital valuation on defendant's books, it is enough to say that the declaration expressly avers that the alleged deductions were not reasonable allowances for depreciation, within the meaning of the act. If more definite or detailed information is needed to enable defendant to plead or prepare for trial, relief by bill of particulars or otherwise is obvious.

The judgment of the District Court is reversed, and the record remanded to that court, with directions to take further proceedings not inconsistent with this opinion.

EDWARDS v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. April 2, 1918.)

No. 3065.

1. POST OFFICE ⟸35—OFFENSES—"USE OF MAILS TO DEFRAUD."
   Where defendant, who made a compound to be fraudulently sold under the name of a rare and high-priced drug, used the mails for the purpose of ordering his materials, such use of the mails falls within Criminal Code (Act March 4, 1909, c. 321) § 215, 35 Stat. 1130 (Comp. St. 1916, § 10385), denouncing the offense of using the mails in connection with a scheme to defraud.

   [Ed. Note.—For other definitions, see Words and Phrases, Second Series, Fraudulent Use of the Mails.]

2. POST OFFICE ⟸49—OFFENSES—SCHEMES TO DEFRAUD.
   In a prosecution under Criminal Code, § 215, for using the mails in connection with a scheme to defraud, where defendant sold a compound of common drugs as acetyl salicylic acid under labels indicating that it was made in Germany, and drugs of that class, which had become rare, were commonly made there, and there was a belief that German origin was important as tending to insure the quality and therapeutic value of such drugs, the jury might consider the false labels on the question whether defendant intended to defraud, for if it is intended to bring about a sale by misrepresenting the quality or identity of an article in a particular which would be likely to have a persuasive effect on the purchaser's mind this may be a sufficient defrauding.

3. CRIMINAL LAW ⟸814(5)—TRIAL—INSTRUCTIONS—OTHER OFFENSES.
   In a prosecution for using mails in connection with a scheme to defraud, whereby defendant sold as acetyl salicylic acid a compound containing acetanilid, without labeling it as required by Pure Food and Drug Act June 30, 1906, c. 3915, 34 Stat. 768 (Comp. St. 1916, §§ 8717–8728), an instruction allowing the jury to consider that fact, although, as the sales were intrastate, the act had no application, was proper on the question of intent to defraud, and not erroneous as allowing the jury to consider another offense.

4. CRIMINAL LAW ⟸371(1)—EVIDENCE—OTHER OFFENSES—INTENT.
   Where the question involved is the defendant's intent, evidence of an act having a direct bearing on the intent is admissible, though the act be a separate offense.

In Error to the District Court of the United States for the Eastern Division of the Northern District of Ohio; John M. Killits, Judge.

Herbert E. Edwards was convicted of using the mails to defraud in violation of Criminal Code, § 215, and he brings error. Affirmed.

Gage, Day, Wilkin & Wachner, of Cleveland, Ohio (Luther Day, of Cleveland, Ohio, of counsel), for plaintiff in error.

Edwin S. Wertz, U. S. Atty., and F. B. Kavanaugh, Asst. U. S. Atty., both of Cleveland, Ohio.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge. Plaintiff in error (hereafter called defendant) was convicted for using the mails to defraud, in violation of section 215 of the Criminal Code. Stating only so much of the alleged scheme as pertained to one of its several branches, it was this: Defendant was a physician, doing business, also, as a manufacturing chemist. The drug, acetyl salicylic acid, which had been manufactured in Germany, had become rare and high priced. Defendant made a compound from other comparatively cheap drugs (one of which was acetanilid), which compound he labeled and sold under the name "acetyl salicylic acid," and, although he made it in Cleveland, he caused the labels to say that it was manufactured by a fictitious firm in Germany. He did not sell this through the mails, nor, so far as appears, in interstate commerce; but the genuine and common drugs which he used in its composition he procured by means of a written order therefor sent through the mails to manufacturing chemists in Philadelphia. Upon the sending of this letter rests the supposed violation of section 215.

What may be called defendant's meritorious defense was his claim that acetyl salicylic acid was not compounded by any standard formula, and that his product was, in fact, acetyl salicylic acid and had all its therapeutic effects—or, at least, that defendant, in good faith and reasonably so believed and had no intent to deceive. This defense was tried at length, was submitted to a jury under a charge to which (on this subject) there was no exception, and was found to be untrue. Upon this writ of error, the defendant's complaints are three:

[1] 1. It is said that such a letter as was here sent was not material "for the purpose of executing such scheme or artifice or attempting so to do." It is, in substance, urged that the statute contemplated only using the mails in the course of the final carrying out of a scheme which is ready for that execution by which the fraud is to be consummated. It may be that the words selected and placed in the statute were capable of this comparatively narrow construction; but the settled course of decisions makes it now too late to consider this question as if it were open. This court has twice recently upheld convictions under facts not to be, in principle, distinguished from those here present, where the charge is one of a fraudulent scheme to manufacture and sell a spurious compound, and where the

use of the mails was in procuring the innocent raw materials for effectuating this scheme. In U. S. v. Goldman, 220 Fed. 57, 135 C. C. A. 625, it appeared that the mails were used, by way of an advertisement, to find some one who might be persuaded to become a confederate in the fraud—the scheme being one such that a confederate with the qualities sought by the advertisement was an essential element in carrying out the plan which the defendant had then completely devised. In Shea v. U. S., 236 Fed. 97, 149 C. C. A. 307, the mails had been used in circulating an advertisement seeking a victim who might be defrauded through the operation of a scheme which the defendants had then formed in a general way, but which was doubtless subject to whatever changes the situation might dictate. The drugs which the defendant ordered in this case were free from fraud, the transaction, considered by itself, was an ordinary purchase and sale, and the defendant might have used them for a perfectly rightful purpose; the woman who answered the advertisement in the Goldman Case might have been free from any wrong intent, and might have been rejected by Goldman and never taken into his plan; those who answered the advertisement in the Shea Case would naturally have been free from any fault but might have been unsuitable material and might have received no further attention from Shea; in each case, the scheme was not ready for its final execution; but in each case, the scheme had been formed and laid out by the defendant along the main and general lines which would be followed, and in each case the materials were used in aid of getting ready for the final execution. If the view of the statute which brings such a procuring of materials within its prohibition might be thought too broad, the construction is one to which we are fully committed.

[2] 2. The court was requested to charge that if the defendant honestly believed that his product was rightly called acetyl salicylic acid, then the fact that he intended to sell it under labels indicating that it was made by a fictitious firm in Germany, would not constitute a plan and scheme to defraud within the meaning of section 215. The court denied this request but charged:

"The court says to this jury, if it did not say it before, that you have the right to go to the use of these false names, these made-up names, these fictitious names on these labels, for the purpose of getting an index of the defendant's mind and intent. That is a part of the charge in this case. And if this charge were nothing more than a charge that the scheme was that the defendant would invent the names of fictitious corporations of domestic and foreign location, and by the use of those names upon labels otherwise false, induce people to buy goods otherwise than those they were expecting to get, this charge would be broad enough to be a scheme to defraud within the view of section 215. That much of the scheme is in this charge."

We are unable to say that there was prejudicial error in this charge. We do not mean that the statutory scheme to defraud is necessarily to be found in every false statement of origin or even that it always may be there found; but this charge and refusal must be considered on the facts here involved. It is not denied that drugs of this class had been commonly made in Germany, and that there was a common belief that the German origin was important as tending to insure the

quality and therapeutic value of the drugs. Under these conditions, the claim of German origin might well be the controlling consideration in bringing about a sale; and that defendant believed it would be a material inducement is evident from its adoption by him. It is now well settled that whether the purchaser gets something "equally as good" and whether he gets an article actually worth the full price he paid are not controlling. If it is intended to bring about a sale by misrepresenting the quality or identity of the article in particulars which would be likely to have a persuasive effect upon the purchaser's mind, this may be a sufficient defrauding. Sparks v. U. S. (C. C. A. 6) 241 Fed. 777, 782, 154 C. C. A. 479; Harrison v. U. S. (C. C. A. 6) 200 Fed. 662, 665, 119 C. C. A. 78.

In Horman v. U. S., 116 Fed. 350, 53 C. C. A. 570, this court held that "to defraud" and "to injure" were largely equivalent terms; and based upon this holding. it is now urged that where there is no intent to accomplish final pecuniary injury, there can be no intent to defraud; but this does not follow. In that case, the court was holding that the words "to defraud" may reach an injury by force or intimidation as well as an injury by trickery; but we think there was no purpose to hold that there must necessarily be an intent to get another's money without giving value for it; an intent to get it by misleading the owner in any particular that affects his completely intelligent consent may be sufficient. See Bettman v. U. S. (C. C. A. 6) 224 Fed. 819, 140 C. C. A. 265.

[3, 4] 3. The court charged the jury that the Pure Food and Drug Act (Act June 30, 1906, § 8 [Comp. St. 1916, § 8724]) required that any compound containing acetanilid should be labeled to show this fact, and that, if not so labeled, it was misbranded and a violation of that act; and further charged:

"* * * This Food and Drug Act was a statute of great notoriety. The defendant says that when he engaged in these transactions he did not know of its existence. He is entitled to so testify before you and have you consider his testimony in that particular. In determining whether or not you should believe him in this particular, you have a right to look at him as he says he was, his business and his relation to the subject-matter of this particular act; you have a right to consider whether he should not have known the existence of this act, and whether or not he did not, when putting out these packages, if you find that any one of these was mislabeled or misbranded—whether or not he did not violate, intentionally, this law. It is true that he is not here under prosecution for misbranding, for violating the Food and Drug Act. This is not the prosecution. He is here under a charge of violating another law of the United States. But you have a right, in determining the character of his transactions, to consider the relation which this notorious law bore to his operations out of which, and because of which this charge comes: It is my duty to say to you that if you believe him when he said that, then you ought not to hold against him the fact that he violated the act, if he did violate the act, but in considering whether or not you should believe him when he made that statement, you must look to the fact which he has brought to your attention himself that he was a druggist, a chemist and a physician of long standing, whose daily business brought him in direct relation with the subject-matter of that act."

Complaint is made of this charge because:

"The jury is instructed that if they believe the defendant violated the Food and Drug Act, they can hold this fact against him in determining the

issue as to whether or not he is guilty of committing an altogether separate and distinct crime—using the mails to defraud."

This complaint has superficial force, but when all the charge on this subject is considered in its relation to the atmosphere of the case, we do not think it should be interpreted as a charge that guilt of one crime is evidence of guilt of another. The Pure Food and Drug Act relates, in the end, to interstate commerce, and there can be no violation of the act unless the food or drug is intended to be put in that commerce. It was not claimed that defendant had sold his articles in interstate commerce, but for the purposes of this trial it was practically conceded that he had not, and so it was conceded that he was not guilty of any offense punishable by that statute. It is, therefore, not to be supposed that when the trial judge referred to "violating" the Pure Food and Drug Act, he was intending to speak of punishable guilt under that act, or that the jury so understood him. The circumstances indicate a much more reasonable and probable meaning. This act was generally familiar to druggists and physicians the country over—the final customers whom defendant intended to reach; they commonly understood that, because of the general enforcement and observance of this act, any compound containing acetanilid would disclose that fact on the label, and they would naturally believe that if a compound offered for sale was not thus labeled, they could safely use it in cases where acetanilid would be dangerous; if defendant knew of this regulation, and hence knew of the effect it certainly had upon the purchasing trade, he would know that his conduct in omitting any mention of acetanilid from his label would inevitably deceive and defraud the ultimate customers for his article. The vital question to be determined by the jury was whether defendant actually intended such fraud and deceit by putting out his article as acetyl salicylic acid of German manufacture; and the part of the charge now under review was in substance only an instruction that, in determining whether his intent was fraudulent or honest, they could consider the fact, if they found it to be a fact, that in the very same transaction he was intending to deceive and defraud the same people in another particular. Viewed in this way, the charge was not objectionable, and was well within the settled rule which permits even complete guilt of another offense to be shown where the question involved is the defendant's intent, and where the other act has a direct bearing on that intent. See the cases upon this subject reviewed and compared in Shea v. U. S., supra, 236 Fed. 102, 149 C. C. A. 307.

The judgment must be affirmed.

ULMAN v. MANHEIMER.

(Circuit Court of Appeals, Sixth Circuit. April 2, 1918.)

No. 3081.

1. CONTRACTS ⊜182(1)—CONSTRUCTION—JOINT OR SEVERAL LIABILITY.
An agreement between liquor salesmen and a corporation entered into when the salesmen became stockholders whereby each agreed to assume one-half of the loss which might be sustained on accounts transferred to the corporation for merchandise shipped to the respective customers of each, must be deemed several instead of joint and not to render each salesman liable for losses on account of sales made by his associate, for otherwise no effect would be given to the word "respective," this being true regardless of the previous practice between the parties whereby the two salesmen and another who had formed an association each guaranteed to make good any loss of profits credited to the association on account of sales made by any of its members.

2. CORPORATIONS ⊜123(16)—PLEDGE OF STOCK—GENERAL VERDICT—SPECIAL FINDINGS.
In a suit to recover a surplus after a sale of corporate stock alleged to have been held as security, where there was a general verdict for plaintiff, but certain dividends claimed were denied, the denial of the dividends cannot be deemed a special finding inconsistent with the general verdict where it was doubtful whether defendant ever received such dividends and it appeared, though not from the bill of exceptions, that plaintiff's counsel after argument, attempted to withdraw the claim to dividends.

3. TRIAL ⊜258(1)—INSTRUCTIONS—REQUEST.
Where in an action on a contract defendant relied on the practical construction by the parties as well as a new and independent agreement, the refusal of an instruction submitting both theories of defense, but which the court treated as dealing solely with the practical construction, on which issue he had already charged the jury, cannot be deemed error where its double aspect was not appropriately called to the court's attention.

In Error to the District Court of the United States for the Western Division of the Southern District of Ohio; John E. Sater, Judge.

Action by Leo Manheimer against Adolph Ulman. Judgment for plaintiff, and defendant brings error. Affirmed.

In the court below, Manheimer, as plaintiff, filed a petition showing the necessary diverse citizenship to give jurisdiction, and further alleging that on April 10, 1911, he was directly indebted to Ulman, defendant in the action, in the sum of about $2,500, and was also indebted upon a guaranty in the sum of about $1,300; that defendant held, as collateral security for such debts, plaintiff's stock in the Ulman Company, a corporation; that in foreclosure of the collateral security, the defendant sold the stock and realized from it and from dividends about $8,700; that thereupon there became due to plaintiff the difference, about $4,900, for the recovery of which the action was brought. Upon the trial before a jury, plaintiff withdrew his claim as to dividends and recovered a judgment for the remainder of his demand, being, with interest to the date of the judgment, about $5,500. Upon a writ of error, the defendant below brings up a record containing the substance of all the testimony and disclosing a history of the transaction, an outline of which is sufficient for present statement. Some of the questions of fact must have more detailed statement hereafter.

Ulman & Co., prior to January 1, 1907, was a partnership engaged in selling liquors at wholesale. On that date the partnership became a corpora-

tion, under the same name and continuing the same business. In July, 1904, Manheimer was a traveling salesman, selling to the retail trade in liquors, and having regular customers, so that he had a certain degree of established business. Goodman was another salesman in a similar situation; so was Ehrlich. These three (and another for part of the time involved), in July, 1904, formed an association analogous to a partnership. They will be here designated as the associates, or as Goodman & Co. At about the time last named, the associates made an oral contract with Ulman & Co., the partnership, by which the associates were to have the exclusive right to sell the Ulman goods in certain territory. Ulman & Co.'s net profit on such goods was to be computed by deducting from the selling price the cost, the expenses of sale, losses, etc., and these net profits were to be divided, one-half to Ulman & Co., in compensation for their part in carrying on the enterprise, and one-half to the associates in compensation for their personal services; but the profits to which Goodman & Co. were entitled were contingent upon the actual receipt by Ulman & Co. of payment for goods sold. The method of bookkeeping by Ulman & Co., followed up until January, 1907, without objection, and which we assume was known, in substance if not in form, to the associates, was this: A memorandum ledger account was kept with Goodman & Co. To this was credited one-half the gross profits made upon each sale by any associate. Against it were charged one-half the expense of the sales, one-half the discounts, and one-half of any loss upon any sale made by any associate whenever the transaction had reached the stage where it was to be entered upon the books as a loss. There were also charged against it all sums paid to the associates on account of their indicated profit. There can be no doubt that if, through a loss upon an account which had been considered good, it had developed that the associates had been overpaid and had received money which turned out not to be profits, there would have been a liability to repay this excess, or, what is the same thing, to deduct it from the next profits which would otherwise have become payable; but there was not, by the associates, any guaranty whatever that the accounts made by them would prove collectible or would be paid. There was a written contract between the associates regarding the disposition of these profits, which provided in substance that the profits should constitute a fund out of which each of the associates should be paid a specified salary, and that the balance of the net profits should be divided in equal shares among the associates. For the purposes of this case, we may accept the defendant's theory that the liability of the associates to return to Ulman & Co. any overpayment—the only liability there was—was joint and not several. From accounts kept in this fashion, it appeared, on January 1, 1907, that plaintiff's share of the accumulated undistributed profits, on the theory that all accounts were good, was $3,153, and in making closing bookkeeping entries at the end of 1906, Ulman & Co. carried this amount to plaintiff's credit on his personal account on their books. He also there had prior credits more or less directly the result of previous distributions or payments of his share of the profits, so that his total credits on this account were about $7,500. Goodman, one of the other associates, was similarly situated, but with different amounts of credit.

All parties desiring that Goodman and plaintiff should be stockholders in the corporation, the Ulman Company, into which the partnership, Ulman & Co., was being transformed, it was agreed that plaintiff should purchase at par $10,000 of the stock from Ulman, who seems to have been acting in some measure for the corporation. Plaintiff paid for this by transferring to Ulman the $7,500 credit on the partnership books and by giving Ulman his notes for $2,500. Goodman made a similar arrangement. The notes contained a pledge of the stock as security for the payment of the notes. The transaction was completed by the execution of the contract of guaranty given in the margin signed by Goodman and by plaintiff.[1] The parties thereto, Ulman and

[1] "Whereas, each of the undersigned * * * for a valuable consideration duly received is answerable to and now agrees to make good to the Ullman

Strauss, composed the former partnership. All the assets of the partnership were transferred to the corporation and all the outstanding accounts made by the associates were taken over by the corporation as assets at their sum as carried on the partnership books. Plaintiff made some payments to Ulman upon his notes. Some small losses developed upon accounts which had been thus transferred, and on the corporation books one-third of the loss was charged to plaintiff's private account (plaintiff says, without his knowledge). In 1909, it was ascertained that a very large loss, involving, not only profits, but the whole selling price, had occurred upon the account of the South Carolina Dispensary. This sale had been made by Goodman, who had the Southern territory, while plaintiff's territory had been in Colorado and the West. The corporation charged one-third of this loss to plaintiff's private account, and, when plaintiff disputed liability, defendant sold his stock under the pledge, realizing $8,100. The matter in dispute was whether, under the contract of January 10, 1907, plaintiff was liable for losses upon accounts for goods sold by any of the associates before January 1, 1907, or was liable only for losses upon the accounts which he had made in his Western territory. Upon the latter theory, plaintiff was entitled to the verdict which he recovered (unless for one subordinate question); upon the former theory, his liability was greater than the entire proceeds of the stock sold.

Simeon M. Johnson, of Cincinnati, Ohio, for plaintiff in error.

Dolle, Taylor, O'Donnell & Geisler and Jas. B. O'Donnell, all of Cincinnati, Ohio, for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge (after stating the facts as above). [1] When we read the contract of January 10, 1907, in connection with the admitted circumstances, we think it must be construed according to plaintiff's theory. There are considerations tending in the opposite direction, but, upon the whole, they are overbalanced. Chief among these is the fact that through this construction Manheimer finally realizes the $3,153, and perhaps further sums, contingently credited to him, but which, as events happened, he would not have been entitled to if the old arrangement had continued unchanged. Assuming, as is entirely clear, that, under the old arrangement, this credit to plaintiff of $3,153 would have been rightfully canceled when the South Carolina loss occurred, its cancellation would still seem to be rightful if the extent and character of the plaintiff's liability had remained un-

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Company, an Ohio corporation, one-half of any loss, which may be sustained by said company on any of the accounts transferred to it for merchandise shipped by Ulman Company to our respective customers. * * *

"Whereas, each of the undersigned * * * has deposited with the said Adolph Ulman as trustee for the Ulman Company the respective shares of stock owned by each in the Ulman Company, as security for the performance by each of his agreement aforesaid with the right in said trustee to sell said stock on such terms at such time, in such manner and on such notice to us as to him may seem best, to make good any of said loss for which we are respectively liable whenever the same may be sustained.

"Now, therefore, in consideration of the premises and one ($1) dollar paid to each of us by the said Adolph Ulman, trustee as aforesaid, we each severally agree to and with the said Adolph Ulman, trustee as aforesaid, that he shall retain said stock in his possession as said trustee until it is finally ascertained to his satisfaction that no loss will be sustained by the Ulman Company on the accounts aforesaid. * * *"

changed. In other words, under the old arrangement, Manheimer would have been subject to lose this sum through the failure of one of Goodman's sales; plaintiff's then liability was, to that extent, joint and not separate; and it would be natural to think that plaintiff's liability under the new contract would be of the same joint character. However, we find that the extent of his liability was very materially changed. It was increased perhaps many fold. It had extended only to the associates' one-half of the profits made by the Ulman partnership upon a sale; but these accounts were being taken over by the corporation at their face value in payment of its capital stock. The old association relations were ending; they were assuming new relations to each other and to the corporation; and it was not out of place for the corporation to require, as it did, a guaranty of payment or against any loss on these accounts. Plaintiff might have been very willing to continue his agreement to give back profits that had come from a sale by any of the associates; it was a very different thing to ask him to guarantee the accounts. He would be familiar with the facts attending his own sales and with the pecuniary condition of his own customers in the Western territory. He would know nothing about those in the Southern territory, except what Goodman might have told him. It would be natural and probable that he should be willing to give a positive guaranty as to his own customers in exchange for the surrender of his liability to repay profits which he had received from Goodman's sales. It would be unnatural and improbable that for the same consideration he should be willing to guarantee Goodman's sales. The language of the contract is consistent with this interpretation. It had been well understood that each of the associates had his own customers in his own territory; the agreement is signed by two of the associates, plaintiff and Goodman; and it says that:

"Each of the undersigned * * * agrees to make good to the Ulman Company * * * one-half of any loss which may be sustained by said company on any of the accounts transferred to it for merchandise shipped by Ulman Company to our respective customers."

And again:

"Each of the undersigned * * * has deposited * * * the respective shares of stock owned by each * * * as security for the performance by each of his agreement * * * to make good any of said losses for which we are respectively liable."

Not only does the use of the word "respective" and "respectively" import the idea that each associate was contracting only with reference to the losses connected with his own customers; but, unless this is the meaning of the contract, there is no satisfactory force in the words "each of the undersigned."

It is argued that this language was adopted so as to make the contract liability several as well as joint; but this conclusion presupposes that otherwise existing merely joint liability which the word "respective" negatives. When several individuals are to share in a liability of which each has created a part, and it is desired that all should be liable, and that each should be liable for the whole, it is the customary

language of the law to declare that they are jointly and severally liable. When a skilled draftsman, acting for the party to which the obligation was owing, departed from this familiar formula and said, "Each of us agrees to be liable for our respective shares," we think the conclusion inevitable that the liabilities were fractional, and not unitary. Otherwise, the word "respective" becomes not merely surplusage, but contradictory. For definitions and constructions of "respective" or "respectively," see Alsop v. Russell, 38 Conn. 99, 103; Wolf v. Lake Erie Co., 55 Ohio St. 517, 45 N. E. 708, 36 L. R. A. 812; Messer v. Jones, 88 Me. 349, 34 Atl. 177; Patrick v. Royle, 13 Q. B. 98, 112.

We may concede that if these words were to be considered by themselves, without knowing the situation to which they were applied, there might be enough of ambiguity, so that the construction we have adopted would be compelled to yield to the effect of a practical construction by the parties; but the trial court took the view that there was such an ambiguity, and submitted to the jury the effect of the practical construction which defendant alleged and plaintiff denied, and the verdict of the jury has the effect of a finding that the plaintiff was right in his denial. The subject of interpretation through practical construction is therefore eliminated from the case; and when we hold, as we do, that as matter of law the liability was distributive, and not in gross, all the error alleged on the subject of evidence to explain or interpret becomes immaterial.

We find no prejudicial variance between the contract of guaranty of payment made with the corporation, as alleged in the petition, and the contract of guaranty against loss made with Ulman, as shown by the proofs. Ulman was, in this respect, a trustee for the corporation. There was only this one written contract between the parties, and the defendant was never misled or prejudiced in the least.

[2] It is plain enough from the figures that the jury allowed all of plaintiff's claims described in the petition, except for the dividend which it was said belonged to plaintiff and had been received by defendant, and that this claim for dividend was rejected. Defendant now argues that the action of the jury in accepting defendant's position about the dividend was, in effect, a special finding, inconsistent with the general verdict. This claim would require examination, were it not for the fact, alleged by counsel and not disputed, that in the final argument to the jury, and after the judge had charged upon the subject of this dividend, plaintiff's counsel became doubtful of the sufficiency of the proof to show that the defendant had ever in fact received it, and so withdrew the item from the jury. This occurrence is not a part of the record of the trial, as fixed by the bill of exceptions; but it is enough to say that the rejection of the item by the jury may have been because of this or for some similar reason, and so is not necessarily inconsistent with the general verdict rendered.

[3] By an amendment to the answer, defendant claimed that, even if the written contract of January 10, 1907, was only that plaintiff would make good losses on the accounts of his own customers, yet that the next year, when the dividend on his stock became payable from the corporation to plaintiff, and when, by the terms of the

pledge, defendant had the right to take this dividend and apply it on the notes due him, plaintiff, in consideration of defendant abandoning that right, orally agreed to assume liability for all the customers' accounts, Goodman's as well as his own, and to allow the dividend to be applied by the corporation upon that joint liability. During the trial, there was some evidence tending to support this answer; but that distinct issue received little attention. At the end of the trial, defendant submitted a series of special requests, No. 2 of which was:

"If the jury should find that the parties to the writing of January 10, 1907, sued on in the within action, have themselves construed the writing as not the contract between them, but subsequently entered into an agreement, whether verbally or by conduct, different from that set forth in the contract, then I charge you will adopt and give effect to the later agreement."

This was refused. If it had distinctly presented the issue raised by the amended anwer, there would be force in the contention that the refusal was error, though it is not clear how this new oral agreement would have escaped the statute of frauds. However, it is not certain that the request was aimed at this defense. The same acts and words relied on to show the new contract were relied on also to show the practical construction of the old; both the testimony and the second request had this double aspect; the court seemed to regard this request as directed to the subject of practical construction and charged fully upon that subject; and neither by exception nor by a further request was the trial court advised that this request was intended to present specifically the defense of a new and independent contract. We conclude that fairness to the trial court requires that a point of this kind should be clearly and distinctly brought to his attention, and that error cannot be predicated solely upon the refusal of a request which covers up as much as it discloses of the contention afterwards made.

The judgment is affirmed.

WEGE v. SAFE-CABINET CO.

(Circuit Court of Appeals, Sixth Circuit. April 3, 1918.)

No. 2982.

1. CONTRACTS ⟸152—CONSTRUCTION—LANGUAGE.
The language of a contract itself must control, unless the parties themselves have placed a practical construction upon it to the contrary.

2. MASTER AND SERVANT ⟸62—INVENTIONS OF SERVANT—AGREEMENTS TO ASSIGN—CONSTRUCTION OF PATENT.
A patent for a sheet-metal safe or cabinet, issued to defendant, *held* one for an improvement in the safe cabinet art, and within the terms of a contract requiring defendant to treat as the property of his employer all his improvements in a safe-cabinet and his inventions embodying any principles of safe-cabinet construction.

3. SPECIFIC PERFORMANCE ⟸71—CONTRACTS—PATENTS.
When couched in unambiguous terms, a contract obligating an inventor to treat all inventions and patents applicable to a particular art as the property of his employer is specifically enforceable.

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

4. CONTRACTS ⊂=108(2)—VALIDITY—PUBLIC POLICY.
Where defendant agreed that any patents for improvements or inventions which he might secure in a particular art should belong to his employer, such contract, though applying to a patent for an improvement in the art secured after defendant terminated his employment, is not invalid, as opposed to public policy, for, if the contract was limited to patents secured during the term of service, defendant might well evade its provisions.

5. MASTER AND SERVANT ⊂=62—INVENTIONS OF SERVANT—ASSIGNMENT.
Where the contract between defendant and his employer, requiring him to act as superintendent of the employer's manufacturing business, provided that any patents for improvement and inventions in the article manufactured should become the property of the employer, defendant is impliedly bound to assign such patents.

6. APPEAL AND ERROR ⊂=1079—BRIEFS—WAIVER OF ERROR.
Where nothing more than the bare assignment of error is set forth in the brief, the error must be deemed waived.

Appeal from the District Court of the United States for the Southern Division of the Western District of Michigan; Clarence W. Sessions, Judge.

Bill by the Safe-Cabinet Company against Peter M. Wege. From a decree for complainant, defendant appeals. Affirmed.

Fred Chappell and Otis A. Earl, both of Kalamazoo, Mich., for appellant.

F. D. Campau, of Grand Rapids, Mich., T. J. Summers, of Marietta, Ohio, and James L. Steuart, of New York City, for appellee.

Before WARRINGTON and KNAPPEN, Circuit Judges, and McCALL, District Judge.

WARRINGTON, Circuit Judge. This is an appeal from a decree requiring Wege to assign certain letters patent and all his rights thereunder, including all claims for past infringements of the patent, to the Safe-Cabinet Company. Wege and the company entered into a written contract on August 7, 1909, whereby Wege was engaged as superintendent of the company upon a salary schedule fixing his compensation according to the amount of business which the company might transact in a series of years, commencing with a minimum salary of $3,000, and running to a maximum of $5,000. On September 8th following they entered into another written contract, which required the company to issue to Wege 50 shares, of $100 each, of its fully paid common stock, and Wege to render services to the company in substance embracing (a) "all present and future mechanical improvements of the safe-cabinet," and (b) "all developments and inventions embodying any or all the principles involved in the safe-cabinet construction, due in part or altogether to" Wege's "talent and labor," and, when made the subjects of United States patents, such patents "and what they may lawfully include" were to be the property of the company. A second clause of this contract reserves to Wege "full property rights in all patents secured by him for inventions in steel or other construction, except as above stated, which are due to his talent and labor, except as may be modified by mutual agreement hereafter,"

and as to patents so secured by Wege and not covered by the first clause the parties were to agree upon their purchase or use by the company; Wege agreeing to offer such excepted patents to the company "before undertaking to market any of them elsewhere."

March 25, 1910, the parties made another contract in writing supplemental to and without intending to modify the previous contracts of August 7 and September 8, 1909. By the first clause the company agreed to retain Wege as its superintendent of construction for five years from February 1, 1910, under his "guaranteed salary contract" of August 7, 1909, with the understanding, however, that he should "give his undivided time and service" to the company and to its satisfaction. By the second clause of the contract, and as an additional compensation for his service and for his "inventions and patents on the safe-cabinet construction proper (all of which by previous existing contracts are and shall be the absolute property of said company)," the company agreed to pay Wege 2 per cent., payable quarterly, of all its business in safe-cabinet construction during the life of "any and all safe-cabinet construction patents," or so long as he should remain or be willing to remain in the company's employ, "irrespective of the time period of five years named herein."

November 3, 1911, the parties made another supplemental contract in writing, by which the company purchased the 50 shares of capital stock which it had previously issued to Wege as stated, paying therefor $5,000 in cash, and the second clause of the contract of March 25, 1910, was canceled, including the obligation of the company to pay Wege 2 per cent. quarterly on its safe-cabinet business, though it is to be noted that before this second clause was canceled Wege had been paid under the 2 per cent. provision the sum of $3,595.39. Thus, Wege was at last guaranteed his position as superintendent for at least five years from February 1, 1910, under a salary graduated between $3,000 and $5,000 according to the amount of the company's business in its safe-cabinet construction, and was also paid a total of more than $8,500 on the faith of his promise to treat as the company's property all of his improvements of the safe-cabinet and all of his developments and inventions embodying any of the principles of the safe-cabinet construction.

He carried out these contracts for a time, both as superintendent and inventor. Of his own accord he left the company's service as its superintendent February 1, 1912, just two years after the guaranty of his position began to run; but before leaving he conceived at least four inventions in the safe-cabinet art, and applied for patents upon all of them. Patents upon three were issued to him as assignor to the company prior to severing his employment as superintendent, and upon the other after that event. These patents may be identified thus: No. 993,483, May 30, 1911, relating to a door which the drawings show is a safe-cabinet door; No. 993,627, May 30, 1911, providing for an improved "cabinet, safe, or other walled structure," and the drawings show a safe-cabinet; No. 999,929, August 8, 1911, which is declared in the specification to be "particularly adapted for fireproof cabinets and safes"; No. 1,038,038, September 10, 1912,

relating to a "combined shelf and partition, more especially for sheet metal cabinets."

[1, 2] Wege refused, however, to accede to a demand of the company to assign to it the patent in suit, and this resulted in the present action. Whether Wege is under contractual obligation to assign this patent is the issue. Wege applied for the patent August 16, 1912, and it was issued February 25, 1913, No. 1,054,325, entitled "Sheet Metal Safe or Cabinet." In view of Wege's covenants with the company, before pointed out, it is important briefly to consider the meaning and scope of safe-cabinet construction, in connection with the subject of the patent in suit. This is not to imply, however, that the comparison so suggested need be carried to the extent usually required in a patent suit. We are not called upon, for instance, to pass upon any question of validity or infringement of the patent in issue. We have only to determine whether the subject-matter of the patent falls fairly within the category of "safe-cabinet" or "safe-cabinet construction," as those terms were used in defining the contractual obligations of the parties.

The business of producing what is known as the safe-cabinet appears to have originated in 1905 with a copartnership, which was carried on under the name of the present appellee and was subsequently converted into a corporation. Willis V. Dick, a member of this copartnership and now president of appellee, testified that he manufactured "a fire-resisting product known as the safe-cabinet produced by the Safe-Cabinet Company," and, further, that he "was the inventor of the original safe-cabinet." Although it is insisted that some of the elements of his safe-cabinet are old, we do not find any contradiction of this testimony. A patent was issued to Willis V. Dick, January 9, 1906, No. 809,497, entitled "Fire-Resisting Cabinet." He states in his specification:

> "The object of this invention is to provide a fire-resisting cabinet, chiefly of sheet metal, which shall be of simple and economical construction, and in which papers, documents, and other perishable things may be stored with reasonable assurance against loss or injury by fire and water, especially in incipient conflagrations."

The structure is described in detail in his specification and is illustrated by accompanying drawings. Its appearance is similar to that of the old type of safes. Its interior is equipped with shelving designed for the filing of papers, documents, and the like; the end (or side) and back walls, as also the two doors in front, are composed of exterior and interior vertical plates of sheet metal, which are so spaced and fastened one with another as to form air chambers between them; the base and top are composed of heavy sheet metal suitably adjusted and, through the use of bolts and nuts or rivets, fastened to the walls. The interiors of the sheet metal walls and of the doors of the cabinet are provided with a sheeting of asbestos to protect them against heat. Metal tie pieces and braces are used for connecting the vertical terminals of the end and back walls and bracing them; and the specification suggests that the paneling of the metal will add to the rigidity of the structure and also enhance its appear-

ance. The doors are provided with lips all around, so as to lap on the front of the cabinet and on each other, and are provided with combination lock, etc. The prominent results sought to be obtained by this construction, according to the specification and claims, were its double walls, lightness, rigidity, fire-resisting qualities, and economy.

The claims do not specify doors, and it is to be noted that some of the models introduced have doors and some have not. A number of the claims relate to the interior shelving, which is not important in the present suit. Claims 1, 2, and 9 may be treated as typical, so far as present pertinency is concerned, of the patented device; they are copied in the margin.[1]

A specific description of a patented structure confessedly belonging to the safe-cabinet art is to be found in Safe-Cabinet Co. v. Globe-Wernicke Co., 242 Fed. 497, 155 C. C. A. 273 (C. C. A. 2). The patent there in suit, No. 999,929, was one of those issued to Wege as assignor to the present appellee, as above pointed out.[2] The patent was held anticipated and invalid; and it is to be observed that one of the anticipating patents there cited and commented on was the Dick patent, above partially described for purposes of the present case. In alluding to the Dick patent, Judge Rogers said (242 Fed. at page 505, 155 C. C. A. at page 281):

"Also prior in time to Wege is the Dick patent, No. 809,497, applied for on February 7, 1905, and issued on January 9, 1906. That was granted for 'new and useful improvements in fire-resisting cabinets.' The specification discloses a double walled sheet metal cabinet of the general shape and outline of that in which it (the complainant) now claims to employ the invention of the patent in suit. It describes 'paneling of the metal' as employed to give rigidity to the structure, and uses interlocking flanges to join the sheet metal parts together, but reinforces these joints by the use of screws and rivets. It is indistinguishable in function and in general appearance from the patent in suit."

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[1] "1. In a fire-resisting cabinet, the combination, with a base, of end and back walls of sheet metal, said end wall having an inwardly standing vertical terminal portion *1c* and said back wall having an outwardly standing vertical terminal, a tie piece for connecting the said terminals of said end and back walls consisting of a doubly and oppositely grooved piece in which said terminals project, and means for securing said piece to said terminals."

"2. In a fire-resisting cabinet, the combination, with a base, of end and back walls of sheet metal, a tie piece and brace for connecting the vertical terminals of said end and back walls and bracing the same, consisting of strip of metal bent to form a double groove into which the said terminals project and a wing to constitute the brace."

"9. In a fire-resisting cabinet, the combination with a suitable base, of the vertical casing thereof comprising an outer wall of sheet metal made in three pieces, to wit, end portions *1* having back portions *1a* integral therewith extending partially across the back, and portions *1b* integral with the end portions extending partially across the front and a portion *2* connecting the edges of the portions *1a* at the back, and an inner wall also of sheet metal extending parallel to the outer wall and joined thereto at or near the edge of the wall *1b*, substantially as described."

[2] The complete double wall feature of the structure described in this patent is to be particularly noticed, since it shows that Wege, as well as the company, regarded this feature as a distinct element of safe-cabinet construction more than a year and a half before the patent in suit was issued.

Examination of that decision, in connection with the fact that Wege considered himself bound to assign the patent there in suit to the present appellee, cannot fail to show that when designing that device Wege regarded the principles of safe-cabinet construction as at once broad in scope and calling for development. That he believed the subject was meritorious is shown by his testimony in the present case:

"It is a fireproof article, and it is the lightest fireproof article in steel furniture I have ever seen."

And although the patent here in issue contains all the essential elements, or their equivalents, of the safe-cabinet construction, yet Wege in effect relies on a single feature and the claimed relation of that feature to the other elements of the patent, to show that the patent does not belong to the safe-cabinet art. We have seen that Wege applied for the patent August 16, 1912, a few months after he quit the company's service as superintendent. He stated in his specification that he had "invented certain new and useful improvements in sheet metal safes or cabinets"; also:

"This invention relates particularly to improvements in sheet metal safes or cabinets, with sheet metal walls. While my improvements are particularly available for safes and the like, and I have illustrated the same embodied in a safe structure, the invention may be made use of in double walled structures in various relations."

The main objects of the invention, he in substance adds, are "to provide an improved sheet metal walled structure which is" (1) "light and simple," "economical to produce," "easily and quickly assembled"; (2) "very rigid"; (3) "in which the passage of heat through the wall joints and door joints is quite effectively prevented." It is unnecessary to point out the practical identity in name and objects of this structure with the name and objects of the safe-cabinet; this is manifest. Further, the drawings throughout illustrate a safe-cabinet and nothing else; and it has been placed in direct competition with appellee's safe-cabinet.

What Wege does here is to place two rectangular metal frames within the walls to engage and reinforce them. The rear frame is held in place between the outer and inner rear walls, such inner wall engaging the entire inwardly turned flange of the frame; the front frame is contained within inwardly turned angle flanges of the front terminals of the outer top, bottom and side walls; the front frame and the edges of the rear wall engage respectively the front terminals and the rear terminals of the inner top, bottom, and side walls; specific description of these parts, or of the mode of assembling them, is not of present importance; it is sufficient to say that the structure is a double wall safe-cabinet. The most that can be said of the frames is that they serve to enhance the rigidity of the structure. When once placed in position, they differ in form, though not in function, from the frame of the patent, No. 999,929, turned over to appellee by Wege in pursuance of his contract, as already stated (see in this connection Safe-Cabinet Co. v. Globe-Wernicke Co., supra, 242 Fed. at page 501, 155 C. C. A. 273); but, save in matter of de-

gree, it is hard to perceive any material difference in either function or operation between the frames of the patent in suit and the metal tie pieces and braces above pointed out in the Dick patent (see claims 1 and 2, note 1, supra). True, as before indicated, counsel urge in Wege's behalf that the frames of the patent in suit are made distinct elements of each of the combinations recited in all but one of the claims, and that these frames and their connections with the other parts constitute the subject-matter of the patent; and the decision of this court in the Scaife Case, 209 Fed. at pages 214, 215, 126 C. C. A. 304, is cited in support of a contention in substance and effect that the claims of the patent in suit must be construed as entitling Wege to combine and use with his frames the old parts of the safe-cabinet; in other words, that by introducing into its construction a new method of bracing and strengthening the safe-cabinet he could rightfully monopolize the whole. This ignores alike the contract on which the instant case is founded and the fact that no contractual question was involved in the Scaife Case. The present contract is explicit, and, unless the parties themselves have placed a practical construction upon it which is inconsistent with the recovery here sought, the language of the instrument itself must control the case.

It is insisted for Wege that the patent in suit is but a development of what is called the Unette patent, No. 993,484, which was issued to Wege May 30, 1911; and it appears that on December 5, 1911, the company gave to Wege a certificate that the contract between the parties did not involve the Unette patent, and that he was "free to deal with this particular patent according to his own will and opportunity." It is to be observed that this certificate was delivered about one month after the date of the last contract the parties entered into. We are unable to appreciate the claimed relevancy of this patent to the present controversy. In the first place, the Unette patent does not call for a double wall structure within the meaning of safe-cabinet construction; it only calls for a supplemental interior wall on two sides to secure the bracing pieces in position. The reason for not following the Unette plan is to be found in Wege's specification for the patent now in suit:

"A double walled structure is secured which is of very great advantage in safes and structures of like character."

Assuming, as counsel claim, that double walls were old, yet this could not help Wege. Since double walls were an essential feature of the safe-cabinet at the time Wege entered into the contract in issue, he could not thereafter appropriate this element to himself as part of an improved safe-cabinet upon any theory either that the element was old or that the element was contained in his Unette patent. In the next place, it is true that for the purpose of strengthening the Unette device Wege placed metal angle braces, calling them in his claims "angular bracing pieces," at the corners of the structure, though the arms of these braces were made to extend only short distances from the corners. These angle braces may be helpful in a partially double wall structure, like the Unette, but they have never been used in a double wall structure, like the safe-cabinet. It was there-

fore not unnatural for the company in December, 1911, to yield as it did to Wege's solicitation to give him the certificate in question. It is an entirely different matter, however, for Wege now to claim that he thus secured a right, not only to convert the Unette into a double wall safe-cabinet, but also to make a distinct improvement upon the bracing features of the safe-cabinet, and then treat the invention as his own property. The language of the certificate does not warrant such results as these. Wege was left "free to deal with this particular [Unette] patent according to his own will and opportunity." It was that patent, not the patent in suit, to which that language was applied. Saying that Wege might "deal" with the Unette was far from saying that he might convert the device into a structure that would destroy both the contract and the safe-cabinet.

Another Wege patent, No. 1,017,354, issued February 13, 1912, is offered to show that the company recognized the right of Wege to use metal corner braces similar to those of the Unette patent, and also in a structure of extraordinary width to employ an intermediate metal interlocking piece to connect with an arm of each of two opposed corner braces, leaving the other arms of such corner pieces of their normal length. This interlocking connection is effected by making a recess and a tongue near the end of each of such opposed corner bracing arms and near each end of the intermediate member, so that such recesses and tongues will register one with another. Here again we find, as in the Unette patent, an inner supplemental wall on two sides of the structure to hold the interlocked pieces in place. It does not appear that this structure has been specially adapted to safe-cabinet construction, nor that it has ever been used in a construction of that kind. The patent was offered to the company, however, if it would accept and pay for it under the second clause of the contract. Our attention is called to the circumstance that the president of appellee appears to have been one of the witnesses to the letters patent; but this, like the refusal to accept the patent, would seem to signify that the interlocking device was not regarded as useful. It is vain for counsel to say that the company's attitude toward this patent was not consistent with its demand for an assignment of the patent in suit. That patent is not like the patent in suit; but, if it were assumed that a mistake was made in not demanding its assignment, this could not affect the validity of the demand made for the patent in suit.

[3] In view of all the facts we are convinced that the patent in suit is a development of the safe-cabinet, and not of either the Unette patent or the patent last considered (1,017,354), and hence that the case must be controlled by the first clause of Wege's contract of September 8, 1909. This contract is distinct from the one employing Wege as superintendent, and according to its terms it is still subsisting. As we have seen, the first clause of this contract obligated Wege, in consideration of $5,000 in paid-up stock of the company, to turn over to it all of his "present and future mechanical improvements of the safe-cabinet" and all of his "developments and inventions embodying any or all the principles involved in the safe-cabinet construction." At the dates of these two contracts the company was the owner of the

Dick patent, and under this patent was engaged in the business of producing the safe-cabinet; through the contracts Wege became pecuniarly interested in the company; both his salary as superintendent and the value of his stock were to be directly affected by the success of the business. It hardly can be doubted that in such circumstances it was competent for the parties to bind themselves according to the covenants of the first clause of the contract of September 8, 1909. It is true that contracts of this character are more frequently entered into with reference to assignments of particular patents and protection of the assignees against impairment, if not destruction, of the value of the patents through improvements subsequently made by the assignors. It is a well-settled rule that contracts of this latter class, when couched in unambiguous terms, are binding and specifically enforceable. Littlefield v. Perry, 88 U. S. (21 Wall.) 205, 222, 22 L. Ed. 577; Aspinwall Mfg. Co. v. Gill, 32 Fed. 697, 700 (C. C.), by Mr. Justice Bradley; Printing & Numerical Registering Co. v. Sampson, L. R. 19 Eq. 462, 464, by Sir George Jessel; Lion Tractor Co. v. Bull Tractor Co., 231 Fed. 156, 161, 145 C. C. A. 344 (C. C. A. 8); Westinghouse Air Brake Co. v. Chicago Brake & Mfg. Co., 85 Fed. 786, 791 et seq. (C. C.). The recent case of American Cone & Wafer Co. v. Consolidated Wafer Co., 247 Fed. 335 (C. C. A. 2), is distinguishable from this class of decisions, because the contract there involved was regarded by the court as vague and uncertain.

[4] The principles of that class of decisions are essentially applicable to contracts like the present one. Here was a special business founded on a particular patented device, the safe-cabinet; the covenants in question were limited to the "present and future" improvement and development of the safe-cabinet, and save in this respect did not purport to interfere with Wege's exercise of his inventive faculties. The subject of the contract was known to Wege when he entered into it; as long as his pecuniary interest continued Wege performed his covenants; in this period he was told all the business secrets and designs of the company. Can it be that he could absolve himself from the obligation of the contract by voluntarily selling to the company his stock and then withdrawing from its service as superintendent? Apart from the analogy of Wege's covenants to those considered in the class of decisions already cited, we think an inventor may, under such circumstances as exist here, aside from his right to bind himself as an incident to his assignment of a patent, lawfully obligate himself to improve and develop a particular device belonging to another person and to assign or otherwise turn over to such person any inventions he may produce in that behalf. This in principle is recognized with respect to contracts of employment where appropriate provision is made in the contract; it is true that the employé's production may be limited to discoveries made during his employment, but this cannot militate against the right to provide for continuing the obligation, regardless of the period of employment; if such safeguard were not available, the inventor might through knowledge obtained in his employment evade the contract later and render it valueless. Hulse v. Bonsack Mach. Co., 65 Fed. 864, 866, 13 C. C. A. 180, et seq. (C. C. A. 4); Thompson v. Automatic Fire Protection Co., 155 Fed. 548, 550 (C. C.); Id., 197

Fed. 750, 752 (D. C.), affirmed 211 Fed. 120, 121, 128 C. C. A. 22 (C. C. A. 2). See, also, Reece Folding Mach. Co. v. Fenwick, 140 Fed. 287, 288, 72 C. C. A. 39, 2 L. R. A. (N. S.) 1094 (C. C. A. 1), Judge Putnam announcing the opinion, though specific performance of the contract was denied for a reason of no present importance. It follows that the present contract is not open to counsel's criticism that this interpretation of Wege's covenants is opposed to sound policy, in that it would prevent him from developing the Unette patent and amount to "a mortgage on a man's brain." The difficulty with the criticism is that under the guise of the Unette patent Wege has produced a safe-cabinet, and so has invaded even the limited field he obligated himself to cultivate for the benefit of appellee.

[5] Counsel call attention to the fact that the contract does not in terms require Wege to transfer to appellee any patent resulting from future inventions. In view of the rule laid down in Littlefield v. Perry, supra, 88 U. S. (21 Wall.) at page 226, 22 L. Ed. 577, we think Judge Sessions correctly disposed of this objection:

"While the contract does not contain a specific provision for the assignment of patents which under its terms are 'the property of the safe-cabinet company,' such requirement is clearly and necessarily implied. Moreover, by the assignment of four previous patents, defendant has expressly recognized his obligation to assign."

[6] After the opinion below was announced, Wege obtained leave to file an account of alleged cost of developing the structure of the patent in suit and securing letters patent, $3,693. This was disallowed, except as to this last item of cost $135.50. Error is assigned to such disallowance, but nothing more than the assignment is set out in the brief, and it must be regarded as waived.

The decree is affirmed.

BOLIN et al. v. WILKES et al.

(Circuit Court of Appeals, Fifth Circuit. March 18, 1918.)

No. 3181.

1. MORTGAGES ⟸37(2)—DEEDS ABSOLUTE ON THEIR FACE—PAROL EVIDENCE.
A conveyance of land absolute in form, without an accompanying defeasance, contract of repurchase, or other agreement in writing, may in equity, by extrinsic and parol evidence, be shown to be a mortgage, without violating the parol evidence rule or the statute of frauds.

2. MORTGAGES ⟸60S½—SUITS TO DECLARE DEED A MORTGAGE—INCIDENTAL RELIEF.
As an incident to a suit to have a deed absolute on its face declared a mortgage, court of equity has jurisdiction to declare an accounting for the profits received from the property.

3. MORTGAGES ⟸32(3)—DEED ABSOLUTE IN FORM.
While the relation of debtor and creditor is essential to the existence of a mortgage, a conveyance absolute in form, but as security for debts of the grantor, which the grantee agreed to assume, will be treated in equity as a mortgage; the debts not being extinguished by the conveyance.

4. MORTGAGES ⊂=591(3)—EQUITY OF REDEMPTION—EXTINCTION BY AGREEMENT.

The parties to a mortgage cannot, by any stipulation or contract therein or contemporaneous therewith, extinguish the right of redemption, and this is so though the conveyance be absolute in form; and hence, in the absence of an estoppel or a release of the equity of redemption, the right of redemption persists in the mortgagor and may be enforced.

5. MORTGAGES ⊂=596, 597—EQUITY OF REDEMPTION—RELEASE AND ESTOPPEL.

A mortgagor may, by an agreement based on sufficient consideration and entered into after the execution of the mortgage, release his equity of redemption; likewise he may estop himself from asserting that right.

6. MORTGAGES ⊂=37(2)—SUIT TO HAVE DEED DECLARED MORTGAGE—PAROL EVIDENCE.

Where land was conveyed by deed absolute on its face as security for a debt, and a representative of the grantor remained in possession of either the whole or a part of the premises, Code Miss. 1906, § 4783, declaring that a conveyance or writing absolute on its face, where the maker parts with possession, shall not be proved by parol evidence to be a mortgage, unless fraud in its procurement be the issue to be tried, has no application.

7. MORTGAGES ⊂=608½—SUIT TO HAVE DEED DECLARED MORTGAGE—AVERMENTS OF FRAUD.

A bill seeking to have a deed absolute on its face of lands partly located in Mississippi declared a mortgage, which alleged that the defendant induced the grantor, an old man, who was in difficulties, financial and otherwise, to have the lands conveyed to her under an agreement that she would pay off indebtedness and would reconvey the property upon being reimbursed, that the offer was made with intent to defraud, and that after securing the conveyance defendant made excessive demands and prevented the grantor from repaying her advances, etc., sufficiently charges fraud to take the case out of Code Miss. 1906, § 4783.

8. EQUITY ⊂=141(1)—MORTGAGES ⊂=608½—BILL TO DECLARE DEED A MORTGAGE—SUFFICIENCY.

The sufficiency of a bill is not to be determined by a consideration of whether the pleader will be able to establish his allegations; so a bill seeking to have a deed absolute on its face declared a mortgage is not subject to attack under Code Miss. 1906, § 4783, on the ground that the character of the instrument could only be established by parol, where the bill set up writings showing the mortgage character of the deed.

9. MORTGAGES ⊂=37(2)—SUIT TO DECLARE DEED A MORTGAGE—PAROL EVIDENCE.

Under Code Miss. 1906, § 4783, declaring that a conveyance absolute on its face, where the maker parts with possession, shall not be proved by parol evidence to be a mortgage only, unless fraud in its procurement be the issue to be tried, parol evidence is admissible to show that a written memorandum, executed by the grantee, acknowledging mortgage character of a deed absolute on its face, was delivered, and that the person to whom it was addressed was acting for the grantor, since, like the statute of frauds, this statute would not exclude all oral evidence, where controlling and essential features are established by written evidence.

10. FRAUDS, STATUTE OF ⊂=63(5)—TRUSTS—DEEDS ABSOLUTE ON FACE—MORTGAGES.

Code Miss. 1906, § 4780, declaring that declarations or creations of trusts shall be made and manifested by writing, but that, where any trust shall arise or result by implication of law out of a conveyance of land, such trust shall not be affected by the statute, by its own terms excepts a mortgage created by deed absolute on its face.

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

Appeal from the District Court of the United States for the Southern District of Mississippi; Henry C. Niles, Judge.

Bill by E. E. Bolin, trustee for William Schild, and another, against Mrs. E. E. Wilkes and others. From a decree dismissing the bill, complainants appeal. Reversed.

Bolin, as trustee for William Schild, and another, filed a bill in the District Court for the Southern District of Mississippi, against Mrs. E. E. Wilkes and others, making, in addition to formal statements, allegations, in substance, as follows:

(1) William Schild, in October, 1916, executed to Bolin, trustee, a deed of trust conveying the real property in controversy.

(2) In 1906 Schild procured from the Grenada Bank a loan of $17,000, and pledged as collateral $33,000 of the notes of the Southern Land Company, secured by a trust deed on part of the land in controversy. This loan was reduced by payments, until on October 9, 1912, the indebtedness amounted to $3,976.99. The Southern Land Company failed to pay its notes, and the property described was sold under foreclosure, bid in in the name of the bank, and conveyance made to it, to be held in trust for Schild, and as security for the balance unpaid on his indebtedness. When the original loan was made, and as further security, Schild conveyed another part of the property in suit to J. T. Thomas, president of the bank. During the period the title to these properties was thus held, from 1906 to 1912, Schild paid the taxes and was in possession of the property, collecting the rents therefrom. When the loan was made, Thomas, acting for the bank, executed a trust agreement, whereby he agreed to hold the title as trustee, and, when the notes were paid, all property and land held as collateral were to be reconveyed to Schild, or to whomsoever he might direct. When the Southern Land Company defaulted, the bank purchased the land sold under the deed of trust of the Southern Land Company, and held the same in trust as security for the debt due by Schild; the land being substituted for the notes primarily held as collateral. In the year 1911, and until June, 1912, Schild was in a sanitarium at Biloxi, and later in the insane hospital at Jackson, where he received treatment for nervous trouble. When he returned, he was advised by the bank that the balance due on the notes must be paid on or before December 1, 1912. The bank at that time recognized that the beneficial title was in Schild, and that the lands were held under the trust agreement. On August 11, 1912, Schild was due the bank $3,987. To give him time in which to arrange to secure money to pay the debt, an extension to December 1, 1912, was granted by a writing dated September 13, 1912.

(3) At various times prior to 1906 Schild purchased the balance of the property described in suit, and had conveyances made to his wife, Mrs. J. M. Schild. On September 30, 1911, Mrs. Schild executed a trust deed, securing $2,000, to R. E. Howard, conveying the land to J. E. Ham, trustee. On September 30, 1911, she executed a second trust deed to secure $2,600. On September 14, 1912, all of this property conveyed to Ham, trustee, was conveyed to Schild by Mrs. Schild in a property settlement had between them; this conveyance being subject to the two deeds of trust securing debts amounting at that time to $3,135.

(4) After the discharge of Schild from the insane hospital, he found that large property holdings, other than those involved here, had been dissipated. During the month of September the bank insistently demanded payment of the balance of the $17,000 loan. About the time of his release, his brother Joel Schild had been making efforts to procure the necessary money to pay off this indebtedness to the bank. Defendants Mrs. E. E. Wilkes, B. B. Wilkes, and John Wilkes were aware of Schild's confinement and of the threatening attitude of the bank with reference to the indebtedness. Mrs. E. E. Wilkes volunteered to Joel Schild to lend the necessary money to pay the bank debt, and to take title to the properties held in trust by the bank, the property to be held by her under all the conditions under which it was held by the bank. In furtherance of this, and to ascertain accurately the situa-

tion, Mrs. Wilkes on September 5, 1912, addressed a letter to Thomas, the president of the bank, stating that Joel Schild had applied for money to pay off the loan, and that whenever the money was repaid, which she had agreed to advance, the title would be reconveyed. The Wilkses had actual notice of the terms under which the bank and Thomas held the property under a written agreement. Some time after the release of William Schild he was apprised by his brother of the offer of Mrs. Wilkes, and was notified by Thomas, president, that Mrs. Wilkes would take up the debt and hold the property in trust. Thomas wrote a letter to Schild, explaining why it would be to his advantage to allow Mrs. Wilkes to take up the indebtedness. While in the latter part of October, 1912, William Schild was negotiating with friends to secure money to take up the debt due the bank, and had arranged and was about to consummate the loan, the offer theretofore made by Mrs. Wilkes was made directly to him; the offer, however, being conditioned upon Mrs. Wilkes' being permitted to take up, not only the indebtedness due the Grenada Bank, but the indebtedness secured by the two deeds of trust to Ham. It was a part of the inducements held out to Schild that, as to the property held by the bank, the title to be taken and held by Mrs. Wilkes was subject to the terms and incidents of the trust agreement executed by the bank. The loan was accordingly agreed upon, interest to be at 6 per cent., and there was to be no date of maturity. It was further agreed that the two trust deeds then held by Ham should be foreclosed and the property sold under the trust deeds, and should be bid in for the benefit of Schild for the amount of the debts—that is, $3,135—which was to be paid by Mrs. Wilkes, but with the specific understanding that the title should be held for the benefit of Schild, and as a part of the security for the loan. By subsequent agreement Schild agreed to pay $135 of the amount due under the two trust deeds, reducing the aggregate loan to $6,976.99. In consummation of this agreement, Mrs. Wilkes, on or about November 1, 1912, paid the amount due the Grenada Bank from Schild, and the properties theretofore held by the bank and Thomas were conveyed to her. In consummation of the agreement, Ham, trustee, made sale of the properties conveyed to him in trust for the amount of the debt due, $3,135; Mrs. Wilkes paying him such amount, but receiving from Schild $135, in accordance with the agreement. It was part of the agreement that title to all the properties covered by the trust deeds to Ham should be subject to the terms existing with reference to the properties theretofore held by the bank, in recognition whereof Mrs. Wilkes thereafter agreed in writing that title to all of said property was held for the benefit of Schild, and as security, and that she would reconvey upon payment of the indebtedness to her. Friendly relations between the Schild family and the Wilkes family had existed for many years. Mrs. Wilkes and her representatives knew that Schild had just returned from the insane hospital; that he was very much embarrassed financially, and had unfortunate domestic troubles. Mrs. Wilkes, acting under the pretense and guise of friendship, represented that she had no desire to do other than to render Schild financial aid, for the purpose of saving his property from being sacrificed at foreclosure sales. Schild, believing said offer was in good faith, consented to Mrs. Wilkes' taking title to his properties, and, relying upon her representations, arranged for the transfer to her as successor in trust to the bank and Ham. After conveyance made Mrs. Wilkes and her representatives repeatedly acknowledged that all of the property was held in trust for Schild, and stated that whenever the indebtedness was paid, either in cash or from rents and profits arising from the property, she would immediately reinvest Schild with title. Mrs. Wilkes and her representatives were not in good faith in any of their offers to assist Schild in his financial distress; but they, with full knowledge of all the circumstances and conditions, took advantage of him for the purpose of fraudulently procuring legal title to all of his property, and after she had received the rents and profits therefrom, and waited for a sufficient length of time to elapse for the purpose of lending color to her now pretended claims to absolute title and ownership, she now claims absolute title and beneficial ownership against Schild, in fraud of his rights

and in violation of the trusts under which she accepted titles, and all of the representations, inducements, and agreements made by her to Schild when conveyances were procured by her. She now claims the right to exclusive possession, and to be in exclusive possession, of all the property, in disregard and violation of the rights of Schild. The conveyances from the bank and Ham, trustee, to her, were all procured by fraud, and with the ulterior intent on her part to defraud Schild of his interest in all the properties, and, through such fraud, to ultimately assume the absolute ownership and to defeat the equitable ownership of Schild. In furtherance of said scheme, when Schild was at divers times offered reasonable and fair prices for timber on portions of the properties, or was offered reasonable and fair prices for portions of the land, she, while admitting that he was the beneficial owner, discouraged the sale at such time, assuring Schild that there was no necessity of his selling, inasmuch as she would continue her trust and postpone payment of the loan until the rents and profits should repay the indebtedness to her, or until it was convenient for Schild to repay in cash. On each occasion, when opportunities for sale of land or timber arose, Schild offered to apply the proceeds on the indebtedness, and on each occasion he failed to avail himself of the opportunity, relying on the assurances of Mrs. Wilkes that she would continue to hold the title in trust without pressing him on his debt. A large portion of the land was then in cultivation and rented, and bore large rentals, which it was agreed should be paid to Mrs. Wilkes on the loan. It was a part of the understanding on which the loan was made that the rentals should be applied, first, to the payment of taxes, and would, within a few years, pay out the loan and interest, in the event Schild should not sooner pay in cash. Schild paid in cash a portion of the taxes after title was vested in Mrs. Wilkes, and the renting of the land has always been under his supervision. Parts of the property, described as the Lipsey place, and a few acres, described as the Bentwood place, and the houses in the town of Durant, and the property in St. Joseph county, Mich., are the only properties susceptible of actual occupancy. While Schild was confined in the asylum, his brother had control of said properties, and rented them and collected rentals. When title was vested in Mrs. Wilkes, it was agreed that Joel Schild should continue to rent the property as the representative of Schild. Shortly thereafter Joel Schild was induced by Mrs. Wilkes to move on the Lipsey place for the purpose of terminating the general supervision by Schild, and to restrict his supervision to the Lipsey place, with the agreement, however, that all rentals should be applied as credits on the indebtedness of William Schild to her. The removal of Joel Schild to the Lipsey place was not intended as a surrender of the right of possession, but with the distinct understanding that the rents should thereafter be merely received by her and applied as credits on the loan. Ever since the moving of Joel Schild to the Lipsey place he has been in occupancy and control, and supervised the tenants, for the purpose of the application of rents and profits to the reduction of the indebtedness. All the rentals have been received by Mrs. Wilkes, and should have been, under the terms of the agreement, applied to the indebtedness. No due date of the loan was fixed, because it was estimated that the net rentals would satisfy the same in a few years. It was agreed that Schild should be permitted to pay off the loan at any time, although he was induced to believe that he would never be pressed for payment, but that the debt would be gradually retired by rentals. Over and above all taxes and proper charges on the land since November 1, 1912, the net rentals received by Mrs. Wilkes have been more than sufficient to repay the loan and interest, and she is now indebted to plaintiff as trustee for William Schild in the amount of the excess. A large portion of the property was wooded with valuable timber. Shortly after the loan was made, Schild was offered $6,500, net, for the oak, hickory, and gum timber on the property. He was then advised by Mrs. Wilkes not to accept this offer, and that it would be to his best advantage not to dispose of the timber, but that the rents would be ample to pay taxes and retire the loan. At this time there were some 1,350 acres of land in timber, a large portion of which was in a

virgin state; that, notwithstanding Schild was discouraged by Mrs. Wilkes from disposing of any of the timber, and notwithstanding the agreement that none should be cut or disposed of, timber of value far in excess of the original loan has been cut from the land and disposed of by Mrs. Wilkes, the exact amount plaintiff being unable to state. Plaintiffs are informed, and state on information and belief, that Mrs. Wilkes has recently sold to defendant V. Reinhardt a large amount of the timber now standing on the land, the amount of which and description of the land from which it is to be cut being unknown to plaintiff; that the sale, if made, is unlawful, and in violation of the agreement.

(5) Defendant Mrs. E. E. Wilkes had repeatedly recognized and admitted that Schild is the beneficial owner of the lands, and that same had been held by her merely as security. From time to time Schild endeavored to obtain statements from her of the amount then due her, and she has failed and refused to render any itemized statement, and has likewise never rendered any statement of rents, issues and profits from the lands, her only response to demands having been to state, in various writings, aggregate balances claimed to be due her. These balances were fraudulent and inflated, and their payment was required of Schild before he could obtain a reconveyance of his property. With a full knowledge on her part that Schild was unable to pay such excessive amounts, said requirements were made for the fraudulent and unlawful purpose of defeating his right to reconveyance, and of unlawfully and fraudulently withholding his property. That the original loan of $6,976.99 is the only money ever received by Schild from Mrs. Wilkes, and an accounting will show that said sum and all proper interest has been paid, and that there is a balance due him. When each of said fraudulent statements was rendered, Schild denied liability for the amount claimed, and has never acquiesced in the justice of any of said claims, except to the extent of the proper balances then due. That Schild is a very old man, worn down by great vicissitudes and misfortunes and the weight of years. With the exception of the properties herein involved, he has been denuded of a large fortune, and the properties herein in suit constitute all left to him. Except by acceding to the unjust and excessive claims, he has been utterly unable to reach any amicable adjustment with Mrs. Wilkes. He has been without funds during the entire period of the transactions, and altogether unable to obtain financial aid necessary to enforce his rights. On several occasions, after Schild would call for statements, and excessive amounts had been claimed, he, being without funds and unable to stand the expense of litigation, took up negotiations with her, in an effort to fix the proper amount. On various occasions she had given written statements that she would convey the property upon payment to her of these amounts. Oppressed by want, and without the means to enforce his rights, but at all times denying liability for the amount claimed, Schild, at various times, undertook to secure money to pay the excessive demands, and further sought to sell portions of the property for that purpose. On several occasions he has found persons willing to lend him sufficient money to pay such excessive demands, but the consummation of the loans has been prevented through the active and fraudulent interference of Mrs. Wilkes or her representatives. On two occasions Mrs. Wilkes actually executed deeds reconveying property involved, which were deposited in escrow, notwithstanding all of which the proposed loans were defeated through her fraudulent interference, and with intent on her part to retain possession of the property. The property is worth $56,525. Defendants B. B. and John Wilkes attend largely to the business of E. E. Wilkes, and have been active participants in all the transactions complained of. B. B. Wilkes and John Wilkes have been suffered to receive, use, and enjoy a large part of the rents and revenues collected from the property and the proceeds of the sale of timber. Diligent efforts to ascertain the amount of timber cut by them have been without success, and the amount or value of the timber taken cannot be stated with accuracy. The ascertainment of the amount of rents and profits, and the amount and value of the timber involves a complicated state of accounts; much of the land having

been rented on shares, and the sales of the timber involving transactions with numerous persons. Plaintiffs are entitled to an accounting, to the end that the amount of the rents and profits, and the amount and value of the timber cut and the respective liabilities of defendants, may be ascertained. Plaintiffs deny that any amount is due to Mrs. Wilkes; but, if mistaken, they are unable to make tender until the amount has been ascertained upon an accounting, and they express a willingness to do anything which the court may find equitable to entitle him to a redemption of the property. They are entitled to have a conveyance from Mrs. Wilkes of all the property, and a full discovery from the defendant Reinhardt of the timber taken and of the contracts made with him, and the price, date, and terms of the sales and of the amount paid, and to have the proceeds of the sale impounded, and, pending the determination, are entitled to a receiver to collect the rents, issues, and profits, and also entitled to have injunction against any further disposition, by sale, removal, or otherwise, of any timber, and of the collection of any rents.

Plaintiffs pray: (1) That the account be stated between Schild and Mrs. Wilkes. (2) That defendant Reinhardt make discovery of all facts relating to any sales to him of timber. (3) That pending the suit an injunction issue, restraining the defendants from cutting timber, and from collecting any rents, etc. (4) That a receiver be appointed to take possession of the property, etc. (5) That plaintiffs be permitted to make payment of such amounts as may be found to be due, and that Mrs. Wilkes be compelled to convey the lands to Bolin, trustee. (6) That plaintiffs have judgment against defendants for such amount as may be found due them. Prayer for general and equitable relief.

Among the exhibits attached to the bill are: Exhibit No. 2: Document signed by Grenada Bank, agreeing to sell to William Schild the property held by the bank in trust to secure his debt for the sum of $3,987, with interest from August 11, 1912, at 10 per cent.; taxes for 1912 to be paid by Schild; limited to December 1, 1912, and accepted in writing by Schild. On the back a note addressed to Grenada Bank, and signed by William Schild, directing the bank to make deed to E. E. Wilkes for the amount of the indebtedness. Exhibit No. 3: Letter from E. E. Wilkes to J. T. Thomas, with reference to taking up the indebtedness to Schild. Exhibit No. 4: Letter from J. T. Thomas, president, to William Schild, dated October 17, 1912, suggesting that he permit Mrs. Wilkes to take up the loan to the bank, and suggesting that a deed to the property could be made direct to Wilkes, in trust for Schild. Exhibit No. 5: A statement, signed E. E. Wilkes, of the indebtedness due from Schild, with a statement: "This includes all indebtedness due to date on property deeded to E. E. Wilkes by the Grenada Bank and J. E. Ham, trustee, which we will deed on payment of above."

Defendants filed motion to dismiss for the following grounds:

(1) The plaintiffs have a plain, adequate, and complete remedy at common law.

(2) That the plaintiffs have not made a case entitling them in a court of equity to any discovery or relief.

(3) That, according to the allegations of exhibits, the title was acquired by E. E. Wilkes through absolute deeds of conveyance; that said Mrs. E. E. Wilkes, ever since receiving said absolute conveyances, has been in possession and control of the land, and using the proceeds; that, while allegations are made that there were written acknowledgments of interest, no such writings are set forth in said bill, nor made exhibits, and therefore no such writings would be admissible in evidence in support of the bill; and that the allegations in relation to the writings are incompetent, irrelevant, and insufficient.

(4) That the bill seeks to enforce parol contracts for the redemption of each of the different tracts of land, upon a showing that Mrs. Wilkes acquired them by absolute and valid and unconditional deeds, and that said agreements or pretended contracts as to redemption are all oral, and therefore are void under the statute of frauds (Code 1906, § 4775), which provides:

"An action shall not be brought whereby to charge a defendant or other party * * * upon any contract for the sale of lands, tenements or hereditaments, or the making of any lease thereof, for a longer period than one year," unless the contract of sale or lease shall be in writing.

(5) That all the pretended contracts in relation to redemption or repurchase of said lands show that such pretended contracts are not in writing, and are void, because the same are not to be performed in one year from the making thereof, which statute of frauds is hereby specially pleaded.

(6) That, as shown, Mrs. Wilkes received absolute deeds to all the different tracts, and went into immediate possession of each of said tracts immediately after receiving said deeds thereto, and is still in possession of said property. Said absolute deeds cannot, on the showing of said amended bill, be converted into a mortgage or like instrument by parol evidence.

(7) That there is no cause of action, either with reference to the granting of an injunction or the appointing of a receiver.

(8) That there is no equity on the face of said amended bill, nor cause of action therein set forth.

(8½) That there is no allegation showing the creation of trust and confidence relation was in writing, signed and acknowledged and filed for record, as required by section 4780 of the Code of 1906.

(9) That the bill waives oath of defendant, and thereby deprives defendants of the privilege of using their answers to the matters of discovery called for as evidence, and thereby dispenses with such discovery by defendants and each of them.

(10) That said bill, as amended, seeks to establish, by parol evidence and proof, agreement to convey an estate, an inheritance or freehold in land, in violation of section 2763 of the Code.

(11) The bill shows that neither E. E. Wilkes, nor any agent of hers appointed in writing, made any written agreement in reference to said land.

The court sustained the motion to dismiss the bill, upon the grounds enumerated in exceptions Nos. 1, 2, 3, 4, 5, 6, 8½, 10, and 11; the seventh, eighth, and ninth being overruled.

C. L. Sivley and John H. Poston, Jr., both of Memphis, Tenn., for appellants.

E. F. Noel, of Lexington, Miss., for appellees.

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

BATTS, Circuit Judge (after stating the facts as above). [1, 2] The general principles upon which this case is to be decided are too well settled in equity jurisprudence to require extended statement or citation of authority. A conveyance of land, absolute in form, and without an accompanying defeasance, contract of repurchase, or other agreement in writing, may, in equity, by extrinsic and parol evidence, be shown to be a mortgage, and an incident to a suit for that purpose may be an accounting for fruits and profits received from the property. The admission of the parol testimony is held not to contradict or vary a written instrument, and not in contravention of statutes of frauds. The bill is apparently good in substance and form, and, unless there is something in the statutes of the state of Mississippi which changes the general rules to be applied, it must be held sufficient. Appellees, in discussing the case, make a number of propositions, each of which will be considered.

[3] I and V. Appellees' first proposition is that:

"No relation of creditor and debtor, or other elements of mortgage, are established."

Not only is it the case that the relation of debtor and creditor must subsist as a prerequisite to the existence of the mortgage, but it is also the case that, when such relation does exist, and a conveyance is made in which the debt is the consideration, and the debt continues to exist, notwithstanding the conveyance, the instrument will be a mortgage, and will have all the legal incidents of a mortgage with clauses of defeasance. In this case each of the pieces of property involved was conveyed to Mrs. Wilkes by a conveyance, absolute in form. Two of the lots were conveyed to her in a foreclosure sale. The other property was sold at public auction under foreclosure proceedings, and conveyed to the Grenada Bank, and by it conveyed to Mrs. Wilkes. The total amount of the consideration paid by Mrs. Wilkes was the exact amount of the debts due by Schild upon the properties conveyed to her. The allegations of the petition are to the effect that she suggested, before the conveyances were made to her, that she would take up the debts of Schild, provided the debts and the security were consolidated, and that she would so administer the property as to discharge the indebtedness from rents and profits, or permit Schild to pay the amount due at any time in cash. According to the further allegations of the petition, she repeatedly thereafter recognized the existence of the indebtedness, and stated accounts which it would be necessary to discharge before a reconveyance of the property. One of these statements was in writing, indicating the amount claimed by her, and stating that she would deed the property upon its payment. The existence of a debt is essential to the existence of a mortgage, and the existence of the debt in this case is amply and repeatedly alleged in the bill.

[4, 5] II. The second proposition made by the appellees is:

"Mortgages can be defeated and superseded by agreements subsequently made, by waiver or estoppel."

The general proposition is that a mortgagor cannot, at the time of the making of the mortgage, by any stipulation or contract therein or contemporaneous therewith, preclude his right to redeem. The nature of the instrument, whether in the ordinary form of a mortgage or in the form of an absolute conveyance, cannot by any contract then or thereafter made, be changed. It is, of course, the case that the right which remains in the mortgagor, whether considered as an equitable right (the legal title being in the mortgagee), or as ownership of the property (a lien existing for the benefit of the mortgagee), may be disposed of by him. He may, upon a sufficient consideration and in a proper way, release his equity of redemption to the mortgagee. He may also part with his right of redemption or his title to the land by authorizing, for that purpose, conveyance by the mortgagee to a third person; and it may be that conduct or declarations on his part might amount to waiver or estoppel, precluding the remedy he would otherwise have. Nothing, however, in this bill indicates either an agreement with the mortgagee that his equity of redemption or other rights should pass to her, or the existence of any fact or conduct upon which a waiver of right to redeem, or giving rise to an estoppel to assert the right, might be predicated.

As to the land held by the Grenada Bank, and that held by Thomas, the president of the bank, the petition alleges that, while the title was held under conveyances absolute in form, it was held as security for the debt. While it would have been possible for a conveyance from these trustees to Mrs. Wilkes to have passed the absolute title to the land, this legal result could not follow, except by some instrument executed by Schild, or some conduct upon his part making the act of conveyance his own act; such instrument or conduct evidencing an intent that she should hold title to the land under terms different from those under which it was held by her grantors. No instrument which could have been executed, and nothing which could have been done by Schild, could have destroyed the effect of the continuance of the debt, when, there being no other consideration, the land was conveyed by the creditor who held it as security, in consideration of the taking up of the debt for the benefit of the debtor. While it might have been possible for Schild to have parted with his equity of redemption to Mrs. Wilkes, by having conveyances made by the trustees in whom was the legal title to the land, the circumstances detailed by the bill absolutely negative such an intention and such a result.

The propositions made are applicable to the land secured from the sale by Ham, trustee.

[6] III, X, and XI. Appellees' third proposition is:

"Section 4783 of the Code of 1906, prohibits mortgages to be established by parol evidence."

Section 4783 of the Mississippi Code of 1906 is to this effect:

"A conveyance, or other writing, absolute on its face, where the maker parts with the possession of the property conveyed by it, shall not be proved, at the instance of any of the parties by parol evidence, to be a mortgage only, unless fraud in its procurement be the issue to be tried."

In the consideration of this section of the Code of Mississippi, a preliminary question might arise as to the power of a state to enact a law of evidence, or other law, which would have the effect of curtailing the jurisdiction of a federal court, or destroying or affecting the established remedies of such court. Nothing is more firmly established than the rights of courts of equity to declare instruments, absolute on their face, to be mortgages, and to receive parol evidence of the intent and purpose of the parties in the execution of such conveyances. To give effect to the provision of the Code cited would be to limit the remedy in federal courts to cases where fraud is charged, and to those in which the maker of the conveyance under consideration retained possession of the property. The application which we make of the facts in this case to the Mississippi statute will render it unnecessary to determine whether such an effect would be permissible.

Under the section of the Code quoted, a conveyance, absolute on its face, shall not be proved by parol to be a mortgage, unless the party making the conveyance retains the possession of the property, or unless fraud in its procurement be the issue to be tried. While the conveyances under which Mrs. Wilkes claims were made by the bank and Thomas, the president of the bank, and Ham, the trustee, it will

be assumed that, having been made for the benefit of Schild, delivery by him to Mrs. Wilkes of possession would be a parting contemplated by the statute. The allegations of the bill do not indicate delivery by him to Mrs. Wilkes. It is stated that the property described as the Lipsey place, and a few acres of the property described as the Bentwood place, and the houses located on lands in the town of Durant, and the property lying in St. Joseph county, Mich., are the only properties that are susceptible of actual occupancy, and that during the period of the confinement of Schild in the asylum his brother had control of the properties and attended to their renting and the collection of rentals therefrom. It is alleged that, when the titles were vested in Mrs. Wilkes, it was understood and agreed that Joel Schild should continue in charge of the renting, as the representative of William Schild. There is nothing in the bill to indicate that there was at that time any change in the occupancy of the property. The law would have reference to that date, and not to a subsequent date. There are allegations to the effect that afterwards Joel Schild was induced by Mrs. Wilkes to move on the Lipsey place for the purpose of terminating the general supervision of the properties; but it was stated that this moving was not intended as a surrender of the right of possession of William Schild. It also states that ever since the moving of Joel Schild to the Lipsey place he has been in occupancy and control thereof, and has supervised the various tenants thereon. Even if it could be said that possession of a part of the property was, at the time of the making of the conveyance, placed in Mrs. Wilkes, the failure to turn over all of it to her would prevent the application of the statute.

[7] The quoted section of the law of Mississippi does not, by its terms, have application to a case where fraud in the procurement of the conveyance is the issue to be tried. Under the proposition now considered, and also in the proposition made under subdivision XI of his brief, counsel for appellees question the sufficiency of the charges of fraud. It is stated that the charge of fraud in the procurement of the conveyance is "shifty," and it is said, quoting from a Mississippi case:

"Where fraud is relied on as a basis of relief sought from a chancery court, the facts on which the charge is predicated must be specifically stated with full definiteness of detail."

It is settled that generalizations with reference to fraud will not be sufficient. The bill is not subject to the charge that it lacks in definiteness. The facts, from the proof of which fraud is to be inferred, and from which it is charged, are set forth with as great a degree of particularity as their character will permit. If the elements of fraud are simple, the pleading will not be held insufficient because complexity is not introduced into a statement of them. Not only is the fraudulent design charged, but there is a statement of how it was to be accomplished, and a statement of much of the evidence by which it is to be established. The following facts are specifically set forth: That Schild was an old man, who had had financial and family troubles, and who had just returned from an asylum for the insane; that im-

mediately after his return he was pressed by the Grenada Bank for the payment of a debt due to the bank; that, while he was undertaking to secure money with which to discharge the debt, Mrs. Wilkes, professing friendship for him, indicated a willingness to take up the debt due to the bank for the security held by the bank, provided she were permitted also to take up another debt secured by other property, and make all of the property responsible for all of the debts. It is charged that this proposition was made with the fraudulent intention of placing all of the property of Schild so that none of it could be used in discharging any part of his indebtedness, whereby all of the property of Schild might be secured. It is charged that, after securing conveyances to the property, she made excessive demands with reference to the amount of the indebtedness due upon the property, with the fraudulent intent to prevent its redemption. It is also charged that, when Schild undertook to sell the property, she discouraged the sales by promising to carry the debt until it was discharged by the rents and profits. When Schild secured purchasers for the land, she, according to the allegations of the bill, prevented the prospective purchasers from consummating the purchases.

[8] It has been held that a mere effort to prevent a conveyance, absolute in form, from having its true status as a mortgage fixed, is fraudulent. In this bill the fraud is charged throughout, and charged with sufficient definiteness and particularity. The entire discussion of article 4783 is, perhaps, unnecessary. There is nothing in that article which undertakes to regulate the manner of pleading. A number of the allegations of the bill are, according to the terms of the bill, to be established by instruments in writing; but this recital as to such allegations does not carry the inference that the others are to be proved by parol. The sufficiency of a bill is not to be determined by a consideration of whether the pleader will be able to establish his allegations.

[9] The exhibits to the petition indicate that the controlling allegations of the bill could be established by evidence in writing. Assuming that article 4783 has application, it would doubtless have the construction given to the provisions of the statute of frauds, and would not exclude all oral testimony in the trial of a case, when the controlling and essential features are established by written evidence. The letter of Mrs. Wilkes to the president of the bank, of date September 5, 1912, establishes that prior to the conveyance it was contemplated that the property would be taken over to secure payment of the sum there named. The status of the title to the lands in the name of the bank, and of Thomas, president of the bank, is indicated by writing. After the conveyance had been made, a memorandum, signed by Mrs. Wilkes, gives the indebtedness which she is claiming from Schild, and states:

"This includes all indebtedness due to date on property deeded E. E. Wilkes by Grenada Bank and J. E. Ham, trustee, which we will deed on payment of above."

The only evidence that it would be necessary to introduce would be to show that Joel Schild, mentioned in the letter of Mrs. Wilkes, was

acting for his brother, and that the statement last referred to was delivered to Schild. Even if the article of the Mississippi statute is entirely applicable, the necessary oral testimony would properly be admitted.

[10] IV, VI, VII, VIII, IX, and X. By subdivisions 4, 6, 7, and 8 of the argument, certain other sections of the Mississippi statute of frauds are quoted, and undertaken to be applied to the facts of this case. It will again be sufficient to state that the ruling complained of in this case is the dismissal of the bill as upon a demurrer, and that there could be, on that account, no application of the rules of evidence by which the facts alleged were to be established.

If this were not true, however, the quoted sections would not prevent the introduction of parol testimony to establish the character of the conveyance, absolute in form, under which Mrs. Wilkes undertakes to hold. All of the rulings which have permitted courts of equity to accept parol evidence for the purpose of showing the character of the conveyance as a mortgage have been made in jurisdictions where statutory provisions in almost the exact form of the Misissippi statute of frauds have obtained. In substance, these rulings have been based upon the idea that the conveyance, absolute in form, is not upon "any contract for the sale of lands," or "the making of a lease thereof for a longer term than one year," or "upon agreement which is not to be performed in the space of a year" (section 4775), or the making of "an estate of inheritance or freehold for a term of more than one year" (section 2763). Section 4780 of the Mississippi Code, by its express terms, excludes its application to conveyances of the character here in question.

This observation disposes also of subdivisions 9 and 10 of the argument.

XII. Subdivision 12 of the argument is to the effect "the demurrer was properly taken and correctly sustained." This contention has, we trust, been answered.

Upon the allegations of the petition the plaintiff is entitled to have the conveyance declared a mortgage, to an accounting, and to the other relief asked, except the appointment of a receiver. It is alleged that there are a number of tracts of land which should be rented, and that a part of the property consists of timber lands, which require attention. It may be that the trial judge will find it advisable to appoint a receiver.

The judgment dismissing the bill is reversed.

THE MASON.

THE CASCADE.

(Circuit Court of Appeals, Second Circuit. January 16, 1918.)

No. 95.

1. TOWAGE ⊂=15(2)—GROUNDING OF TOW—EVIDENCE OF NEGLIGENCE.
That tugs in moving in the daytime a vessel having at the time no motive power of her own, in harbor waters and in good weather, run her aground, warrants an inference of negligence on their part.

2. ADMIRALTY ⊂=118—REVIEW ON APPEAL—FINDINGS OF FACT.
When an admiralty court has rejected the positive testimony of witnesses who were in the best position to know exactly what the truth was as to some disputed fact and accepted the testimony of others whose opportunity to know the truth was manifestly not so good, and does this on the expressed ground that the testimony rejected does not harmonize with the inherent probabilities of the case, there is no reason why the appellate court should not review the testimony unembarrassed by the finding as to such facts.

3. ADMIRALTY ⊂=73—SUIT FOR INJURY TO VESSEL—DAMAGES—BURDEN OF PROOF.
The party found in fault upon the merits in a suit for injury to a vessel, although otherwise than in collision, must bear whatever inconvenience of hardship there may be in proving the exact amount of damages sustained.

4. ADMIRALTY ⊂=73—SUIT FOR STRANDING OF TOW—DAMAGES—EXPERT TESTIMONY—DOCUMENTS.
In cases of stranding, damage is commonly received in places where no eye can see that which happens at the time of harm, and the best evidence as to what was injured, and often excellent and persuasive evidence as to how the injury occurred, is that of competent and experienced men who subsequently examine the hurt, and on these issues not only the oral testimony of marine surveyors, but their reports or surveys, as documentary evidence are admissible.

5. TOWAGE ⊂=15(2)—SUIT FOR STRANDING OF TOW—DAMAGES—EVIDENCE.
When a vessel takes the ground, loaded, and lies there for a week, and is then found to have an injured plate, or places showing recently made breaks or deflections from the normal, this is enough to establish an apparent causal connection between the stranding and the injury to the plates, and any other cause for the injury, admittedly existing, is by all experience the unusual cause, and a claim that the injury was due to such cause should be sustained by convincing evidence.

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

Suit in admiralty by the Kinsman Transit Company, owner of the steamer Mathew Andrews, against the steam tugs Mason and Cascade; the Hand & Johnson Tow Line, claimant. From the decree, both parties appeal. Claimant's appeal dismissed, and libelant's appeal sustained, with directions to modify decree.

See, also, 221 Fed. 799.

Libelant's steamboat Mathew Andrews had lain up in Buffalo Harbor during the winter of 1908–09. On March 13, 1909, the tugs above named were employed to remove her from her anchorage to a loading berth. In so doing, within harbor limits and during good weather, they ran her aground, and it

required salving operations extending over about a week to release her. This action was brought to recover the damage and expense resulting from this stranding. The court below held the tugs liable and sent the assessment of damages to a commissioner. Claimants did not deny that some damage had been received, and especially that the Andrews had struck something that broke one of her propeller blades, although she was not under her own steam when the tugs stranded her. She was loaded, having had a "storage cargo of grain" in her hold during the winter.

It appeared that in 1907 the steamboat had taken the ground and received certain injuries to her bottom, which had been repaired or patched by cement on the inside of the plating. It was proven that she had not subsequently grounded to the knowledge of her owners until March, 1909, and under the circumstances above stated. Very shortly after the stranding, three marine surveyors examined the Andrews, made their reports in the usual form, stating that she had suffered damage by stranding additional to that received in 1907, and patched with cement as above set forth. All of these surveyors testified to their examination, the truthfulness of their reports, and gave their reasons for being able to distinguish between old damage (i. e. that of 1907) and recent injury to the plating of a steel vessel. The test used by them was substantially the difference in color between cracks, indentations, or corrugations that showed dark or chocolate colored and those bright and showing metal newly exposed.

Claimants contended that the place where the Andrews had taken the ground showed a soft or sandy bottom, but that she had spent the winter at an anchorage where she might have taken the ground under some conditions of the wind and where the bottom would have been more likely to injure her than the sand or mud forming the major portion at all events of the bottom at the place of stranding.

The commissioner's report, based upon a reading of depositions (so far as the surveyors were concerned), was that libelant had not "clearly shown" that the bottom damage claimed for was attributable to the stranding of 1909. He regarded the surveyors' testimony as "speculative" and an "arbitrary conclusion," for "it was not thought that the beaching of the boat at the entrance of the Buffalo Harbor on a mud bank produced any of the injuries to the bottom of the boat claimed herein." Accordingly, bottom injury, the cost of repairing which was $1,003, and the attendant cost of drydocking, were disallowed, and the commissioner's report was confirmed by the District Judge. From final decree accordingly claimants appealed on the merits, and libelant in respect of the disallowance of said bottom damage and drydocking.

Harvey L. Brown, of Buffalo, N. Y. (Laurence E. Coffey, of Buffalo, N. Y., of counsel), for claimant.

Duncan & Mount, of New York City (Oscar Dibble Duncan and Warner C. Pyne, both of New York City, of counsel), for libelant.

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

HOUGH, Circuit Judge (after stating the facts as above). [1] The appeal of claimant presents no question of law. It is asserted, and at once admitted, that the tugs were liable only for the absence of ordinary care and skill. Such absence was found below because, in good weather and harbor waters, the tugs in broad daylight put aground a vessel having at the time no motive power of her own, and completely under the control of the tugs. When these facts were shown claimant gave no evidence. If negligence is not inferable from such circumstances, it is difficult to imagine anything that could justify the conclusion short of a proven intent to injure another's property.

Libelant's appeal also raises questions of fact, but further requires consideration of the competency and weight of a kind of testimony commonest in the admiralty and not always easy to appraise at its proper value; viz., the expert evidence of marine surveyors.

On assessment of damages herein, whether the vessel was injured, or injured by the fault of claimant's tugs, were points settled by the interlocutory decree; the questions were only how much she had been injured, and what it had cost to repair such injury.

The single issue, framed by discussion rather than pleading, was whether the damage to one particular part of the Andrews' bottom was caused by the stranding of March, 1909; the cost of repair was practically not denied.

That an injury existed after that stranding was also admitted; but that it resulted from resting on the bottom of Buffalo Harbor in March, 1909, rather than at some other time or in some other place, was held not proven.

It was amply shown that the newly injured portion of the Andrews did rest on the ground at the time mentioned; and, also proved that whatever the general nature of the bottom at the place in question, there was something there hard enough to break a propeller that was not turning over.

This was positive evidence; but there was no direct evidence at all that, while the Andrews lay at her winter anchorage, she was ever aground. The argument was that from the reading of the water gauge kept somewhere in Buffalo Harbor, as compared with the draft of the Andrews, she must have been aground at least on a day in February, 1909. Considering the records in evidence, we do not think they establish the allegation or suggestion.

[2] This is a situation for applying our ruling in The Albany, 81 Fed. at 968, 27 C. C. A. 28, viz.:

> Though a finding of fact made below will not ordinarily be disturbed especially when the lower court heard and saw witnesses, yet when that court "has rejected the positive testimony of witnesses who were in the best position to know exactly what the truth was as to some disputed fact, and accepted the testimony of others whose opportunity to know the truth was manifestly not as good, and does this on the expressed ground that the testimony rejected does not harmonize * * * with the inherent probabilities of the case, there is no reason why the appellate court should not review the testimony unembarrassed by the finding as to such facts."

In this case, as stated, the evidence of the marine surveyors was taken by deposition.

[3] It is assuredly a settled general rule, though oftenest applied in collision, that a fault in one party, once firmly established, casts upon that party the burden of showing any contributing fault committed by his opponent. The Persian, 224 Fed. 441, 140 C. C. A. 135. The analogue of this rule is applicable to matters of damage, wherefore as was stated in The Mayflower, 1 Brown, Adm. 376, Fed. Cas. No. 9345, affirmed as The Dove, 91 U. S. 381, 23 L. Ed. 354, the party in fault upon the merits of the case must bear whatever inconvenience or hardship there may be in proving the exact amount of damages sustained; and, if the party not in fault "derives incidentally

a greater benefit than mere indemnification, it arises only from the impossibility of otherwise affecting such indemnification without exposing him to some loss or burden which the law will not place upon him." [1]

[4] In cases of stranding, damage is commonly received in places where no eye can see that which happens at the time of harm, and in the nature of things the best evidence as to what was injured, and often excellent and persuasive evidence as to how the injury occurred, is given and must be given by competent and experienced men who subsequently examine the hurt. This being common knowledge among those accustomed to maritime affairs, it has long been the practice to admit as evidence, not only the oral testimony of marine surveyors, but their reports or surveys as documentary evidence. As it was put by Judge Addison Brown in The City of Chester (D. C.) 34 Fed. 429:

"The surveys in this case were, as I understand, the usual surveys which were a necessary preliminary toward making the repairs, and should therefore be allowed."

When it comes to questions of amount, often most bitterly contested, it is settled that expert evidence (and such is the nature of a surveyor's testimony) may be used to impeach actual expenditures by showing that they were carelessly, extravagantly, or even dishonestly incurred. Of this The Umbria (D. C.) 148 Fed. at 283, affirmed in this court 153 Fed. 851, 53 C. C. A. 33, is a good instance. The testimony of a surveyor or other maritime expert is often regarded as an admission by one party or the other, when both sides of a controversy appoint surveyors to consider the nature and amount of damage. Such surveys are always evidence, though not conclusive. The Elmer A. Keeler, 194 Fed. at 341, 114 C. C. A. 331.

Post hoc, ergo propter hoc, is often poor reasoning; but it has some value, and the process of apportioning evidential difficulties must be conducted in the light of experience and common sense.

[5] When a vessel takes the ground, loaded, and lies there for a week, and is then found to have an injured plate or places showing recently made breaks or deflections from the normal, this is enough to establish an apparent casual connection between the act of stranding and the injury to the plating. See The Vigilant (D. C.) 10 Fed. at 766. Any other cause for the injury admittedly existing is by all experience the unusual cause, and a claim of an unusual kind "ought to be sustained by evidence correspondingly convincing." Per Brown, D. J., in The Grapeshot (D. C.) 42 Fed. at 505. See, also, The Margaret J. Sanford (C. C.) 37 Fed. at 152, per Wallace, J.

For these reasons, we are (1) required to consider the evidence on the reference in full; and, having done so, are obliged to hold (2) that libelant has given competent and persuasive evidence that the damage in question was occasioned by the stranding of March 1909; (3) that claimants have not shown any other even probable cause for

[1] This language was taken by Longyear, J., from Dr. Lushington's judgment in The Gazelle, 2 W. Rob. at 284.

said damage; and (4) that the testimony of the marine surveyors was neither "arbitrary," nor "speculative."

The libelant's appeal is sustained, and that of claimant dismissed, with one bill of costs to libelant. The cause is remanded with directions to modify the decree in conformity with this opinion; libelant to have interest on the damages as increased.

MUNSON S. S. LINE v. GRIMWOOD et al.

(Circuit Court of Appeals, Second Circuit. January 16, 1918.)

No. 89.

1. SHIPPING ⊂=108—BREACH OF CONTRACT—TONNAGE FOR CARRIAGE OF COAL —DAMAGE.

Plaintiff firm was a dealer in coal at Mexican ports, and prior to 1912 had made shipments on vessels of defendant steamship company. At that time the parties entered into a contract by which defendant, for a term of three years from January 1, 1913, agreed to furnish vessels for carrying all the coal shipped by plaintiff, which was to be sent from certain ports of the United States at specified rates of freight. Shipments were made during the first part of 1913, when, owing to the unsettled political and business conditions in Mexico, plaintiff ceased further shipments and suspended its business, except for the sale of coal on hand. In 1915 plaintiff demanded five ships under the contract, which were refused. It made no effort to obtain transportation by other vessels and practically abandoned further shipments. *Held*, in an action for breach of the contract, that an instruction that plaintiff was entitled to recover as damages the difference between the contract rate and the current rate of freight was erroneous; that, assuming the validity of the contract, in the absence of evidence of loss in plaintiff's business, resulting from its breach, and the amount of such loss, there was no basis for the recovery of substantial damages.

2. CONTRACTS ⊂=175(1)—CONSTRUCTION—PREVIOUS COURSE OF BUSINESS.

It is presumed that, in making such contract, the parties contracted with reference to the quantity of coal reasonably required by plaintiff to carry on its established business.

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

Action at law by Adolfo Grimwood and Fernando Cavallo,[9] copartners doing business as A. Grimwood & Co., against the Munson Steamship Line. Judgment for plaintiffs, and defendant brings error. Reversed.

The defendants in error (hereinafter called Grimwood) had for a number of years before 1912 an established coal business in Vera Cruz, and perhaps other Mexican ports. They evidently had dealt with plaintiff in error (a steamship company, hereinafter called Munson) for some time before 1912, by obtaining transportation for American coal to Mexico. At the trial, Grimwood attempted to show the history of his relations and the extent of his dealings with Munson prior to the date of written contract sued on (July, 1912), but was prevented by the court. At the time just stated, the parties hereto made an agreement, of which the following is the important part: "[Munson] agrees to receive and transport by steamers, and [Grimwood] agrees to furnish for shipment from Baltimore, Md., Newport News, Norfolk, or Sewell's Point, Va., to Vera Cruz, Tampico, or Puerto Mexico, Mexico, all

of the coal and coke shipped by [Grimwood] from January 1, 1913, to December 31, 1915, for any of the voyages mentioned above; it being understood that [Grimwood] is not to ship coal or coke from any other United States port outside of Baltimore, Md., Newport News, Norfolk, or Sewell's Point, Va., to Vera Cruz, Tampico, or Puerto Mexico during the period mentioned above." Steamers were to be supplied on 10 days' notice, were not to exceed 5,000 tons coal cargo capacity, ports of loading and discharge were to be designated, and, if Grimwood called for more than 4,000 tons to be carried at one time, Munson could supply two steamers in response thereto. Freight rates were specified, which varied with the port of destination, and the number and capacity of the ships furnished.

Grimwood shipped some coal by Munson's steamers between January and June, 1913. By that time the political and business conditions in Mexico were such that he deemed it best, as he said, to ship no more, and "peddle out" what he then had at Vera Cruz, about 12,000 tons. He remained of this mind until March, 1915, when he notified Munson that he "required a steamer to load at Baltimore for Vera Cruz," not stating any intended tonnage: Munson refused to furnish one. Nothing further was done until November, 1915, when the United States recognized Carranza as "first chief" of a de facto government in Mexico, and Grimwood (as he says) felt that it was time to send more coal, wherefore he demanded four steamers, each to carry "approximately 4,000 to 5,000 tons," and to be ready to load at divers times specified, but all before December 31, 1915, the expiration date of contract. Munson again refused, and this action was begun in February, 1916, alleging large, but not specifically described, damages for breach of the contract of 1912; i. e., for refusal to furnish tonnage in 1915.

It appeared on the trial that Grimwood had made no effort to get transportation by any other vessels, that he had sent no coal whatever to Mexico after Munson's refusals, except some from Alabama by rail, much of which had been seized in transit by some alleged governmental Mexican authority, after which experience he had abandoned the effort. There was no evidence of any sales or attempted sales of coal by Grimwood in Mexico in 1915, other than the "peddling" aforesaid; but there was testimony of high and advancing prices for coal in Vera Cruz at that time, and of great advances in freight rates for water carriage after the outbreak of the European War in 1914.

The answer of Munson pleaded, in effect, that the so-called contract was invalid, and no contract in law, and had been abandoned by Grimwood. At the close of plaintiff's case, motion was duly made to dismiss, because there was no proof of damages, and such motion was repeated when both parties rested. The court, however, held as matter of law that the contract was valid, left the defense of abandonment to the jury, and instructed them that plaintiff's measure of damages, if in good faith he intended to ship the large quantities of coal, for which he demanded tonnage, was the difference between the contract freight on five shipments, of 4,000 tons each, and current freight on the same quantities at the times of the above stated demands, together with interest from the demand dates.

The jury returned a verdict for Grimwood for $45,000 and interest. To the judgment thereon Munson took this writ.

Kirlin, Woolsey & Hickox, of New York City (J. Parker Kirlin, John M. Woolsey, and Harry D. Thirkield, all of New York City, of counsel), for plaintiff in error.

Kellogg, Emery & Cuthell, of New York City (Frederick R. Kellogg, and Earle L. Beatty, both of New York City, of counsel), for defendants in error.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [1] This cause was submitted to the jury under a theory of damages so

unsuited to the facts developed by the evidence that a new trial is necessary. Damages are either compensatory or punitive; in this action on contract the latter may be disregarded; so that this plaintiff is necessarily represented by the jury's action as having been compensated by this verdict for some loss or injury. This is a result imposed by law, which also forbids any verdict for more than nominal damages, when there is no lawfully proven pecuniary loss for which to award compensation.

The substance of the argument in support of the judgment below, is that the parties were dealing in a commodity; i. e., tonnage. Grimwood was entitled to get it from Munson, who unlawfully refused the demand; therefore Grimwood was properly awarded the difference between what he had agreed to pay Munson for it, and what it would have cost to get it elsewhere at the time of demand, irrespective of whether he got it or not, provided only he made the demand in good faith—i. e., apparently with a real intent to ship coal.

Tonnage is in a sense a commodity; so are railway and theater tickets, and many other things, which may or may not be directly productive of losses. If one buys tickets or tonnage to sell again, the profit or loss in such dealings is computable as if coal or grain or any other objects commonly bought and sold were the subject of bargain. But ordinarily the right of carriage or admission is an incident or preliminary to gain from that which is transported, or intellectual pleasure from that which may be seen or heard.

In this case, if Grimwood had actually sent coal to Mexico at an expense greater than Munson's price, there would have existed an actual expense, actually incurred, and requiring compensation on a familiar basis, without any regard to the ultimate fate of such Mexican coal venture. But this contract was (if valid at all, and by the very argument on its behalf) to supply the requirements of Grimwood's established business in respect of getting, for purposes of sale, American coal into Mexico; that is, what tonnage he could demand depended on the requirements, and the reasonable requirements, of an actual business. It did not depend on how much tonnage Grimwood wanted to take a risk on. For all that this record shows, instead of demanding four ships in November, 1915, 40 might have been called for.

Still less was it within the contemplation of the parties that Grimwood, without any proof of business destroyed by Munson's refusal, should collect as his damages for not getting coal, any part of the sums he did not pay for transportation. We assume that there was a real desire to send 20,000 tons of coal in one month to a market and a business that had not absorbed over 12,000 tons in two years; but there was no proof at all that such a procedure was a reasonable requirement for the business, either at the time when demand made, or at the date of contract. The relations between the parties as evidenced by the contract, and regarding that agreement as a "requirement" contract, were such that tonnage was for them not a commodity, like coal, but a service. Damages did not and could not flow directly from a refusal to transport coal, but only from the effect of such re-

fusal on the business of selling coal, and Grimwood's particular business of that nature.

It is quite possible that, during Mexico's period of especial anarchy, Grimwood had kept together a business of sorts, equally possible that what he had was ruined, or its rehabilitation prevented, by not getting coal in November and December, 1915; yet it is also not only possible, but on this record apparent, that he has been awarded a very large sum of money, not because he showed any loss, but solely because he was willing to risk some shipments to a region of which the business capabilities in 1915 are not shown at all. He has paid out nothing, and been rewarded for abandoning a risk; this is mere gambling. Loss in the business with reference to which the parties contracted must be shown. How that can or will be done cannot now be laid down. It depends on evidence not yet adduced; but there must be shown a loss in Mexico. The present verdict represents nothing but an absolutely unearned profit for not sending coal to that distracted country.

[2] The fundamental question in this case, whether the writing of July, 1912, is a "requirement" contract, or an unenforceable and illegal promise to obey the will or whim of Grimwood, we cannot decide on this record, with fairness to plaintiff below. As stated above, he was prevented from showing dealings with Munson before 1912; we do not know whether by such evidence the quantity of tonnage needed can be reasonably ascertained. It is presumed that "the intention of the parties, was to contract in reference to such quantity." This quotation is from our decision in Manhattan, etc., Co. v. Richardson, etc., Co., 113 Fed. 923, 51 C. C. A. 553, a case which as far as it goes still represents our views on this subject; whether it will cover this case, when presented by proper evidence, we cannot tell.

We may add, however, that, had no offer to show the extent and nature of Munson's previous knowledge of Grimwood's requirements been made, and the trial court had held the contract a "will, wish, or want" agreement, we should have agreed with such ruling on the Manhattan Case, supra, and the judgment of Sanborn, J., in Coldblast, etc., Co. v. Kansas City, etc., Co., 114 Fed. 77, 52 C. C. A. 25, 57 L. R. A. 696, which fully and ably covers the subject, so far as it can be divorced from facts peculiar to each transaction.

In so far as the language of decision in Ramey, etc., Co. v. Schroeder, etc., Co., 237 Fed. 39, 150 C. C. A. 241, seems to assert that an agreement otherwise void, as depending for effect on the will, wish, want, or whim of one party, is validated merely by the promise of such party to abstain from dealing in respect of the subject in hand, with any person other than the second party, we are compelled to think it inadvertently used, and to disagree.

Judgment reversed, and new trial awarded.

RENSSELAER & S. R. CO. v. IRWIN, Collector of Internal Revenue.

(Circuit Court of Appeals, Second Circuit. January 16, 1918.)

No. 70.

1. NOVATION ⟸5—WHAT CONSTITUTES.
A "novation" is a substitution of one debtor in place of another; the old debt being extinguished.

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

2. INTERNAL REVENUE ⟸7—INCOME TAXES—"INCOME."
Income Tax Act Oct. 3, 1913, c. 16, § 2, G(a), 38 Stat. 172, declares that the normal tax hereinbefore imposed upon individuals shall likewise be levied upon the entire net income arising or accruing from all sources during the preceding year to every corporation. Long prior to the passage of the act, plaintiff railroad company had leased its line to a second company, which agreed to pay the interest upon bonds issued by plaintiff, and to pay direct to each stockholder dividends at the rate of 8 per cent. per annum. Under the agreement, plaintiff received $1,000 yearly from the lessee to enable it to maintain its corporate existence. *Held*, in view of the fact that the agreement provided that the lessee should not pay any income tax that might thereafter be imposed on the dividends and interest, and that, if required by law to pay the same, it might deduct the amount from such interest and dividends, the dividends paid direct to the stockholders as rent must be treated as corporate "income" subject to taxation, for the provision for payment directly by the lessee was a mere labor-saving device.

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

3. INTERNAL REVENUE ⟸7—INCOME TAXES—LIABILITY.
A corporation is liable under Income Tax Act Oct. 3, 1913, § 2, G(a), imposing taxes on corporate income arising or accruing from all sources, even though it was not engaged in business and derived all its income as rent from its property.

Hough, Circuit Judge, dissenting.

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

Complaint by the Rensselaer & Saratoga Railroad Company against Roscoe Irwin, as Collector of Internal Revenue. A demurrer to the complaint was sustained (239 Fed. 739), and plaintiff brings error. Affirmed.

G. B. Wellington, of Troy, N. Y., for plaintiff in error.

D. B. Lucey, U. S. Atty., of Ogdensburg, N. Y., for defendant in error.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

WARD, Circuit Judge. This is a writ of error to a judgment dismissing the complaint on demurrer. The action is to recover taxes paid under protest by the plaintiff to the defendant as collector of internal revenue of the Fourteenth district of the state of New York assessed upon its income for the years 1913 and 1914 under section

2, G(a), of the Act of October 3, 1913 (38 Stat. 172, c. 16), which reads:

"The normal tax hereinbefore imposed upon individuals likewise shall be levied, assessed, and paid annually upon the entire net income arising or accruing from all sources during the preceding calendar year to every corporation, joint-stock company or association, and every insurance company, organized in the United States, no matter how created or organized, not including partnerships. * * *"

[1, 2] May 1, 1871, the plaintiff leased its railroad, equipment, and franchises for the term of its charter of 500 years and of any extension thereof to the Delaware & Hudson Canal Company, in consideration whereof the lessee agreed to pay an annual rent as follows: The interest on $1,625,000 of mortgage bonds made, guaranteed or assumed by the lessor; the interest and $5,000 annually on account of the principal of the lessor's bond to the city of Troy on account of the Troy Union Railroad Company; the interest on $375,000 of 7 per cent. bonds to be issued by the lessor, payment of interest guaranteed by the lessee; a dividend of 4 per cent., payable semiannually, on the lessor's capital stock; and the rents accruing and to become due on certain leases to which the lessor was a party. The lessee further agreed to stamp upon the lessor's bonds and stock on presentation a guaranty of payment of the interest and dividends aforesaid to the owners and holders. Every share of the plaintiff's stock is so stamped. It was, however, expressly provided that the lessee was not to pay the then income tax or any income tax that might thereafter be imposed on the said dividends and interest, and that, if required by law to pay the same, it might deduct the amount of tax so paid from the said interest and dividends.

The lessor covenanted to continue its corporate organization at the expense of the lessee, not exceeding $1,000 annually, and to co-operate with the lessee as far as legal and practicable to make the lease perpetual. The lessee from 1871 down to the present time has continued to be in possession of the lessor's properties and franchises, has operated and maintained the road, and has kept transfer books of the lessor's bonds and stocks.

The plaintiff contends that it has no other income than the $1,000 paid it annually by the lessee as expense of keeping up its corporate organization and an income from other sources amounting to $3,600 annually, and that the moneys paid as rent to the holders of its bonds and stocks is their income. On the other hand, the defendant contends that the rent, though so paid, is as matter of law income of the plaintiff. Judge Ray took the latter view, sustained the demurrer, and dismissed the complaint. We entirely concur with him.

It is true that the rent of its road does not go into the plaintiff's treasury and that it has no means of withholding the tax from it. It is also true that the rent reserved by the lease is paid by the lessee in fixed sums to third parties. All the same, the rent is the property of the plaintiff, and remains such, though by the terms of the lease paid out to others, whose rights are derived through it. While the rent is a debt of the lessee to the lessor, it is, as between the lessor and

its stockholders, the lessor's income, out of which the dividends, if any, are to be paid.

The application of the rent under the lease is a mere labor-saving device, the effect being exactly the same as if it be paid to the lessor and by it paid out as far as necessary to bondholders for interest, and the surplus in dividends to its stockholders. The description of the fixed sum to be paid by the lessee of 8 per cent. to the lessor's stockholders as a dividend shows that the payment is made as agent of the lessor.

To speak of the lease as a novation is a misuse of language. A novation is a substitution of one debtor in place of another, the old debt being extinguished. 29 Cyc. 1130. The lessee's guaranty of the payment of interest on the lessor's bonds does not substitute the lessee as debtor for the lessor, not extinguish the old debt by releasing the lessor from liability to the holders. It is merely an additional security likely to increase the market value of the bonds. Between the stockholders and the lessor, the relation of debtor and creditor does not exist, so that no question of the substitution of the lessee as debtor for the lessor can arise. The stockholders do not cease to be stockholders of the lessor because the lessee has agreed to pay them 8 per cent. per annum on their stock as a dividend. As we said in Anderson v. Morris & Essex R. R., 216 Fed. 83, at page 90, 132 C. C. A. 327, 334:

"But, to make the act applicable, the lessor company must not alone exist 'under the laws' of the state which created it. It must, in addition, have a net income over and above $5,000, etc. It is said the lessor company does not meet that requirement of the law, as no money was paid to it; the rentals having been paid, not to it, but to its stockholders and bondholders. The notion that a corporation is an artificial entity distinct from the members who compose it is a fiction of the law, which the courts recognize for some purposes and disregard for others. Without going into the matter at length, it suffices to say that the fact that the lessee paid the rent, not to the corporate entity, but to the stockholders and bondholders, cannot prevent the act from applying to the money so paid, if the other conditions of the act make its terms applicable. The fiction referred to cannot be permitted to accomplish a fraud upon the statute and an evasion of its obligations."

[3] The fact that the plaintiff is not engaged in business which, as we held in that case, would be conclusive against the liability for income tax under the act of August 5, 1909 (36 Stat. 11, c. 6), is wholly immaterial under the act of 1913, which taxes income "arising or accruing from all sources." We are not concerned with the questions how the plaintiff can pay the tax or how the government is going to collect it.

Decree affirmed.

HOUGH, Circuit Judge (dissenting). It seems certain that what is taxed is the income of the persons against whom assessment is made, not that of some one else. Nor is any peculiar signification given to the word "income," which ordinarily means "money, and not the expectation of receiving it, or the right to receive it at a future time." United States v. Schillinger, 14 Blatchf. 71, Fed. Cas. No. 16,228.

This plaintiff certainly never received this money, nor had it any right so to do, for by the terms of the lease the so-called "dividends" shall be paid direct to the shareholders. That is the shareholders' right, not at all a privilege of the plaintiff, nor a "mere labor-saving device." The test is: Would a payment by the Delaware & Hudson to the Rensselaer & Saratoga discharge the former's obligation or liability to the individual shareholders? It seems to me that reading the lease requires a negative answer.

The truth is "dividends" is an inappropriate and misleading word, for these recurring payments bear no relation to earnings, and are debts of the Delaware & Hudson to the shareholders severally, who own said debts as they arise or accrue, who could sue for them, and against whom the tax should be laid or assessed.

The quotation relied on from Anderson v. Morris & Essex R. R., supra, was not necessary to the decision of that case, and as obiter, is not an adjudication. As applied to the statute now under consideration, it produces this result, namely: That income arises or accrues to a person, though he has it not in possession, and does not even own the right to sue for and recover it.

On these grounds I dissent.

WILSON & WILLARD MFG. CO. v. UNION TOOL CO. et al.

(Circuit Court of Appeals, Ninth Circuit. February 11, 1918. Rehearing Denied May 13, 1918.)

No. 2996.

1. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—UNDERREAMER.
   The Double patent, No. 734,833, for an underreamer, is for a combination of old elements, must be limited to the device shown and described, and is not entitled to a broad range of equivalents. As so construed, *held* not infringed.

2. PATENTS ⟸246—INFRINGEMENT—COMBINATION OF OLD ELEMENTS.
   While a combination of elements, all of which are old in the art, may be invention, the combination must be considered as a unitary structure; and, if a defendant omits one or more of the material elements, he does not infringe.

3. PATENTS ⟸241 — INFRINGEMENT — MECHANICAL STRUCTURES — "EQUIVALENT."
   To make one mechanical device the "equivalent" of another, so as to establish infringement, it must appear, not only that it produces the same effect, but that such effect is produced substantially by the same mode of operation.

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

4. PATENTS ⟸165—RULES OF CONSTRUCTION.
   A patent is no broader than its claims; and, if the language of the claims is clear and distinct, the patentee is bound thereby.

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

Suit in equity by the Union Tool Company, Edward Double, Rosa Eichenhofer, as administratrix of the estate of Frederick Eichenhofer, deceased, and George Chadderdon, against the Wilson & Willard Manufacturing Company. Decree for complainants, and defendant appeals. Reversed.

For opinion below, see 237 Fed. 837.

Raymond Ives Blakeslee, of Los Angeles, Cal., for appellant.

Frederick S. Lyon, of Los Angeles, Cal., for appellees.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. On appeal by the Wilson & Willard Manufacturing Company from a decree in favor of the Union Tool Company finding the Double patent No. 734,833, issued in 1903, valid and infringed as to claims 1, 2, 6, 7, and 8. Injunction and accounting were ordered. Wilson v. Union Tool Co. (D. C.) 237 Fed. 837. As will be seen by an examination of Union Tool Company v. E. C. Wilson, 249 Fed. 736, — C. C. A. —, No. 2918, decided this day, the patent has to do with an underreamer for drilling oil wells.

[1] The District Court found that the Double underreamer took the lead in oil well tool trading over all former underreamers, and in deciding the case treated the main question involved as pertaining to what range of equivalents complainant was entitled to under the patent in suit, and held that the Double underreamer constituted combinations of decided merit, which entitled complainants to a fair range of equivalents. The claims involved are as follows:

(1) "An underreamer comprising a hollow mandrel furnished with an internal shoulder, a downward extension having opposite parallel bearing faces having a keyway therein, shoulders at the sides of such extension, and upwardly and inwardly sloping dovetail slipways beneath said shoulders; a spring on the shoulder in the hollow mandrel; a rod playing in the mandrel, furnished with a key seat and supported by the spring; dovetail tilt slips playing in the slipways and furnished with key seats, respectively; a key in the key seats of the slips and rod, and playing in the keyway of such extension, to hold the slips against the shoulders; said slips being furnished with inward projections to slide upon the downward extension of the mandrel to spread apart the cutting edges of the slips when the slips are drawn up."

(2) "An underreamer furnished with a mandrel having a downward extension provided with opposite parallel bearing faces and a keyway in the extension; a spring-supported rod furnished with a key seat and playing up and down in the mandrel; tilt slips slidingly connected with the mandrel and furnished with inward projections to slide upon the opposite bearing faces of the downward extension to spread the slips apart at the lower ends when the slips are drawn up; and a key carried by the rod and carrying the slips."

(6) "In an underreamer, a mandrel furnished with a hollow slotted extension, the lower end of which slopes upward at the edges; tilt slips slidingly connected with the mandrel and furnished on their inner faces with projections, the upper faces of which slope downward to slide upon the extension of the mandrel; and means connecting the slips with the rod."

(7) "In an underreamer, the combination with a hollow mandrel, provided with a slotted extension, a spring-actuated slip-operating rod provided with

a pivot key, tilt slips provided with key seats adapted to be engaged by said pivot key, said key seats being somewhat larger than the key to allow the slips to tilt, said slips provided with inwardly projecting shoulders, and said slotted extension provided with surfaces adapted to tilt said slips and hold the same in expanded position."

(8) "In an underreamer, the combination of a hollow mandrel with a hollow slotted extension, said extension having opposite parallel bearing faces, a slip-carrying rod in said mandrel, slips connected to said rod, said slips having projections which bear against said extension, said slips being provided with key seats, a key carried by said rod, each end of the key lying in a key seat of a slip, and the key seat in each slip being somewhat larger than the key to allow the slips to partake of a tilting action."

The finding of the District Court was that "the chief novel feature of the Double invention was the tilting means adapted for the collapsion and expansion of the cutters in combination with interrelated dovetails on the cutters and ways of the body extension," and that there was no anticipation. The errors assigned are based on these several contentions: That the Wilson underreamer does not include the fundamental elements of the Double underreamer, namely, the "hollow slotted extension" with opposite parallel bearing faces with upwardly and inwardly inclined dovetailed ways; that the Double underreamer was but a transitory step in the art; that the Double underreamer was, in effect, abandoned by the predecessors of the appellee because of the success of the Wilson underreamer; that Double, the patentee of the patent in suit, was not the original and independent inventor of the combination claimed in the patent in suit; that the finding of the court that the essence of the Double invention was the open dovetailed slipways with dovetail cutters, coacting therewith, and means for expanding the cutters and to cause them to tilt on the suspension means, was error.

[2] It is clear that all of the elements of the Double combination patent, No. 734,833, were old in the art. This being true, the claims of invention in the patent should be limited to the specific combinations of elements as covered in the claims of the patent. Combination of elements which are old in the art undoubtedly may be invention, but the combination must be considered as an entirety or unitary structure. If defendant omits one or more of the material elements which make up the combination, he no longer uses the combination; and it is no answer to say that the omitted elements are not essential, and that the combination operates as well without as with them. Leeds & Catlin v. Victor Talking Machine Co., 213 U. S. 301, 29 Sup. Ct. 495, 53 L. Ed. 805; Evans et al. v. Hall Printing Press Co., 223 Fed. 539, 139 C. C. A. 129. It must also be established by one who alleges infringement of a combination that the entire combination, as a unitary structure and having substantially the same mode of operation, is present in the alleged infringing machine. Owens v. Twin City Separator Co., 168 Fed. 259, 93 C. C. A. 561.

[3] To make one mechanical device the equivalent of another, it must appear, not only that it produces the same effect, but that such effect is produced by substantially the same mode of operation. Has the Union Tool Company, appellee, shown that the underreamer de-

vice involved is a combination of the same elements as the Wilson device, and that their mode of operation is substantially the same? Western Engineering Co. v. Risdon Iron & Locomotive Works, 174 Fed. 224, 98 C. C. A. 132. In the Double combination there is a hollow mandrel with inner shoulder, a downward extension with a shoulder at the side of the extension, a spring on the shoulder in the hollow mandrel, a rod playing in the mandrel supported by a spring, and a key at the lower end of the rod to carry the cutters. All of these elements were old in the art; but it is to be reiterated the court found that the chief novel feature of the invention was the tilting means adapted for the collapsion and expansion of the cutters, in combining that tilting means with interrelated dovetails on the cutters and ways of the body extension. The court also found that none of the underreamers of the prior art combined cutters "tilting over the lower end of the reamer body with shanks having dovetails so interrelated with dovetail ways upon the body of the reamer as to afford inner, outer, and lateral bearings when in the reaming position."

In the Double reamer we find the hollow mandrel, the mandrel having a longitudinal hole for the reception of the spring and rod. The hole has a lateral shoulder upon which the spring is seated; the lower end of the mandrel has a downward extension which is hollow or drilled for the reception of the spring-actuated rod and for the reception of the key, upon which slips are hung, and there are opposite parallel bearing faces upon which the inward projections of the slips rest when in reaming position. The bottom of the downward extension has rounded faces with shoulders. At the side of the downward extension there are dovetails sloping upwardly and inwardly beneath the shoulders and joint member, which subdivides the mandrel and confines the rod and its spring.

In the Wilson underreamer we find a hollow mandrel having a longitudinally drilled hole for the reception of the spring-actuated rod, but there is no internal shoulder upon which the spring seat rests. The spring seats there move upon a removable key or block. Wilson et al. v. Bole & Double et al., 227 Fed. 607, 142 C. C. A. 239. The seating of the spring upon the removable key, instead of upon a fixed shoulder in the mandrel, appears to be novel; but in the Double device the key performs the service of connecting the slips with the spring-actuated rod. In the Wilson mandrel we find the bottom has two prongs, terminating in lugs, which spread the cutters apart into reaming position and hold them so spread, and as described in Union Tool Company v. Wilson, supra, above the lugs there are parallel shoulders in dovetails which form ways for the shoulders on the cutter shanks. The devices operate upon different principles and under different modes of operation. The mandrel of the Wilson has no internal shoulder, no downward extension with its hollow, no slot, no opposite parallel bearing faces, and no rounded or beveled lower edge; nor has it shoulders at the side of the downward extension, nor dovetails sloping upwardly and inwardly beneath the shoulders, nor what

is called the "sub" or extra joint in the body of the underreamer. The hollow or longitudinal hole in the Wilson mandrel, the hole being for the reception of the spring and rod, and the shoulders inside of the prongs for the reception of the cutter shanks being parallel, do not permit a sliding action of the shanks of the cutters upon the suspension means to permit tilting, but merely allow the lower ends to swing toward each other, a pendulum swing, pivoting on the point of suspension, the integral cross at the bottom of the spring-actuated rod.

This mode of operation is new with Wilson, and is covered by his patent, No. 827,595. In the Double reamer the slot is not only a key guide, but its lower walls act as a stop for the key, or the downward travel of the rod, key, and cutters. The Wilson device has no such part, with any such functions, in the open spring between the prongs of the body. In the Wilson reamer No. 2, the removable key in the body serves the double function of supporting the spring at its lower end and acting as a stop to arrest the downward travel of the rod by engaging with the upper wall of the elongated slot in the rod. The means used in this rod-affecting function are quite different in the Wilson reamer from those employed in the Double reamer, and we do not understand that the Wilson pronged type of underreamer can be held the equivalent of the hollow slotted extension type of the Double reamer body. It is significant that the slot features of the Double extension, with its two functions, is lacking in the Wilson reamer.

Proceeding, we find that the tilt slips in the Double reamer, connected with the mandrel and with dovetails, play in the slipways on the mandrel, with key seats larger than the key, with inward projections which slide upon the downward extension of the mandrel, and with the upper faces of these inward projections sloping downward. In the Wilson cutters there are not inward projections which slide upon the downward extensions of the mandrel, nor are there the upper faces of the inward projections sloping downwards. In fact, the Double cutter does not contain shanks; whereas, the Wilson cutter has a cutter head and a long shank. The design of the cutter in the Wilson device, co-operating with the special design of the mandrel, allows the cutter heads to bear solidly against the prongs when in reaming position, but, when collapsed, the cutter head is below the prongs and the shanks are in between the prongs. This interrelationship between the Wilson pronged mandrel and the Wilson cutter with its shank and head and bearing on the projecting shoulders of this head enables an operation whereby the portion of the mandrel which serves to spread the cutters and hold them apart in reaming position is not between the cutters when the cutters are in collapsed position. The description of such construction is that the cutters can be given a very great strength, inasmuch as no material has to be removed from them to make room for the spreading device when the cutters are collapsed.

In the Double underreamer the rod plays in the mandrel, is supported by a spring, contains a key seat, in which is a key which plays in

the slot or keyway in the downward extension. and the key has a notch to permit the rod to engage it and thus to prevent displacement. Wilson shows a rod or stem with a cross or T which as a single member plays in the mandrel, is supported by the spring, and draws the cutters upward into reaming position. But there is no key seat nor key playing in the slot or keyway of the downward extension of the mandrel. A slot cut in the rod or stem of the Wilson reamer appears to allow room for a vertical play of the rod or stem; but the seats for this key are in the mandrel, and not in the rod, and the key is a part of the mandrel not belonging to the rod or stem. Comparison of the elements of patents shows in the Double device the downward extension, the slot in the downward, and the inward projections in the slips; none of these elements appears in the Wilson reamer. On the other hand, Wilson shows certain novel elements not contained in the Double underreamer. The tilting action of the cutters of the Double device, due to the presence of the spreading member or downward extension between the cutters at the time of collapsion, is not to be had in the Wilson reamer, for, as already indicated, there is no part of the mandrel between the cutters at the time of collapsion, upon which there could be a tilting.

It is contended that the tilting action of the Double cutters is not old in the art, in that the Double underreamer shows shoulders removed high up on the slips close to the key, which acts as a fulcrum, and that the location of the shoulders causes the sudden collapse of the cutters. But an examination of the claims of the Double reamer fails to show the inclusion of that feature in the patent; moreover, the quick collapse of the cutters in the Double reamer is due to the fact that they do not collapse during the downward movement, when they are sliding upon the opposite parallel bearing faces of the downward extension, except that slight collapse enabled by the outward travel of the upper ends of the cutters on the key. But, when the inward projections of the slips pass off of these opposite parallel bearing faces, then we have the collapse of the cutters. The record shows that this operation causes what is called "plunging," and which is obviated in the Wilson underreamer, because of the fact that the cutters there collapse from the beginning of the downward movement.

[4] Inasmuch as the invention of Double was not broad and primary in its character, we believe that the doctrine of equivalents is not broadly applicable (Paper Bag Patent Case, 210 U. S. 405, 28 Sup. Ct. 748, 52 L. Ed. 1122), and that, therefore, the inclined bearing faces on the prongs of the Wilson device are not the equivalent of the opposite parallel bearing faces on the downward extension of the Double underreamer. It is thoroughly well established that the patentee is limited to his claims, and the patent is no broader than the claims, and, if the language of claims of the patent is clear and distinct, the patentee is bound by the language he has employed. Keystone Bridge Co. v. Phœnix Iron Co., 95 U. S. 274, 24 L. Ed. 344. Claim No. 1 of the patent involved does not describe any means of

producing the tilting action, and none of the other claims herein involved covers both the interrelated dovetails and the tilting means found by the court to be the essence of the invention of Double. There is no doubt of the success of the Wilson device, for the record shows that it met with immediate sale and great favor. The Double underreamer should be held to have been a step in the art, carried forward by Wilson's invention.

In conclusion, we hold that in the device designed by Wilson—the fork or pronged type of underreamer mandrel and the cutters and body with shanks to co-operate with lugs and ways on the mandrel, so as to allow having the spreading prongs or forks between the cutters when in reaming position, and with the hollow spreading device between them, when in collapsed position, with the cutters collapsed upon these prongs, instead of tilting or spreading—Wilson has invented, and that his device is distinct from the Double invention.

With respect to the contention of the appellee that the Double underreamer was the first successful device, we need only say that the record contains much evidence to the effect that there were other types of successful underreamers, namely, the Swan, Austrian, Plotts, Kellerman, O'Donnell & Willard, and others. None of them was wholly successful, but they were used until the Double underreamer came in and was more successful than any of its predecessors had been. But the Double underreamer was also not wholly satisfactory, because of the frequent breaks of the cutters, and it dropped behind after Wilson invented.

It must be held that the Double patent should be strictly construed, and the patentee, having limited himself to the elements of his combination, is limited in the construction of his claim to the devices shown. Oriental Tissue Co. v. Louis De Jonge & Co. (D. C.) 235 Fed. 296. The importance of this point is emphasized by the record, which shows that Double canceled his claim No. 8 and substituted claim No. 7, limited his specification, and amended his claims to provide for opposite parallel bearing faces upon his hollow slotted extension. He thus eliminated from his claim those things which were excluded by surrender of scope and of definition of his claimed combination. Wright v. Yuengling, 155 U. S. 47, 15 Sup. Ct. 1, 39 L. Ed. 64; Roemer v. Peddie, 132 U. S. 313, 10 Sup. Ct. 98, 33 L. Ed. 382; Greene v. Buckley, 135 Fed. 520, 68 C. C. A. 70.

What is called the Jones round-nosed reamer, which was introduced in evidence as one of the earlier forms of reamer, appears to have had dovetail cutters operating in open dovetail slipways, the cutter extending the periphery of the body to contact with the casing above the spreading bearings and above the fulcrum point; and the evidence shows that Double saw the Jones round-nosed reamer before he made the reamer of the patent in suit. It was also the opinion of the District Court that the tilting action of the cutters, as disclosed in the Brown patent, No. 687,296, was the same as that used by Double, excepting that the cutters were not actuated by the downward motion of the suspension means.

Appellant contends that the District Court erred in its view that the cutters in the Brown reamer patent were not actuated by the downward motion of the suspension means, and that the cutters do travel downwardly as the suspension means travels downwardly, and are positively actuated by such suspension means. We find it difficult to reach a satisfactory opinion upon this point, but it looks as though there was a tilting of the cutters in the Brown reamer substantially like the tilting in the Double reamer.

The decree of the District Court must be reversed, and the cause remanded, with directions to dismiss the complaint and to dissolve the injunction.

UNION TOOL CO. v. WILSON.

(Circuit Court of Appeals, Ninth Circuit. February 11, 1918. Rehearing Denied May 13, 1918.)

No. 2918.

1. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—UNDERREAMER.
The Wilson patent, No. 827,595, for an underreamer, *held* not anticipated and valid, and claims 9 and 19 infringed.

2. PATENTS ⟸238—INFRINGEMENT—OMISSION OF PARTS.
That an alleged infringer does not use all the features of the patented device does not negative infringement.

3. PATENTS ⟸314—SUITS FOR INFRINGEMENT—CONSOLIDATION.
Under equity rules 19 (198 Fed. xxiii, 115 C. C. A. xxiii) and 26 (201 Fed. v, 118 C. C. A. v), a District Court has power to consolidate for trial patent causes which involve the same patent, where the parties are the same, although it effected a broadening out of the charge of infringement over a prior election in the record.

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

Suit in equity by Elihu C. Wilson against the Union Tool Company. Decree for complainant, and defendant appeals. Affirmed.

For opinion below, see 237 Fed. 847.

Frederick S. Lyon, of Los Angeles, Cal., for appellant.

Raymond Ives Blakeslee, of Los Angeles, Cal., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. Appeal from an interlocutory decree in favor of Wilson, appellee, plaintiff, against the appellant, Union Tool Company, defendant, holding that Wilson patent No. 827,595, for an underreamer, patented July 31, 1906, was valid particularly as to claims 2, 4, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, and 19, and was infringed as to

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claims 9 and 19 by the manufacture and sale or lease of the so-called "Double Improved and Type F" underreamers of a kind introduced as exhibits. Accounting was also decreed. The defendant denied infringement, and pleaded prior invention and want of novelty. The case was heard in the lower court in conjunction with Wilson & Willard Manufacturing Co. v. Union Tool Co., Edward Double et al., 249 Fed. 729, — C. C. A. —, decided contemporaneously with the present case, wherein interlocutory decree was made in favor of the Union Tool Company, finding the Double patent, No. 734,833, for underreamers, valid and infringed as to claims 1, 2, 6, 7, and 8 thereof, and providing for accounting and costs. The parties to the two suits are not identically the same, but the suits pertain apparently to the same interests, as one of the plaintiffs in the last referred to suit is the defendant in the present appeal, and the defendant in 2996, the Wilson & Willard Manufacturing Company, is the same company as in this case, 2918. The same general interests have been found to use the invention of the other interests, with its own, in the making of its underreamer product. The two suits were instituted under letters patent for underreamers for enlarging oil well holes to allow the lowering of the casing. The Double underreamer patent, 734,833, was issued in 1903, and, as stated, the Wilson patent in suit was issued in 1906. In both suits prior patent art was relied upon as a defense, and in both cases it was found that neither patent was anticipated; that is, that the underreamers made by the defendant in the one case infringe the Double patent, and the underreamers manufactured in the other case infringe the Wilson patent.

[1] Claims 9 and 19, found infringed, are as follows:

(9) "An underreamer body terminating in prongs forming a fork and provided with shoulders on the inner faces of the prongs which form cutter ways and terminate in downwardly projecting lugs, and cutters mounted between the prongs of said fork and having shoulders inside the fork and faces to bear on the projecting lugs."

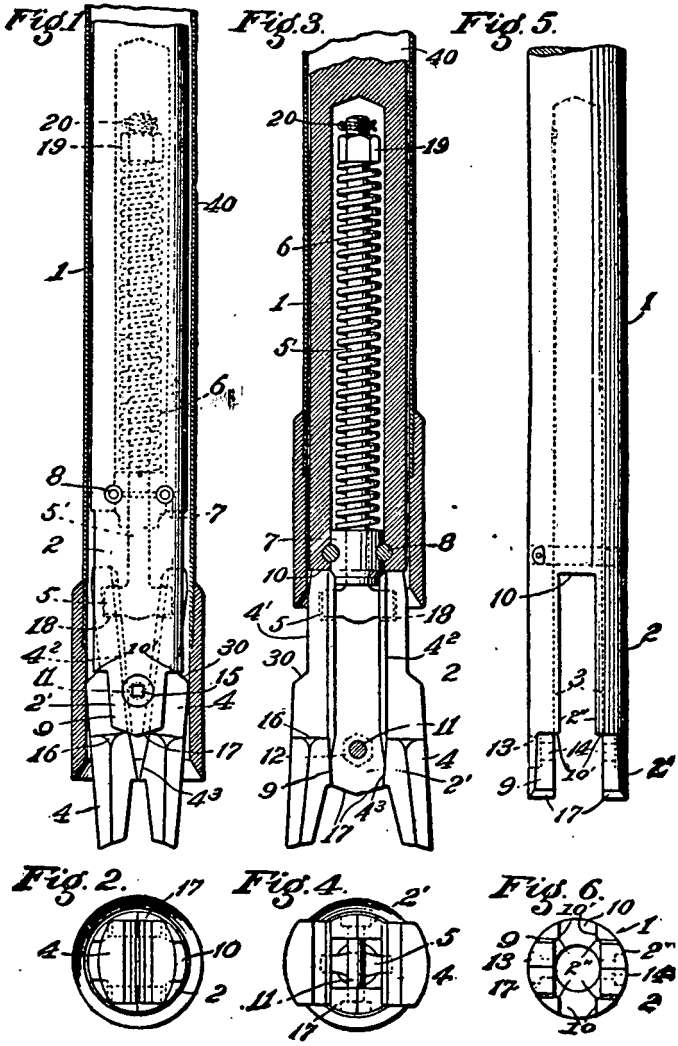
(19) "An underreamer comprising a body terminating in two prongs, and cutters each having two shoulders and a bearing face on the inner side of each of the two shoulders to engage said prongs."

The contention of the appellee is that claims 9 and 19 use the term "prongs" to designate the portions of the body which are provided with other working features, such as shoulders on their inner faces and the downwardly projecting lugs at their lower ends; that the term "prongs" is used as defining the bifurcated structure at the lower end of the body, which, under the Wilson patent, permits the cutters to collapse closely together, approaching each other between such prongs and likewise permits assembling at the bottom of the reamer and remachining. It is not contended by the appellee that this close collapsing operation of the cutters is found in the underreamers of the Union Tool Company, which are said to infringe; but it is insisted that the interrelation and other construction pertinent to the provision of shoulders on the inner faces of the prongs and downwardly projecting lugs at their lower ends, with both of which the

cutters co-operate, have been adopted by the appellant as also have been the assembling and remachining advantages. To this, therefore, we will confine our consideration.

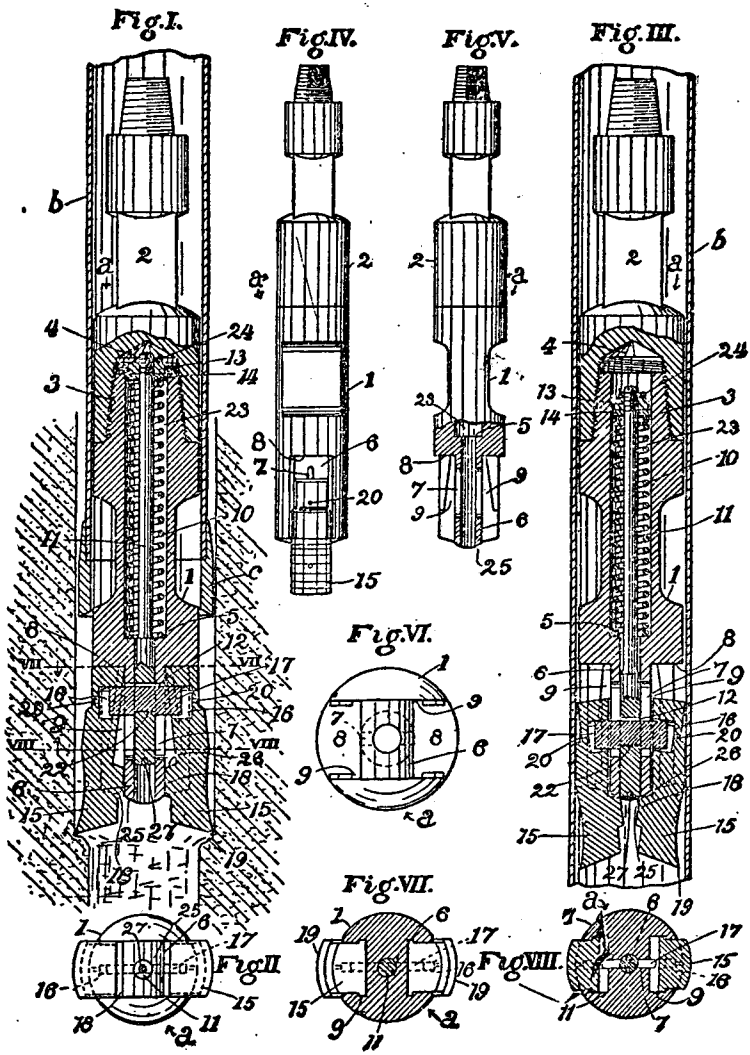
Wilson, in his underreamer, shows a hollow elongated body provided at its lower ends with the projections or prongs forming a fork and terminating at their lower ends in downwardly projecting lugs; such prongs having shoulders on their inner faces to form ways for cutters. The cutter shanks have bearing shoulders which engage inside of the ways, the cutters also having expansion bearing faces on lateral shoulders, which expansion faces coact with the spreading bearings on the lugs which hold the cutters apart. The lugs terminate at their lower ends in beveled end faces over which ride bearings, in which the expansion bearing faces terminate at their upper ends, thus causing the cutters in the main to be expanded and permitting them in the main to be collapsed, although the spreading bearings are slightly upwardly and outwardly inclined to terminate the expanding action and initiate the collapsing action by coaction with the expansion bearing faces. The cutters are pivotally connected with a spring-actuated rod or stem at a T-head or cross at the lower end thereof; the connection being by means of recesses or pockets in the inner faces of the cutters. These pockets are formed in the cutter shanks. The spring-actuated rod or stem is received within the hollow body of the underreamer, and adapted to move endwise therein; the spring which actuates such rod or stem being confined between a nut threaded onto the upper end of such rod, and a holding device shown in the patent to consist of a block which forms a seat for the spring at its lower end, and through a hole or bore in which the rod or stem may play, such block being held in place in the hollow body by dowel pins or the like. Down-thrust bearings on the body between the prongs co-operate with the upper ends of the shanks of the cutters, and other down-thrust bearings are in the nature of shoulders on the forks at the lower ends of the shoulders on the prongs, and which co-operate with the cutters at the zone of the bearings. In-thrust upon the cutters in action is taken by the spreading bearings to which it is imparted by the expansion bearing faces, and out-thrust of the cutters is taken by the shoulders of the ways on the prongs which co-operate with the bearing shoulders on the cutter shanks. The cutters are provided with certain shoulders on their outer faces, which coact with the casing or shoe, causing the cutter to be collapsed when the underreamer is to be elevated and withdrawn through the casing. A detachable crosspiece or safety bolt is provided between the lugs at the lower ends of the prongs, which to a certain extent braces the prongs and also prevents the cutters and the T or cross from dropping into the hole and being lost, in case the rod or stem should break, and similarly prevents dropping of either cutter in the hole in case a fracture should occur through the cross or T. This detachable crosspiece is held in place in two bolt holes in the lugs, within one of which fits a nut into which one end of the bolt is screwed by a suitable implement. For convenience the illustrations may be referred to.

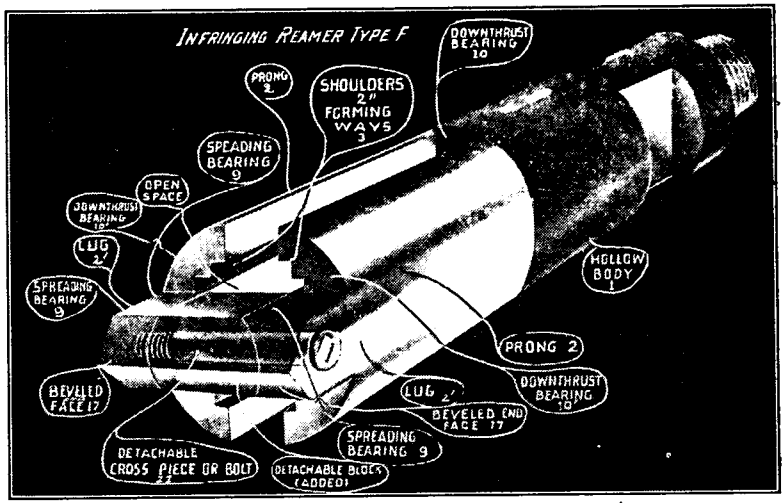
E. C. WILSON UNDERREAMER.

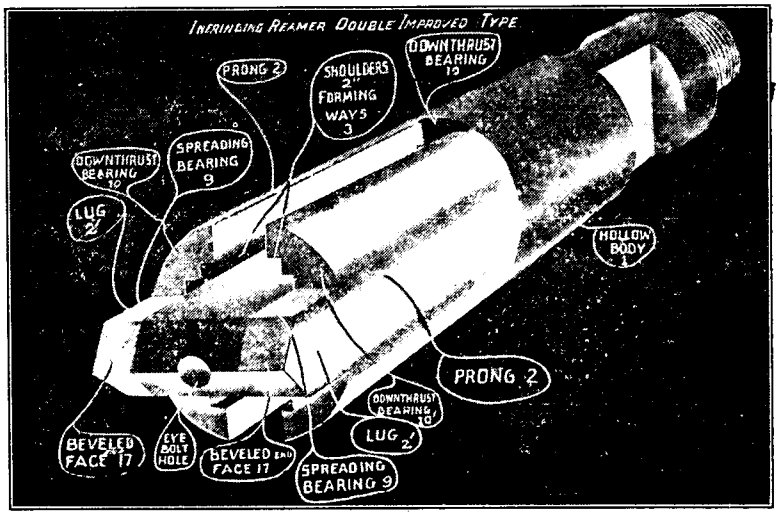


DEFENDANT'S EXHIBIT DOUBLE PATENT NO. 1.

E. DOUBLE UNDERREAMER.




INFRINGING REAMER TYPE F
DOWNTHRUST BEARING 10
PRONG 2
SHOULDERS 2" FORMING WAYS 3
SPREADING BEARING 9
OPEN SPACE
DOWNTHRUST BEARING 10
LUG 2'
SPREADING BEARING 9
HOLLOW BODY 1
PRONG 2
BEVELED FACE 17
LUG 2'
DOWNTHRUST BEARING 10
BEVELED END FACE 17
SPREADING BEARING 9
DETACHABLE CROSS PIECE OR BOLT 24
DETACHABLE BLOCK (ADDED)


INFRINGING REAMER DOUBLE IMPROVED TYPE
DOWNTHRUST BEARING 10
PRONG 2
SHOULDERS 2" FORMING WAYS 3
DOWNTHRUST BEARING 10
SPREADING BEARING 9
LUG 2'
HOLLOW BODY 1
PRONG 2
DOWNTHRUST BEARING 10
LUG 2'
BEVELED FACE 17
EYE BOLT HOLE
BEVELED END FACE 17
SPREADING BEARING 9

In use the cutters are drawn down against the expansive action of the spring, the rod or stem and the cutters moving together, and the expansion bearing faces moving over the spreading bearings until the bearings ride over the beveled end faces, permitting the cutters more closely to approach each other, or swing together, in which action they may be accommodated between the prongs, so that the cutters may be entered into the well casing. The underreamer is lowered through the casing with the cutters so collapsed, and the cutters are retained in such positions of collapsion due to their confinement within the casing. But, when the cutters emerge from the lower end of the casing or the shoe thereon, they are permitted to expand, the expansion bearing faces riding up over the spreading bearings until the upper ends of the shanks of the cutters come against the down-thrust bearings of the cutter, and, if the parts are so specifically formed, the bodies of the cutters at their sides are brought up against the down-thrust bearings. The reaming of the hole is necessary in order to cut away the annular shoulder or wall in the hole which remains beneath the casing after a certain period of drilling operation has ensued; this annular shoulder remaining because the drilling bit has an outside diameter less than the inner diameter of the casing. The underreamer is brought into position to remove the shoulder, and its cutters are expanded in the space immediately above the shoulder and beneath the shoe of the casing, which is elevated to make clearance between it and the shoulder for the cutters. The cutters being in expanded positions, the underreamer is reciprocated in the hole, or raised and permitted to drop alternately by means of a drilling line which is attached to the walking beam in the derrick at the mouth of the hole. The cutters attack the formation of the shoulder, and chip it or break it away, and reduce it to chippings which are mixed with water within the hole by a circulating system to produce a mud which is led away from the mouth of the hole by a bailer. When the underreaming operation has gone on to a point practically coincident with the bottom of the drilled hole and the casing has been lowered correspondingly, the underreamer is put into condition for withdrawing from the hole by elevating it until the shoulders come into engagement with the lower end of the shoe on the casing, which pinches the cutters inwardly and causes the expansion bearing faces to ride downwardly over the spreading bearings until the bearings are brought into engagement with the beveled end faces upon the lugs, over which latter they ride until the cutters assume the collapsed positions. The body of the underreamer travels upwardly, while the cutters remain relatively stationary, and when the cutters have assumed the collapsed positions they enter the casing or the shoe, and being confined by such casing, and so held in collapsed condition, the entire underreamer is elevated and withdrawn from the casing at the mouth of the hole.

Appellee urges that an important feature of the underreamer is the possibility of assembling the underreamer or cutters, the spring-actuated rod and its spring, and the body, at the lower end of the underreamer, without employing a middle joint in the body or a cap

or joint at the upper end thereof, and contends that this advantage flows from the combination of parts and features provided by Wilson and which was not possible before Wilson invented. It is pointed out that the Double patent, No. 3, although showing a construction and interrelation of features whereby the cutters and spring-actuated rod and its spring may be removed at the lower end of the body, nevertheless, part of the body has to come away with these parts.

We now turn to the evidence of infringement of the claims referred to. The bodies in type F of the Double underreamer and in the Wilson underreamer are surmounted by a square and suitable threaded joint for the attachment of a string of tools. In both reamers the main bodies are single pieces, and in the bore of such reamers is placed a spring for flexibly supporting the underreamer cutters. At the lower end of the bore are fork-mouthed extensions which have on their inner faces grooves or dovetail ways for the retention of the cutters, these co-operating with the dovetails on the shanks of the cutters. At the lower end of the prongs are bearing faces which bear against the inner faces of the cutters on the body of the cutters, and in the Double reamer this bearing extends somewhat up on the shank of the cutter. On the lower end of the prongs are holes to receive a bolt, which bolt is threaded into one of the prongs after passing through the hole in the other. In the Double reamer type F the bolt is arranged to support a loose or movable block which does not exist in the Wilson reamer. This block forms an extension of the bearing faces on the lower ends of the prongs, which bearing faces coact with the cutters when in expanded position. There are, on the lower ends of the prongs in both the Double and Wilson underreamers, upwardly and outwardly inclined bearing faces, with angles of outward inclination of the lowermost bearing faces on the prongs of the Double reamer; the angles being the same in both devices. The effect of the angle is to regulate the pressure of the cutter against the walls of the casing when passing into and out of the well. The cutters in both devices consist of a body surmounted by a shank with the dovetails on the shank, a shoe notch on the outer edge of the shank, and suitable tapered bearing faces at the lower end of the shank, which bearing faces are intended to ride against the casings when the cutters are collapsed, and a tapered inclined portion just above the shoe notch. The body of the cutters consists of a curved exterior portion meeting with two parallel lateral faces. The inside portion of the body is cut out or relieved of the upper curved portion, below which is a straight portion or plane surface at right angles to the lateral planes of the cutter body. Above this in both reamers is a plane face, which forms bearing faces on the outward extensions or shoulders of the body of the cutters beyond the shank. The upper end of the shank of the cutter shown in the Wilson patent is a slot against which bears the prong or extension called the T-bar of the underreamer. In the Double reamer the cutter has, near the upper end of the shank, a square lug projecting inwardly with a shoulder which bears against a projection on the lower end of the T-bar or cross. In both reamers there are,

at the upper end of the T-bar, suitable threads for the reception of the nut, also holes for a cotterpin, and cotterpin for supporting the upper end of the spring.

In the Wilson patent the lower end of the spring is supported upon a block, which in turn is supported by pins which rest against the holes in the body. In the Double reamer (type F) the lower end of the spring bears against a key, the lower edge of the key resting against holes or slots in the sides of the underreamer body, the key having suitable downward projections for retaining the same in the body and passing through an enlarged slot in the T-bar. In the Wilson patent the block consists of a cylindrical piece with suitable reception notches at the sides of the pins. The lower portions of the block extend down and form a thrust bearing between the upper ends of the cutter shanks. In the Double reamer there are shoulders on the inside of the prongs, which form a bearing at the upper end of the shank of the cutter to prevent inward displacement of the shanks, but the main portion of this is supported by the pressure of the lug at the inward and upward end of the cutter shank against the lower end of the T-bar. The dovetail ways on the cutters of the Wilson patent engage in the body with shoulders, which are parallel to the axis of the underreamer body. In the Double reamer (type F) the shoulders on the shank of the cutter bear against upwardly and inwardly inclined dovetailed ways on the insides of the prongs of the underreamer body. In the Wilson patent the bearing faces at the lower ends of the prongs on the underreamer are inclined upwardly and outwardly, while in the Double reamer the faces are parallel. In the Double patent on the face of the cutter at the lower end of the shank, where the same joins the body of the cutter, and outside of the dovetailed ways on the shank, are auxiliary dovetail ways which extend upwardly for a distance of approximately one inch in the exhibit produced. These dovetailed ways do not appear on the cutters of the Wilson patent drawings. On the back of the shank of the cutter or inside of the same is a notch, with a short downwardly and inwardly inclined plane at its lower edge, and its upward edge is an inwardly inclined plane, which is cut in the back of this cutter for the purpose of preventing the collapsing over the inserted block, which rests on the bottom bolt and also upon the slight inward shoulders on the lower ends of the prongs. In the Wilson patent no such notching appears.

The testimony shows that the block which is held in place by the detachable bottom bolt in the type F reamer is for the purpose of forming an extension of the bearing faces at the lower ends of the prongs in the underreamer body; but the underreamer would be as operative without the block as with it. This being true, it would appear as though the object of providing the block was to distinguish the underreamer type F from the Wilson underreamer by an attempt to make the bearing surfaces on the lower ends of the prongs of the underreamer continuous, whereas in the Wilson underreamer they are separate and distinct. The block can be put in position, but the evidence is that, if the lower end of the underreamer body is worn

by use, it would probably be difficult to extract the block from the lower end of the reamer, and when extracted that it would be difficult to replace it where it belonged.

Another point emphasized in the evidence was that in type F reamer there is no such hollow-slotted extension as had been shown in certain other underreamers made by the Union Tool Company. In the type F there is a horizontal hole through the block. The evidence is that probably the lowest limit of the spring-actuated rod would butt against the block; such action being like that which occurred in the old hollow slotted extension reamers by the key butting against the lower end of the slots in the hollow slotted extension. It appears that there was a loosely mounted key passing through the spring-actuated rod of what was called the Double improved reamer and cutters. But the key in type F reamer, held in holes or openings in the body and passing through a slot in the spring-actuated rod, was to be found in the Wilson underreamer, manufactured by the Wilson & Willard Manufacturing Company after the spring of 1911.

Letters patent have been issued for an underreamer disclosing and claiming a key similar to the one referred to in combination with the other parts and features. Wilson et al. v. Double & Bole, 227 Fed. 607, 142 C. C. A. 239. The evidence discloses that when the detachable block is in place, and held in place by the bottom bolt in the type F reamer, the tendency is to assist the action caused by the shoulders on the lower ends of the prongs on the underreamer in expanding and collapsing of the cutters. The key, when in place, supports the lower end of the spring when the parts in the reamer are all in working position, and limits the downward movement of the spring-actuated rod by the contact of the upper edge of the slot in the spring-actuated rod coming in contact with the upper edge of the key. The real purpose of the block and bottom bolt is to prevent loss of parts out of the underreamer body in case the spring-actuated rod or key are broken, but the block in itself forms an extension of the bearing face of the lower ends of the prongs or forks at the lower end of the body.

Without extending the statement of the evidence, it is sufficient to say that a reading of it satisfies us that there are various decided advantages incident to co-operation and coaction of the several parts and features, in the expanding and collapsion of the cutters, the imparting of in-thrust and up-thrust and out-thrust, the prevention of rotatory action, prevention of what is called "keyholing," and achieving of a more effective and extended cutting zone and cutter action, and gaining of more stock in the cutters to utilize. It is quite apparent from the evidence that the conception of Wilson has resulted in a reamer with end cutters, disposed for operation at the lower end of the body, in which there are the advantages of a proper expanding and collapsing, and better provision for in-thrust with the parts capable of being assembled in an open mouth in the bottom and in which the lower end of the reamer could be remachined, and in which the solid T could be used. To accomplish these many desired

and formerly unattained features and characteristics, Wilson has invented by an operative and efficient combination, and we believe that infringement as to claims 9 and 19 has been well shown. The old idea prior to Wilson was to expand entirely by inwardly directed shoulders or surfaces entirely under or within the bodies or shanks of the cutters, and to Wilson is due the conception of provision of lateral shoulders and co-operating lateral surfaces upon the body for expansion and collapsion, in-thrust and prevention of rotatory action. In certain prior reamers, for example, defendant's patent No. 3, there were what are called "spaced stub projections" for supporting part of the underreamer body, and in defendant's exhibit Jones Removable Bowl Reamer there are spaced ways for cutters, surrounded by a bowl with which the cutters have to co-operate in expanding and collapsing. But Wilson has invented, so that nothing is required except prongs and cutters and up-thrust on the body in all of the underreamer expanding, collapsing, and working actions and strain resistances. He did away with the bolt, and no part of the body has to be removed for assembling the cutters and other features, and has done away with the necessity for assembling of parts at the lower end of the body, and other features as shown in the Double patent No. 3. The Double patent No. 3 shows a pin fixed in place and impossible of removing, but in the Wilson invention no joint had to be removed, and no stationary wall or hollow slotted extension had to be disturbed in the ready disassembling of the parts for removing the cutters. None of the prior reamers were capable of being remachined at the lower end without cutting away the spring-holding shoulder. But in the type F there appears to have been the use of such advantageous features.

We think the lower court was correct in its comments upon the plea of anticipation. The view taken was that, in the companion case it being held that the Wilson device infringed the Double patent, and that the Double patent was not anticipated by the prior patents referred to in that hearing, it followed that, in so far as the alleged anticipatory patents preceded the Double invention in time, none of them anticipated the Wilson invention, and with respect to the patents issued and the devices designed and used prior to the Wilson application for patent, and not shown to be prior to the Double invention, no anticipation was had. The District Court pointed out the essential differences of the so-called Jones removable bowl reamer, and held that the forks in the bowl reamer, while forming ways for the cutters, were not joined at the bottom in any way, and that the shanks of the cutters at all times bore against the prongs and did not collapse between them, and that the bearing at the end of the prongs, affording the inner face of the cutter, had in the removable bowl reamer, did not anticipate the bearings afforded by the lug face of the Wilson patent. The combination of parts in the bowl reamer was not the same, nor was the action the same, nor did the Jones, nor did what is called the O'Donnell & Willard underreamer (patent No. 762,435), have shoulder prongs with ways and cutters with shoulders

on the ways. In fact, what is spoken of as the "bowl mouth" in the Jones reamer could not be taken away without rendering the reamer inoperative.

[2] We believe that the Double patent No. 1 does not suggest the pronged formation, to permit close collapsion of the cutters assembled at the bottom of the reamer, or as carrying bodies for a lug element or cutter ways; nor do we find in Double patent No. 2 anticipation of the Wilson invention. There are, in this patent, supplemental lugs or dovetails on the cutter entering pockets or grooves, said to hold the slips and prevent them from spreading outwardly; but these are out-thrust bearings forming ways, and the lugs become supplemental dovetails or shoulders on the cutters added to the shoulders in the Double patent No. 1. The fact that the appellant has not used each attribute of the Wilson invention cannot excuse it from being held to infringement. The Paper Bag Case, 210 U. S. 405, 28 Sup. Ct. 748, 52 L. Ed. 1122; Stebler v. Riverside Heights Association, 205 Fed. 735, 124 C. C. A. 29; Parker v. Automatic Machine Co. (D. C.) 227 Fed. 451; Jackson Fence Co. v. Peerless Fence Co., 228 Fed. 691, 143 C. C. A. 213; Walker on Patents, § 350.

[3] Appellant makes much of the action of the court in consolidating the causes heard in the District Court, and of the action of the court in the consolidated cause as to the several types of reamers belonging to the appellant; but we find no error on the part of the court in its rulings and procedure. Under equity rules 19 (198 Fed. xxiii, 115 C. C. A. xxiii) and 26 (201 Fed. v, 118 C. C. A. v) the court was authorized to make the orders that it did; the appellant had its day in court, and presented its full defense. Inasmuch as the subjects of claims 9 and 19 are found in each of the defendant's improved reamers, including types D, E, and F, performing the same functions in substantially the same way, to produce the same results and obtain the same benefits, the appellee is entitled to a decree against the appellant.

The order, therefore, will be that the decree of the District Court is affirmed.

WONDER MFG. CO. v. BLOCK et al.

(Circuit Court of Appeals, Ninth Circuit. May 6, 1918.)

No. 3118.

1. TRADE-MARKS AND TRADE-NAMES ⊂⊃59(1)—INFRINGEMENT—WHAT CONSTITUTES.
Where plaintiffs had a trade-mark in the word "Wizard," defendant's sale of goods identical in appearance under the name "Wonder" was an infringement.

2. TRADE-MARKS AND TRADE-NAMES ⊂⊃3(4)—APPROPRIATION—WORDS SUSCEPTIBLE OF.
The words "Arch Builder" and "Heel Leveler," used in connection with insoles in shoes, are susceptible of exclusive appropriation as trademarks, since they are used in a secondary sense, for the terms of themselves do not suggest the purpose of correcting defects of the human foot; the first signifying one who builds arches, and the second suggesting the shoemaker's trade.

3. PATENTS ⊂⊃324(5)—REVIEW—INJUNCTION.
On appeal from an interlocutory injunction in a patent case, the appellate court will go no further than to ascertain whether the court below abused its discretion; therefore, where it was not disputed that there was an infringement by defendant, the question of the extent of the infringement will not be reviewed.

4. PATENTS ⊂⊃312(2)—INFRINGEMENT—ACTIONS—EVIDENCE.
Though an earlier patent was not set up in the answer or by notice, it is admissible in an infringement suit as evidence of the state of the prior art, and to aid in construing the claims of the patent asserted to have been infringed.

5. PATENTS ⊂⊃312(2)—ACTIONS—EVIDENCE.
Though a prior patent was a mere paper patent, and there was no evidence that the invention had ever been used, it is admissible on the question whether a device infringes a subsequently issued patent.

6. PATENTS ⊂⊃328—VALIDITY—ANTICIPATION.
The Block patent, No. 1,127,349, for the support of the anterior metatarsal arch of the foot, *held*, in view of the prior art, to have been anticipated and not to show invention, as to claim 1, for a flexible insole having a portion located beneath the anterior metatarsal arch of the foot of the wearer, and means for adjusting the thickness of the insole at one or more points along the line of such arch.

7. PATENTS ⊂⊃328—SCOPE—INFRINGEMENT.
Block patent, No. 1,127,349, claim No. 2, *held* limited by the language of the claim, and, as limited, not infringed.

8. PATENTS ⊂⊃172—CONSTRUCTION—LIMITATION.
Where a patentee was not the first in the field, and there had been earlier similar inventions, the scope of the invention must be deemed limited, by the language of the claim, to the construction therein specified.

9. PATENTS ⊂⊃112(3)—ISSUANCE—PRESUMPTIONS.
The issuance of a patent creates a prima facie presumption of a patentable difference between the device for which a patent was issued and an earlier patented invention.

10. PATENTS ⊂⊃328—INFRINGEMENT.
The Block patent, No. 1,061,353, for an arch support, claims 1 and 4, which present the combination of an insole member, an insertion, and self-contained means carried by the insole member and insertion, whereby the insertion may be detachably secured at predetermined points, *held* not infringed.

Appeal from the District Court of the United States for the Second Division of the Northern District of California; Wm. C. Van Fleet, Judge.

Suit by Alexander E. Block and the Wizard Foot Appliance Company, a corporation, against the Wonder Manufacturing Company, a corporation. From a decree for injunction and order directing an account of profits and damages for infringement of trade-marks and patents, defendant appeals. Remanded with instructions to dissolve the injunction as to certain patents; the decree being otherwise affirmed.

Charles E. Townsend and Dewey, Strong & Townsend, all of San Francisco, Cal., for appellant.

Wm. A. Smith, of San Francisco, Cal., and James Love Hopkins, of St. Louis, Mo. (N. A. Acker, of San Francisco, Cal., of counsel), for appellees.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. This is an appeal from a decree of injunction and an order directing an account of profits and damages for infringement of three trade-marks and four patents, all issued to Alexander Block, and all relating to insoles for shoes. The trade-marks are the word "Wizard," certificate No. 110,976, issued June 20, 1916, and the technical trade-marks, "Arch Builder" and "Heel Leveler."

[1, 2] We think that the court below properly disposed of all questions which arise in connection with the use of the trade-marks. The word "Wonder," upon goods identical in appearance with the plaintiff's goods, conveys the same idea as does the word "Wizard," and its use is an infringement. National Biscuit Co. v. Baker (C. C.) 95 Fed. 135; Florence Mfg. Co. v. J. C. Dowd & Co., 178 Fed. 73, 101 C. C. A. 565; Aluminum Cooking U. Co. v. National Aluminum Works (D. C.) 226 Fed. 815; Daniel O'Donnell v. Riscal Mfg. Co. (D. C.) 228 Fed. 127. And the terms "Arch Builder" and "Heel Leveler," as used by the plaintiffs, are susceptible of exclusive appropriation, since they are used in a secondary sense. The primary meaning of "arch builder" is one who builds arches. No suggestion is conveyed that the arch referred to is the arch of the foot. The primary meaning of "heel leveler" is perhaps more obscure, but it is more suggestive of the shoemaker's trade than that of the chiropodist. It is only in its application to the plaintiffs' device that its significance becomes apparent.

[3] It is said that the decree of the court below as to infringement of patent No. 1,043,058, for an arch support, issued November 5, 1912, should be modified, so as to permit the use by the defendant of the arch support shown in plaintiff's Exhibit 5; the contention being that, in view of the limitations placed upon the scope of plaintiff's patent by the proceedings in the Patent Office and the language of the claim, which covers "a plurality of overlapping pockets," etc., the plaintiffs should be limited to the feature which distinguishes that combination from the prior art, to wit, the overlapping pockets, and,

inasmuch as Exhibit 5 shows no overlapping pockets, its use is not an infringement. The contention cannot be considered on this appeal. The decree contains no finding that Exhibit 5 infringes the plaintiffs' patent. It finds only that the defendant has infringed the claim of the plaintiffs' patent. It is not disputed that plaintiffs' Exhibit 3 presents a device which does infringe the patent. This court can consider only the question whether the court below erred in finding that there was infringement, and on the appeal from an interlocutory injunction in a patent case an appellate court will go no further than to ascertain whether or not the court below abused discretion in granting the injunction.. Kings County Raisin & Fruit Co. v. United States Consol. S. R. Co., 182 Fed. 59, 104 C. C. A. 499; Blount v. Société Anonyme, etc., 53 Fed. 98, 3 C. C. A. 455; Consolidated Rubber Tire Co. v. Diamond Rubber Co., 157 Fed. 677, 85 C. C. A. 349; Interurban Ry. & T. Co. v. Westinghouse E. & Mfg. Co., 186 Fed. 166, 108 C. C. A. 298.

The defendant admits its infringement of patent No. 1,191,655, issued July 18, 1916, for "combined heel and arch support," and abandons its appeal from the decree as to that patent.

[4] We are of the opinion that the defendant has not infringed letters patent No. 1,127,349, issued February 2, 1915, for a "support for the anterior metatarsal arch of the foot." The patent has two claims. The first is for the combination of "a flexible insole having a portion located beneath the anterior metatarsal arch of the foot of the wearer, and means for adjusting the thickness of the insole at one or more points along the line of said anterior metatarsal arch." The patent to B. Nathan, for an inner sole, December 17, 1907, may be referred to as showing the prior art. Nathan's inner sole contains a continuous transverse pocket beneath the metatarsal arch, wider at the outer-edges than at the center, and removable wedge-shaped fitting members for the pockets. The plaintiffs contend that the Nathan patent is to be disregarded, for the reason that it was not set up in the answer or by notice. But that is no objection to its use as evidence of the state of the art, and to aid in the construction of Block's claim. Grier v. Wilt, 120 U. S. 412, 429, 7 Sup. Ct. 718, 30 L. Ed. 712; Brown v. Piper, 91 U. S. 37, 41, 23 L. Ed. 200.

[5, 6] It is contended, also, that the Nathan patent is without probative value, for the reason that it is but a paper patent, and that there is no evidence that the invention has ever been used. But that fact does not affect its value as evidence upon the question of infringement. Universal Winding Co. v. Willimantic Co. (C. C.) 82 Fed. 228, affirmed, 92 Fed. 391, 34 C. C. A. 415; Packard v. Lacing Stud Co., 70 Fed. 66, 16 C. C. A. 639; E. L. Watrous Mfg. Co. v. American Hardware Mfg. Co. (C. C.) 161 Fed. 362. The Nathan patent presents all the features of claim 1 of the Block patent. It has a flexible insole located beneath the anterior metatarsal arch and means for adjusting the thickness of the insole at one or more points along the line of that arch.

[7-9] Block's second claim presents the combination of "a flexible insole beneath the anterior metatarsal arch, and a series of superim-

posed and overlapping members forming pockets mounted on the lower face of said insole, and insert members adapted to be removably seated in said pockets, substantially as described." The defendant's device has a single inclosed transverse pocket beneath the metatarsal arch, and four slits therein to permit the insertion and adjustment of an insert member, so that the same may be placed at any desired point along the line of the arch. It contains no superimposed or overlapping members forming pockets. If the Block invention were of such a character as to be entitled to broad construction, it might properly be held that the defendant's device presents a series of pockets, although in fact it is but one pocket, with a series of slits opening into the same. But Block was not the first to place pads in pockets in leather insoles, nor was he the first to place a pad beneath a metatarsal arch support. Pockets were old, and pads were old. He was the first, however, to use an insole containing a transverse series of pockets beneath the metatarsal arch. But his claim called for a series of "superimposed pockets," and we are of the opinion that, in view of the express terms of his claim and the state of the prior art, he should be held to have limited intentionally the scope of his invention by the language of his claim. Keystone Bridge Co. v. Phœnix Iron Co., 95 U. S. 274, 24 L. Ed. 344; McClain v. Ortmayer, 141 U. S. 419, 12 Sup. Ct. 76, 35 L. Ed. 800. By the superimposition of the pockets he obtained a structure which holds the pads in position without other attachment, and permits the location thereof at desired points on the line of the arch; whereas the defendant holds its pads in place by the metallic points which attach them to the lower covering of a single pocket.

We may advert also to the fact that on July 11, 1916, a patent, No. 1,191,122, was issued to James Brown, for a "foot corrector"; the invention showing an inclosed pocket beneath the metatarsal arch, the same containing slits at a plurality of points to permit the insertion of a pad, and the adjustment of the same in position, the device being identical with that used by the defendant, with the unimportant exception of the shape of the slits, and the means for attaching the pad. The issuance of that patent created a prima facie presumption of patentable difference from the Block invention. Hardison v. Brinkman, 156 Fed. 962, 87 C. C. A. 8; Miller v. Eagle Mfg. Co., 151 U. S. 186, 208, 14 Sup. Ct. 310, 38 L. Ed. 121.

[10] The defendant was held to have infringed claims 1 and 4 of patent No. 1,061,353, for an "arch support." Claim 1 presents the combination of "an insole member, an insertion and self-contained means carried by the insole member, and the insertion whereby the insertion may be detachably secured to the insole member at predetermined points." Claim 4 differs from claim 1 only in calling for a plurality of inserts, instead of a single insert. In the specifications the insole is described as containing imbedded therein a number of the sockets of ordinary glove fasteners, distributed at the heel, the instep, and at the ball of the foot. The insert is described as mounted with the obverse half of the glove fastener. No other locking device is mentioned, but the applicant said:

"It is obvious that the securing means may be any two-part separable locking device of which one part is seated in the insole member, and the opposite part in the lift or insertion, and which is therefore practically self-contained within the parts themselves, so that I am enabled to dispense with the use of bars, pockets, or other mountings in securing the lift or insertion to the insole member."

The defendant's device has no socket in the insole, has no two-part separable locking device of which one is in the insole and the other in the insertion, and it is not enabled to dispense with the use of pockets. It makes an insole with a pocket therein, and fastens its insertions by means of small sharply pointed metallic projections which penetrate the lower covering of the pocket. It uses no two-part device, and no interlocking device, and it does not attach the insert at predetermined points on the insole. These differences, we think, are sufficient to avoid infringement.

The cause will be remanded to the court below, with instructions to dissolve the injunction as to patents 1,127,349 and 1,061,353. In other respects the decree is affirmed. In the view of the defendant's inequitable use of advertising matter, we are not disposed to award costs to either party on the appeal.

TURNER v. DEERE & WEBBER BLDG. CO. et al.

(Circuit Court of Appeals, Eighth Circuit. March 9, 1918. Rehearing Denied May 10, 1918.)

No. 4998.

PATENTS ⟸328—INVENTION—ANTICIPATION.

The Turner patent, No. 985,119, for improvements in reinforced concrete building construction, claims 1, 2, 4, 6, and 8 *held* void for lack of invention, in view of the prior art.

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

Suit by Claude A. P. Turner against the Deere & Webber Building Company and another. From a decree for defendants (238 Fed. 377), complainant appeals. Affirmed.

Frank A. Whiteley, of Minneapolis, Minn. (Willard Eddy, of Omaha, Neb., on the brief), for appellant.

A. C. Paul, of Minneapolis, Minn., for appellees.

Before HOOK, CARLAND, and STONE, Circuit Judges.

HOOK, Circuit Judge. This case involves claims 1, 2, 4, 6, and 8 of patent No. 985,119, issued February 21, 1911, to Claude A. P. Turner, the plaintiff, for new and useful improvements in reinforced concrete building construction. The trial court held the claims void for want of novelty and invention; also that defendants had not infringed. 238 Fed. 377. The plaintiff appealed.

In Turner v. Moore, 128 C. C. A. 138, 211 Fed. 466, we had previously decided that the elements of three of the claims, Nos. 1, 4, and 6, were old, and that it was not invention to bring them together as the plaintiff did. It is urged that that case is not conclusive of the one now before us, because the parties are not the same, and also because we have here two claims not then considered, and we are asked to consider much evidence not before presented or available. We have given due attention to these matters. The trial court discussed in detail the similarity of the two additional claims now involved to the three in the Moore Case and held there were no substantial differences. The court was clearly right; the differences were those of phraseology, not of principle or function, of which notice is taken in the patent law. The additional evidence in the present record has but served to confirm the conclusion in the prior case. The truth is that plaintiff was by no means a pioneer. The use of concrete in building construction was old. Its resistance to compression and susceptibility to other stresses in certain positions were familiar to all who had to do with it, as were the general principles of reinforcing it with wire, rods, or strips of metal which possessed the quality the concrete lacked. When the plaintiff entered, the art had so progressed that the nature of the stresses, and in a general way the places where the reinforcement should be disposed or arranged, were a part of the common knowledge of builders, as in greater degree was the subject of struts, braces, and the like in carpentry. In pretentious or complicated construction, where ordinary experience did not suffice, mathematical computation was available. The evidence of prior practice in building and prior publications and patents show that little was left for patentable invention in placing the customary pieces of metal here or there or turning them this way or that in the mass of concrete.

Since the Moore case the plaintiff's patent has been in judgment in the following cases: In Drum v. Turner, 135 C. C. A. 74, 219 Fed. 188, also in this court, it was held anticipated by the prior patent to Norcross, No. 698,542, April 29, 1902. In Turner v. Lauter Piano Co., 236 Fed. 252, the District Court for the District of New Jersey decided that claims 4 and 8 were void for lack of invention in view of the prior art. This conclusion was recently affirmed by the Court of Appeals of the Third Circuit. — C. C. A. —, 248 Fed. 930. That court said that the places at which the stresses or strains in given concrete constructions may be expected, "while susceptible of accurate mathematical ascertainment, are so well known that they are determined empirically by many engaged in the art." The court added:

"There is to-day 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."

The decree is affirmed.

T. A. WILLSON & CO., Inc., v. HUDSON PRODUCTS CO.

(Circuit Court of Appeals, Second Circuit. February 13, 1918.)

No. 154.

PATENTS ⇐328—INVENTION—DESIGN FOR GOGGLE FRAME.

The Bachman design patent, No. 43,514, for a design for a goggle frame, *held* void for lack of invention.

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

Suit in equity by T. A. Willson & Co., Incorporated, against the Hudson Products Company. Decree for defendant, and complainant appeals. Affirmed.

The following is the opinion of Manton, District Judge, in the court below:

Plaintiff sues for infringement of a design patent. Plaintiff is the present owner by assignment of letters patent No. 43,514, which were issued to Walter G. Bachman on February 11, 1913, for design for a goggle frame. The defendant is charged with manufacturing and selling goggles, the lenses of which are inserted in a goggle frame copied after the fashion and design of the plaintiff's patent.

The goggle frame is specified as: "Figure 1 is a front elevation showing the shape or configuration of the lens frames of the article of my new design, and Fig. 2 is a top or plan view showing the peculiar rear bowing of said lens frames, and which, in conjunction with the frontal formation of the said lens frames as shown in Fig. 1, define thereby main features of my said design invention." And he says: "I claim the ornamental design for goggle frame, as shown and described."

From an examination of the exhibits in the case, I am of the opinion that this design patent does not disclose invention. What has been done, if anything, in the patent in suit, has been to vary slightly the shape and disposition of the goggle frame of the otherwise old designs of goggle frames. I think the design so nearly resembles the prior art that it is not entitled to consideration. There is nothing that indicates patentable invention.

The bill will therefore be dismissed.

T. D. Rambaut, of New York City (Arthur C. Fraser, of New York City, of counsel, and Walter H. Stewart, of New York City, on the brief), for appellant.

Frederick P. Randolph, of New York City (Joseph F. O'Brien, on the brief), for appellee.

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

PER CURIAM. Decree affirmed.

UNITED STATES v. SCHWARTZ.

(District Court, N. D. Iowa, E. D. April 2, 1918.)

No. 4271.

COSTS ⟸304—EXAMINATION BEFORE COMMISSIONER.

In view of Rev. St. § 1014 (Comp. St. 1916, § 1674), declaring that a hearing before a commissioner or other magistrate shall be at the expense of the United States, defendant, against whom costs of the prosecution were assessed pursuant to section 974 (section 1615), cannot be charged with the costs of his preliminary examination before the United States commissioner; the amendment of Rev. St. §§ 5399, 5406, by Criminal Code (Act March 4, 1909, c. 321) §§ 135, 136, 35 Stat. 1113 (Comp. St. 1916, §§ 10305, 10306), so as to include a United States commissioner, within the purview of the acts providing for the punishment of persons intimidating witnesses before any courts, etc., not making the commissioner a court.

Walter L. Schwartz was convicted of a violation of the White Slave Traffic Act. On motion to tax against defendant the costs upon the commissioner's hearing in the preliminary examination. Motion denied.

The defendant was indicted for a violation of the White Slave Traffic Act (Act June 25, 1910, c. 395, 36 Stat. 825 [Comp. St. 1916, §§ 8812–8819]), and upon arraignment pleaded guilty thereto and was sentenced to imprisonment for 2½ years and to pay the costs of the prosecution. The United States attorney thereupon filed a motion to tax against defendant, as part of the costs, "all costs of the prosecution, the same to include the costs upon the commissioner's hearing in the preliminary examination," wherein the defendant was held under bail to appear before the grand jury, in default of which he was committed to jail to await the action of the grand jury.

F. A. O'Connor, U. S. Atty., of New Hampton, Iowa.

REED, District Judge (after stating the facts as above). The government has filed an elaborate brief in support of its contention that, under section 974 of the Revised Statutes, the costs upon the preliminary hearing of a person before a United States commissioner held to appear before the grand jury, are taxable as a part of the costs of the prosecution if the defendant is convicted, and should be included in the judgment against him upon his conviction. Such has not been the practice in this district since its creation.

This question was before Judge Trieber in United States v. Briebach (D. C.) 245 Fed. 204, where, upon a careful consideration of the statute and applicable authorities, he held that such costs were not a part of the prosecution of the defendant, and were not properly taxable, and ordered them excluded from the taxation of costs in that case, where they had been taxed by the clerk against the defendant at the instance of the Attorney General.

Section 974 reads in this way:

"When judgment is rendered against the defendant in the prosecution for any 'fine or forfeiture' incurred under a statute of the United States, he shall

be subject to the payment of costs; and on every conviction for any other offense not capital, the court may, in its discretion, award that the defendant shall pay the costs of the prosecution."

Section 1014 of the Revised Statutes expressly provides that the hearing before a commissioner or other magistrate under that section shall be "at the expense of the United States." It seems clear that neither of these sections directly authorizes the costs of the hearing before the commissioner to be taxed against the defendant. The commissioner, of course, is not a court, and has no power to enter a judgment against a person brought before him upon a preliminary hearing, for any purpose. Todd v. United States, 158 U. S. 278, 15 Sup. Ct. 889, 39 L. Ed. 982. He can only inquire and determine whether or not there are reasonable grounds to hold the person to appear before the court having cognizance of the offense with which he is charged; and proceedings before the commissioner as an examining magistrate are not the commencement of a prosecution for the offense of which the person may be accused. Virgina v. Paul, 148 U. S. 107, 119, 13 Sup. Ct. 536, 37 L. Ed. 386.

The rule is familiar that costs can only be awarded by a court to a successful litigant when the statute clearly so authorizes; and they should not be so awarded upon a strained or technical construction of the statute. The amendment of sections 5399 and 5406 of the Revised Statutes by sections 135 and 136 of the Criminal Code, whereby were added the words, "or in any examination before a United States commissioner or officer acting as such," were obviously intended to meet the decision of the Supreme Court in Todd v. United States, 158 U. S. above; but such amendment does not constitute the commissioner a judge, or a court of the United States, nor render a preliminary examination before a commissioner a proceeding "in any court of the United States."

As well might it be claimed that the fees of witnesses before a grand jury and of the marshal in summoning them before that body, in case an indictment is found, shall be taxed as a part of the costs of the prosecution of the cause, in the event an indictment is found and the defendant convicted upon a plea of guilty or a trial thereof, as that these costs shall be taxed as a part of the costs of the prosecution of said cause, and this motion to tax "all costs of the prosecution" is broad enough to include such fees and costs; but apparently the government does not contend that such fees could rightly be so taxed. The opinion of Judge Trieber in United States v. Briebach, above, and the cases there cited, so clearly state the rule that seems to me correct that it is unnecessary to consider the matter further.

The motion to tax the costs of this preliminary hearing against the defendant is therefore denied; and it is so ordered.

FLANDERS v. COLEMAN.

(District Court, S. D. Georgia, E. D. March 16, 1918.)

1. EQUITY ⟸410(7)—ORDER OF REFERENCE—PRESUMPTION.
Equity rule 59 (198 Fed. xxxv, 115 C. C. A. xxxv), declaring that, save in matters of account, a reference to a master should be made only upon a showing that some exceptional condition requires it, does not forbid a reference; and, where the cause is referred, it is to be presumed, on exceptions to the report, that the judge properly exercised his discretion.

2. EQUITY ⟸402—REFERENCE—OBJECTION—WAIVER OF OBJECTIONS.
Where either party objects to an order of reference on the ground that it is improper under equity rule 59, the proper practice is to move before the judge for revocation of the order; and a failure so to move is tantamount to acquiescence, as the point cannot be initially raised before the master.

3. BANKRUPTCY ⟸293(2)—JURISDICTION.
A court of bankruptcy is without jurisdiction, under Bankruptcy Act July 1, 1898, c. 541, §§ 23b, 60b, 67e, and 70e, 30 Stat. 552, 562, 564, 565, as amended (Comp. St. 1916, §§ 9607, 9644, 9651, 9654), of a suit in equity by the bankrupt's trustee to recover land, possession of which the bankrupt surrendered to his father within four months of adjudication, on the theory that title had passed to the bankrupt by virtue of a parol gift from the father; but the trustee's remedy is by suit in the proper state court, for there is no question of preference or voidable transfer.

4. BANKRUPTCY ⟸139(½)—MESNE PROFITS.
Where a bankrupt, whose father had allowed him to go into possession, demised the land, taking rent notes in his own name, such notes represent the mesne profits or issues of the land, and the right thereto will follow the ownership of the land.

In Equity. Suit by R. A. Flanders, trustee of M. C. Coleman, bankrupt, against E. J. Coleman. Dismissed, without prejudice, in event that the parties agree as to the proportionate amount of rent notes to which the trustee was entitled on account of the bankrupt's demise of his own land, with land the record title to which was in defendant, but, in event of failure, the suit retained as to such question, and otherwise dismissed.

Saussy & Saussy, of Savannah, Ga., for plaintiff.

F. H. Saffold and Arthur Jordan, both of Swainsboro, Ga., for defendant.

BEVERLY D. EVANS, District Judge. This is a suit in equity by the bankrupt's trustee against an adverse claimant to recover a tract of land and certain notes given by the tenant for the rent of it. The jurisdiction of the court is invoked under sections 60b, 67e, and 70e of the Bankruptcy Act, as amended. The general scope of the bill is to the effect that, many years prior to the bankruptcy, the father of the bankrupt, who is the defendant, made a parol gift of the land to the bankrupt, who entered into possession of the land, made valuable and permanent improvements thereon on the faith of the gift, and that under the laws of Georgia the bankrupt became vested with a complete title thereto. About a year prior to the bankruptcy the bankrupt made a parol lease of the premises for five years, taking five

notes, payable to himself or bearer, maturing annually, for the rent of the land. Within four months of the filing of the petition to be adjudicated a bankrupt, the bankrupt, while insolvent, surrendered possession of and control over the land, and delivered four of the rent notes to the defendant (the other having been previously hypothecated to a bank), with intent, as alleged, to hinder, delay, and defraud his creditors. The defendant denied that he made any gift of the land as alleged to his son, the bankrupt, and averred that the land belonged to him and never belonged to his son, and that his son's possession was permissive, and by virtue of his consent that he might have the use of the land, and that the son's possession was his possession, and that the rent notes, although taken in the name of the son or bearer, were his notes. The defendant also pleaded to the jurisdiction of the court.

The matter was referred to a master, who filed a report advising a judgment in favor of the trustee for the recovery of the land and of a stated sum collected from two rent notes, and also for the unpaid notes which had not matured. Exceptions are filed to the master's report.

[1, 2] The exception that the order of reference to the master is void under equity rule 59 (198 Fed. xxxv, 115 C. C. A. xxxv) is without merit. The rule does not prohibit a reference of an equity cause to a master. It declares:

"Save in matters of account, a reference to a master should be the exception, not the rule, and shall be made only upon a showing that some exceptional condition requires it."

It is to be presumed that the judge properly exercised his discretion in making the reference, and, if either party desired to controvert the propriety of the reference, the proper practice would be to move before the judge for a revocation of the reference. The failure to make such motion is tantamount to acquiescence, and the point cannot be initially raised before the master.

[3] The conflict in evidence before the master revolved around the factum of a parol gift. The trustee submitted evidence tending to show circumstances from which a parol gift of the land might be inferred, while that of the defendant was to the point that he had permitted the bankrupt to use the land, and that no gift of it had been made. The evidence further disclosed that the bankrupt made a parol lease of the land for five years, taking five notes, payable to himself or bearer, and that within four months before the filing of the petition he delivered four of the notes to the defendant, having previously used one of them. The bankrupt and the defendant denied that a parol gift of the land had been made, and insisted that the bankrupt's possession was by permission and with the consent of the defendant. Under these circumstances, the question is presented as to the jurisdiction of the District Court to entertain the suit.

The Bankruptcy Act, as amended by the Act of 1910, declares that:

"Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, except suits for the

recovery of property under section sixty, subdivision b; section sixty-seven, subdivision e; and section seventy, subdivision e." Bankruptcy Act, § 23, subd. "b."

Subdivision "b" of section 60 makes provision for the recovery of preferences given by the bankrupt within four months before the filing of the petition in bankruptcy. Subdivision "e" of section 67 makes provision for setting aside fraudulent conveyances, and the recovery of the property so conveyed, at the suit of the trustee. Subdivision "e" of section 70 provides that a trustee may avoid any transfer by the bankrupt which any creditor might have avoided, and may recover the property so transferred, or its value, from any person, except a bona fide purchaser for value. The bankrupt did not create or undertake to create a preference, nor did he execute a conveyance; so that the record does not bring the transaction within the operation of section 60b, or section 67e.

Section 70e relates to the avoidance of transfers by the bankrupt, voidable at the instance of creditors, and the recovery of the property so transferred or its value. I construe this section to limit actions to cases where the defendant is alleged to claim title, and its consequent advantages, under the bankrupt, by virtue of a transfer from him. I do not think that the transaction as disclosed by the evidence, viewed either from the aspect of the trustee or the defendant, shows any transfer by the bankrupt of the land. Evidence favorable to the trustee's contention that the defendant had made a gift of the land to the bankrupt goes no farther than the parties now deny that a gift ever was made. If there was a gift of the land, the title still is in the bankrupt, and he has made no transfer of it which a court of equity may cancel. The trustee's remedy is by suit in the proper state court to recover the land. Bardes v. Hawarden Bank, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175; Harris, Trustee, v. First National Bank of Mt. Pleasant, 216 U. S. 382, 30 Sup. Ct. 296, 54 L. Ed. 528; Newcomb v. Biwer (D. C.) 199 Fed. 529.

[4] The rent notes represent the mesne profits or issues of the land, and their ownership and right of possession to same, under the facts, would follow the ownership of the land. With respect to the rent notes, this feature, not disclosed by the pleadings, appears in the evidence: The notes were given for a body of land, which included a small tract of 50 acres, which belonged to the bankrupt. This 50-acre tract went into the possession of the trustee, and there is no contest over its ownership. The defendant makes no claim to so much of the rent notes as equitably represents the rent of the 50-acre tract, and offers to account for same. Under the special facts of the case, I think that, upon the defendant's accounting for the rent of the 50-acre tract, the action should be dismissed, without prejudice to the right of the trustee to institute a suit in the state court to recover the land and mesne profits.

Accordingly, if the trustee and the defendant can agree on the amount, upon the payment of the same, the action will be dismissed in this court, without prejudice. If payment be not made, then so much of the action as relates to the recovery of the notes be retain-

ed, so as to permit a recovery of the amount of the rent of the 50-acre tract.

Let an order be prepared to this effect.

THE MONTCALM.

(District Court, D. Maine, S. D. March 6, 1918.)

No. 377.

SHIPPING ⊂=84(3)—LIABILITY OF VESSEL—INJURY TO STEVEDORE.

Libelant, one of a gang of stevedores engaged in loading a ship with grain, was injured by the falling of a derrick, owing to the parting of a guy rope. The derrick was furnished by the ship, and was being used in taking on board a heavy appliance used in the loading. *Held*, on the evidence, that the breaking of the rope was not due to any defect or unsoundness, but to the fact that the derrick was canted by the stevedores, which subjected the rope to an unusual strain, and that the ship was not chargeable with any negligence which rendered it liable.

In Admiralty. Suit by John Conley against the steamship Montcalm. Decree for respondent.

William A. Connellan, of Portland, Me., for libelant.

Symonds, Snow, Cook & Hutchinson, of Portland, Me., for respondent.

HALE, District Judge. The libelant, one of a gang of stevedores in the employ of Robert M. Smith, on the 25th day of March, 1916, was engaged in loading grain upon the steamship Montcalm, at one of the Grand Trunk wharves. He was injured by the falling of a derrick, due to the parting of a guy rope, while the derrick was being used by the stevedore gang in taking aboard an appliance used in loading the grain. In this suit to recover damages, he alleges that his injury resulted from the failure of the ship to exercise reasonable care in furnishing suitable ropes for the derrick. He contends that the ship undertook to provide a completed derrick, with suitable guys for the stevedores' use, but that it did provide guy ropes, which proved to be unsafe and unsuitable, and which broke when exposed to a reasonable use.

The ship contends that the derrick, with its appliances, was erected by the ship and turned over to the stevedores with their approval; that Smith, the contracting stevedore, his walking boss, and his foreman, all men of experience in the work of loading and unloading ships, received the derrick and its appliances after due examination; that the rope constituting the guy was sound and suitable for the use for which it was designed; that the injury resulted, not from any defect in it, but from a negligent use of it; that, at the time of the injury, the stevedores were using the derrick in lowering a certain gooseneck, a heavy appliance used to supplement the spout through which the grain is carried, and constructed so that by means of a

joint it can be turned in either direction to deliver the grain from the carrier to the hatch; that, in so using the derrick, the stevedores canted it from the perpendicular position in which it had been left by the ship; and that this position brought an unusual, unreasonable, and unexpected strain on one of the guys, which parted and caused the injury.

It was clearly the duty of the ship to exercise reasonable care in providing the stevedores, who were performing a service for the ship, with a safe place in which to work, and safe appliances with which to work. The testimony shows that the rope constituted a part of the appliances of the derrick furnished by the ship; that on being subjected to a certain strain it did break. This alone is, of course, not enough to charge the ship with negligence. It becomes the duty of the court to examine the proofs, to see whether the injury occurred by reason of the ship's failure to exercise reasonable care in providing suitable appliances, including the rope in question.

It appears in evidence that the rope was examined by those in charge of the ship and pronounced to be a sound rope; that it was further examined by the stevedore and his men, and no fault found with it; and that it was afterwards under their exclusive control. The rope itself is in evidence, and has been submitted to various experts, who testify that they find no open or latent defect in it. After examination of all the testimony, I cannot sustain the contention of the libelant that the guy was affected with dry rot. The portion of it which parted is in court; no sign of dry rot is found upon it; nothing which competent experts pronounce to be dry rot is shown. It appears to be sound rope; it is declared by the experts to be sound rope.

The proofs show that the derrick had been used on the day before the injury, in moving the gooseneck and its attachment; that, after the derrick was turned over to the stevedores, it was swerved from the perpendicular position in which it had been left by the ship, and was canted over No. 5 hatch; that, by being so canted, it was subjected to greater strain than was originally intended; that on the night before the injury the gooseneck was left upon the wharf, and upon the morning of March 25th the stevedores were attempting, by means of the derrick and its appliances, to lower the gooseneck from the wharf to the deck of the ship, and place it over No. 5 hatch; it was low tide; the rail of the ship was on a level with the top of the wharf; the libelant was giving the signal to the winchman, and, when such signal was given, the gooseneck, with its attachment, slid upon the deck; the winchman put on the steam, after receiving the signal from the libelant; at this time the guy parted; the evidence tends to show that the rope broke at the moment when the weight of the gooseneck was put upon it and when the winchman put on the steam. The proofs tend to the conclusion that the rope parted when it was subjected to an unusual strain. In my opinion they fail to show that it broke by reason of any fault or negligence on the part of the ship. On the other hand, they tend to the conclusion that

the derrick, with its appliances, including the rope in question, was provided by men of experience, after competent examination, was accepted by stevedores of experience, and was afterwards used exclusively by the stevedores in the work of loading grain into No. 5 hatch. It is clear that the men on the ship who examined the guy, and the stevedores who accepted and used it, believed, and had reason to believe, that it was sound and suitable for the uses for which it was intended.

Upon the whole evidence, I think, the libelant has failed to show negligence, on the part of the ship, in failing to provide suitable derrick and appliances, including the guy rope in question. Nothing is shown which seems to me sufficient to charge the ship with fault in failing to anticipate that the rope would break when subjected to reasonable strain.

In The Henry B. Fiske (D. C.) 141 Fed. 188, 191, the libelant charged that a certain patent spring rider, which supported one of the anchor chains, was defective, and that the ship was guilty of negligence in maintaining such an appliance. Judge Dodge held that, on the evidence in the case, there was no reason for believing the rider defective, and no reason, on the part of the ship, for anticipating that the rider would break when exposed to reasonable strain; his conclusion was that the rider was not unsound in such a sense as to give the libelant the right to recover. In the case at bar, I think, the libelant fails to show that the ship was negligent in providing appliances which were unsound, in such a sense as to give the libelant the right to recover damages against the ship.

It is ordered that the libel be dismissed. I think, however, it is my duty to relieve the libelant from the payment of costs. He appears to have acted in good faith in supposing he had a remedy against the ship, when in fact his remedy was against the stevedore, if, upon the evidence, he can have a remedy against any one. The ship recovers no costs against the libelant.

COCA-COLA CO. v. DUBERSTEIN et al.

(District Court, S. D. Ohio, W. D. March 19, 1918.)

1. TRADE-MARKS AND TRADE-NAMES ⟸59(5), 70(4)—"UNFAIR COMPETITION"—WHAT CONSTITUTES.
   Where complainant had a registered trade-mark in the word "Coca-Cola," and had built up a large trade in that popular soft drink, defendant's sale of a competing soft drink under the name of "Coca and Cola," although his product, unlike that of complainant, contained no trace of the coca shrub or cola nuts, must be deemed "unfair competition," and an infringement of complainant's trade-mark, as defendant imitated the size and shape of the bottles in which complainant sold its product, and the word "and," between the words "Coca" and "Cola," was in such small type that purchasers might well deem they were obtaining complainant's product.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Unfair Competition.]
2. TRADE-MARKS AND TRADE-NAMES ⟸97—UNFAIR COMPETITION—INFRINGEMENT OF TRADE-MARK.
   Where, during the pendency of a suit by complainant, which had valid trade-mark in the word "Coca-Cola," and had built up a large business in the sale of that drink, to enjoin defendants from selling an imitative drink under the label "Coca and Cola," defendant's change of the label of his drink to "El-Cola" was a mere evasion, and sale thereunder was an infringement of complainant's trade-mark, which under the circumstances amounted to a contempt of court.
3. TRADE-MARKS AND TRADE-NAMES ⟸84 — INFRINGEMENT — LABELS — DEFENSE.
   Where, after complainant sued for infringement of its trade-mark, defendant with a paper label covered the infringing name blown in the bottles in which it sold its soft drink, that fact furnishes no protection, as the paper labels were likely to become detached; the bottles being in contact with ice and water while waiting for use.

In Equity. Bill by the Coca-Cola Company against Benjamin Duberstein, doing business as the Dayton Mineral Water Company, and others. Decree for complainant, granting an injunction and an accounting, and defendant Duberstein found guilty of contempt.

Matthews & Matthews, of Dayton, Ohio, Harold Hirsch, of Atlanta, Ga., and Frank F. Reed and Edward S. Rogers, both of Chicago, Ill., for complainant.

Dale & Kusworm, of Dayton, Ohio, for defendant Duberstein.

HOLLISTER, District Judge. [1] Beginning in 1886, complainant's predecessors had built up a large business in a syrup in which there was an infusion of an extract of coca shrub and of cola nuts; the latter made after, it is said, the cocaine is extracted from them. The syrup is the basis of a nonintoxicating beverage made by combining it with carbonated water. Since 1892, the complainant has been the exclusive owner and proprietor of the business. The product was named "Coca-Cola" at the beginning, and the beverage has been known under that name for more than 30 years. By the expenditure of millions of dollars in advertising it has become well known throughout

the land. The name means, and is understood by the public to mean, complainant's product. The name was registered in 1893 in the Patent Office, and again in 1895, in pursuance of the act of Congress of that year, was registered. The bottles in which it is sold are of uniform size and appearance, with the name "Coca-Cola" blown in them, and the caps of the bottles bear the trade-mark.

The defendant Duberstein, a bottler of soft drinks at Dayton, Ohio, under the name of Dayton Mineral Water Company, bottles a product purchased by him from one John D. Fletcher, who calls his product "John D. Fletcher's Carbonated Syrup, a genuine Coca and Cola Flavor." He was the president of the Nashville Syrup Company, enjoined from making and selling "Fletcher's Coca-Cola." 215 Fed. 527, 132 C. C. A. 39 (C. C. A. 6). The bottles in which Duberstein sells the product to the other defendants, saloon keepers, etc., at Dayton and vicinity, are approximately of the same size as Coca-Cola bottles, and in them is blown the words "Coca and Cola." The "and" is in small type, and the "Coca" "Cola" in script, imitating the script of the genuine Coca-Cola trade-mark. The defendant Coshocton Glass Company is the maker of bottles for Duberstein.

The validity of complainant's trade-mark as the exclusive property of complainant, has been established in a number of cases elsewhere and in this circuit. Coca-Cola Co. v. Nashville Syrup Co. (D. C.) 200 Fed. 153; 215 Fed. 527, 132 C. C. A. 39 (C. C. A. 6). Defendant's product is colored to an exact imitation of the color of complainant's by the use of caramel, which serves no other purpose. The cap on defendant's bottles contains the name "Coca and Cola" in red, with other descriptions indicating that the contents is a flavor of coca and cola. There is no trace of the coca shrub or cola nuts or coca leaves in it. The testimony shows conclusively that it was intended to deceive the consuming public, and in many proved instances did deceive; but, aside from this, the appearance, coloring, size, caps, the delivery slips, the name "Coca and Cola" blown in the bottle, make the product on its face a fraud on the complainant and on the public. The complainant is entitled to an injunction against all the defendants in accordance with its prayer, and for an accounting.

[2, 3] During the progress of the case, Duberstein sold his product as "El-Cola" in the same bottles in which he had been selling "Coca and Cola," covering the words "Coca and Cola," blown thereon, by a diamond-shaped label pasted thereover, on which was printed, in large type in white on a diamond-shaped black background, "El-Cola." By pasting on the label, Duberstein would change his "Coca and Cola" product to "El-Cola," and thereby escape the condemnation he evidently expected "Coca and Cola" would receive in this case. Thereby he is charged by complainant with contempt of court.

This is illustrative of a strange lack of perception on the part of defendant Duberstein, and by many, as the decisions show, in cases of infringement of trade-mark and unfair competition, that the courts deal with matters of substance rather than of form, and that the odor of fraud is difficult to remove. This case reeks with it. Why does the defendant use the word "Cola" at all? And why color its product

as it does? And why adopt the same size of bottles? The only purpose is to appropriate a part of the value of complainant's trademark and good will.

Pasting the label "El-Cola" affords no protection to defendants' illegal act. These bottles are in contact with ice and water all the time while waiting for use. Aside from the instances proved of the labels having become detached, their liability to become detached is so great as not to afford protection, even if their permanency would be a protection. Prest-O-Lite Co. v. Davis (D. C.) 209 Fed. 917, affirmed 215 Fed. 349, 131 C. C. A. 491 (C. C. A. 6); Prest-O-Lite Co. v. Bogen (D. C.) 209 Fed. 917; Prest-O-Lite Co. v. Avery Lighting Co. (C. C.) 161 Fed. 648; Evans v. Von Laer (C. C.) 32 Fed. 153; Wood v. Burgess (1890) 59 Law Jour. N. S. 11; Thwaites & Co. v. McEvilly, 20 Rep. Pat. Cas. 663, affirmed 21 Rep. Pat. Cas. 397, 401, 402.

It is also proved that defendants' "El-Cola" is palmed off by dealers as "Coca-Cola." But the label, if permanent, affords no protection. "El-Cola" is in itself an infringement of complainant's trade-mark "Coca-Cola." Complainant has cited more than 25 applicable decisions.

In addition to the injunction, plaintiff may take an order finding Duberstein guilty of contempt, the punishment to be determined when the formal order is taken.

In re McNEIL CORPORATION.

(District Court, D. Massachusetts. March 13, 1918.)

No. 25375.

1. BANKRUPTCY ⟸223—COURT—JURISDICTION—SCOPE.
   Under Bankr. Act July 1, 1898, c. 541, §§ 40, 52, 62, 30 Stat. 556, 559, 562 (Comp. St. 1916, §§ 9624, 9636, 9646), relating to compensation of referees and clerks, the question whether a referee in bankruptcy is entitled to an allowance for certain expenses is one within the general jurisdiction of the bankruptcy court.

2. BANKRUPTCY ⟸223—COURTS—ORDERS—COLLATERAL ATTACK—DEPARTMENT OF JUSTICE.
   An order of the bankruptcy court relating to expenses of referees and clerks being within its jurisdiction is not open to collateral attack, and the Department of Justice, if desiring to question such orders or expenses, must do so directly by intervening in a bankruptcy case if it has standing so to do.

3. BANKRUPTCY ⟸223—REFEREES—EXPENSES.
   Under Bankruptcy Act, §§ 40, 62, declaring that referees shall receive as full compensation for their services a fee of $15, and that the actual and necessary expenses incurred by the officers in the administration of an estate shall be reported and approved or disapproved by the court, and General Order in Bankruptcy No. 26 (89 Fed. xi, 32 C. C. A. xi), requiring the referee to keep an accurate account of his traveling and incidental expenses and those of any clerk or any officer attending him, the referee, being a judicial officer exercising much of the bankruptcy court's powers, may, where reasonably necessary, hire clerical assistance and the expense thereof is properly chargeable against the estate in which it is necessary, so expenses of clerical assistance in sending out notices to creditors may be charged against the estate.

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4. BANKRUPTCY ⟸223—CLERKS—EXPENSES.
Under General Order No. 35 (89 Fed. xiii, 32 C. C. A. xiii), declaring that the statutory compensation of clerks shall not include expenses necessarily incurred in publishing or mailing notices or other papers, a clerk of a court of bankruptcy is entitled to reimbursement from an estate for the expense of sending notices to creditors.

5. BANKRUPTCY ⟸223—REFEREES—EXPENSES.
Referees under Bankruptcy Act, §§ 40, 62, and General Order No. 26, are, where reasonably necessary, entitled to maintain offices for the transaction of their business as such, and the expense of maintaining such office may be prorated and charged to the various estates referred.

6. BANKRUPTCY ⟸223—REFEREES' EXPENSES—COMPUTATION.
General Order No. 26, requiring a referee to keep accurate accounts of his traveling and incidental expenses, and of those of any clerk or other officer attending him, does not require the expenses of clerical assistance in sending out notices to be computed for each particular case, but such expense may be based on a general average arrived at by careful computation and estimate covering many cases.

7. BANKRUPTCY ⟸223—REFEREES' EXPENSES—DISCRETION.
Though an estate revests in the bankrupt, where a composition is accepted by creditors and confirmed by the court, and the question whether a final meeting of creditors is necessary is doubtful, yet a referee, according to his practice, having called such meeting and sent out notices, may recover from the estate for such notices, no abuse of discretion appearing.

8. BANKRUPTCY ⟸438—COMPOSITION—ACCEPTANCE—EFFECT.
Where a composition is accepted by the creditors and confirmed by the court, the estate thereupon revests in the bankrupt.

In Bankruptcy. In the matter of the bankruptcy of the McNeil Corporation. On petition of the referee for allowance and payment of expenses. Petition granted.

Henry E. Warner, referee in bankruptcy, of New York City, pro se.
James S. Allen, clerk of court, of Boston, Mass., pro se.
James M. Olmstead, of Boston, Mass., amicus curiæ, for Association of Referees for New England States.

MORTON, District Judge. The McNeil Corporation, before adjudication, filed an offer in composition. This offer was assented to by the requisite number and amount of creditors, was approved by the referee, and was confirmed by the court. The required deposit was made with the clerk. The purposes for which the deposit was made were stated on the form entitled, "Summary of Composition Deposits," and included, "Referee's expenses not paid, $24." Upon the confirmation by the court of the composition offered, it was ordered that the sums deposited by the bankrupt be paid out by the clerk "according to the terms of the composition." To the same effect was the order for distribution of composition made in accord with form No. 63 (89 Fed. ix, 32 C. C. A. ix) annexed to the General Orders to Bankruptcy. No objection was made to the entry of these orders, and no appeal was ever taken therefrom.

The referee applied to the clerk for the payment to him of the $24 deposited for his expenses as above stated. The clerk, solely because of circular No. 757 under date of November 26, 1917, issued by the Attorney General to clerks of the United States District Courts, refused

to make the payment. The referee thereupon filed the present petition praying that such payment be ordered. The Department of Justice was advised of the proceedings by the clerk with the suggestion that the Attorney General might perhaps desire to be heard thereon. The reply was, in substance, that the department did not regard circular 757 "as an order to clerks, or referees, but simply as advice to them of the views of the department and the fact that certain suits had been filed." See U. S. v. Waters, 133 U. S. 208, 10 Sup. Ct. 249, 33 L. Ed. 594. Certain suits (which I understand to be those referred to) have since been decided adversely to the government's contention. U. S. v. Brainerd (District Court, Eastern District Oklahoma) 250 Fed. —, opinion Pollock, J., February 6, 1918.

The items charged by the referee which are drawn in question by the proceedings are the following:

"(1) Expense of services of clerical assistant to referee in this case; charge fixed by general order of the court. 'General Expense,' so called. $2.00.

"(2) Expense of sending notices of first meeting to 72 creditors at 7 cents per creditor. $5.04.

"(3) Expense of sending 20 letters to creditors at 7 cents. $1.40.

"(4) Reserve for expense of calling a final meeting—notices to 72 creditors at 7 cents. $5.04.

"(5) Cost of blanks used by the referee, charge fixed by order of the court. $.15.

"(6) Traveling and transportation expenses to and from referee's office to place of meeting divided among cases considered. $.09.

"(7) Expense incurred by the clerk of the District Court in sending notices to creditors and their attorneys of the bankrupt's petition for confirmation of the composition offer, at 5 cents a notice. This rate of charge is fixed by order of the court. $3.80.

"(8) Reserve for expenses of the clerk of the District Court to be incurred in sending notices to creditors and their attorneys, of the bankrupt's petition for the return of the balance of the composition deposit, and limit of time for proving claims. This rate is fixed by order of the court at 5 cents a notice. $3.80."

The view of the Department of Justice, as I understand it, is that these expenses are not allowable under the act, except perhaps the small items for cost of blanks and traveling expenses; that the other matters are covered by the statutory fee allowed to the referee for services. The items in question may be grouped for the purposes of discussion in two classes: (a) Expenses of sending notices and letters; (b) general expenses.

As to (a): Ever since the present act went into effect, the referees in this district have, by order of court, charged the cost of preparing and sending the notices required by law. The amount fixed therefor has been ascertained by computation from time to time in the different referee's offices, and has been changed to meet the varying conditions in a reasonable way. The charge is not the same throughout the district. As to the referee for Middlesex county, whose charges are under discussion, the rate for notices was established at 7 cents by an order of this court entered December 5, 1914. It had previously been 5 cents, and the increase was made because of the increased cost of the work. It represents, in connection with that part of the $2 charge (hereafter discussed) which is used for clerk hire, the actual cost of the

work to the referee, as nearly as it can be ascertained. There is no reason to believe that it was improperly or unwisely fixed. I do not understand that any such suggestion has been made from any quarter. If the expense of preparing and sending notices may be allowed by special order of court, the charge is a proper one in this case.

Two items in the expenses for notices should be specially referred to. They are the sums charged and reserved respectively by the referee, for account of the clerk to reimburse him for the expense of notices to creditors which had been sent and which were to be sent by him, at 5 cents each. (Items 7 and 8, supra.) In the practical administration of the act it had been found more convenient for these sums to be collected in the first instance by the referees and paid over by them to the clerk. The clerk's charge of 5 cents was established by a special order of this court on June 1, 1912. The practice in regard to the collection of the charge as above described seems to have grown up without any special order. It has obtained for many years. As to these items, the referee is endeavoring to collect them in order to repay them to the clerk. The right of the clerk to charge for them is thus necessarily involved in the present proceedings.

As to (b), the charge for clerical and general expenses, $2: This charge also was established by the late Judge Francis C. Lowell in connection with the original organization of the bankruptcy work in this district under the present act and has been in force ever since without objection. No order of court was formally entered covering it, but the referees were notified by Judge Lowell concerning it, and a formal letter approving it was sent by him to the present referee under date of February 26, 1903, in connection with a re-examination of the fees of referees in view of the amendment to the act passed at that time. There can be no doubt that what Judge Lowell did had the force and effect of an order of court, although, so far as now appears, it was never formally entered upon the docket. This charge was intended to cover general clerical expense, and incidental expenses, e. g., rent, where the referee maintained a separate office for bankruptcy work. The referee in the present case does maintain such an office entirely separate from his law office and in a different building, where he maintains a clerical force which does nothing but attend to the bankruptcy business. It is necessary for him to do this on account of the large number of cases which go to him. The office is well and economically run; the management of it was highly commended to me within a year by an examiner from the Department of Justice. As to the foregoing facts, I believe there is no dispute, and indeed no room for fair difference of opinion.

[1, 2] Coming to the questions of law involved, section 40 of the Bankruptcy Act relates to "Compensation of Referees." It provides in substance that they "shall receive as full compensation for their services * * * a fee of fifteen dollars * * * and twenty-five cents for every proof of claim filed for allowance," and also certain percentages. Section 52 relates to the compensation of clerks and provides that they shall "receive as full compensation for their serv-

ice to each estate a filing fee of ten dollars." Section 62, relating to the "Expense of Administering Estates," provides that:

"The actual and necessary expenses incurred by officers in the administration of estates shall * * * be reported * * * and approved or disapproved by the court. If approved, they shall be paid or allowed out of the estates in which they were incurred."

By section 53 (Comp. St. 1916, § 9637) the Attorney General is required annually to lay before Congress tables showing, among other things, "the expenses of administering said estates"; and by section 54 (section 9638) the referees are required to furnish him with information for statistical purposes upon his request. By section 30 (section 9614) the Supreme Court is authorized to make all necessary orders as to procedure and for carrying this act into force and effect.

Under this last section the Supreme Court passed the General Orders in Bankruptcy, of which 26 (89 Fed. xi, 32 C. C. A. xi) requires the referee to keep accurate accounts of "his traveling and incidental expenses and of those of any clerk or other officer attending him (the referee) in the performance of his duty in any case which may be referred to him." By G. O. 35 (89 Fed. xiii, 32 C. C. A. xiii) it is provided that:

"(2) The compensation of referees prescribed by the act shall be in full compensation for all *services* (italics mine) performed by them under the act or under these General Orders; and shall not include *expenses* (italics mine) necessarily incurred by them in publishing or mailing notices, in traveling or in perpetuating testimony, or other expenses necessarily incurred in the performance of their duties under the act and allowed by special order of the judge."

Such being the law applicable to the case, I proceed to consider the application of it to the items under discussion.

Each of the charges in question was expressly authorized by order of the District Court. Whatever be the true construction of the act in the particulars under discussion, it seems hardly doubtful that the determination of the referee's expenses thereunder is within the general jurisdiction of that court under the act, nor that the court has power upon investigation to determine the actual expense of services like those in question and by order to authorize a charge therefor, as was done in this case. If so, such orders and charges in conformity therewith cannot be collaterally attacked. U. S. v. Brainerd, supra, citing authorities. The clerk is bound to obey and recognize them. If the Department of Justice desires to question such orders or expenses, it should do so by intervening in a bankruptcy case and attacking them directly, if it has standing to do so—which I doubt. It would seem to me that the questions are to be dealt with by the Supreme Court under General Orders if it see fit to do so; otherwise, by the District Courts.

This would be sufficient to dispose of the present case and to require an order granting the prayer of the petition. But as the statutory authority for each of the several charges in question has been discussed, and is the question at the base of the controversy, it is, perhaps, advisable to consider the charges on the merit in the present proceeding.

[3] First as to clerical expenses: These have been explicitly recognized by the Department of Justice, and the referees have, for several years at least, been called upon to state them on Form 1, under section E 2 (c). They are, as has been noted, explicitly referred to in General Order 26 (89 Fed. xi, 32 C. C. A. xi). Section 62 of the act providing for the repayment to the referees of "actual and necessary expenses" is to be read with these facts in mind. Moreover, the Bankruptcy Act, being a commercial statute, should receive a practical construction. It would be wholly impossible for a referee, whose duties require the constant employment of two clerks to perform them properly, to do that work unassisted in addition to his judicial duties under the act. To limit the number of cases sent to a referee to those in which he was personally able to perform the clerical work required would be to put the referee on the basis of mere clerks, which I do not think the act intends. Referees are in fact judicial officers exercising the powers of the court to a large extent. "He exercises much of the judicial authority of that court," Gray, J., White v. Schloerb, 178 U. S. 542, 546, 20 Sup. Ct. 1007, 44 L. Ed. 1183. In view of General Order 26, it seems clear that the Supreme Court understood that the referee had the power to employ clerks if necessary in the performance of his duties; and there are many decisions of lower courts to the same effect. See In re Pierce (D. C.) 111 Fed. 516, 517; In re Dixon (D. C.) 114 Fed. 675, 676; In re Mammoth Pine Lumber Co. (D. C.) 116 Fed. 731, 736; In re McCubbin Co., 33 Am. Bankr. Rep. 277; In re Tebo (D. C.) 101 Fed. 419, 421. In this last case Judge Jackson said:

"In regard to the allowance of clerk hire, the court is of opinion that no referee can, without the aid of a clerk or such other officer as he may require, discharge his public duties. This is a matter largely within the discretion of the referee, which discretion, if abused, would justify the court in removing him. While Bankr. Act, § 64b, par. 3, does not mention clerk hire as being embraced in the cost of administration, yet the paragraph does not forbid it, and this court is of opinion that it is a necessary incident to the referee, in the due administration of his office, as he is, in fact, the judge of the bankrupt court."

In these views I fully concur. A referee is not obliged under the act to perform all the clerical work of his office himself. He may, where reasonably necessary, hire clerical assistance, and the expense thereof is properly chargeable against the case in which it is used. The charges here in question for notices are in substance a charge for clerk hire. While not arrived at by timing the clerks on this particular case, they are the result of careful calculation and represent the average cost of the work done. They seem to me to be allowable as to the notices sent by the referee.

[4] As to the notices sent and to be sent by the clerk: Much of the foregoing discussion is applicable to these, but there is one provision in the General Orders which relates solely to the clerk. General Order 35 (89 Fed. xiii, 32 C. C. A. xiii) explicitly provides that the statutory compensation of the clerks shall "not include * * * expenses necessarily incurred in publishing or mailing notices or other papers." It seems to follow that the clerk is entitled to charge the

reasonable expense of preparing and sending notices required to be sent by him including the expense of clerical assistance. The present rate therefor, five cents each, represents as nearly as can be ascertained the actual cost of that work. The clerk may properly make that charge for it and it may be collected for him by the referee. The question is immaterial so far as the clerk's personal interest is concerned, because his office returns each year to the government a large surplus over and above all its expenses, including his own compensation.

[5] As to the charge for clerical and general expense: What has been said disposes of all the items in question except the charge for clerical or general expense and a point as to item 4, which will be discussed later. Most of the $2 charge for general expense (item 1, supra) is used to pay clerk hire, and is covered by what has been already said. It covers the general work of the referee's clerks on the cases, other than that of preparing and mailing notices. Part of it is used to pay the rent of the office (which, as stated, is devoted exclusively to bankruptcy purposes), and the incidental expenses of that office. As I have already said, I regard the maintenance of such an office as so advantageous to the public and to persons interested in the bankruptcy cases in charge of the referee that, in my opinion, under the conditions actually existing here, such an office for this referee may fairly be said to be necessary. It has been maintained by him and his predecessors substantially as at present ever since 1898. The cost of it is an actual and necessary expense incurred by the referee in the performance of his duties. This exact question arose in Re McCubbin Co., ubi supra, and I agree with what is there said about it. No doubt conditions differ in different localities, and it might well be that, in a country district with a comparatively small number of cases, such an expense would not be reasonably necessary; but under conditions existing in Boston, with reference to which this referee's office is maintained and charge therefor is made, I am of opinion that it is justified.

[6] This charge for clerical or general expense, like the charge for notices, does not represent an actual computation of the expense of the particular case. It is a general average arrived at by careful computation and estimate covering many cases. Such a method of ascertaining overhead expenses is well recognized in business and seems to me proper in this instance. The language of General Order 26 does not, I think, preclude such a method of ascertaining it.

It should perhaps be stated as to all the items under discussion that the referee derives no financial benefit therefrom. They are fixed as accurately as may be to provide an income equal to the actual expenses; and the balance year in and year out is very nearly even.

[7, 8] There remains one further question. Item 4 relates to expenses to be incurred by the referee in calling a final meeting. The composition was accepted by the creditors and confirmed by the court. The estate thereupon revested in the bankrupt. Whether, under such circumstances, a final meeting is necessary in order to close the estate, is a question of some doubt. The referee here in question has customarily called such a meeting; other referees, I believe, do not do

so. This is a matter of practice in the referee's office which must be left largely to his discretion. I see no reason to believe that the discretion was improperly exercised in this instance.

The result is that as to each of the several items in question the referee is entitled to charge therefor and the sum in question should be paid to him by the clerk. An order may be ordered to that effect.

UNITED STATES v. MOY NOM.

(District Court, N. D. Iowa, Cedar Rapids Division. April 2, 1918.)

No. 98.

1. ALIENS ⟸25—CHINESE PERSONS.
   The minor son of a Chinese merchant, who was entitled to remain in the United States under the Chinese Exclusion Act without registration, during his minority at least, is one of the exempted class.
2. ALIENS ⟸25—CHINESE EXCLUSION ACT—MERCHANTS.
   Where the minor son of a Chinese merchant, who was lawfully in the United States, by reason of the status of his father, acquired by gift or purchase an interest in a mercantile business, such minor is, after reaching his majority, entitled to remain in the United States, notwithstanding his father's return to China.
3. ALIENS ⟸27—CHINESE PERSONS—EXCLUSION.
   Where defendant's status as a Chinese merchant was established before he went to China for a visit, the fact that after his return and admission into the United States he worked as a laborer for part of the time does not of itself forfeit his right to remain in the United States as one of the exempted class.
4. ALIENS ⟸27—CHINESE EXCLUSION ACT—ESTOPPEL OF GOVERNMENT.
   Where a Chinese person, before returning to China for a visit, presented himself to the Bureau of Immigration for preinvestigation as to his status as a merchant, and the Bureau found that he had for the required time been engaged as a merchant and gave him a certificate, the government is, after his return from China, estopped from questioning his status as a merchant, where there was no competent proof of fraud on his part in obtaining re-entry into the United States.

At Law. Proceeding by the United States for the deportation of Moy Nom and others, Chinese persons. From an order of deportation of a United States commissioner, defendant Moy Nom appeals. Order reversed, and defendant discharged.

The defendant Moy Nom, a Chinese person, appeals from an order of a United States commissioner directing that he be deported to China. The defendant was arrested upon an information filed before United States Commissioner Harwood, of this district, by an immigrant and Chinese inspector, which charged "that on or about March 16, 1917, the defendant Moy Nom (and two other Chinese persons, naming them) did unlawfully enter the United States at Cedar Rapids, Linn county, in this district, and were found laboring therein without certificates of residence, contrary to the form of the statute in such cases made and provided," etc. Upon a hearing before the commissioner the defendant was ordered deported to China, and the other two defendants discharged, and defendant brings this appeal to reverse such order as against him.

E. A. Fordyce, of Cedar Rapids, Iowa, and F. T. Milchrist, of Chicago, Ill., for appellant.

F. A. O'Connor, U. S. Atty., of New Hampton, Iowa, and Charles A. Lich, of St. Louis, Mo., representing the Bureau of Immigration, for the United States.

REED, District Judge (after stating the facts as above). The testimony before the commissioner shows without dispute that the appellant was born in China, and when 12 or 13 years old came to this country in about 1890 with his father, who then, or shortly thereafter, settled in Chicago, and engaged in business as a member of the mercantile company known as Hip Lung Ying Kee & Co., selling groceries and Chinese goods at No. 515 South Clark street, in that city. The father continued as a member of that company for some years, and then returned to China. When he returned to China, he arranged to sell an interest in this company to his son, the appellant, and the son then, or soon after, became a member of the company, and engaged in its business as such member, and continued therein until January, 1912, when he returned to China, remaining there some 18 or 20 months, then returned to Chicago, and again joined Hip Lung Ying Kee & Co. as a member thereof, and assisted in carrying on its business for a couple or more years. The appellant testified upon the hearing before the commissioner in his own behalf, and though his testimony is disconnected, and in some respects inconsistent, the foregoing is a substantially correct statement of his connection with Hip Lung Ying Kee & Co. in Chicago, and there is nothing to contradict it, unless it be the inconsistency in his statements as to the time and place of work in Chicago, and his connection with the Hip Lung Company.

The appellant on December 6, 1911, applied to the Immigration Bureau, then in the Department of Commerce and Labor, at Chicago, for preinvestigation of status, upon form No. 431 of that bureau, in which he named two white persons, among others, who could testify of their own knowledge that he was a merchant in Chicago. Upon completion of the examination under this application, the inspector in charge at Chicago on January 12, 1912, found and reported as follows:

"I do not feel that the appellant in this case has made a perfect showing as to his mercantile status, but in view of the fact that he holds a certificate of stock in an incorporated firm, that he is identified by the manager as the owner thereof, that the book records of the firm, which are apparently genuine and used in the ordinary course of business, show wages paid to him, and other money transactions between him and the manager of the firm, and the identification of applicant by the white witnesses as having been exclusively employed in the store during the past year, I do not feel justified in recommending the case for unfavorable consideration. Taking the case as a whole, I believe that the application should be granted.

"Respectfully, [Signed] Howard D. Ebey, Chinese Inspector."

This finding was duly forwarded to the Commissioner of Immigration at the port of Seattle, Wash., accompanied by triplicate thereof, transcripts of the testimony, and report in accordance with rule 15. On presentation of this certificate to the Commissioner of Immigration at Seattle, Wash., the appellant was given an identification certifi-

cate, and he took passage upon a steamship for China, where he went, and returned therefrom in August, 1913. Upon his return he was examined by the Immigration Bureau at Seattle, and given a certificate of identity (which is No. 12676, marked Exhibit A, and attached hereto), and was permitted to re-enter the United States as a returning merchant, and he did so re-enter the United States about the 26th of August, 1913, returned to Chicago, where he again assumed his relations with Hip Lung Ying Kee & Co., and remained with that company as one of its members for something more than a year; but, the business of the company being dull, he obtained employment outside of that company, and assisted in working in some restaurants and laundries. About two years before his arrest he went to Iowa City, and there engaged in the laundry business, where he was discovered by the inspector, who filed the information against him, upon which he was arrested, given a hearing before the commissioner, and was ordered deported, as hereinbefore stated, apparently because he was found working in a laundry and had no certificate of registration permitting him to remain in the United States.

[1, 2] There is no doubt under the testimony, notwithstanding some inconsistencies in that of Moy Nom himself, that he became interested as owner in the mercantile company of Hip Lung Ying Kee Company to the extent of $1,000, and engaged in the business of that company in Chicago, on South Clark street, for some years prior to 1912; that he came to this country as a minor with his father, who was then or shortly after engaged in the mercantile business as one of that company in Chicago, and was therefore of a class entitled to remain in this country under the Chinese Exclusion Act without registration; and that appellant, as son of his father, was entitled to enter and thereafter remain with him as one of the exempted class, during his minority at least. United States v. Mrs. Gue Lim, 176 U. S. 459, 20 Sup. Ct. 415, 44 L. Ed. 544; Tom Hong v. United States, 193 U. S. 517, 24 Sup. Ct. 517, 48 L. Ed. 772; United States v. Yee Quong Yuen, 191 Fed. 28, 111 C. C. A. 500; Lee Kan v. United States, 62 Fed. 914, 10 C. C. A. 669, and cases cited. And if during that time the son succeeded to an interest of the father in the Hip Lung Company, either by purchase or gift from him, and engaged in the same business the father was engaged in, no reason is perceived why he does not acquire the status of the father as one of the exempted class. He was lawfully in the United States, and might rightly acquire property therein, of which he could not be deprived, except by due process of law.

[3] The father returned to China some time prior to 1912. Whether or not he disposed of his entire interest in the Hip Lung Company before going is not clear under the testimony, and is not deemed very important; for it does appear that before returning to China the father transferred to his son a part, at least, of his interest in the property of that company, that the son also acquired an additional interest therein, which with that obtained from the father amounted to $1,000, and became an owner to that extent in the property of that company, and as such owner participated in the business of the company in Chicago for some time prior and up to the year 1912, when he himself returned to China. That the appellant was of the exempted class, and

not liable to be deported, when he went to China in 1912, seems clear. Upon his return from China he was again examined by the Immigration Bureau at Seattle, to which he delivered, or which had retained, the certificate and papers given him by the Chicago Bureau, and received a certificate of identity in due form and was permitted to reenter the United States as a returning merchant, did re-enter the same, went to Chicago, and again engaged to some extent in business with the Hip Lung Company, where he remained for some time, just how long may not be entirely clear. While there he was temporarily employed, he says, in some restaurants and also in a laundry, and about two years before his arrest he went to Iowa City, this state, and engaged in a laundry, where he was discovered in bed by an energetic Chinese inspector, taken before a commissioner, and ordered deported to China. The fact alone, however, that he worked as a laborer during a part of the time after his return from China, does not of itself forfeit his right to remain in the United States as one of the exempted class. United States v. Yee Quong Yuen, 191 Fed. 28, 111 C. C. A. 500; United States v. Sing Lee (D. C.) 71 Fed. 680; In re Yew Bing Hi (D. C.) 128 Fed. 319; United States v. Louie Juen (D. C.) 128 Fed. 522; United States v. Leo Won Tong (D. C.) 132 Fed. 190; United States v. Foo Duck, 172 Fed. 856, 97 C. C. A. 204; United States v. Lee You Wing (D. C.) 208 Fed. 166; United States v. Lim Yuen (D. C.) 211 Fed. 1001; Ex parte Lew Lin Shew (D. C.) 217 Fed. 317.

[4] When the appellant presented himself to the Bureau of Immigration at Chicago in December, 1911, for preinvestigation as to the status claimed by him as a merchant, it was its duty, we think, to have fully investigated and then determined whether or not he was entitled to the status claimed by him. He submitted himself for examination, and produced two white witnesses and others who, with himself, were examined by it as to his status, and that bureau found him to have been then engaged for the required time as a merchant in Chicago, and gave him a certificate accordingly, with copy of the evidence taken by it, which was delivered to the Bureau of Immigration at Seattle, and upon his return from China the bureau at Seattle again examined him and gave him a certificate of identity, which permitted him to reenter the United States as such returning merchant. After that the government should be estopped from questioning his status as a merchant, unless it shall allege and establish by competent proof some fraud upon his part in obtaining re-entry to the United States. See United States v. Yee Quong Yuen, 191 Fed. 28, 111 C. C. A. 500; United States v. Lee You Wing, 211 Fed. 939, 941, 128 C. C. A. 437; United States v. Lim Yuen (D. C.) 211 Fed. 1001, 1007; United States v. Foo Duck, 172 Fed. 856, 858, 97 C. C. A. 204; Lui Hip Chin v. Plummer, Immigrant Inspector, 238 Fed. 763, 151 C. C. A. 613; Louie Dai v. United States, 238 Fed. 69, 73, 151 C. C. A. 144.

There is no charge or claim of any such fraud, or that the appellant is not a person who might rightly be admitted upon a proper showing to the United States. He writes his name plainly in English, speaks the English language, though not very plainly or correctly, and is apparently an intelligent Chinese person, in the full possession of

his faculties, and I am convinced that the evidence is not sufficient to warrant his deportation.

The case is clearly distinguishable from that of the United States v. Fong Foo (D. C.) 235 Fed. 452, cited, among others, by the government. In that case Fong Foo claimed that he was born in the United States, and not subject to deportation. He also claimed that he had attained the status of a merchant, and was therefore of the exempted class when he went to China in 1907. Upon his return from China, in 1909, he was examined at the port of San Francisco, and given a proper certificate of identity, and permitted to re-enter the United States as a returning merchant. Upon his return and re-entry into the United States, he did not again engage in the mercantile business, but within a short time left San Francisco, and was next found in the northern part of this state in November, 1914, owning and operating a laundry. His testimony was uncorroborated, and it was held that he failed to sustain the burden resting upon him to show his right to remain in the United States, and was therefore ordered to be deported.

The order of the commissioner, deporting the appellant, is reversed, his bail on appeal is exonerated, and he is discharged. It is ordered accordingly.

THE MELDERSKIN.

(District Court, S. D. New York. June 19, 1916.)

SALVAGE ⊂⊃34—AMOUNT OF COMPENSATION—TOWING SHIP DISABLED AT SEA.

The steamship Melderskin, a vessel of nearly 4,000 tons gross, while on a voyage from Santos to New York with a cargo of coffee, lost her propeller. On account of the value of the cargo, the master was unwilling to jettison it, and after drifting westward for 9 days, while trying unsuccessfully to ship an extra propeller, and when 180 knots to the eastward of San Salvador, the vessel fell in with the steamship Hesperides, also a large vessel, with a valuable cargo. She took the Melderskin in tow, and after about 10 days, having towed 819 knots, landed her and her cargo safely at Tybee Roads, which was agreed upon as the first available port where repairs could be made. During most of the time heavy seas rendered the towing excessively difficult, although not especially dangerous. No hurricanes were encountered, although it was September and there was always the risk of them. The value of the Melderskin and cargo, with pending freight, was $1,450,000. The value of the Hesperides and freight at risk was $328,000. *Held*, that the Melderskin was in a position of great danger, being helpless, and her cargo in even greater, because subject to the additional danger of being jettisoned, that the service was efficiently rendered, and that the Hesperides and crew were entitled to a salvage award of $45,000 in addition to her actual expenditures for coal, etc.

In Admiralty. Suit by the British & South American Navigation Company, Limited, owner of the steamship Hesperides, against the steamship Melderskin. Decree for libelant.

J. Parker Kirlin and Mark W. Maclay, Jr., both of New York City, for libelants.

Charles S. Haight, of New York City, for claimant.

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

HOUGH, District Judge. On September 9, 1915, the Norwegian steamer Melderskin, 360 feet long and 3,961 tons gross, while on a voyage from Santos to New York, broke her tail shaft and totally lost her propeller in latitude 24° 20′ N., longitude 65° 26′ W. She was fully laden with a very valuable cargo of coffee, which there was great unwillingness to jettison. She had a spare propeller on board, and endeavors were made both to navigate under sail and to ship the extra propeller; the vessel, except for this failure of motive power, being tight and in excellent condition. Her log shows that the effort to sail resulted in not even getting steerage way, although there was plenty of wind. Awnings were used to supplement the sails, and the awnings promptly split. Cargo was shifted in order to get her down by the head sufficiently to enable the engineers to work at the sleeve. These efforts continued for several days, until on September 14th the log recites that:

"We stopped shifting cargo, as the ship is now so deep by the bow that the water is coming in through the scuppers when the ship is pitching, and is coming in on the deck; there remains still so much to lift the stern that we find it will be impossible to reach the sleeve unless a large part of the cargo is jettisoned."

The abandonment of the effort to ship the extra propeller left the Melderskin helpless in the trough of the sea, and under the conditions of wind and weather steadily going westward, until on September 18th, having then drifted about 210 knots, she was almost exactly 180 knots eastward of San Salvador Island, and fell in with the Hesperides.

The evidence is persuasive that the condition of the ship was so good and the value of the cargo so great that the captain deliberately preferred to keep on drifting toward the Bahamas rather than jettison cargo, in the hope and expectation of falling in with vessels capable of rendering assistance. Whether he would have continued to drift in the same direction as he consistently did from the time of his accident to the time of meeting the Hesperides cannot be known with certainty, but the subsequent weather experience of the two vessels when in company show that the same easterly swell that had already moved the Melderskin upwards of 200 miles continued for a considerable time. If that drift had continued for another 150 knots, or thereabouts, the ship would have fallen into the path of steam traffic from Colon, Jamaica, and the southerly sides of Cuba and Haiti northward bound through the Windward Passage. Yet as matter of fact the Hesperides subsequently towed the Melderskin across this very path, and without meeting any body of traffic worthy the name. It is quite remarkable that so few vessels were seen, even in the distance, from the time the Melderskin broke down until she was safely in harbor.

September in the region of the Antilles is a "hurricane month." No actual hurricane was encountered, yet the risk thereof was always present. There was no radio apparatus on the disabled vessel. It thus seems to me evident that the dangers to the Melderskin and her cargo at the time the Hesperides encountered her were very real. The ship, with her cargo aboard, was helpless. The cargo was worth more

than twice as much as the ship, and was subjected, not only to the perils of the vessel, but to the additional danger of being jettisoned in order to render it perhaps possible to ship a propeller in a seaway, an operation of the greatest delicacy and never attempted in the experience of any man on board the ship.

The Hesperides is a British steamer, belonging to a regular line plying between American North Atlantic ports and the River Plate, of 3,393 tons gross and 350 feet long. She was fully laden with a valuable cargo and was endeavoring to maintain a schedule sailing. The master of the Melderskin put the whole matter of his rescue in the hands of the Hesperides. The manner of making fast, the rate of towing, and the port of destination were all left to the salving vessel. An attempt to make Nassau was first considered, but abandoned, owing to the ignorance of all parties of local conditions, and a belief that the vessels were too large to attempt the harbor. Jacksonville was next thought of, but abandoned on arrival off St. Johns river, after consultation with local pilots, on account of the tortuous navigation necessary to effect an entrance. In result the Melderskin was towed to Tybee Roads, and there left in good condition.

The towing necessary to accomplish this result was 819 knots, and the time consumed 9 days and 22 hours. There has been a most commendable spirit of fairness exhibited by all the witnesses in not seeking to carp at or unduly minimize the services rendered or the manner in which they were performed. Almost the only criticism of the manner of rendering service arises out of the disposition or arrangement of the towing lines. These lines broke down three times, always parting at the manila portion of the hawsers rigged between the two vessels. The rope used was six-inch, arranged so as to lead on board the Hesperides (after connection with the main steel towing hawser) in many parts in order to distribute the strength. It is said that a heavier rope might have been used. The recognized difficulties of towing such as this are summed up in Knight's Modern Seamanship, p. 351:

"In very bad weather towing should not be attempted, unless exceptional circumstances make it necessary, as the running of lines in a heavy sea is attended by difficulty and danger, and even if they are run successfully the chances are much against their holding."

The logs of the two vessels are unanimous in showing that during most of the time from the inception of the enterprise until the vessels were near St. Augustine Inlet the condition of the sea made towing excessively difficult, though not especially dangerous for the vessels themselves. The Melderskin's log reads somewhat as follows, beginning on September 18th:

"Light wind, high swell, and considerable rolling and pitching." "Northeast swell." "High breaking sea, pitching and rolling."

The log of the Hesperides on September 18th contains the entry: "Light breeze and showery, with heavy beam swell, ship rolling very heavily"—and so continues for several days. These contemporaneous entries convince me that the method of towing is not open to exception. The Hesperides had to look out for her own safety, and it was

better that her hawsers should part in a beam sea and with a larger vessel tailing behind than that her own hull or engines should be imperiled.

On September 24th, when off and a little below St. Augustine Inlet, the hawser parted at 6 p. m.; the Melderskin's log showing, "High breaking sea, pitching and rolling." The vessels thereupon parted company for the night, and the Melderskin drifted in toward the Florida shore until she anchored. The Hesperides stayed further out and used her wireless to get the assistance of the revenue cutter Yamacraw. That vessel, being of light draft, approached and endeavored to tow the Melderskin, but the hawser parted at once. On the morning of the 25th the Hesperides got near enough to the Melderskin (the weather having moderated) to again make fast, and thereafter the trip to Tybee Roads was without remarkable incident.

It is suggested that the Hesperides did not do all that could have been done when the Melderskin was anchored off the Florida coast. Undoubtedly that was a position of peril, rather potential than actual, for the weather was moderating as the night wore on; but if the squall had increased, instead of diminishing, it would probably have been impossible to save the Melderskin. I do not think that any just criticism attaches to the Hesperides for not approaching nearer while the sea was high; but it is undoubtedly true that, in so far as the peril off the Florida coast was concerned, there was a space of more than 12 hours when the Hesperides was of no assistance, nor do I think she could have been of assistance. The salving vessel herself was at no time in danger. It required skill, watchfulness, and good discipline to keep a constant eye on the towing hawsers, to regulate the speed of the vessel according to the exigencies of weather, and carefully to nurse the Hesperides' engines to keep them from overheating or injury, owing to the strain of so heavy a tow—a kind of work for which they were not designed.

The result of the foregoing is the presentation of the following problem: The property to which service was rendered is valued as follows:

Cargo	$ 913,000.00
Ship	469,000.00
Pending freight	68,939.42
A total of	$1,450,939.42

The Hesperides was valued at $265,000 and her freight at risk amounted to $63,087.87. During the period of salvage service she expended for coal, oil, hawsers, and other material, and matters rendered necessary by the towage service, the sum of $1,944.83.

It is suggested as an element of salvage award that she was thrown out of her schedule and had to pay overtime at ports of discharge, and also that her operating expenses for the period of delay were very considerable. All this is true, but such matters are not to be separately paid for, but merely considered in arriving at salvage compensation.

It is also urged by the libelant that this service was rendered at a time when, owing to the European war, every species of marine material is held at very high prices, and rates for vessels and cargo space

are abnormally high; therefore salvage services should be extraordinarily compensated. In all this there is a measure of truth, but the increased amounts asked for are largely taken care of automatically by the fact that the above-given values for cargo, vessels, and freight are enormous as compared with peace prices.

The care of counsel has reminded me of a long line of salvage cases, of which I have especially considered the following, relating to vessels either towing or permitting themselves to be used as rudders, and concerning values of upwards of $1,000,000: The Alaska (D. C.) 23 Fed. 597; The Varzin (D. C.) 180 Fed. 892, affirmed 185 Fed. 1007, 107 C. C. A. 398; The City of Berlin, 32 L. J. (N. S.) 307; The City of Richmond, 25 Mitch. Mar. Reg. 271; The Werra, 12 P. D. 52; The Bremen, 10 Asp. L. C. 229; The City of Lincoln, Mar. Reg. June 2, 1915.

The unusual element in this case is the distance towed, only exceeded, so far as I have observed, in The Werra, supra, though it was approached in The Colon (C. C.) 4 Fed. 469. Having regard to all the circumstances, The Varzin, supra, is the most like upon the facts. Measuring by this case, I am of the opinion that the danger to the Melderskin was not as great as that to which the Varzin was subjected, except during the time when the Melderskin was adrift or at anchor off the Florida coast, and during that period of danger the Hesperides was not responsible, nor could she assist. While the distance towed was here much greater than in the Varzin, the time spent in towage was a half day less; a fact which indicates greater difficulty in the earlier case.

It is to be noted, also, that the boat work necessary to pass hawsers was all done by the Melderskin's crew. The crew of the Hesperides did their usual work for the usual times, with the exception of the watch officers, who, in order to exercise supervision over hawsers, engines, and speed, stood extra watch, with the captain on duty most of the time. While keenly aware that all efforts in salvage cases must result only in approximation, I conclude upon the whole that the same award as was made in The Varzin will be just, to wit, $45,000, with the additional sum of $1,944.83 for actual out of pocket disbursements and expenses. Of this award (exclusive of expenses) one-fifth will be awarded to the master and crew of the Hesperides in proportion to their wages, with the exception that the master, chief, second, and third mates, and the four engineers shall receive a double share out of said one-fifth. This is an expression of my opinion that the meritorious work of the salvors was head work and not hand work.

Costs will follow the decree.

THE SCHUYLKILL.

(District Court, E. D. New York. March 6, 1918.)

1. ADMIRALTY ⊜65—EXCEPTIONS TO LIBEL—ADMISSION.
   Where claimant excepted to a libel on the ground that no admiralty lien was in existence or had been created, the allegations of the libel are for the purpose of the exceptions admitted.
2. MARITIME LIENS ⊜11—BUILDING OF VESSELS—REPAIRS—"MARITIME CONTRACT."
   While the building of a vessel before it is launched is not an admiralty contract, because done wholly on land, the repair of a vessel, to enable a continuation of her voyage and for the purpose of obtaining a new registry, where not equivalent to the building of a new vessel, is a "maritime contract," and gives a lien.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Maritime Contract.]
3. MARITIME LIENS ⊜25—STATUTORY LIENS—REPAIRS.
   Under Act June 23, 1910, c. 373, § 1, 36 Stat. 604 (Comp. St. 1916, § 7783), declaring that any person furnishing repairs, supplies, or other necessaries, including the use of dry dock or marine railway, to a vessel upon the order of the owner, shall have a maritime lien on the vessel, which may be enforced by a proceeding in rem, architects, who prepared plans for repairs to the hull of a vessel, her engines, boilers, and machinery, are entitled to a lien for their services, for undoubtedly, if the person who did the work of repair should include a charge for drawing plans, he would have a lien therefor, and the rule should be the same where the plans were prepared independently by architects.

In Admiralty. Libel by Harry G. Smith and another against the steamer Schuylkill, her engines, etc. On exceptions to libel by claimant. Exceptions overruled.

Robert M. McCormick, of New York City, for libelants.
Bullowa & Bullowa, of New York City, for claimant.

CHATFIELD, District Judge. The libelants seek to recover for work done as architects upon the steamer Schuylkill, in the way of preparing plans for repairs to her hull, engines, boiler, machinery, etc. The libel alleges that this was on the order of the owners and of a person authorized by them. Exceptions have been filed to these allegations. The charge for the work of these architects was $12,222.42 (of which $6,202.01 has been paid), while the vessel was in the port of Buffalo; and while in the port of Quebec the libelants furnished repairs to the steamer Susquehanna, amounting to $3,101.93.

It would seem that the word "Susquehanna," in the third allegation of the libel, is a clerical error, which has as yet not been corrected, but it does not enter into the present question.

[1-3] The claimant has excepted to the libel generally, contending that no maritime lien exists or has been created by statute (36 Stat. 604, Act of June 23, 1910) for the services of an architect. No authority has been produced for the claim that such services will create a general maritime lien. The statute (section 1) uses the words "furnishing repairs, supplies, or other necessaries, including the use of

dry dock or marine railway," in defining the articles or work which may be made the basis for a statutory lien.

The exceptions to the libel admit, for the purposes of this consideration, the facts as alleged, and include an allegation that the plans and specifications and superintendence were for the making of repairs. The Schuylkill was evidently a vessel in service before this work was done, and continuing thereafter upon what is termed in the libel "her voyage." The libel also alleges that the repairs were necessary to make the vessel seaworthy. This takes out of the case any suggestion that the work done for obtaining a new registry was equivalent to the building of a new vessel. It has been held that the building of a vessel, before it is launched, is not a maritime contract, as it takes place entirely upon the land, and as the object upon which the work is done has not yet reached the point where it is within so-called admiralty jurisdiction. The Dredge A (D. C.) 217 Fed. 617.

Under the general lien laws of the state of New York, and such cases as Stryker v. Cassidy, 76 N. Y. 50, 32 Am. Rep. 262, and Spannhake, Inc., v. Mountain Const. Co., 159 App. Div. 727, 144 N. Y. Supp. 968, architects' fees are treated as labor and included in the word "repairs." The language of that statute is somewhat different from the one now under consideration. But the general application of the words has some force by analogy. It has been held in New Haven Steamboat Co. v. Mayor (D. C.) 36 Fed. 716, and The Dorchester (D. C.) 134 Fed. 564, that the cost of survey and superintending repairs, arranging bids, and preparing contracts for the same, were proper expenses, which could be included within the word "repairs," and hence would come under the maritime lien law, if credit was furnished directly to the vessel. In the case of The J. Doherty (D. C.) 207 Fed. 997, it was held that towage was not a "necessary," in the nature of repairs or supplies, when the language of the Lien Law was considered from the standpoint of the proceedings in Congress which led to its adoption. But that case was actually disposed of by a finding that the credit had been given to the charterer, and not to the vessel, for services which might create a maritime lien without involving the statute.

In The Alligator, 161 Fed. 37, 88 C. C. A. 201, it is said that a lien arises for pilotage service, for seamen's wages, for towage service, and for salvage service, whether or not they be rendered to a domestic vessel. An architect's services are not within this class, and no lien can arise unless it be given by the statute in question.

If the person who did the work of repairing should include a charge for drawing plans, it would evidently give him a lien therefor. It would follow that the work was therefore a part of the repairs, even when done by a third party. No sufficient reason is shown why a different holding should be made, and the exceptions will be overruled.

THE HOLTHE.

(District Court, S. D. Georgia, E. D. March 16, 1918.)

1. SHIPPING ⊂=61—LIBEL—AUTHORITY OF MASTER.
   Where towage service is for the purpose of assisting the voyage of a vessel, and the vessel assisted is as much in need of outward towage as of towage into port, a contract by the master for both inward and outward towage is not invalid, as beyond his inherent authority.
2. TOWAGE ⊂=9—CONTRACTS—LIABILITY IN REM.
   Where the master of a tug and a vessel entered into a contract for the towing of a vessel into and out from a port, and the master willfully repudiated so much of it as related to the outward voyage, the vessel is liable in rem; the breach of the contract creating a lien thereon.
3. ADMIRALTY ⊂=66—LIBEL—AMENDMENT.
   Where a libel alleged that the master of a vessel contracted with the captain of libelant's tug for the towage of the vessel into and out of the harbor, and that, though libelant was ready and willing, the master of the vessel repudiated his contract for the outward towage, a proposed amendment, alleging the particulars of the contract and the circumstances under which it was made, but which did not vary the terms of the libel, is germane, and is properly allowable.

In Admiralty. Libel by the Savannah Towing & Wrecking Company against the bark Holthe. On motion to dismiss. Amendment allowed, and motion to dismiss overruled.

Lawton & Cunningham, of Savannah, Ga., for libelant.
A. Minis, of Savannah, Ga., for defendant.

BEVERLY D. EVANS, District Judge. The libel alleged that the Savannah Towing & Wrecking Company is the owner of a tugboat, whose captain entered into a contract on behalf of libelant with the captain of the bark Holthe, to tow the bark into and out of the port of Savannah at the customary rates of towage. In pursuance of the contract libelant with its tugboat towed the bark into the port of Savannah, and has been paid for that part of its contract of towage. The captain of the bark repudiated his contract with libelant to give libelant the outward towage of the bark, although libelant stood ready and willing to perform this service. The bark is about to leave port. The customary rate of towage in and out of the port is alleged.

On a motion to dismiss the libel, the libelant offered to amend by alleging that the bark Holthe is a Danish ship. She was lying at anchor 40 miles northeast of Tybee bar, being unable to reach Savannah on account of southerly winds. While lying in that position she was spoken by the master of libelant's tug, and then and there a contract was made between the masters of the tug and the bark, whereby the tug was to tow the bark to Tybee bar for $150, and into and out of the port of Savannah at the customary rates of towage; the contract being an entire one for whole towage. The customary towage rates were stated, and it was alleged that the profitable part of the towage is the outward towage, and that it was customary for the contract of towage to cover both inward and outward towage,

and that such an understanding between masters and tugs is common and usual. The motion to dismiss was renewed, and objection made to the allowance of the amendment.

[1] It is urged as matter of law that the contract is void, because it is beyond the scope of authority of the master of the bark Holthe to make such a contract. This assertion is predicated on the proposition that a master of an incoming vessel has no inherent power to contract for outward towage, because his powers to bind his vessel arise out of the necessity of the case, and ordinarily no such necessity can exist for an emergent contract for the outward towage. In 38 Cyc. 554, a towage service is described "as the employment of one vessel to expedite the voyage of another, irrespective of any circumstances of peril, and when nothing more is required than the accelerating her progress, and is confined to vessels that have received no injury or damage." I am unable to find any express adjudication that a master of a vessel at the outward bar of a port may not contract for both inward and outward towage. It is generally conceded that the master of a vessel may contract with the owner or master of a tug for inward towage. I can see no reasonable objection to such contract covering both inward and outward towage, where no invalidity is urged against the contract, other than the inherent power of the master to make it. If towage service is for the purpose of expediting the voyage of a vessel, the vessel assisted is in as much need of outward towage as of inward towage, where the vessel contemplates an immediate return voyage.

A contract between the master of a vessel and a towboat for towage from and to sea was enforced in the case of The Queen of the East (C. C.) 12 Fed. 165, and no question seems to have been raised as to the power of the master of the vessel to make the contract. See, also, G. L. Rosenthal (D. C.) 57 Fed. 254; The Oscoda (D. C.) 66 Fed. 347. I do not think the case of The Clan MacLeod (D. C.) 38 Fed. 447, antagonistic to the foregoing conclusion.

[2] The facts alleged in the libel create a lien on the ship, which is enforceable by a libel in rem. Where the masters of a tug and a vessel enter into an entire contract for the tow of the vessel from and to sea, and the master willfully breaches so much of it as relates to the outward towage, and refuses to accept the tow's offer of performance, the vessel is answerable in rem for the breach of the contract. The G. L. Rosenthal (D. C.) 57 Fed. 254.

[3] The amendment is germane. It amplifies the allegations of the libel by setting out the circumstances under which the contract was made, but does not vary its terms.

The amendment is allowed, and the motion to dismiss is overruled.

SOUTHERN PAC. CO. et al. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. May 6, 1918.)

No. 2958.

1. PUBLIC LANDS ⟸120—PATENTS—AFFIDAVIT.
Where a railroad company, which selected lands under its grant of certain alternate sections of public land not mineral in character, was required to attach to its selection list an affidavit of its land agent setting forth that the lands had been examined and to the best of his knowledge were not of mineral character, the agent, in a suit to set aside the patent on the ground that the lands were valuable for minerals, must be charged with knowledge of facts which an examination would have disclosed, as well as all facts known to the railroad company's geologists and employés.

2. MINES AND MINERALS ⟸17(1)—MINERAL LANDS—DISCOVERY.
Public lands are not locatable or enterable as mineral lands until discovery, and mere information that they may be valuable for oil purposes is not a discovery.

3. PUBLIC LANDS ⟸120—ENTRY—EVIDENCE.
In a suit to cancel a patent to public lands issued to a railroad company on an affidavit of its land agent that the lands were not of mineral character, evidence *held* insufficient to show that at the time the selection list and affidavit were prepared the conditions were such as to engender a belief that the lands were valuable on account of the oil deposits, and hence a patent thereto cannot subsequently be set aside because the lands were afterwards discovered to be in an oil belt.

Gilbert, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Southern District of the Northern Division of California; Robert S. Bean, Judge.

Bill by the United States of America against the Southern Pacific Company, a corporation, and others. From a decree for complainant, defendants appeal. Reversed, with directions to dismiss bill.

Guy V. Shoup and Charles R. Lewers, both of San Francisco, Cal., and Joseph H. Call and James W. McKinley, both of Los Angeles, Cal. (Wm. F. Herrin, of San Francisco, Cal., of counsel), for appellants.

F. P. Hobgood, Jr., Sp. Asst. Atty. Gen., for the United States.

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

DIETRICH, District Judge. This is an appeal by the Southern Pacific Railroad Company and other defendants from a final decree entered August 9, 1915, in the District Court of the Southern District of California, canceling a patent issued to the railroad company on December 12, 1914, for 6,109.17 acres of land. The patent was procured, so the bill charges, through the fraud of the railroad company, in that it falsely represented to the Land Department that the lands were nonmineral and were of the character contemplated by the grant of July 27, 1866 (14 Stat. 292, c. 278), and the joint resolution of

June 28, 1870 (16 Stat. 382, No. 87). This grant was to the Southern Pacific Railroad, the predecessor in interest of appellant, of every alternate section of public land, not mineral, designated by odd numbers, to the amount of ten alternate sections per mile on each side of the grantee's line of road. Suitable provision is made in the act for the lieu selection of unoccupied agricultural lands in odd-numbered sections, within 20 miles of the line of road, to make good such losses as might be sustained from the primary grant because of the mineral character of lands embraced within the limits thereof. The lands in suit were selected as lieu lands under this provision, and embrace parts of sections 17 and 19, and all of sections 15, 21, 23, 25, 27, 29, 33, and 35, in township 30 south, range 23 east, Mt. Diablo Base and Meridian, which township and range will, for convenience, be referred to as 30—23.

[1] By regulation existing at the time the selection was made, the railroad company was required to attach to its selection list, and to file with the local land officers, an affidavit by its land agent, "setting forth in substance that he has caused the lands mentioned to be carefully examined by the agents and employés of the company as to their mineral or agricultural character, and that to the best of his knowledge and belief, none of the lands returned in said list are mineral lands." 19 Land Dec. 21. Such an affidavit, executed by Charles W. Eberlein, acting land agent of the company, was attached to the selection list in question, as was also another affidavit, in which he stated that the lands were "not interdicted mineral or reserved lands," but were "of the character contemplated by the grant, being within the limits of the exterior ten (10) miles indemnity belt," etc. While couched in technical language, the full scope of the charge as set forth in the bill is that, whereas the lands were known to be valuable for their mineral oil, Eberlein falsely represented to the Land Department that they were nonmineral, and thus induced the department to issue the patent. There is some comment in the government's brief upon the statement in the affidavit that affiant had caused the lands to be carefully examined by the agents and employés of the company, and the correctness thereof is no doubt open to question; but there is no averment in the bill of its falsity, nor is any relief claimed by reason thereof. And, besides, it is not thought that such a statement, even if untrue, is actionable in itself. It is significant here only by reason of its association with the accompanying statement that the listed lands were nonmineral in character; in that connection it may serve to fortify the view that, in making the substantive representations as to the character of the land, Eberlein is to be held chargeable with knowledge of all the conditions which such careful examination, if made, would have disclosed. Accordingly, in determining the quality and legal effect of his representation that to the best of his knowledge and belief none of the lands were mineral in character, we shall assume that he had all such available information, including of course everything that was known to the company's geologists and other agents or employés; and, indeed, as a matter of fact, we find that, through its several agencies, the company had such information as a

fairly careful surface exploration of the territory by the prospector and geologist would afford, and, for present purposes, this knowledge must be imputed to Eberlein, its responsible agent and representative. With such information, could he truthfully and in good faith represent to the Land Department that to the best of his knowledge and belief the lands were nonmineral?

[2, 3] When we come to analyze the record, we find that as to the physical conditions there is little conflict in the evidence, and that, aside from the "expert" testimony, the greater part of it relates to the geological significance which people variously qualified or unqualified were, during the general period in which the lists were filed, inclined to attach to such conditions. The original list was offered for filing November 14, 1903, but to correct certain errors a new or amended list was filed on September 6, 1904. We therefore inquire: What were the observable geological and other physical conditions during that period?

The lands are situated in what are locally known as the Elk Hills, the range of which is approximately 15 miles long and 6 or 7 miles wide at the widest point, with a northwesterly and southeasterly trend. Toward the east they fall quite abruptly for 1,000 or 1,200 feet to the broad San Joaquin Valley. From 5 to 10 miles westerly, with a similar trend, is the main uplift of the region called the Temblor Range, between which and the Elk Hills are the McKittrick Hills to the north, and the Buena Vista Hills to the south; the several uplifts being separated and defined by narrow intervening valleys. To the prospector for oil doubtless the most conspicuous feature of the territory in 1903 and 1904 was the actual development, more particularly in the McKittrick Hills, but also at Sunset, 25 or 30 miles to the southeast, and at Midway, halfway between, the latter fields both being upon the easterly flank of the Temblor Range. In the aggregate there were in these three fields in 1904 between 200 and 300 wells (part of them producing), and particularly in the McKittrick field the presence of oil in large volume reasonably near the surface and economically susceptible to extraction was abundantly shown. Perhaps 20 per cent. of these wells were in the Midway field, and the others were about equally divided between McKittrick and Sunset. If a line had been drawn from McKittrick to Sunset, through Midway, it would have been observed that all of the development was within a zone not to exceed a maximum width of 3 miles, and for most of the distance less than 2 miles. The railroad company's geologists, who were in the territory at various times during this period, doubtless noted oil seepages and oil sand outcrops for many miles along the line of the McKittrick development, and in several places along a line or zone westerly from the Midway field. From observations readily made they must have concluded that underlying this zone there were shales in which it is supposed the oil originates, and beds of sand into which it migrates. They must have further concluded that the several uplifts are structural, that is, they are the results of a folding or of foldings of the earth's crust, and they would have known that such a fold or anticline is a favorable formation for the accumu-

lation and retention of oil. They would have determined that the principal dip of the country is northeasterly, and the general trend of the fold axes is northwesterly and southeasterly.

With these known conditions, and with such additional surface occurrences as might have been observed in the Elk Hills themselves (admitted by all to be of minor significance), should they, by a process of geological correlation, have reasonably concluded that the lands in question were mineral lands, in the sense in which the phrase is judically used? They would have noted that from this zone of development it was a distance of between 3 and 4 miles to the nearest, and approximately 9 miles to the most distant, of the lands in question, with a valley intervening. The only development, if such it may be called, upon the township in which the lands are embraced, or to the north, or to the east thereof, or to the south (aside from the Midway and Sunset fields, several miles away), was an abandoned prospect hole in section 8, 30—23, sunk to a depth of about 900 feet, in 1901, without encountering oil; and another abandoned hole on section 2, 31—24, sunk about 600 feet, in 1901, striking small amounts of oil. As to surface indications, such as gas blow-outs, brea, and oil sands, which seem to be of about the same significance to the oil prospector that float and stain are to the lode prospector, the evidence is not highly satisfactory, and, when limited to the lands in question, or, indeed, to the entire township in which they are embraced, very meager. In a few places to the north and east, witnesses who testified doubtless believed that they found traces of oil that has vanished; but whether any importance at all can be attached to these occurrences is left in much uncertainty because of the doubtful character of the most conspicuous one, and the only one the existence of which was more or less generally known, namely, a so-called oil seepage in section 32, 30—24—a little more than a mile easterly from the east boundary of township 23. To say nothing of the view of the defendant's experts that there was no oil here, or anything to indicate the presence of oil, one of the chief experts for the government testified that he had made two examinations of the sands (which, it is to be noted, were dry), and upon a choroform test they gave no oil. He found some particles of carbon, and by a course of reasoning reached the conclusion that at some time in the past escaping gas carried oil, which had either been burned or had evaporated. But manifestly, if necessary to resort to such possible reasoning, it can scarcely be held that an occurrence of so doubtful a nature and significance must have been regarded by the defendant's geologists in 1903 and 1904 as having an important bearing upon the question of the mineral character of the selected lands.

Resorting to the history of the region, the railroad company's geologists would have learned that until oil was discovered in the Kern river field near Bakersfield in the spring of 1899, 30 miles to the east, the land in suit, as well as the surrounding territory, had been used for grazing purposes only, and had not attracted serious attention for its mineral possibilities; that following the Kern river discovery there was widespread excitement, and the whole countryside

was plastered with "locations" and "relocations." People from all walks of life were drawn into the race for claims. No one pretended to make an actual discovery, and one group of speculators, employing 25 or 30 locators, located approximately 50 square miles. Everything unpatented was taken in. The claims, of course, were speculative, and in the Elk Hills no actual discovery was made, and, with the two exceptions heretofore noted, there was no attempt at discovery or development. Claims were held, not by working them, but by the cheaper method of relocation, so that in 1903 locations were sometimes piled upon each other three or four deep. As a result, doubtless, of the discoveries in the Kern river field and the later ones at McKittrick and Sunset, as well as of the current excitement, the Commissioner of the General Land Office, on February 28, 1900, directed the local land officers to "suspend from disposition until further orders" a large body of lands, including the entire township in which the lands in suit are situate, and of this withdrawal the railroad company and its agents of course had knowledge. While the question is perhaps of but slight importance, it may be said in this connection that in our view this order was intended to withdraw lands from agricultural entry only, and it was so generally understood. The interests of the government were not imperiled by the possible mineral entry of comparatively worthless grazing lands, and therefore no reason existed for suspending that form of entry. And that the order was intended to be so understood is made clear by the contemporary construction of the department from which it issued. In response to a request of the railroad company that an investigation be made by the land office, with a view to lifting the suspension, so that the lands could be selected under its grant, certain correspondence passed, in all of which it is assumed that the suspension extended only to agricultural entries. For example, in the letter of December 10, 1903, from Acting Commissioner Fimple to Special Agent Ryan, there is found this sentence:

"It is stated that nearly four years have elapsed since the order of suspension and no mineral entries have been made for any of said lands."

And in the letter of February 11, 1904, from the same office to the register and receiver of the local land office, advising them of the restoration of the lands to entry, the original order is referred to as having "suspended (the land) from disposition under the agricultural land laws upon allegations that the same contain deposits of mineral (oil)." Although as thus appears the lands were open to mineral entry during three years or more after the excitement of 1899 and 1900, leading to the speculative location of all the public lands in the region, there was no effort to develop any of the lands in suit, nor, with the exception of the two ineffectual attempts already noted, was there any development anywhere in the Elk Hills, or any entry of any lands therein for patent. To state the case fully, it should be added that during this period the price of oil was comparatively low, and transportation facilities were poor.

Of all of these conditions—the "oil land boom," the following inactivity and depression, the rapid development in the narrow McKittrick-Midway-Sunset zone, the two abortive attempts at development

in the Elk Hills, the total want of oil land entries, notwithstanding suspension from agricultural entries, the general abandonment of locations—the railroad company's agents must have known, and must have considered as having more or less weight.

Such in outline are the material features of the geology of the region and of its development as an oil field. The geologic facts are interpreted by oil prospectors and operators, and by geological experts; and to this class of testimony we now direct attention. It is too voluminous to review in detail, and the most general analysis must suffice. As to certain geological features of the region there is practical harmony of view. It is virtually conceded by the experts for the railroad company that in the McKittrick-Midway-Sunset zone it was known that there was oil in considerable quantities, susceptible to profitable extraction, and that an anticline such as is found in the Elk Hills is an occurrence favorable to the accumulation and retention of oil, to which prospectors would hopefully look upon discovering the presence of oil in adjacent territory. They also concede that it then appeared probable that some oil would be found, but not in sufficient quantities or near enough the surface to warrant extraction and marketing. Upon the other hand, while confident that oil is to be found in the lands in suit, the government experts virtually concede that in the most favorable view its depth is great—so great in fact that under the conditions existing in 1903 and 1904, and, indeed, at the time the testimony was taken, extraction was economically impracticable. When it is borne in mind that a deep well costs at the rate of approximately $15 per foot, a large flow of oil, with fair prices, must be assured to justify the sinking of a well 4,000 or 5,000 feet deep. While some estimates of the probable depth were ventured, they were made reluctantly, and were apparently based upon data insufficient to give them the weight of reasonably satisfactory scientific deductions. Nor could any intelligent estimate be made of the quantity or quality of the oil. But while in still other respects the geologists are in substantial agreement, when it comes to a statement of general conclusions upon the ultimate question of the character of the lands, there is seemingly great diversity of opinion. To a certain degree, it is true, this variance is, upon analysis, found to be more apparent than real. For one witness to affirm and another to deny that the Elk Hills uplift is "oil territory" does not necessarily imply a real issue of fact, for the phrase "oil territory" has no fixed or well-recognized meaning, and may very well be used in one sense and understood in another. When therefore we look beneath the mere form of expression, we are not surprised to find that in a measure the seeming diversity disappears.

We can illustrate the point and at the same time convey some idea of the scope and substance of the expert testimony as a whole better by quoting at considerable length from a single witness than by assembling fragmentary and conflicting statements from many. Naturally, no expert witness for the one party will be wholly satisfactory to the other; but suppose that for our purpose we take the testimony of a witness called by the government, Prof. John Caspar Branner, of Stanford University, whose general competency and familiarity with

the geology of the California oil fields are conceded. Dr. Branner visited the McKittrick field in 1900, but did not go into the Elk Hills. This latter territory he inspected for the first time about 1910, and again in 1912. The testimony given by him upon direct examination, upon which the government most relies, is found in the following paragraph:

"I should say that if any competent geologist, observing the natural waste of oil about McKittrick and the state of development in 1900 or a year or two subsequent, and visiting the Elk Hills and making some examination of the structural formation, failed to form an opinion that the Elk Hills were oil in character and that there was an oil-bearing zone underneath those hills, he did not understand his business."

Upon cross-examination he testified:

"In passing upon the character of the Elk Hills, I did not determine in any way the quantity of oil and made no attempt to do so. I could not have done so from the examination I made. That could only be determined by putting down wells. One well might determine the matter and it might not. Development is required to determine whether or not that is a valuable oil deposit.

"A geologist does not determine the economic value of the land for oil. All he undertakes to do is to say whether or not the land has prospective value. I mean by prospective value, that the company proposing to develop that region should take it up—buy it, if necessary—and put down a well on it, should prospect it. I can best illustrate my idea of it by saying that I have considered it a reasonable investment, or, if you please to call it so, venture. I should have advised anybody who might have employed me to report on those propositions, to buy the lands with a view to developing them as petroleum lands, from the surface indications and my knowledge of the surrounding conditions and of the oil formations in general. I could not, when I first examined the land, have given an assurance that oil in valuable quantities could have been found. I could do so now on the basis of wells that have been put down there and have found oil. On the basis that in only two cases out of twenty-eight wells, some of them 4,000 feet deep, indications of oil had been found, and in those two cases oil had been found in quantities not sufficient to make these particular wells profitable, I would not hesitate to advise operators to go ahead with prospecting. In the first place, it depends on how those wells were located. If the wells were put down without reference to the geologic structure, they might go to an enormous depth without getting oil, and yet they may move off to one side and put down a well, within 1,000 or 2,000 feet, and get entirely different results. And still, I may add, the general structure of the Elk Hills is so favorable to the accumulation of oil in that region that, if they had gone to 5,000 feet and not found the oil, I should still advise a company to not give up hope of finding it. * * *

"As to whether all the portions of a bed of Monterey shale would be equally producing, I will say that these diatomaceous shales, being the source of oil, the oil does not as a rule stay in those beds. It passes out into an absorbing bed—a porous bed—where the oils accumulate. Now, the accumulation, therefore, depends on the presence of diatom beds to furnish the source, but the accumulations themselves, as you see, depend on the nature of the beds into which those oils pass; and you may have no beds there to receive that oil. The conditions may be unfavorable and the beds overlying them into which that oil can be expected to pass may vary in texture so that the oil accumulates more in one place than in another, so that the oil beds may be pockety even under conditions where you have diatomaceous beds of great thickness and evenness. * * *

"When I first went into the McKittrick district in 1900, I visited the Temblor Range. I had two assistants working with me to do topographical work, and we were mapping an area of several square miles, in detail, and my im-

pression is I must have been there something like ten days or two weeks working on that geology.

"I made quite a careful examination during that period for the purpose of reporting on oil possibilities and reached the conclusion that there was oil, probably in paying quantities, on the property, if the wells were put down at certain points; and I located the wells and they found the oil, but I cannot say whether in paying quantities or not. From my surface examinations I could not determine with any degree of exactness whether there was oil there in paying quantities. That had to wait the test of the drill. * * *

"Even if I had not seen that seepage, my opinion would have been, owing to the formation of the Elk Hills, that they were suitable for the accumulation of oil; but that would not necessarily mean that they had accumulated oil. That could be determined only by exploration. I suppose there are promising formations giving indications of adequate reservoir space for the accumulation of oil, that do not produce oil in paying quantities. I should say such things do occur. * * *

"Suppose you had an oil company and the geologist looked at that whole anticline. The geologist would naturally say, 'Look for your petroleum along where these domes are.' But, at the same time, that whole arch there is practically an inverted arch or trough under which the petroleum accumulates. Now, there is an end to the petroleum somewhere. It is not going to accumulate everywhere in that entire arch. So, you can bore holes right along the crest of the anticline and in some places get great quantities of petroleum and in other places you won't get any at all, because the water crowds the petroleum up underneath there.

"There might have been an anticline broken across and so dislocated that the petroleum might have floated right out, and it might have come out to the surface, especially on the side that is uplifted, so that it would be floated out to the surface and lost. There are sometimes processes going on in the oil beds where the oil is deposited which would make it unprofitable to get out the oil. * * *

"I do not think there is any way to determine from an examination of the surface how large an area yields oil at any particular point. It sometimes happens that the sand beds become hardened so that they cease to be media through which oil can pass, and it occasionally or even frequently happens that the sand beds pinch out between hard layers of strata. That is one of the reasons that one well is not a complete test of the character of any given territory; and, as to other reasons therefor, I will say it depends on the localization of the oil. * * *

"I do not think that the presence or absence of water in the strata carrying oil could be regarded as decisively having a bearing upon where you would find the oil; certainly not in the light of what I understand to be the well-known fact in regard to the occurrence of petroleum in the San Joaquin Valley to-day. It used to be considered that if a well were put down and struck water there was no use looking for petroleum there; but I understand that the water has been shut out, in a number of instances, and the well has gone on deeper and found the petroleum below the water horizon.

"It is my general impression that the view I have first mentioned generally prevailed in the California oil fields until a few years ago.

"Other things permitting, water would force the oil into the anticline to where there is a large accumulation of gas developed at the crest of the anticline. The oil would stay on top of the water, and the presence of water would have considerable bearing upon whether you would find oil in the anticline or not. These conditions cannot be determined from a surface examination.

"It is not possible from a surface examination such as I made of the Elk Hills to determine the depth of the oil sands. There are only two ways in which that can be determined. One would be to work out the geology with great care and detail over the region—not only in the Elk Hills themselves, but in the surrounding country—to find in what horizon the oil accumulates, and then by fitting one's evidence together and studying it one might come to

the conclusion in regard to the depth at which the well would reach the oil-bearing bed. The only other way would simply be to put a well down and test it.

"I have not made sufficient examination with that question in mind, to be able to tell whether you could ascertain the depth without a well, in the Elk Hills. I made no attempt to do so. The purpose of my examination was to ascertain, generally, whether that could be considered as possible oil territory, and I made no attempt to determine whether it was paying oil territory. * * *

"It is not ordinarily possible for a geologist, or practical oil man, to determine from the existence of an oil bed at a particular point that the bed continues for any particular or definite distance in all directions or any direction, partly because the oil comes to an end where it rests on the water; partly because the porous beds are not infrequently more or less lenticular in form. That is, they may pinch out and come to an end of themselves in that way, by thinning down, or they may be interrupted by breaks, what we call faults or displacements of beds, so that the beds may be chopped square off."

Upon redirect examination he stated that the Monterey shales were very thick—approximately 5,000 feet in the region just west of the Elk Hills and the Buena Vista Hills—and that he would not expect them to be so faulted as to be disadvantageous to the accumulation of oil in these hills; that he had no reason to believe that the oil sands were thin or hard or pinched out; and that geologically quartz mining is less certain than petroleum, but that coal mining is most certain of all. And then he testified:

"In coal mining one can get a very close idea of the tonnage to be taken out under a given tract of land; that is, we can calculate the product. It is the rule, in fact, in the anthracite regions in Pennsylvania, that the company will have in its reports by its geologist: 'We have so many acres of land. This land yields so many tons an acre.' And they count on that just exactly as if it were money in the bank. Now, in petroleum mining, of course you can't do that exact thing; there is an element of uncertainty about it that you don't find in coal mining. * * *

"I should expect to find certain parts of the folds in Elk Hills more productive than others; but it would be a pretty nice question to say just where the petroleum is going to come to an end. I don't think anybody could tell.

"It seems to me that the best chances for oil in the whole country in that region were in the Elk Hills and the Buena Vista Hills. In forming that opinion I took into consideration the possibilities of the nonoccurrence of oil resulting from the conditions of the sand and the pinching and hardness of the stratum, and other interruptions; I think that any reasonable geologist knows that there is a certain amount of risk in any kind of petroleum mining. He counts on that.

"I should say, decidedly, that the conditions in the Elk Hills are such as to warrant the ordinarily prudent man in the investment and expenditure of money with a reasonable expectation of developing a paying oil property. But I should like to explain this, that if we went back to the conditions as they existed there before any wells were put down in either of those hills, and if I had been the consulting geologist for some company or party who anticipated putting down wells there, I should have put it to him in this way: 'In my opinion the geology, altogether, of the mountains to the west, and the floor of the valley, and everything taken together, strongly suggest that these hills are the best place in which to put down oil wells. There ought to be, so far as we can see, enormous quantities of petroleum under those two groups of hills. Now, there is nothing absolutely certain about putting down an oil well in a new region; there is a certain amount of risk about it and you can't get away from that risk.' And I should have said to those men:

'If you have got money to risk and you can afford to lose it, put it in there; if you can't afford to take any risks, you had better let somebody else do it.'

"I mean that any one who had money to risk and who might afford to lose it might get larger returns for his money than he would from an ordinary investment. Perhaps I ought to say that one of the reasons for that risk lies in the fact that there is no way, short of putting a well down there, to determine the thickness of the strata that overlie the oil-bearing bed. As every one knows, who knows anything about petroleum wells, you may have an enormous volume of petroleum so deep that you can't get it, and I should have said that may be the possibility there. Of course, the developments there have shown that the oil is there, and the question now, of course, is entirely different from what it would have been before those wells were put down.

"It is my belief that there is an enormous petroleum deposit in those hills, but I have made no attempt to work out the details as to the depth and am not prepared to state whether it would be 2,500 or 5,000 feet."

And again, upon recross:

"I did not mean to say that I could tell whether the oil-bearing beds under the Elk Hills were folded, faulted even, or what condition they were in; that I could not determine. It might possibly be folded and overturned.

"I don't know when I first heard of the change of view in reference to water being found in oil wells; it was comparatively recent; certainly within three or four years, but I would not say exactly. Prior to that time water in a well had been regarded as an almost fatal condition."

And still again, upon redirect:

"I should have said that I did not know whether water, under the conditions mentioned above, would be fatal or not, because my observation in regard to water led me to believe that it could be separated from oil horizons and that it was separated from them; but the well drillers all protested, so that, as far as my experience went, when they got to water they gave it up as no use."

And finally, upon recross:

"I do not mean to be understood as saying that I actually determined that the territory did contain an immense quantity of oil. I meant to say that if I had gone over that ground in 1900 with a view to saying whether or not those were probably petroleum lands, I should have, under those circumstances, pronounced them oil lands and recommended their exploitation to any one who was able to take the risk. I realized that the risk might result in a total loss of the investment."

In considering this testimony, it should be borne in mind that nowhere in the record is there any attempt to show, nor is there any claim, that any subdivision of the lands in suit contains more oil or is more valuable for oil than any other subdivision of such lands, or, for that matter, than any other part of the entire territory embraced in the Elk Hills. So that (to make a concrete case), if we are to find that the southwest quarter of the southwest quarter of section 19, 30—23, was known oil land, we must also find that every 40 acres in a tract aggregating 40 or 50 sections is of the same character. Having in mind this aspect of the case, perhaps we should supplement the testimony of Dr. Branner with the views of "practical oil men." Frank Barrett, a witness for the government, was 67 years old, and had been in the oil business all of his life—after 1905, in California. He examined 30—23 in 1899, and "recommended the entire south half of the township as good oil-bearing territory." And yet he testified:

"I believed the country might produce oil, and I was examining it with reference to its character as an oil prospect. I knew of no discovery of oil in the township and heard of none. I could not have said, 'This is known oil territory.' I could only have said that, in my opinion, it would prove to be such. My experience extends back pretty nearly to the time the first oil well was sunk in this country. I have seen promising oil territory develop, not oil, but I have seen them throw out what was pretty near as good as oil —gas—plenty of it, that was utilized for manufacturing purposes. I have observed promising indications very frequently that didn't pan out. The oil business is a good deal like elections. I don't think the percentage of failures in the oil business is greater than 50 per cent. if it is gone into intelligently and systematically, but, still, at the same time, you can't—well, I will illustrate to you. In one section a well down 3,200 feet and no oil; the next section to it, 250 feet, and good producer. A high priced expert couldn't see a bit deeper into the ground than another. The oil doesn't always appear where they say it will. The true expert is the drill. You couldn't say that a territory is known oil ground till you put a drill in it. It is not known till it is proven."

W. E. Youle, an operator of long experience, also produced as a witness by the government, having first stated that he regarded the Elk Hills as oil territory, testified:

"I didn't at that time come to the conclusion as to the depth we would have to sink. That would be out of the question. I never heard such a question asked before. It would be far from an experienced man's ideas to think of such a thing. There is a gamble in the oil business, and we are willing to go just as long as the string will let us or the money will let us, and often go very deep; and I do not believe that I ever heard an expert oil man or a geologist ask the question before what he thought of depth, because it is so utterly foolish to think that a man could tell anything at all about the depth."

And again:

"I know a man that had 16 dry holes and made a million dollars after that. He got oil in the same country. He crept out and got it.

"The fact that oil is found on one section is not evidence that it may be found in every section in the township; there may be kidneys. Oil is not contained like a river under ground, but in kidneys. While you are in the oil sand all the time, we know by experience that there are dry holes drilled in oil sand. Had those been drilled, the first one, two, or three, you might condemn the territory and throw it out, the same as the Associated did. It might have been possible to make a well for the purpose of getting the land cheap. I have had fellows do it on me, who owned the ground, and get the sand and wouldn't tell about it and you had a dry hole.

"The discovery of oil in one section or quarter section does not indicate to a practical oil man that oil will be discovered in every section in that township. It implies this: If you get oil in this section, experience has taught us that oil is not just in that little space in that well, but that it has a direction somewhere. And immediately you will find oil men locating and acquiring lands quite a distance from that well. You find that among oil men because experience has taught that there is a direction to that oil vein."

By "oil territory," it would seem to be clear, these and other government witnesses mean territory where the observable geological conditions are such as to justify expenditures in prospecting, and prospecting by those who are able to take the chances. Using the language of the last-named witness:

"I had had no experience in that field to the extent of $50,000 in one hole. I could drill 3,500 or 4,000 feet for $50,000 or less.

"I did not contemplate having to go that far. The oil business is a gamble. It is not like farming. You just bet that you don't go down that deep and

that territory was good to have bet on. If you win once in four or five times, you make a lot of money. That is the reason why I would have advised people to spend $50,000 or $100,000 there. I wouldn't advise widows and orphans and dishwashers and cooks who could not risk money; but, if you wanted a chance to make a million dollars, I would pick the Elk Hills quicker than any piece of land in there, because the formation justifies what I say."

As expressing the general views of the geologists produced by the defendant we can perhaps do no better than to quote the conclusion of Frank M. Anderson, who testified at great length touching both the geology of oil and the economic factors to be considered in producing and putting it upon the market, as well as in relation to local conditions in the Elk Hills:

"My conclusion as to the likelihood of the Elk Hills being then or ever being oil territory was negative. That is to say, I did not believe that they were oil-bearing or ever would be found to be oil-bearing. At least, not in paying quantities—not commercially oil-bearing. I suppose that I did expect there might be some insignificant deposits of oil found in them, as there might be in any part of the country between Sunset and Coalinga if there was a well put down in these beds. All of them throughout their whole extent are more or less organic in character, and, if a well is put down in a strata containing these organic materials, there would be insignificant and unimportant occurrences of gas and oil found nearly anywhere, and that has been generally the case wherever wells have been drilled so far as I know. But as to these hills containing any commercial deposits of oil, I didn't believe they would, and I don't now believe they would."

It may be of some assistance to refer to the general views of two other geologists, who were not sworn, and who, so far as the record shows, were neutral touching the present controversy and the parties thereto. From certain bulletins prepared by Mr. Ralph Arnold, who, it was stated by Dr. Branner, has done "more work for the United States than any other man in connection with the oil geology in California," and "has the reputation, deservedly, of being an able geologist," the following extracts were read in evidence:

"Any one at all familiar with the conditions of occurrence of petroleum in the California fields knows that any but the most tentative predictions as to the location of the oil are extremely hazardous. The following suggestions, based on the evidence in hand, although lacking definiteness for the reasons above stated, may be of some assistance to those engaged in developing this field."

And again:

"It must be borne in mind, however, that absolute determination, by work on the surface, of the occurrence or nonoccurrence of oil in any one locality, is not possible. The best that can be done is to calculate the degree of probability on the basis of surface indications and structural conditions."

And from a bulletin issued relative to another California field by Mr. Robert Anderson, who was Mr. Arnold's assistant, and upon his resignation was put in charge of the petroleum work in California by the United States survey, the following is taken:

"For an undeveloped region such as this, in which the character of the rocks makes it not impossible for oil to be present, but which for the most part has not been subjected to experimental test by the drill and in which the local tests made have been inconclusive, it is of course impossible to

reach positive conclusions as to the occurrence of oil in commercial quantities at depths."

With the observable facts and conditions as we have sketched them, interpreted in the light of geologic science, should it be held that at the time of their selection in 1904 these lands were known to be valuable for petroleum? Upon behalf of complainant it is conceded that the available information was insufficient to constitute a "discovery," as that term is used in the mineral land laws, and that therefore the lands were not locatable or enterable as mineral lands. Butte Oil Co., 40 Land Dec. 602. But it is contended that land may be "known to be valuable" for its mineral content, and yet such knowledge be insufficient to constitute "discovery." Manifestly, from this view, if adopted, it would necessarily follow that there are bodies of unreserved public lands for the private acquisition of which Congress has made no provision. But whether "discovery," in a legal sense, necessarily implies actual exposure to the eye, is an inquiry not directly involved here, and, in view of its far-reaching importance, its definitive answer should await a suit in which it is directly put in issue. While therefore we put aside as being of doubtful relevancy the decisions which define "discovery," especially in the case of metaliferous deposits, we are inclined to regard as in point cases construing and applying section 2333 of the Revised Statutes of the United States prescribing the procedure where a lode is embraced within a placer claim. It is there provided that, "where a vein or lode * * * is known to exist within the boundaries of a placer claim," an application for patent for placer which does not include an application for the lode shall be construed as a waiver by the applicant of any claim to the lode, and the title thereto shall remain in the United States, notwithstanding the placer patent. The granting act under consideration here excludes from the grant all the lands which at the time of their selection by the grantee were known to be valuable for their minerals. The terms of exclusion in the two statutes, it will be observed, are closely analogous, if not identical, in meaning. In construing and applying section 2333, it was said, in Sullivan v. Iron-Silver Mining Co., 143 U. S. 431, 12 Sup. Ct. 555, 36 L. Ed. 214:

"Defendants offered a mass of testimony, the scope of which was similar to that condemned as insufficient in the case of Iron Silver Mining Co. v. Reynolds, supra (124 U. S. 374 [8 Sup. Ct. 598, 31 L. Ed. 466]). Its purport was that it was commonly believed that underlying all the country in that vicinity was a nearly horizontal vein or deposit, frequently called a blanket vein; and that the parties who were instrumental in securing this placer patent shared in that belief, and obtained the patent with a view to thereafter developing such underlying vein. But whatever beliefs may have been entertained generally, or by the placer patentees alone, there was up to the time the patent was obtained no knowledge in respect thereto. It was, so far as disclosed by this testimony, on the part of everybody, patentees included, merely a matter of speculation and belief, based not on any discoveries in the placer tract, or any tracings of a vein or lode adjacent thereto, but on the fact that quite a number of shafts sunk elsewhere in the district had disclosed horizontal deposits of a particular kind of ore, which it was argued might be merely parts of a single vein of continuous extension through all that territory. Such a belief is not the knowledge required by the section. In the case referred to this court said: 'There may be difficulty in determining

whether such knowledge in a given case was had, but between mere belief and knowledge there is a wide difference. The court could not make them synonymous by its charge, and thus in effect incorporate new terms into the statute.' "

See, also, Iron Silver Mining Co. v. Reynolds, 124 U. S. 377, 8 Sup. Ct. 598, 31 L. Ed. 466; United States v. Silver M. Co., 128 U. S. 673, 9 Sup. Ct. 195, 32 L. Ed. 571; Migeon v. Montana Central Ry. Co., 77 Fed. 249, 23 C. C. A. 156; Thomas v. South Butte M. Co., 211 Fed. 105, 128 C. C. A. 33; Barnard Realty Co. v. Nolan (D. C.) 215 Fed. 996.

But of more decisive importance, the government contends, is the comparatively recent case of Diamond Coal & Coke Co. v. United States, 233 U. S. 236, 34 Sup. Ct. 507, 58 L. Ed. 936. Upon it, it places its chief reliance, and throughout the trial its representatives have studiously sought to establish a state of facts upon which to predicate the claim that in their legal aspects the two cases are substantially identical. The Diamond Coal suit was brought to set aside, for fraud, homestead patents to what were alleged to be coal lands, in the state of Wyoming. The relief prayed for was granted by the Circuit Court of Appeals, and in affirming the decision the Supreme Court took occasion to restate in comprehensive form the principles under which the issues in such a suit are to be determined. After referring to the familiar doctrine that the government must bear the burden of proof, and "sustain it by that class of evidence which commands respect, and that amount of it which produces conviction," the court said:

"To justify the annulment of a * * * patent as wrongfully covering mineral land, it must appear that at the time of the proceedings which resulted in the patent the land was known to be valuable for mineral; that is to say, it must appear that the known conditions at the time * * * were plainly such as to engender the belief that the land contained mineral deposits of such quality and in such quantity as would render their extraction profitable, and justify expenditures to that end. If at that time the land was not thus known to be valuable for mineral, subsequent discoveries will not affect the patent. * * * If the proofs were not false then, they cannot be condemned, nor the good faith of the applicant impugned, by reason of any subsequent change in the conditions. We say 'land known at the time to be valuable for its minerals,' as there are vast tracts of public land in which minerals of different kinds are found, but not in such quantity as to justify expenditures in the effort to extract them. It is not to such lands that the term 'mineral' in the sense of the statute is applicable."

The novelty, if any there be, in this restatement of the rule, is to be found in the suggestion that the requirement of "knowledge" of the mineral character of the land is satisfied by knowledge of "conditions" which are "plainly such as to engender the belief" that the land is valuable for its minerals. To be mineral in fact, it is further explained, the lands must contain "mineral deposits of such quality and in such quantity as would render their extraction profitable and justify expenditures to that end." Of course, it will not be assumed that the court intended to repudiate the doctrine which it had announced in Iron Silver Mining Co. v. Reynolds, and had reaffirmed in Sullivan v. Iron Silver, etc., supra, from which we have already quoted. There is no real conflict. The distinction is to be found in the fact that

in one case the "belief" referred to was without any substantial basis, whereas in the other it was induced by deductions which the responsible, qualified, practical man would naturally make. The "belief" approved in the Coal Case is an intelligent, rational belief. It is the knowledge acquired through scientific deduction, or through reasonable inference, by persons competent, because of their learning or experience, to make such deductions or to draw such inferences. The court having there reasoned from visible to invisible conditions, it is here contended that, if the conclusion was warranted that a coal measure lay beneath the surface of the lands in suit, by parity of reasoning it should be held here that there is oil beneath the surface of these lands. Two assumptions are involved. The first is that the occurrence of petroleum in the earth is subject to the same geological laws as coal measures. But is such the fact? True, both are to be found in horizontal or stratified deposits, but the record abundantly shows that the close analogy ends there, and in the case of oil not only are there more unknown factors in correlating the known with the unknown, but there are contingencies incident to commercial exploitation to which coal is not subject. Such in terms, as we have already seen, is the testimony of Dr. Branner:

"In coal mining," he says, "one can get a very close idea of the tonnage to be taken out of a given tract of land; that is, we can calculate the product. * * * Now, in petroleum mining you cannot do that exactly; there is an element of uncertainty about it that you don't find in coal mining."

Indeed, the difference must be obvious. A coal bed is fixed and unchangeable in relation to the inclosing strata. It may be bent or broken together with the folding or crushing of the earth's crust, and its original continuity may be interrupted by faulting or erosion but its relative position remains unaltered. Not so with oil. It is mobile. It is not sought in the shales in which it originates, but in the porous sand strata into which it migrates. If it has not escaped from the sands through some break in the continuity of the inclosing strata, it may be uniformly persistent, but with no such degree of certainty as in the case of coal or phosphates. Owing to the pressure of water and gas, it may be forced to and held in "pockets," or confined to those portions of the folded sand stratum lying between certain horizontal planes or levels, above or below which zone there may be nothing but gas or water. For that reason, while the sand stratum may, like a coal bed, be continuous, and may be found at any point beneath a given area, it may turn out to be wholly barren of oil in one place, while carrying an abundant supply but a short distance away. Until recently at least, according to the testimony of Dr. Branner, to encounter water in driving a well rendered the enterprise hopeless, in the eyes of practical oil men. So too it has been more or less generally thought that oil does not abide the presence of sea water, and there is evidence to the effect that in this region sea water may be encountered from 1,200 to 1,500 feet beneath sea level.

Now as to the second assumption, that the "known conditions" are substantially the same here as they were in the coal case. In that case 34 patents had been issued to representatives of the coal company,

to 2,840 acres of land, upon what are known as soldiers' additional homestead entries. The defendant, to whom the lands were conveyed, was engaged in mining coal upon a large scale from adjacent lands, and its well-informed and experienced superintendent acted upon its behalf and as its agent in the acquisition of patents, the proceedings for which were initiated in 1899, and continued through two or three years. The court said:

"For many years the district in which the lands were situate had been known to contain coal. They were surveyed in 1874, and the surveyor reported one of the sections as coal land; the others being contiguous to lands similarly reported. This was shown in the field notes and upon the official plats. The lands were in a valley, 3 or 4 miles in width, bounded on the east and west by foothills. A thick bed of coal was disclosed in the eastern face of the western hills, but its quality was not such as to make it of commercial value. Along the western base of the eastern hills was the outcrop of another coal bed. This outcrop had been weathered down and in some places covered by the wash from above, but it could be traced upon the surface for several miles. It had been opened up at different places, and the openings disclosed a coal bed, from 6 to 14 feet in thickness, dipping to the west at an angle of from 15 to 25 degrees from the horizontal, as did the Cretaceous rocks with which it was interstratified. This coal was of superior quality and recognized commercial value, and the rocks containing it were the coal-bearing strata of that region. The lands in controversy were west of the outcrop, in the direction of the dip. Some were near the outcrop, and the east line of the farthest section was about a mile and a half away. There was nothing upon their surface showing the presence of coal beneath, nor anything indicating that the bed outcropping on the east and dipping to the west did not pass through them. Unless valuable for coal, they were not worth to exceed a dollar and a quarter an acre. They were arid sagebrush lands, about 7,000 feet above sea level, and afforded very limited pasturage. Without irrigation they were not susceptible of cultivation, and the cost of securing water for that purpose was prohibitive.

"Attracted by this outcrop, the coal company opened a mine thereon, in the vicinity of these lands, in 1894. In the beginning the output of the mine was small, but it reached 183,750 tons for 1897, 259,608 tons for 1898, and 441,277 tons for 1899."

It was further shown that this superintendent, who had knowledge of all the conditions, had in 1898 engineered a project for procuring the lands (which he deemed to be valuable for coal) through the medium of "dummy" homesteaders. These dummies, having been paid $500 each by the company, later relinquished upon its request, so that its superintendent and another of its representatives might make the soldiers' additional entries. In 1898 this same superintendent had filed in the land office a sworn declaration attending his application to purchase one of the tracts in controversy, in which he stated that it contained a valuable vein of coal. Within a half mile in each of three directions from the lands in question there was a quarter section upon which a good bed of coal eight feet in thickness had been disclosed. And this the coal company had purchased from one Lees for $3,400. The lands in question, unless valuable for coal, were not worth to exceed $1.25 per acre, and yet the company willingly spent at least ten times that amount to acquire the title.

"It was hardly intending to make an aimless or grossly excessive expenditure. It was a practical concern, operated by practical men. It had located a mine upon the outcrop five years before, and in the meantime had proved

the wisdom of the undertaking by its mining operations. They had disclosed the existence of an extensive bed of valuable coal dipping to the west under the valley, and in that way had supplemented the evidence afforded by the outcrop and its surroundings."

The court summed up and closed the discussion as follows:

"An exposure to the eye of coal upon the particular lands was not essential to give them a then present value for coal mining. They were all adjacent to the outcrop and above the plane of the coal-bearing strata dipping under the valley. In alternate even-numbered sections they substantially paralleled the outcrop for seven miles, and in two places were separated from it by only a few rods. Those to the north were opposite the company's developed mine (No. 4), and those to the south were opposite the tract acquired through Lees, upon which good coal was disclosed. The outcrop, the disclosures in the vicinity, and the geological formation pointed with convincing force to a workable bed of merchantable coal extending under the valley and penetrating these lands. These conditions were open to common observation, and were such as would appeal to practical men and be relied upon by them in making investments for coal mining. They did so appeal to the Cumberland people, as well as this company, both large concerns represented by men of experience, understanding the uncertainties and hazards of the business as well as its rewards.

"It will be perceived that we are not here concerned with a mere outcropping of coal with nothing pointing persuasively to its quality, extent or value; neither are we considering other minerals whose mode of deposition and situation in the earth are so irregular or otherwise unlike coal as to require that they be dealt with along other lines."

Manifestly, a case so remotely analogous cannot be deemed to be conclusive of the issues here, especially in the light of the caution which the court took the pains to express in the closing paragraph of the opinion. The known conditions here are much further removed from the unknown, and, even were the geological occurrences comparable, the character of petroleum is such that, as we have seen, speculation as to its presence at any given place beneath the earth's surface is attended with uncertainties from which explorations for coal are free. And other considerations to which the court there attached much weight, if not wholly wanting here, are so weakened as to have but little persuasive force. Here, as there, the lands had only a nominal value; but the defendant company here was paying nothing for them. Apparently it was under the necessity of taking these lands or incurring the risk of getting nothing under its existing grant. Upon the other hand, in the coal case, so persistent was the zeal of the coal company to acquire the lands that it not only resorted to fraudulent practices to obtain them, but was willing to pay at least ten times what they were worth for any purpose other than coal. As the court points out, the evidence of valuable coal beds was of such character, and was so abundant, as to induce intelligent and practical operators, not merely to prospect for coal, but to open up coal mines, and that such was the view of the company's superintendent there could be no doubt. Though still in its employ at the time of the trial, he was not called by the company as a witness, to contradict or explain damaging statements and admissions attributed to him. Here, from the contemporary correspondence and maps and other data, and such testimony as appears to be credible touching oral statements made by different rep-

resentatives of the company from time to time, we are convinced that Eberlein and the geologists, and also, it must be presumed, some of their superiors, regarded the lands as possible oil lands, and hoped that they might turn out to be such; but no one went further than to regard them as "prospecting" territory.

Certain incidents, it must be admitted, are equivocal, and are susceptible of a construction which tends to give them a sinister aspect. Chief of these perhaps is the fact that Eberlein kept most of the correspondence and papers relating to the selection in a private file—conduct which the government contends signifies a consciousness of wrongdoing. Upon the other hand, it is pointed out that he had but recently come from New York to take charge of appellant's land department, and that he found it in an unsatisfactory condition; that the business of appellant was transacted through departments; that he soon found that his views were at variance with those of the heads of other departments who were in closer touch with the local management; and that he was solicitous about his records in order that they should be available for his use in absolving himself from blame should the San Francisco management be criticized by the New York offices, as he anticipated would be the case. Both theories are plausibly supported, but neither is entirely satisfactory. Upon the one hand, it is difficult to see why he did not at once lay the matter before the New York officers, and, upon the other, if he was conscious that his records would incriminate him, we are at a loss to understand why he should have taken pains to restore and preserve them after their partial destruction in the San Francisco fire, and especially after he knew that the only outstanding copies or duplicates had been totally destroyed. So of the incident of the proposed lease of the lands belonging to the company lying near those in suit, to a subsidiary organization, for mineral exploration. In one aspect, his objection to such lease would seem to imply a knowledge or belief that the lands in question were valuable for oil, and, upon the other, he plausibly explains that in view of the known attitude of the General Land Office and the prevailing speculation as to oil in the general locality of these lands, for the appellant to lease these or other lands which it owned in close proximity, for mineral exploration, would naturally arouse a suspicion on the part of the land officials that it (the applicant) had undisclosed information that the lands were valuable for oil, which, even though without foundation in fact, would be sufficient to cause an indefinite suspension of the application for patent.

But whatever view may be taken of these incidents, manifestly neither the mental nor the moral attitude of Eberlein furnishes any substantive evidence touching the real character of the land or the controlling issue which we must decide. In this respect the case is readily distinguishable from the Diamond Coal Case, where the company's superintendent was not only personally acquainted with the lands and all their surroundings, but was well-informed upon the subject of coal mining, and competent to form an intelligent judgment. Eberlein knew nothing about oil, was never upon the lands, and personally was unfamiliar with local conditions. One of his assistants, of whom

he inquired, had a general knowledge of the lands; the company maintained other agencies for securing information touching land selections, to which, however, he seems not to have resorted. Apparently he entertained a view of the law prevailing in some quarters that the only investigation required before making application for patent was of the surface conditions upon the lands applied for. Upon recently coming to the land department of the company he found selections under the grant in arrears, and if we say that he was anxious to make selections before all the available lands were gone, that he hoped that these lands would ultimately turn out to be oil lands, that he was anxious to procure patent before there should be such development upon, or in close proximity to, them as might demonstrate that his hope was not without substance, and that he had some vague fear that other representatives of the company had information or belief inconsistent with his representations, or would take a course tending to cast discredit thereon, and compromise him, his conduct may be explained better than by any other theory which has been suggested.

It is further contended that it was generally believed in the community in 1903 and 1904 that these lands contained valuable oil deposits; some witnesses affirming and others denying the prevalence of such belief. Of course, mere popular opinion upon such a subject is of no value. As already suggested, to amount to knowledge, the "belief" must be the rational conclusion or the scientific deduction of one who is qualified by experience or learning to form an intelligent judgment. Referring to coal, for illustration, would not nine out of ten ordinary men consider an outcrop sufficient to warrant a "coal location," especially if the venture entailed only a nominal expense. The outcrop would probably engender in the ordinary man a belief in the existence of an underlying coal bed. But, as stated in the Diamond Coal Case, the belief that rests upon "a mere outcropping of coal, with nothing pointing persuasively to its quality, extent, or value," is insufficient. And inasmuch as exploration for oil is admittedly subject to greater contingencies than coal, empirical belief relative to its occurrence is correspondingly less reliable. And see the pertinent language hereinbefore quoted from Sullivan v. Iron Silver M. Co., 143 U. S. 431, 435, 436, 12 Sup. Ct. 555, 36 L. Ed. 214. Moreover, it is difficult, after the lapse of years and the change of conditions, to reproduce a faithful picture of the state of mind existing in 1903 and 1904. It is easy enough for one who shared in the optimism characterizing the oil boom of 1900 and 1901 now unconsciously to project that feeling over in 1903 and 1904, or unconsciously to relate to that period the persuasive influence of more recent discoveries, better methods of extraction, and improved marketing conditions.

Between 1904 and the time the testimony was taken, there had been a material increase in the price of oil. A railway had been extended up into the Midway valley. A government bulletin had been issued suggesting the view that oil would probably be found nearer the surface in the Elk Hills than had theretofore been thought probable. But most important of all perhaps was the striking of an enormous flow of gas in the Honolulu well in the Buena Vista Hills, at a depth of

about 1,700 feet, and the subsequent striking of oil in the same well. It is to be inferred that considerable excitement followed this discovery. The gas was encountered in July, 1909, oil in the spring of 1910, and a few months later, in December, 1910, this suit was instituted, and thereafter, in due time, the testimony was taken. Whether these and other conditions, nonexistent in 1903 and 1904, had anything to do with the commencement of the suit, it is unnecessary to inquire. It is sufficient to say that no suit was brought or testimony taken until after the conditions arose, and that consideration of such new conditions must of necessity have given a measure of color to the testimony. The outstanding and undisputed fact is that, if there was faith at all in 1903–04, it was faith without works. While development was going on in the McKittrick-Midway-Sunset belt, there was an absolute want of activity in the Elk Hills. Not only was there no expensive exploration, but locations were being permitted to lapse, and there was not even sufficient interest to induce locators to maintain their rights by the comparatively inexpensive device of relocation. Moreover, although defendant's application was pending for a year, and it embraced lands covered by numerous locations, and though notice of its pendency was given by publication, as required by the regulations of the land department, no objection was raised either by the general public or the parties interested in the oil locations. In the meantime the department had sent a special agent to make inspection, and he had reported that the lands were nonmineral. True, his examination was hasty and superficial, but there is no suggestion of fraud or bad faith upon his part. Both he and his superiors at Washington had knowledge of the fact that although the lands had, for over three years, been under suspension from agricultural entries, no serious effort was being made by any one of the numerous locators to demonstrate the existence of oil in commercial quantities or to acquire title. And under such circumstances it is perhaps not strange that they readily concluded the land was nonmineral.

Let it be granted that the market for petroleum products was low at that time, and transportation facilities meager, and that capital was conservative; the fact remains that although, by the earlier boom, the attention of the experienced and inexperienced, the informed and uninformed, all classes—capitalist as well as promoter—had been drawn to this territory, and though in the nearby McKittrick-Midway-Sunset belt both exploration and operation were going forward, the defendant company was permitted, after public notice, to acquire a patent without opposition, protest, or question. It is difficult to reconcile such facts with the theory that it was generally believed that the lands were valuable for their petroleum content.

Without further discussion, our general conclusion is that the lands were not, in 1903–04, known to be valuable for their mineral. The conditions were such only as to suggest the probability that they contained some oil, at some depth, but nothing to point persuasively to its quality, extent, or value. Or, putting it in another way, the conditions were such as to suggest the possibility of oil in paying quantities, and to induce the more venturesome—such as were willing to take

chances—to prospect the field; but we are satisfied they were not "plainly such as to engender the belief" that any given section or other legal subdivision contained oil of such quality and quantity, and at such depth, as would render its extraction profitable. Having reached this conclusion, we deem it unnecessary to decide whether the evidence offered by the appellants touching exploration and development work within and near township 30—23, since 1904, which they contend demonstrates that the lands are not valuable for oil, is relevant for any purpose.

The decree will be reversed, with directions to dismiss the bill.

GILBERT, Circuit Judge, dissents.

CHESAPEAKE & O. RY. CO. v. UNITED STATES (two cases).

(Circuit Court of Appeals, Sixth Circuit. April 5, 1918.)

Nos. 3063, 3064.

1. RAILROADS ⟸229—SAFETY APPLIANCE ACT—CONSTRUCTION.
   The Safety Appliance Act (Act March 2, 1893, c. 196, 27 Stat. 531 [Comp. St. 1916, §§ 8605–8612]), as originally passed, being remedial and humanitarian in its purpose, should be broadly construed.
2. RAILROADS ⟸229—SAFETY APPLIANCE ACT—PENALTY.
   Safety Appliance Act March 2, 1893, as amended by Act April 14, 1910, c. 160, 36 Stat. 298 (Comp. St. 1916, § 8617 et seq.), which provides that a car properly equipped, which has become defective or insecure while in use, may be hauled from the place where such equipment was discovered to be defective, or insecure, to the nearest available point where such car can be repaired without liability for the penalties imposed, does not permit a railroad company to move without penalty from one point to another a defective car not known to be defective, and which is not so moved for the purpose of repair, although in fact it is hauled to the nearest available point for repair.
3. RAILROADS ⟸229—SAFETY APPLIANCE ACT—DUTY OF GOVERNMENT INSPECTORS.
   Where government inspectors discover the defective condition of cars, they are not bound to report that fact to the railroad company, that the defects may be remedied before the cars are moved.

In Error to the District Court of the United States for the Eastern District of Kentucky; Andrew M. J. Cochran, Judge.

Two actions by the United States of America against the Chesapeake & Ohio Railway Company. There were judgments for plaintiff, demurrers being sustained to the answers (242 Fed. 161), and defendant brings error. Affirmed.

John Galvin and Maurice L. Galvin, both of Cincinnati, Ohio, for plaintiff in error.

Thomas D. Slattery, U. S. Atty., of Covington, Ky., and Philip J. Doherty, Sp. Asst. U. S. Atty., of Washington, D. C.

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

SATER, District Judge. These cases were brought by the United States to recover from the railway company, as defendant, penalties for alleged violations of the Safety Appliance Act of March 2, 1893 (27 Stat. 531), as amended April 14, 1910 (36 Stat. 298, 299).

The defendant, an interstate carrier, at the times mentioned in the pleadings maintained yards, car inspectors, and repair men at Silver Grove, Ky., but not at Covington, which is an intermediate point between Silver Grove and the defendant's western terminus at Cincinnati, Ohio. On arrival of defendant's west-bound freight trains at Silver Grove, they are taken in charge and broken up by the yard men. The cars are inspected and, if need be, repaired, and are then delivered to the proper connecting lines at Cincinnati. The cars received from such connecting lines are inspected before they are received, and are thence transported by the yard men across the Ohio river, through Covington, to Silver Grove, some 10 miles distant, where they are placed in the appropriate east-bound trains. Government inspectors discovered that certain east-bound cars received by the defendant from connecting carriers at Cincinnati were each on their arrival at Covington in bad order as to some portion or portions of their safety appliances, and that certain west-bound cars coming from the Silver Grove yards were each on their arrival in Covington likewise defective. The discovery thus made was not communicated to the defendant, whose yard men moved the east-bound cars in their defective condition to Silver Grove and the west-bound cars in like condition to Cincinnati. On account of the transportation of such cars from Covington these suits were brought, the recovery sought in each count of each petition being $100.

The defendant, as to all of the counts here involved, answered that it made no inspections at Covington and had no inspectors, repair men, or facilities for making repairs at that place, and that, "as to most, if not all, of said cars," the defects of which complaint was made were found on the arrival of such cars at Silver Grove or Cincinnati, as the case might be, and on discovery were repaired, and that those places were the first at which the repairs could be made after the defects occurred and were detected. The defendant further alleged that, when the west-bound cars left its yards at Silver Grove and the east-bound cars left the terminals at Cincinnati, the safety appliances on each were in a safe and proper condition, and that, if they were in fact defective, as charged, when examined by the government inspectors in Covington, the defects arose after they started on their journeys from Silver Grove and Cincinnati, respectively, and could not have been discovered and corrected, as regards the west-bound cars, until they arrived at Cincinnati, or, as to the east-bound cars, until they reached the yards at Silver Grove. A demurrer, which admitted all well-pleaded facts, was sustained to the answer in each case, and, as the defendant did not wish to plead further, judgment was entered against it by Judge Cochran, whose opinion is found in 242 Fed. 161. A reversal of both judgments is sought.

Although some of the defects in the cars were confessedly slight, and it would seem, were susceptible of prompt repair at almost any

point on the defendant's line as soon as discovered, if defendant's trains were ordinarily equipped to meet such situations, and although the answers are with much show of reason assailed as faulty on the ground that an excusing averment in each is alleged in the contingent or hypothetical, and not in the issuable, form (6 Ency. Pl. & Pr. 270; Suit v. Woodhall, 116 Mass. 547), we shall consider the cases as presented by the defendant on its own liberal and favorable construction of its pleadings. The situation, then, is this:

The defendant's cars were in good order when they were started on their journey from Silver Grove and Cincinnati, respectively, but became in disrepair while in transit to Covington. The defendant transported such cars over its line without inspection, and in ignorance of their defects, from Covington, Ky., to the nearest station, where the defects were discovered by it and repaired. It maintains that under any reasonable interpretation of the law it committed no offense and cannot be penalized, and seeks refuge under section 4 of the amendment of April 14, 1910, to the Safety Appliance Act (Comp. St. 1916, § 8621), which amendment, in so far as germane, is as follows:

"That any common carrier subject to this act, using, hauling, or permitting to be used or hauled on its line, any car subject to the requirements of this act not equipped as provided in this act, shall be liable to a penalty of one hundred dollars for each and every such violation: * * * Provided, that where any car shall have been properly equipped, as provided in this act and the other acts mentioned herein, and such equipment shall have become defective or insecure while such car was being used by such carrier upon its line of railroad, such car may be hauled from the place where such equipment was first discovered to be defective or insecure to the nearest available point where such car can be repaired, without liability for the penalties imposed * * * if such movement is necessary to make such repairs and such repairs cannot be made except at such repair point."

The defendant contends that the discovery mentioned in the proviso of the amendment means the occurrence of the defect, that the defect must be held to have been discovered as soon as it arose, and that, if a defect occurs while a car is in transit, the car, if it cannot be forthwith repaired, may be transported to the nearest available repair point without offending the law and incurring its penalty. This contention is stoutly combated by the government.

[1, 2] The Safety Appliance Act as originally passed, being remedial and humanitarian in its purpose, is broadly construed, and in clear and unequivocal language imposes on the defendant, as it did on all other interstate railroads, the absolute and unqualified duty of maintaining the safety appliances on its cars in a secure condition. By its provisions movement on its line, in interstate commerce, of a car with a defective appliance subjected the defendant to a penalty; and this was so, even if it had been vigilant to discover the defect and was actually ignorant of its existence. It being the purpose of the act to produce the highest degree of care in the inspection of cars for the protection of the lives and limbs of employés, knowledge of defects, diligence in detecting them, and wrong intent in transporting cars with defective appliances, were not made ingredients of the acts condemned. Chicago, B. & Q. Ry. v. United States, 220 U. S. 559,

569, 570, 31 Sup. Ct. 612, 55 L. Ed. 582. To relax somewhat the rigid rule prescribed by the original act, which did not exempt the necessary movement to a point where repairs could be made, the amendment of April 14, 1910, was enacted. Although the amendment measureably grants relief to and enlarges the right of interstate railroads, it nevertheless is limited by its express terms and manifest intent, and its further extension is unwarranted. It only permits the hauling, without penalty, of a car which becomes defective while the car is in use by the carrier on its line of railroad, to the nearest available point where such car can be repaired (if such movement is necessary to make repairs) after the defect has been discovered. Any other hauling of such a car, and consequently a hauling of it before its bad order condition is discovered, although the carrier be without fault in not making the discovery, is a violation of the statute. This interpretation of the amendment accords with that of Judge Knapp in C. & O. Ry. Co. v. United States, 226 Fed. 683, 686, 141 C. C. A. 439 (C. C. A. 4), in which he held that:

"It permits the transfer without penalty of a disabled car to 'the nearest available point' where it can be repaired, provided such transfer is necessary because the defects cannot be remedied at the point where they are first discovered, and that is the only movement which does not subject the carrier to liability."

A like conclusion was reached in Chicago, B. & Q. R. Co. v. United States, 211 Fed. 12, 15, 127 C. C. A. 438 (C. C. A. 8), and United States v. Trinity & B. V. Ry. Co., 211 Fed. 448, 128 C. C. A. 120 (C. C. A. 5), and was forecast by this court in Pennsylvania Co. v. United States, 241 Fed. 824, 827, 154 C. C. A. 526, and Baltimore & O. S. W. R. Co. v. United States, 242 Fed. 420, 423, 155 C. C. A. 196.

[3] The proviso contained in the amendment of 1910 and ingrafted on the preceding enactment takes no case out of such enactment which does not fall fairly within the proviso's terms; and the defendant, in its reliance on the exception so carved out, was required to bring itself within both its language and reason. United States v. Dickson, 15 Pet. 141, 165, 10 L. Ed. 689; Baltimore & O. S. W. R. Co. v. United States, 242 Fed. 421, 423, 155 C. C. A. 196 (C. C. A. 6). The defendant has not so brought itself within the exception, in that its transportation of the cars mentioned in the petition occurred not after, but before, it discovered their defects. It may be added that no duty rested on the government inspectors, when they discovered the defective condition of the cars at Covington, to report that fact to defendant's employés that the defects might be remedied before the cars were moved. Chicago, B. & Q. R. Co. v. United States, 211 Fed. at page 15, 127 C. C. A. 438.

It follows that the judgment rendered in the District Court must be affirmed; and it is so ordered.

SUNDIN et al. v. EDWARD RUTLEDGE TIMBER CO.

(Circuit Court of Appeals, Ninth Circuit. April 1, 1918. Rehearing Denied May 13, 1918.)

No. 3049.

1. MASTER AND SERVANT ⟸185(15)—INJURIES TO SERVANT—FELLOW SERVANT.
   Where lumber was loaded on mill cars by one gang of men, and the cars were moved by another gang, negligence in loading the lumber cannot, as to the second gang, be deemed the negligence of a fellow servant, but must be deemed the failure of the defendant master to furnish the second gang with reasonably safe place in which, or reasonably safe appliances with which, to work.

2. MASTER AND SERVANT ⟸288(1), 289(1)—INJURIES TO SERVANT—ACTIONS—EVIDENCE.
   In an action for the death of an employé of a lumber company, killed when a load of planks fell from a car which the employé and others were moving, the question of the employé's contributory negligence and assumption of risk *held*, under the evidence, for the jury.

In Error to the District Court of the United States for the Northern Division of the District of Idaho; Frank S. Dietrich, Judge.

Action by Olga Sundin and others, widow and minor children of Alex Sundin, deceased, against the Edward Rutledge Timber Company, a corporation. There was a judgment for defendant, and plaintiffs bring error. Reversed and remanded for new trial.

The widow and children of Alex Sundin brought an action in the court below to recover damages for his death, which occurred while he was in the employment of the defendant in error, herein to be named the defendant. The defendant was conducting a large sawmill, with lumber yards, tracks, and cars. The lumber was carried from the mill by means of an endless chain conveyor to a point where it was taken and loaded upon mill cars. This was done by a gang known as the chain men. After the cars were loaded, another gang, known as the transfer gang, shoved the cars by hand power out along and upon short tracks a distance of 22 feet, where they, ran them upon another car, carrying two sets of transverse tracks and standing upon a track at right angles with the short transfer tracks. Thereafter the transfer car, carrying the loaded mill cars, would be conveyed out into the yards of the company, where the lumber was stacked by another gang. Sundin was, and for six weeks prior to the accident had been, a member of the transfer gang. That gang performed no work other than to take the mill cars, after they had been loaded by the chain men, out into the yards as described, and it had nothing to do with loading the lumber on the mill cars. There was a foreman in control of the chain men, the transfer gang, and the lumber pilers. The mill cars were 8 feet long, 4 feet wide, and the platform thereof stood 2 feet above the track. The death of Sundin was caused by a load of lumber falling upon him while he was assisting in moving along one of the short tracks a mill car which had been loaded by the chain men. That load consisted of 8 tiers of about 50 boards, each 6 inches wide, about an inch thick, and 16 feet long. In loading the lumber upon the mill cars, the custom was, and the defendant so ordered, to place between the layers of lumber, crosspieces of lath to bind the load and prevent any part thereof from falling off while the same was being moved out to and upon the transfer car and into the yards. The load of lumber which fell and caused Sundin's death was provided with no crosspieces or binders, the chain men having omitted to comply with

their duty in that respect. The movement of each mill car required the services of four men. Sundin was working with three others. There were 68 of the short tracks extending out to the transfer car track. Other cars stood on either side of the track on which Sundin was working when the accident occurred. There was not room for four men to push the car from the rear end. There was evidence that it was customary and proper for one of the four to take hold of the side of the car, with his back to it, as soon as the car emerged from between the cars which stood on either side thereof. Sundin did this, and all four men continued moving the car until it reached the rails of the transfer car. Owing to the sinking of the short track, so that it was about an inch and a half lower than the rails on the transfer car, the men were unable to move the mill car onto the transfer car, and were obliged at least twice to bring their loaded car back a few feet, so as to get increased momentum. While doing this the load collapsed, and about 100 boards fell upon Sundin. The court below instructed the jury to return a verdict for the defendant, on the ground that the negligence complained of was the act of a fellow servant, and on the further ground that the deceased assumed the risk of the accident which caused his death.

Plummer & Lavin, of Spokane, Wash., and Black & Wernette, of Cœur d'Alene, Idaho, for plaintiffs in error.

Ralph S. Nelson, of Cœur d'Alene, Idaho, for defendant in error.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1] The principal question in the case is whether or not it should be held that the failure to load the car properly was the neglect of Sundin's fellow servants, for which the defendant was not responsible. The rule is well settled that the master is not answerable for injuries to employés resulting from misuse or nonuse of instrumentalities by other employés, and that, if he furnish his employés with suitable appliances and materials with which to do their work in safety, he will not be liable for an injury which results from the use of defective materials or defective appliances. We are inclined to the view that the present case does not fall within those rules, and that the master's duty to furnish his employé a safe place in which to work, and safe appliances to work with, was sufficiently comprehensive to include the duty to furnish the servant, who was injured in this case, cars properly loaded with which to perform the sole service which he was employed to render, the transportation of mill cars loaded with lumber, for with that service Sundin's duties began and ended.

The court below, in instructing the jury to return a verdict for the defendant, used for illustration the case of two workmen engaged in loading hay upon a wagon; the one upon the wagon stowing the hay in such a careless way that it falls upon the man below, who is pitching the hay on the load. In such a case, the court said, the employer would not be responsible, because he could not anticipate that one of the men was going to be negligent. We cannot agree that the illustration presents the situation found in the record here. The men who worked in moving the loaded mill cars had nothing to do with loading the same. They had no opportunity of observing the work of those who loaded them, or of influencing their action. They were required to take the cars as they found them standing upon the track and already loaded.

In Port Blakely Mill Co. v. Garrett, 97 Fed. 537, 38 C. C. A. 342, this court approved the instruction of the trial court that:

"It was the duty of the defendant in this case to inspect all the cars in that train, including this car upon which the lumber was loaded, and see, before it went out upon a run, that they were in safe condition for operation. And, when I speak of the car upon which the lumber was loaded, it is to be understood as including, not only the platform itself, and the trucks and running gear, but the side stakes, which were required to hold the lumber in place, and keep it from shaking off or being toppled off. That obligation is one which the defendant company owed to all of its employés, including Hugh Garrett, and it cannot be relieved from responsibility and liability by showing that, if there was anything wrong about that car, it was negligence of a coemployé of Hugh Garrett."

In that case the accident resulted from defective stakes, which had been inserted in iron sockets on either side of a flat car to keep the lumber in place. We can see no difference in principle between that case and this. The stakes in that case and the strips of lath in this served the same purpose of holding the load on the car. No distinction should be made from the fact that in the Garrett Case the flat car was 30 feet long, and the lumber was carried 38 miles, whereas in this case the car was but 8 feet long, and was carried a distance of only 22 feet to the transfer car, and thereafter a distance of perhaps 300 feet. In the former case we said:

"It is a well-established rule, in the doctrine of master and servant, that it is the duty of the master to provide a reasonably safe place for the servant to work in, and to furnish reasonably safe and adequate appliances or instrumentalities for the servant's use."

And we answered the contention that the defendant in that case had supplied proper material for stakes, and that putting them in place was the work of the car loader, who was a fellow servant of the deceased, by saying:

"If the act from which an injury arises is one pertaining to the duty which. under the law, the master owes to his servants, he is responsible to them for the manner of its performance, and is not excused from liability to an employé for an injury caused by the negligence of a fellow servant unless he himself has done his full duty."

And we held that it was the duty of the defendant to see that the lumber car was in safe condition for operation before it was put into service, and that the delegation of this duty to a fellow servant of the deceased did not relieve the master from liability. Similar decisions are Pennsylvania R. Co. v. La Rue, 81 Fed. 148, 27 C. C. A. 363; McIntyre v. Boston & Maine Railroad, 163 Mass. 189, 39 N. E. 1012; Scoop v. W. H. White Co., 182 Mich. 539, 148 N. W. 762; Cummins v. Sparks Co., 173 Ky. 803, 191 S. W. 515; Gaudie v. Northern Lumber Co., 34 Wash. 34, 74 Pac. 1009; Dumas v. Walville Lumber Co., 64 Wash. 381, 116 Pac. 1091; Mattson v. Eureka Cedar Lumber Co., 79 Wash. 266, 140 Pac. 377.

[2] The questions of assumption of risk and of contributory negligence, we think, should have been submitted to the jury. There was no evidence of a rule of the company that the transfer men should not take hold of the car at the side. The evidence goes no further

than to show that the foreman, when he saw that a load was not piled straight and in such a way as not to be safe, would tell the men to keep away from the side which he thought unsafe, but there was no evidence that a load properly bound with strips of lath was in danger of collapsing, or had ever fallen from a car. There was no evidence that a load such as this which fell upon Sundin had ever before been piled upon any car without the use of the crosspieces. It is suggested that, if Sundin had looked at the load, he could have seen that there were no binding crosspieces in it. But the evidence was that the strips of lath were inconspicuous, and that often they did not emerge from the sides of the load, and we think a court would not be justified in holding that each member of the transfer gang, before taking hold of loaded cars under the directions of the foreman, was bound to stop and inspect each load, to see if the boards had been properly bound together by crosspieces. When the foreman told these four men to take out this particular car, they had the right, we think, to assume that the car was safe to handle, and that the order of the foreman, together with the general known method of loading, were assurance to them of that fact. The defect in the manner of loading the car does not seem to have been obvious, for neither the foreman nor any of the transfer gang observed it.

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

WHELPLEY v. GROSVOLD.

(Circuit Court of Appeals, Ninth Circuit. April 1, 1918. Rehearing Denied May 13, 1918.)

No. 3027.

1. PUBLIC LANDS ⟸7—ISLANDS—AUTHORITY OF SECRETARY OF TREASURY TO LEASE.

Under Act July 27, 1868, c. 273, § 6, 15 Stat. 241 (Rev. St. § 1956 [Comp. St. 1916, § 8850]), giving the Secretary of the Treasury power to authorize the killing of fur-bearing animals within the limits of Alaska Territory, Act March 3, 1879, c. 182, § 1, 20 Stat. 383 (Comp. St. 1916, § 6943), giving the Secretary power to lease certain unoccupied and unproductive lands of the United States, and Act May 14, 1898, c. 299, § 10, 30 Stat. 413 (Comp. St. 1916, § 5091), declaring that the homestead laws of the United States shall be extended to the district of Alaska, but that the Annette, or Pribilof Islands, and the islands leased or occupied for the propagation of foxes, be excepted, the Secretary of the Treasury had authority to lease unoccupied and unproductive Alaska islands for the propagation of foxes.

2. PUBLIC LANDS ⟸7—LEASE—EXECUTIVE POWERS.

Though Act Feb. 14, 1903, c. 552, § 7, 32 Stat. 828 (Comp. St. 1916, § 858), transferring to the Department of Commerce and Labor the jurisdiction and control possessed and exercised by the Department of the Treasury over the fur-seal, and salmon and other fisheries of Alaska, did not confer on the Department of Commerce and Labor the power to lease unoccupied lands, yet in view of the early recognition of the power of the President as head of the respective executive departments to assign to the departments powers vested in the executive, the presidential

order transferring to the Secretary of Commerce and Labor the authority of the Secretary of the Treasury to lease certain islands in Alaska for the propagation of foxes was valid: the power to lease being an executive power.

3. PUBLIC LANDS ⟸6—STATUTES—APPLICABILITY.
Act May 17, 1884, c. 53, 23 Stat. 24, providing a civil government for Alaska, and enacting (section 8) that the Indians or other persons in the district shall not be disturbed in the possession of lands actually in their use or possession, recognizes only the rights of such Indians or other persons who were in possession of lands at the time of the passage of the act, and cannot be invoked by one who did not enter into possession of Alaska lands until afterwards.

4. EVIDENCE ⟸258(2)—ADMISSIONS—AGENTS.
Where defendant in his answer asserted that he was the agent of a corporation, evidence as to a conversation between plaintiff and another representative of the corporation, concerning the matter involved in the controversy, was properly received.

5. INJUNCTION ⟸48—REPEATED TRESPASSES.
Where defendant repeatedly trespassed on an island in which plaintiff had a leasehold interest, and which he used for the propagation of foxes, and the damages for subsequently threatened trespasses would be difficult of ascertainment, plaintiff is entitled to an injunction, although not to damages, as defendant, on the occasion of his previous trespasses, merely removed his own foxes from the island.

Appeal from the District Court of the United States for the Third Division of the Territory of Alaska; Fred M. Brown, Judge.

Suit by Andrew Grosvold against Frank E. Whelpley. From a decree for plaintiff, defendant appeals. Affirmed.

Little Koniuji Island, one of the Shumagin group, lying south of the Alaska peninsula, was occupied by Lawrence Reid from about 1903 to 1913 for the purpose of raising blue foxes, which had been brought and placed upon the island. Until 1900 he paid to the Treasury Department $100 a year for permission to use the island for the purpose indicated. In 1900 the Treasury Department ceased collecting the tax. On May 13, 1913, Reid, for the sum of $4,000, sold to the appellant his right in and to the use of the island and the foxes which were then thereon. In January, 1914, the government proposed to lease to the highest bidder Little Koniuji Island and certain other islands, each for a period of 5 years from July 1, 1914, for the propagation of foxes, for an annual rental of not less than $200 a year. One Williams, a partner of the appellant, tendered a bid, as did the appellee, and, the latter being the higher bidder by $5 per year, received on July 30, 1914, from the Department of Commerce and Labor a lease of Little Koniuji Island for the period of five years.

On March 20, 1916, the appellee brought a suit against the appellant, alleging that on or about November 5, 1915, the appellee stocked the island with seven pairs of blue foxes and placed a keeper in charge; that on December 16, 1915, the appellant entered upon the island without the appellee's consent and trapped many of the foxes and appropriated the same, and that three days later he again entered upon the island and trapped and appropriated many of the foxes thereon without the appellee's consent; and that on numerous occasions thereafter he has repeated such trespasses and appropriation of the foxes upon the island, and threatens to continue such trespasses, and to do injury to the appellee, if he in any wise interferes with such trespasses, and that unless restrained by an injunction he will continue to commit other trespasses and trap other foxes as he threatens to do. The prayer was for an injunction and for damages.

A demurrer to the complaint was overruled, and the appellant answered,

alleging that the foxes which he had removed from the island were his property, held by him in trust for the Provincial Fox Company, Limited, and further alleging that the appellee's lease was null and void. The judgment of the court was that the appellant be enjoined from disturbing the appellee's possession, and that the appellant have judgment against the appellee for his costs.

Donohoe & Dimond, of Valdez, Alaska, J. Lindley Green, of Seard, Alaska, and Robert W. Harrison, of San Francisco, Cal., for appellant.

L. L. James, Jr., and Morford & Finnegan, all of Seward, Alaska, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1] The principal question on the appeal is whether or not the Department of Commerce and Labor had authority to execute the lease. On July 27, 1868 (Rev. Stat. § 1956), Congress gave the Secretary of the Treasury power to authorize the killing of any fur-bearing animal except fur seals within the limits of Alaska Territory or in the waters thereof, "under such regulations as he may prescribe." By the act of March 3, 1879 (20 Stat. 383), power was given the Secretary of the Treasury at his discretion to lease, "for a period not exceeding five years, such unoccupied and unproductive property of the United States under his control, for the leasing of which there is no authority under existing law." This act is similar in its scope to Act July 28, 1892, c. 316, 27 Stat. 321 (Comp. St. 1916, § 6944), authorizing the Secretary of War to lease property "under his control," and the question arises whether the island in question was under the control of the Secretary of the Treasury. We are inclined to the view that it had been placed under his control by the act of July 27, 1868; but, however that may be, we think it clear that the act of May 14, 1898 (30 Stat. 409, 413), recognizes and ratifies executive authority through the Secretary of the Treasury to lease the island in question. It was thereby enacted that the homestead laws of the United States, and all rights incident thereto, be extended to the district of Alaska:

"Provided, that the Annette, Pribilof Islands, and the islands leased or occupied for the propagation of foxes be excepted from the operation of this act."

[2] It is contended, however, that, assuming that the Secretary of the Treasury had the power to lease, there has been no lawful transfer of that authority to the Department of Commerce and Labor. Section 7 of the act of February 14, 1903 (32 Stat. 825, 828), transfers to that department "the jurisdiction, supervision and control now possessed and exercised by the Department of the Treasury over the fur-seal, salmon and other fisheries of Alaska"; but there was no express transfer of the authority to lease unoccupied land. On February 2, 1904, an executive order was promulgated upon the recommendation of the Secretary of the Treasury and the Secretary of Commerce and Labor transferring to and vesting in the Secretary of Commerce and Labor the authority of the Secretary of the Treasury

to "lease certain islands in Alaska for the propagation of foxes, and all duties and powers pertaining thereto." The appellant asserts that the President had no power to make the order, and that he thereby assumed authority over the public domain which by the Constitution had been expressly vested in Congress.

But the power to make the leases, if it exists, is executive power. It has always been recognized that the President, as the head of the respective executive departments, in the absence of any inconsistent statutory provision, has authority to assign to the heads of the departments powers which are vested in the executive. In Act July 27, 1789, c. 4, § 1, 1 Stat. 28 (Comp. St. 1916, § 300), creating the Department of State, it was provided that the Secretary of State shall perform such duties as shall from time to time be enjoined on and entrusted to him by the President, and he shall conduct the business of said department "in such manner as the President of the United States shall from time to time order or direct." Similar provisions are found in the acts creating the Departments of War and the Navy, and the omission of such provisions from acts providing for departments that were later created should not be held to indicate legislative intention to withhold similar powers as to those departments. We hold, therefore, that, the executive authority to lease the island in question having been recognized and ratified by the act of May 14, 1898, it was within the power of the President to vest that authority in the Department of Commerce and Labor, as was done in this case. 7 Ops. Attys. Gen. 462, 469; 25 Ops. Attys. Gen. 497.

[3] The appellant claims the protection of Act May 17, 1884, c. 53, 23 Stat. 24, providing a civil government for Alaska, wherein it was enacted that:

"The Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation, or now claimed by them."

But that act recognizes only the rights of "such Indians or other persons as were in possession of lands at the time of the passage of the act." Russian-American Co. v. United States, 199 U. S. 570, 576, 26 Sup. Ct. 157, 50 L. Ed. 314. It does not appear that the appellant or any of his predecessors in interest was in possession of the island or claimed it in the year 1884.

[4] It is assigned as error that the appellee was permitted to testify to a conversation had on March 18, 1914, with one Colwell, who represented the Fundy Fox Company, in which it was agreed that Colwell should be allowed until September 1, 1914, to take off personal property from the island, in consideration of which the property thereafter remaining should belong to the appellee. It was objected that no showing was made that Colwell was the agent of the appellant. In his answer to the complaint the appellant had pleaded that the Provincial Fox Company was the owner of all the property which he had purchased from Reid, and that he, the appellant, represented said company, and owned one-fifth of the capital stock thereof. At that time the appellant was also a member of the Fundy Fox Company, a limited partnership, which company was the agent of the Provincial Fox

Company, and seems to have advanced the purchase money which was paid to Reid. Another member of the Fundy Fox Company was Williams, and he testified that Colwell was sent to take possession of Little Koniuji Island in the place and stead of the appellant, and that the Provincial Fox Company instructed Colwell to take charge of their interests on the island. The evidence was sufficient, therefore, to show, prima facie at least, that Colwell was the agent of both the Fundy Fox Company and the Provincial Fox Company.

[5] The complaint alleges trespasses, repeated and threatened to be repeated, the effect of which would be to destroy the value of the appellee's leasehold interest, and for which damages were necessarily difficult of ascertainment and could be obtained, if at all, only by a multiplicity of suits. In such a case a suit in equity for an injunction is the permissible and the only adequate remedy. 22 Cyc. 826, 827; Joyce on Injunctions, § 1127; Nichols v. Jones (C. C.) 19 Fed. 855; United States Freehold, etc., Co. v. Gallegos, 89 Fed. 769, 32 C. C. A. 470. The facts entitling the appellee to an injunction were not only sufficiently pleaded in the complaint, but were found by the court and are shown by the record, and although the trial court found that the appellant had removed from the island only his own foxes, and on that account denied the appellee damages, it was found as facts that the appellant threatened to continue the trespasses and continue to remove foxes, whereas he had removed all that belonged to him. Under those circumstances, the injunction was properly issued.

The decree is affirmed.

BERRY v. PULLMAN CO.

(Circuit Court of Appeals, Fifth Circuit. March 16, 1918. Rehearing Denied April 10, 1918.)

No. 3177.

1. RELEASE ⊂=7—CONSTRUCTION.

Where a passenger on a railroad, who was injured while alighting from sleeping car, executed an agreement covenanting not to sue the railroad company, but expressly reserving all rights of action against the sleeping car company, such agreement cannot be treated as a release of one joint tort-feasor, which would release all, and, despite the use of the expression "quitclaim," the instrument must be deemed a mere covenant not to sue, and not barring an action against the sleeping car company.

2. PLEADING ⊂=214(8)—DEMURRER—EFFECT.

Where a passenger, who in consideration of $1,000 had covenanted not to sue a railroad company, sued the sleeping car company, and in connection with other pleas it set up that the passenger had not suffered injury to the extent of $1,000, a demurrer to the pleas cannot be construed as an acknowledgment that the passenger's injuries did not amount to $1,000, and so to preclude further recovery, for the plea merely presented an issuable defense for the jury.

In Error to the District Court of the United States for the Northern District of Mississippi; Henry C. Niles, Judge.

Action by Mrs. A. L. Berry against the Pullman Company. There was a judgment for defendant, and plaintiff brings error. Reversed and remanded, with directions.

Wm. D. Anderson, of Tupelo, Miss., and Jas. A. Cunningham, of Booneville, Miss., for plaintiff in error.

Robert H. Thompson, of Jackson, Miss., and W. M. Cox, of Baldwyn, Miss., for defendant in error.

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

NEWMAN, District Judge. The plaintiff in error here brought suit against the Pullman Company for damages, alleged in the petition to be $25,000, for injuries she sustained while being removed from a Pullman car on which she was a passenger from Memphis, Tenn., to Tupelo, Miss. She alleges that when she went on the Pullman car the company had notice that she was an invalid and would require special attention as such. The Pullman car was being operated from Memphis to Tupelo over the St. Louis & San Francisco Railroad, of which James W. Lusk, W. B. Biddle, and W. C. Nixon were at that time receivers. In being removed from the Pullman car, in an invalid's chair, she says, in her suit, that by the negligence of the Pullman employés she was allowed to fall on a hard rock pavement, and thereby received her injuries, which she says were severe and permanent. She says in her suit against the Pullman Company that:

"A porter of the defendant company willfully and negligently passed an 'All right' signal to the train to pull out at a time when plaintiff was in a position of great peril, and the same known to him, or by the exercise of reasonable care would have been known."

As defense to this suit against the Pullman Company two special pleas were filed, in which it was set up, in effect, that the plaintiff, after she was injured, brought suit against the St. Louis & San Francisco Railroad Company, and its receivers, for such injury, and afterwards settled with the receivers for the sum of $1,000. The pleas, while somewhat different in character, make, with one exception, which will be referred to hereafter, a single question, and that is the claim that the release of the receivers of the railroad company for the sum of $1,000, and the paper executed to them as a release of liability on their part, had the effect of releasing also the other joint tortfeasor, the Pullman Company. The pleas are called the first and second pleas. The second plea has attached to it the following:

"Covenant Not to Sue.

"Whereas, on or about December 23, 1913, the undersigned, Annie T. Lee Berry, of Booneville, Mississippi, while a passenger on a passenger train of the St. Louis & San Francisco Railroad, then being operated by James W. Lusk, W. C. Nixon, and W. B. Biddle, receivers, while being removed from a car of the Pullman Company, at Tupelo, Mississippi, by employés of the said Pullman Company, she being then an invalid, received injuries, which she says are of a serious and permanent nature; and

"Whereas, the undersigned, Julius E. Berry, as the husband of Annie T. Lee Berry, claims to have been put to expense and suffered loss and dam-

ages by reason of the accident and injuries to his said wife, Annie T. Lee Berry: and

"Whereas, the undersigned, Annie T. Lee Berry and Julius E. Berry, claim that the accident and injury was the result of the actionable negligence of the receivers aforesaid, James W. Lusk, W. C. Nixon, and W. B. Biddle, and the Pullman Company, through their respective agents and employés, and being present and knowing the facts surrounding the accident and injury, believe the negligence of the aforesaid receivers to have been slight, while that of the Pullman Company was gross; and

"Whereas, James W. Lusk, W. C. Nixon, and W. B. Biddle, as receivers of the St. Louis & San Francisco Railroad, are desirous of preventing litigation against them and the resultant expenses thereof, to recover damages for their negligence, if any, and such receivers expressly deny that they were guilty of any negligence; and

"Whereas, the undersigned, Annie T. Lee Berry and Julius E. Berry, are willing to covenant not to sue the said railroad receivers or their employés for the injuries sustained, or that may hereafter develop, by reason of said accident, but desire to expressly reserve unto themselves their right of action against the Pullman Company and the agents and employés of said Pullman Company:

"Now, therefore, in consideration of the sum of one thousand dollars ($1,000.00), to us this day paid by James W. Lusk, W. C. Nixon, W. B. Biddle, receivers, St. Louis & San Francisco Railroad, we hereby covenant and agree not to sue or prosecute any suit, action at law or bill in chancery, against the said railroad receivers, or their employés, to recover damages for and on account of the accident and injury aforesaid, but in so doing distinctly and expressly reserve unto ourselves any and all rights of action we may have against the Pullman Company, to recover damages for said accident and injuries, this instrument not being executed in full settlement of our entire cause of action for the said accident and injuries, but being a mere quitclaim and covenant not to sue, so far as it may relate to any interest of the said receivers and railroad, but not applying in any sense to any cause of action we may have against the Pullman Company, or the employés of the Pullman Company.

"Before executing this instrument, the undersigned, having fully informed themselves of its contents, covenant and represent that they are the persons and bear the relations therein named, are of lawful age, and legally competent to execute it, have been advised by counsel to execute it voluntarily, with full knowledge thereof.

"Given under our hands, this the ..... day of March, 1915.

"[Signed] (Mrs.) A. L. Berry.
"J. E. Berry.

"Witness: W. H. Critz,
"Sara L. Buchanan."

The two pleas were demurred to, and both demurrers overruled, and, the plaintiff declining to plead further, final judgment was entered dismissing the plaintiff's case, from which judgment this writ of error is prosecuted.

[1] The question is, therefore, whether this paper, executed by Mrs. Berry and her husband, J. E. Berry, to the receivers of the railroad company, is a release of the Pullman Company. This question has been before the courts, and the decisions are not at all in accord. In 34 Cyc. p. 1086, the law is thus stated:

"A release under seal of one joint tort-feasor releases him and all his joint wrongdoers, because a sealed release operates to extinguish the cause of action. Moreover, it has been held that a reservation of the right of the injured party against the releasee's cotort-feasors is repugnant to the nature of the instrument and void, for the right of action cannot be extinct as to

one tort-feasor and alive as to his fellow wrongdoers, and, having been destroyed as to one, it is extinguished for the benefit of all. The logical and legal soundness of this rule, however harsh its application may be in the particular case, is undoubted, provided the sealed instrument is once construed to be a release, but to escape the application of this principle, where it would work injustice and defeat the evident intention of the parties, the modern tendency of the courts is to construe, if possible, such instruments as covenants not to sue, which accordingly do not release the co-obligors. Moreover, the common law has been altered in some jurisdictions by statute."

This question has been before the Supreme Court of Kentucky in Louisville & Evansville Mail Co. v. Barnes' Adm'r, 117 Ky. 860, 79 S. W. 261, 64 L. R. A. 574, 111 Am. St. Rep. 273. What was there held can probably be determined from the fourth headnote of the case, which is as follows:

"The acceptance by one, who has a cause of action against two joint tort-feasors, of a sum of money from one of them in part satisfaction and in consideration of a release of the tort-feasor making the payment, does not preclude recovery against the other."

That case was very thoroughly considered, as shown by the opinion of the court. In the briefs of counsel, which precede the opinion of the court, will probably be found all the cases which were deemed pertinent, pro and con, up to the time that decision was made in 1904. A strong case on this subject is a decision of the Supreme Court of Tennessee in the case of Smith v. Dixie Park & Amusement Co., 128 Tenn. 112, 157 S. W. 900. The court, in the opinion there, by Mr. Justice Williams, says:

"A number of courts hold that a release which shows that it is not intended to evidence a settlement of the plaintiff's entire demand based on a tort, but reserves the right to pursue one or more of the joint wrongdoers for the balance, is not to be treated as a release of all, but as a covenant not to sue, with result of nonrelease of such other or others"

—citing the cases, and then proceeds:

"The reasons advanced in support of these decisions are that the rule gives effect to the intention of the parties executing the instrument, without violating any rule of morals or public policy, and that it tends to encourage compromises, which the law favors. The cases holding to the contrary are numerous, and are believed to give the weight of authority to the maintenance of the rule that such a release will not, nothing else appearing, be deemed a mere covenant not to sue"

—citing a considerable number of cases. The court proceeds, later in the opinion, to say:

"Releases of, and covenants not to sue, a wrongdoer have from early times been considered distinct. A covenant not to sue one of several joint obligors or joint tort-feasors did not at common law operate to discharge others from liability, since it was said not to have the effect, technically, of extinguishing any part of the cause of action."

And still later this:

"Indicia of a covenant not to sue may be said to be: No intention on the part of the injured person to give a discharge of the cause of action, or any part thereof, but merely to treat in respect of not suing thereon (and this seems to be the prime differentiating attribute); full compensation for his in-

juries not received, but only partial satisfaction; and a reservation of the right to sue the other wrongdoer"

One of the strongest cases on this subject is a decision by the Circuit Court of Appeals for the Eighth Circuit. Carey v. Bilby, 129 Fed. 203, 63 C. C. A. 361. The opinion by Circuit Judge Thayer in that case so fully covers the question here that we quote the larger part of it, which is brief, as follows:

"It is an old and well-established rule of law that the release of a cause of action as against one of two or more joint tort-feasors or joint obligors operates as a release of all. This is upon the theory that, when one has received full compensation for a wrong, no matter from which wrongdoer or from what source, the law will not permit him to recover further damages. Lovejoy v. Murray, 3 Wall. 1, 17, 18 L. Ed. 129. When a release of a cause of action for a tort is given by the injured party to one of two or more persons who committed the wrong, the release is construed most strongly against the party executing it. The law indulges in the presumption that the release was given in full satisfaction for the injury, and upon a sufficient consideration, and will not permit the presumption to be overcome by oral proof to the contrary. Ellis v. Esson, 50 Wis. 138, 6 N. W. 518, 520, 36 Am. Rep. 830; Bronson v. Fitzhugh, 1 Hill [N. Y.] 185, 186. Sometimes, however, as in the case in hand, a release executed in favor of one wrongdoer is accompanied with the reservation of the right to sue others who were jointly concerned in the wrong, and in such cases the question has frequently arisen, how shall such an instrument be interpreted? Shall the reservation of the right to sue others be ignored, and the instrument treated as raising a conclusive presumption that full compensation for the wrong has been made, as though it were a technical release under seal, or shall the reservation of the right to sue others be taken to mean that full compensation has not been received by the injured party, and that he merely intended to agree with the released party not to pursue him further, but without releasing his cause of action against the other wrongdoers, or admitting that he has received full compensation for the injury? With reference to this question the authorities are not in accord. Some courts are disposed to hold, and have held, that when such an instrument contains apt words releasing one of the joint wrongdoers, it operates to release all, and that any clause inserted therein reserving a right to sue others after one has been released is repugnant to the release, in that it defeats or attempts to defeat, the natural legal effect of the instrument; and that it should therefore be ignored. McBride v. Scott et al. [132 Mich. 176] 93 N. W. 243, 61 L. R. A. 445 [102 Am. St. Rep. 416, 1 Ann. Cas. 61]; Abb v. Northern Pacific Ry. Co. [28 Wash. 428] 68 Pac. 954, 58 L. R. A. 293 [92 Am. St. Rep. 864], and cases there cited. Other courts hold, however, that such an instrument should be given effect according to the obvious intent of the person executing it, and that it should not be treated as a technical release operating to destroy his cause of action as against all of the joint tort-feasors, but rather as a covenant not to sue the party in whose favor the instrument runs. Gilbert v. Finch [173 N. Y. 455] 66 N. E. 133, 61 L. R. A. 807 [93 Am. St. Rep. 623]; Matthews v. Chicopee Mfg. Co., 26 N. Y. Super. Ct. 711, 712; Ellis v. Esson, 50 Wis. 138, 6 N. W. 518, 36 Am. Rep. 830; Hood v. Hayward, 124 N. Y. 1, 16, 26 N. E. 331; Sloan v. Herrick, 49 Vt. 327; McCrillis v. Hawes, 38 Me. 566; Miller v. Beck [108 Iowa, 575] 79 N. W. 344, 345; Price v. Barker, 4 El. & Bl. 760, 776, 777.

"We are of opinion that the doctrine enunciated in the cases last cited is supported by the greater weight of authority, and is founded upon the better reasons. It has the merit of giving effect to the intention of the party who executes such an instrument, which should always be done when the intention is manifest and it can be given effect without violating any rule of law, morals, or public policy. Besides, we are not aware of any sufficient reason which should preclude a person who has sustained an injury through the wrongful act of several persons from agreeing with one of the wrongdoers,

who desires to avoid litigation, to accept such sum by way of partial compensation for the injury as he may be willing to pay, and to discharge him from further liability without releasing his cause of action as against the other wrongdoers. The law favors compromises generally, and it is not perceived that an arrangement of the kind last mentioned should be regarded with disfavor. The release which was read in evidence in the case at bar plainly shows that the sum paid by Hysham was not accepted by the plaintiffs as full compensation for the injury which they had sustained; that it was not in fact full compensation for the injury; and that they had no intention of releasing their cause of action as against Carey. Why, then, should it be given an effect contrary to the intent of the one who executed it? We perceive no adequate reason for giving it such effect, and accordingly agree with the lower court that it did not release Carey."

In Mississippi, the Supreme Court of that state, in Bailey v. Delta Co., 86 Miss. 634, 38 South. 354, state their view of the law on this subject as follows:

"Under this state of facts, the partial satisfaction for the injuries received by the servant made by the master, not intended to be a settlement in full and not received as, nor in fact being, full compensation, cannot inure to the other person, whose concurrent negligence caused the injury complained of. We are not unmindful that in many jurisdictions it is held that any release of one tort-feasor operates to absolve all others from liability. We prefer, however, to adopt the reasoning of that other numerous line of decisions which hold that, in order for such release to have this legal effect, the satisfaction received by the party injured must be intended to be, and accepted as, full compensation for all injuries inflicted. This is more in accord with justice, and in better harmony with the principles of enlightened jurisprudence, which will not permit a party suffering a wrong to be deprived of his right to redress by any purely technical reasoning. We refer specially, as supporting this conclusion, to the strongly reasoned case of Louisville & E. M. Co. v. Barnes, 79 S. W. 261, 64 L. R. A. 574, 117 Ky. 860, 111 Am. St. Rep. 270 [273], where the whole subject is exhaustively discussed, and the true rule clearly and definitely set out."

While we concede that the authorities on this subject are not harmonious, yet we think the weight of authority, at all events the authorities which we are disposed to recognize as sound, treat a covenant not to sue, such as that given in this case, as a mere agreement to release the one joint tort-feasor by whom the settlement is made, and not as a release of the cause of action, leaving the other joint tort-feasors liable to the person injured. It is always understood, and in all these cases it is held, that the joint wrongdoer against whom the suit was brought, when such a settlement with another wrongdoer has been made as pleaded, is entitled, pro tanto, to the amount received in settlement by the plaintiff injured as a credit on any liability which may be found to exist against the one sued.

It will be perceived that the covenant not to sue contains the following language:

"This instrument not being executed in full settlement of our entire cause of action for the said accident and injuries, but being a mere quitclaim and covenant not to sue, so far as it may relate to any interest of the said receivers and railroad."

Stress is laid, in the argument here, on the use of the expression "quitclaim." We do not see that this term "quitclaim" amounts to any more than is elsewhere expressed in the paper—that it is an agree-

ment not to sue the railroad company or the receivers. They yield their rights of recovery for the wrong done simply as against the party making the payment. The term "quitclaim," of course, does not properly apply in such an instrument. It is usually and generally a conveyance of land without warranty, and can hardly be properly used elsewhere; but here it clearly does not affect the fact that the purpose of the instrument, and the intention of the parties, is simply to agree that they will not sue the railroad company or the receivers, with the express stipulation that they reserve their rights as against the Pullman Company. To give any other construction to this paper would do violence to the intention of the parties, and to what we think the clear purpose and intent of the instrument is.

[2] Another claim made here is that the effect of the second plea, admitted by the demurrer to be true, is an acknowledgment on the part of the plaintiffs that they had been paid in full of all damages sustained. The language of the plea which is invoked in this connection is this:

"Defendant further avers and charges that plaintiff did not suffer damage because of the matters and things charged in the declaration in this cause to the extent of $1,000, and that she had well and truly been fully paid for and on account of the alleged wrongs and injuries charged to have been suffered by her."

We think this made simply an issuable defense about which evidence will be heard by the jury, and it will be determined on the trial whether or not she has been injured as much or more than the $1,000 which she has received. If she has been paid in full for her injuries, it will be so found. If she has not, the $1,000 should be credited on any recovery she may have.

The judgment of the District Court is reversed, and the cause remanded, with instructions to proceed in accordance with what has been stated in this opinion.

Judgment reversed.

DENVER & R. G. R. CO. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. February 18, 1918.)

Nos. 4861, 4862.

1. RAILROADS ⟸229—OPERATION—SAFETY APPLIANCE ACTS—MOVEMENT OF DEFECTIVE CARS.

Under the proviso of Act April 14, 1910, c. 160, § 4, 36 Stat. 299 (Comp. St. 1916, § 8621), declaring that, where any car which shall have been properly equipped as required shall become defective or insecure while being used, such car may be hauled from the place where the equipment was first discovered to be defective to the nearest available point where such car can be repaired without liability for the penalties imposed, the movement of a car discovered to be defective while in transit is restricted to what is necessary for the repair, and, if the defect can be repaired at the point of discovery, it cannot be moved at all without liability on the part of the railroad company.

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

2. RAILROADS ⟸229—OPERATION—SAFETY APPLIANCE ACT—MOVEMENT OF DEFECTIVE CARS.

Likewise a car discovered to be defective cannot, under the proviso, be hauled or handled for any purpose other than repair, and may not be handled for the purpose of delivering its load to the consignee, even when unloading is necessary for its repair, unless it be affirmatively shown that such delivery involves no more movement or handling of the car than in unloading or transferring its load; hence it cannot be assumed, defective cars having been used for making deliveries, that there was no more handling than would have been required in their transportation to repair points.

3. RAILROADS ⟸254(6)—OPERATION—MOVEMENT OF DEFECTIVE CARS—PRESUMPTION.

Where loaded cars, which were discovered to be defective while in transit and had to be moved to be repaired, were also used for the purpose of transporting their contents to the consignees, the vague presumption that every one does his duty is not sufficient to make an affirmative showing that deliveries involved no more handling of the cars than unloading or transferring their loads, and so was permissible under Act April 14, 1910, § 4.

4. RAILROADS ⟸254(6)—OPERATION—MOVEMENT OF DEFECTIVE CARS—STATUTE.

Under such act, when a car is hauled past the nearest repair point at which a supply of men and materials is kept adequate for making the repairs required, this justifies the holding that the law is violated unless there is a showing of a special reason for the movement, and it is not a sufficient explanation that main line and foreign line cars were repaired only at the terminals of the railroad company, and not at intermediate points where repair shops for branch line cars were maintained.

5. RAILROADS ⟸229—OPERATION—DEFECTIVE CARS—"REVENUE TRAIN"—"COMMERCIALLY USED."

Under the proviso of Act April 14, 1910, § 4, allowing cars, the equipment of which has become defective while being used, to be hauled to the nearest available point for repair, but providing that nothing shall be construed to permit the hauling of defective cars by means of chains instead of drawbars in revenue trains, or in association with other cars that are commercially used, unless such defective cars contain live stock or perishable freight, a train is a "revenue train" when it is moved for the purpose of transporting traffic for revenue, and cars are "commercially used," either when they are moving traffic, or when, though empty, they are moving to points for the purpose of receiving traffic; therefore it is a violation of the act for a railroad company to operate chained cars in a train made up of other defective cars, which cars, however, were used for making deliveries and were set out at various points, this being particularly true as the train, though called a hospital train, was composed of many cars.

In Error to the District Court of the United States for the District of Utah; Tillman D. Johnson, Judge.

Two actions by the United States against the Denver & Rio Grande Railroad Company, which were tried together on an agreed statement of facts. There were judgments for plaintiff, and defendant brings error. Affirmed.

E. N. Clark, of Denver, Colo. (Waldemar Van Cott, E. M. Allison, Jr., and William D. Riter, all of Salt Lake City, Utah, on the brief), for plaintiff in error.

Philip J. Doherty, Sp. Asst. U. S. Atty., of Washington, D. C. (Wil-

liam W. Ray, U. S. Atty., of Salt Lake City, Utah, on the brief), for the United States.

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

AMIDON, District Judge. These are two civil actions brought by the United States against the Denver & Rio Grande Railroad Company to recover penalties for alleged violations of the Safety Appliance Act. They were tried together in the District Court upon an agreed statement of facts, resulting in judgments in favor of the government. The railroad company brings error.

Case No. 4861 involves the hauling between the stations of Helper and Salt Lake City of 11 cars that were coupled by means of chains, instead of drawbars. Case No. 4862 involved the hauling of 5 cars similarly defective.

The trains were what is known as "hospital trains." They were composed entirely of cars so defective as to make them unfit to be handled in ordinary freight trains until they were repaired. These trains were moved only in the daytime, and were in charge of special crews under special officers to see that they were carefully handled. They had on board a force of repair men for the purpose of making any temporary repairs that should become necessary for their movement in their defective condition. They picked up cars and set out cars at numerous stations along the line. The stations at which cars were set out were of two classes: First, the station for which the cargo was destined; second, when the cargo was destined for a station on a branch line the cars were set out at the terminus of that branch to be later hauled to the station for which they were destined. When the train involved in case 4861 started from Helper, it consisted of a caboose, 10 empties, and 1 loaded car. In the course of its journey it picked up at way stations 93 cars, set out 35 cars, and arrived at Salt Lake City with 58 cars. With the exception of 31 empties, all the cars handled in the train were loaded and proceeding in the direction of their final destination. The other train involved a similar state of facts, though the number of cars moved was not so numerous. The company kept a force of car repairers and equipment at the intermediate stations at Helper, Thistle, Provo, and Midvale; but its shops, with extensive facilities for making repairs, were maintained at the terminal at Salt Lake City. The intermediate points just mentioned were stations on the main line from which branch lines extended, and the repairs made at those points were chiefly confined to defects arising upon the branch lines. Foreign cars, and cars of the company becoming defective on the main line, were taken to such important repair points as Salt Lake City for repair. The company received pay for the loaded cars in these hospital trains, the same as if they had been moved in ordinary freight trains. It is also true, and that these cars could not be repaired until they had first been unloaded.

The answer of the carrier, and the recitals in the agreed statement, admit all the allegations in the complaints. The defense rests

entirely upon the claim made in the answer that each hauling of the cars involved was for the purpose of repair; the defendant claiming that the particular circumstances set forth in the statement of facts furnished a justification for the movements in question under the proviso of section 4 of the Act of April 14, 1910. The proviso reads as follows:

"Provided, that where any car shall have been properly equipped, as provided in this act and the other acts mentioned herein, and such equipment shall have become defective or insecure while such car was being used by such carrier upon its line of railroad, such car may be hauled from the place where such equipment was first discovered to be defective or insecure to the nearest available point where such car can be repaired, without liability for the penalties imposed by section four of this act or section six of the act of March second, eighteen hundred and ninety-three as amended by the act of April first, eighteen hundred and ninety-six, if such movement is necessary to make such repairs and such repairs can not be made except at such repair point; * * * and nothing in this proviso shall be construed to permit the hauling of defective cars by means of chains instead of drawbars, in revenue trains or in association with other cars that are commercially used, unless such defective cars contain live stock or 'perishable' freight."

The movement of a defective car is restricted by this proviso—

[1] 1. To what is "necessary" for its repair. If it can be repaired where the defect is discovered, it cannot be moved at all in its defective condition. If the defect is such that it must be moved to repair it, the movement is restricted to what is necessary for the repair.

[2, 3] 2. To hauling it from the point where the defect is first discovered to the nearest available point of repair. This and the first restriction, taken together, forbid every hauling or handling of the car for any other purpose than repair. It may not be handled for the purpose of delivering its load to the consignee, even when unloading is necessary for its repair, unless it be affirmatively shown that such delivery involves no more movement or handling of the car than unloading it or transferring its load. That affirmative showing cannot be made by the vague presumption that every one does his duty. It calls for positive proof. The defendant made no such showing. It insists that as the cars had to be unloaded before they could be repaired, every movement for unloading them is justified by the ultimate purpose to repair. That is the capital vice of the defense. The cars were loaded with coal. The coal could have been placed in bins or transferred to other cars. We cannot say without proof that this operation, even when the delivery was on the main line, would involve as much handling of the car as its delivery to the consignee; and it is entirely plain that such would not be the case when the delivery was on a branch line, for that would involve a double switching and a complete diversion of the car from the nearest available point of repair.

[4] Again, main line and foreign cars were carried past several intermediate repair points to the terminal at Salt Lake City. This called for explanation. The only explanation given was that the company was accustomed to repair main line and foreign cars only at the terminals at Denver and Salt Lake City, points separated by a distance

of 745 miles, and to repair only branch line cars at intermediate points. The explanation is insufficient to meet the requirements of the law. The great distance between the terminals made intermediate points of repair necessary. The statement of facts shows that a supply of men and materials was kept at the intermediate points adequate to make heavy repairs such as the cars here required. When defective cars are hauled past such a point, "the nearest available point of repair" clause of the proviso demands something more than the habits or convenience of the carrier to justify the act. It must be shown by affirmative proof that the facilities at the intermediate point are not "available" and that the movement is "necessary." In the absence of such proof the act is "unlawful" under section 5. We do not lay down any absolute rule which would forbid hauling a defective car past an intermediate repair point. It might be that the congestion of defective cars at that point, or the seriousness of the defect in the car hauled, would be such as to justify the movement. All we say is that, when a car is hauled past the nearest repair point at which a supply of men and materials is kept, adequate for making the repair required, this justifies the holding that the law is violated, unless there is a showing of special reasons for the movement.

[5] 3. Chained cars may not be moved, even for repair, in revenue trains, or in association with cars commercially used, unless the chained cars contain live stock or perishable freight. Here, as always, the exception defines the grant. When is a train a "revenue" train? When are cars "commercially" used? The answer to these questions had been wrought out by the courts before the proviso was adopted, and it is a matter of familiar history that its language was chosen with those decisions in mind. Chicago & N. W. Ry. Co. v. United States, 168 Fed. 236, 93 C. C. A. 450, 21 L. R. A. (N. S.) 690; United States v. Southern Pacific R. R. Co., 169 Fed. 407, 94 C. C. A. 629; Southern Railway Co. v. Snyder, 187 Fed. 492, 109 C. C. A. 344. The answer to our questions cannot be given by calling a train a "hospital" train. The language of the proviso is not borrowed from the medical profession, but from the field of commerce. A train is a revenue train when it is moved for the purpose of transporting traffic for revenue. Cars are commercially used, either when they are moving traffic, or when, though empty, they are moving to points for the purpose of receiving traffic. Chicago, N. W. Ry. Co. v. United States, 168 Fed. 236, 237, 93 C. C. A. 450, 21 L. R. A. (N. S.) 690. Within that definition the trains here involved were revenue trains, and the cars hauled in connection with the chained cars were commercially used. It follows that the hauling of the chained cars was a violation of the law, as they were not loaded with live stock or perishable freight.

What distinction is there between these trains and ordinary freight trains? It is said they were run slowly and in the daytime, and were in charge of special crews. But, if we look to what they did, we find no material difference between them and ordinary freight trains. They were constantly engaged in stopping at stations to pick up cars and at other stations to set out cars. There was the same necessity for switching and coupling and uncoupling. Cars were hauled to their

destination and there switched for the purpose of being unloaded. The trains attained a large size, thus putting a heavy strain upon the couplings, and exposing the trains to the danger of separating while they were in movement. The danger to air hose was greatly increased, and the liability to accident by taking up and running out the slack of chained cars was also enhanced. In fact, every peril was created through the whole length of the journey of these trains which the proviso of the Safety Appliance Act clearly shows a purpose to prevent.

We fully appreciate the traffic advantages from the use of these hospital trains; but those advantages can afford no justification for a violation of the Safety Appliance Act. The soundness of what was said by Judge Adams, speaking for this court, has been amply shown by experience:

"Congress had before it for consideration the important question of promoting the safety of employés and travelers upon railroads, and in the accomplishment of its purpose it may well be that the legislative mind considered the inconvenience and impracticability of a literal compliance at times with the law, and the consequent infliction of the light penalties imposed for its violation to be of little moment compared with the greater importance of protecting life, limb, and property. Drastic measures are frequently necessary to protect and safeguard the rights and interests of the people." United States v. Southern Pacific R. R., 169 Fed. 407, 409, 94 C. C. A. 629, 631.

Straightened is the gate and narrow the way marked out by the proviso for the movement of a defective car. Any departure from that narrow way is made by section 5 of the act unlawful, and subjects the carrier to the penalty of the statute. These restrictions were necessary to prevent the Safety Appliance Law from being destroyed by the privilege granted by the proviso. Congress showed plainly its purpose that this result should not occur, by the reiterated safeguards, negative and affirmative, which it placed around the privilege.

The judgments are affirmed.

OMAHA ELEVATOR CO. v. UNION PAC. R. CO.

UNION PAC. R. CO. v. OMAHA ELEVATOR CO.

(Circuit Court of Appeals, Eighth Circuit. March 4, 1918.)

Nos. 4740, 4741.

1. COMMERCE ⇐88—ORDERS OF INTERSTATE COMMERCE COMMISSION.

A provision in an order made by the Interstate Commerce Commission June 29, 1908, relating to payments by a railroad company to an elevator company for services in elevating grain, which forbade payment for elevation of grain not reshipped within 10 days, etc., *held* part of the Commission's administrative order, and cannot, in view of the decisions of the courts, be treated as a part of a previous definition of elevation made in an attempt by the Commission to prevent rebating under a contract between the parties; hence the 10-day limitation expired on the expiration of the order affecting payments.

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2. COMMERCE ⟸88—REGULATIONS—INTERSTATE COMMERCE—COMMISSION.
Under Interstate Commerce Act Feb. 4, 1887, c. 104, § 15, 24 Stat. 384, as amended by Hepburn Act June 29, 1906, c. 3591, § 4, 34 Stat. 584 (Comp. St. 1916, § 8583), a limitation in an administrative order of the Interstate Commerce Commission concerning a railroad company's payments under a contract with an elevator company for the elevation of grain, becomes effective when the order becomes effective, and expires on expiration of the order by lapse of time.

3. COMMERCE ⟸37—INTERSTATE COMMERCE COMMISSION—SCOPE OF REGULATION.
Elevator facilities furnished a railroad company in connection with the transportation of grain are, in view of the Hepburn amendment, within the provisions of the act to regulate commerce, and, unless allowances therefor by the railroad company were covered by published and filed rate schedules, such amounts could not be legally collected by the elevator company; hence, after the cancellation of tariff schedules providing for the allowances, the elevator company cannot recover for such services thereafter rendered.

4. JUDGMENT ⟸683—CONCLUSIVENESS—PERSONS CONCLUDED.
A judgment allowing an elevator company to recover against a railroad company for the elevation of grain under a contract providing for payment is not conclusive as to the right of an assignee of the contract to recover for such services, the facilities being within the act to regulate commerce, where at the time of its rendition it appeared there was a tariff, duly filed, prescribing a rate for such services, but which was thereafter canceled, for cancellation was a matter of which all parties must take notice, and the elevator company could not thereafter recover for such services, though it continued to render them.

In Error to the District Court of the United States for the District of Nebraska; Thomas C. Munger, Judge.

Action by the Omaha Elevator Company against the Union Pacific Railroad Company. There was a judgment for plaintiff for part only of the amount claimed, and plaintiff brings error, while defendant also brings error. Affirmed.

Edward P. Smith, of Omaha, Neb., for plaintiff.

Edson Rich and N. H. Loomis, both of Omaha, Neb. (C. B. Matthai, of Omaha, Neb., on the brief), for defendant.

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

BOOTH, District Judge. This is an action at law by Omaha Elevator Company against Union Pacific Railroad Company upon a contract to recover for services rendered in transferring through the elevator of the plaintiff at Council Bluffs, Iowa, grain brought in over the line of defendant railway company. The contract was originally entered into February 7, 1899, between Frank H. Peavey and defendant railway company, and was assigned by Peavey to the elevator company. The history of the contract and of the litigation concerning it may be found in 10 Interst. Com. Com'n R. 309; 12 Interst. Com. Com'n R. 85; 14 Interst. Com. Com'n R. 315; (C. C.) 176 Fed. 409; 222 U. S. 42, 32 Sup. Ct. 22, 56 L. Ed. 83. The fifth paragraph of article I of the contract, upon which this action is based, reads as follows:

"Fifth. Railroad company will deliver to said elevator all grain originating on its lines and transported thereover which may be consigned to or in care of said elevator, and will pay to Frank H. Peavey or his assigns, on all such grain transferred through said elevator a transfer charge not exceeding one and one-quarter cents per hundred pounds during the first ten years of this contract, and not exceeding one cent per hundred pounds thereafter, but at no time shall the transfer charge herein provided to be paid exceed such transfer charge as is customarily made upon similar business at similar points. Such payments to be made on the 20th day of the month succeeding month in which the transfer service is performed."

The rate of charge fixed by this paragraph was changed in November, 1907, to three-quarters of a cent per 100 pounds. Recovery is sought for the transfer of upwards of 40,000,000 pounds between September 1, 1911, and November 25, 1914, amounting to $3,005.29. There is no dispute as to the actual handling by plaintiff of the amount of grain as stated. Two defenses were interposed:

First. (a) The order made by the Interstate Commerce Commission on the 29th of June, 1908, but not taking effect until May 1, 1910, reading as follows:

"It is ordered that the Union Pacific Railroad Company be, and it is hereby, notified and required forthwith to cease and desist for a period of two years from paying any allowance to Peavey & Co. on their own grain received into any of their elevators at Kansas City and Council Bluffs (or on grain so received in any of said elevators in which they have any direct ownership or interest) that is not reshipped out of said elevators within ten (10) days after it has been received therein, and to cease and desist from paying any allowance to Peavey & Co. on grain belonging to them or in which they have any direct or indirect ownership or interest, that has been mixed, treated, weighed, or inspected in any of their said elevators at Kansas City and Council Bluffs."

(b) In connection with said order the decree entered by this court in the case of Peavey & Company et al. v. Union Pacific Railway Company, reported in 176 Fed. 409, as modified by the decision of the Supreme Court of the United States in 222 U. S. 42, 32 Sup. Ct. 22, 56 L. Ed. 83.

(c) The allegation that all of the grain elevated by plaintiff, as set forth in its petition, was owned by plaintiff, and that no part of said grain moved through and out of said elevator within ten days after the elevation services.

The second defense was that defendant had no tariff on file after May 20, 1912, covering either the allowances provided for in the contract, or any substituted allowances.

The court below found the above-mentioned allegations of fact in the defenses to be true; and in its findings separated the time during which the services in question were rendered by plaintiff into three periods: First, from September 1, 1911, to May 1, 1912; second from May 1, 1912, to May 19, inclusive, 1912; third from May 20, 1912, to November 25, 1914. The court held that there could be no recovery for services rendered during the first period, although defendant then had a tariff published and on file with the Interstate Commerce Commission covering the charges, because of noncompliance with the 10-day limitation which was in force up to May 1,

1912. The court further held that there could be a recovery for the services rendered during the second period, namely, between May 1 and May 19, inclusive, 1912, inasmuch as during that period there was a tariff published and on file by the defendant company covering the charges claimed, and the 10-day limitation was not in force, having expired by the terms of the order. The court further held that there could be no recovery for the services rendered during the third period, viz., May 20, 1912, to November 25, 1914, because during that period there was no tariff published and on file by the railway company covering the charges in question. Judgment was accordingly entered covering the charges for the services during the second period, from May 1, to May 19, inclusive, 1912, amounting to the sum of $43.65.

Writs of error have been prosecuted by both parties—by the elevator company, claiming error because judgment was not rendered in its favor for the services performed during the first and third periods, as well as the second; by the railway company, claiming error because judgment was not rendered in its favor that plaintiff recover nothing.

Two matters require consideration: First, the 10-day limitation mentioned in the order of the Interstate Commerce Commission of June 29, 1908; second, the effect of the lack of a published and filed tariff after May 20, 1912, covering the charges sued for.

[1] As to the 10-day limitation, the plaintiff contends that this provision, being a part of the order of June 29, 1908, went into effect at the time the order became effective, and ceased to have vitality when the order expired by its own limitation. The defendant contends that this 10-day limitation is part of a definition given by the Interstate Commerce Commission of the word "elevation," as used in the Hepburn amendment to the Interstate Commerce Act, and being simply a construction of the act, or of the word "elevation" in the act, it was unnecessary that the 10-day limitation should be included in the order, and its inclusion was mere surplusage; but being part of the definition of the word "elevation," the vitality of this 10-day limitation continued even after the order itself expired.

This contention of defendant cannot be sustained. While it is true that the Interstate Commerce Commission, in its efforts to prevent rebates and discriminations under the operation of the Peavey contract, did in its opinion of April, 1907, frame a tentative definition of "elevation," which included as one of its elements the 10-day limitation, yet, as pointed out by Commissioner Lane in his dissenting opinion at that time, the definition had but doubtful application to the actual facts of the case. He said:

"Neither the provisions of the tariff nor of the contract conform to this definition."

The 10-day limitation was not contained in the order made by the Commission in reference to this contract in April, 1907. If, as counsel suggests, the omission from that order of the 10-day limitation was intentional, inasmuch as it was already included in the defi-

nition adopted by the Commission, then it might be urged with equal force that the specific inclusion of the 10-day limitation in the order of June 29, 1908, was with deliberate intent, either because the Commission at that time held that it was not included in the definition or that the definition was not applicable to the facts. It is clear from the record that the Commission had at the time of the latter order materially changed its views as to several matters included in the practical operations under the contract.

But, whatever the views of the Commission were in June, 1908, in regard to the 10-day limitation, this court, in its consideration of the allowance controversy and in its opinion reported in 176 Fed. 409, did not include the 10-day limitation as an element in its definition of "elevation," but considered that limitation simply as one of the restrictions or conditions in the administrative order of June 29, 1908. This is evident from the amount of the judgment ordered against the defendant railway company.

Furthermore, though this court by its decree held the whole order of June 29, 1908, null and void, and the Supreme Court by its decision in 222 U. S. 42, 32 Sup. Ct. 22, 56 L. Ed. 83, modified the decree by allowing the 10-day limitation to stand, yet the language of its opinion shows conclusively that the Supreme Court also considered the 10-day limitation, not as part of a judicial definition, but as one of the conditions or restrictions of an administrative order.

Therefore, in view of the language of the contract, the language of the tariffs filed and published, both before and after June 29, 1908, the language of the order itself, the attitude of this court as shown by the opinion and decree above mentioned, and the attitude of the Supreme Court as indicated by its language, we are convinced that this 10-day limitation, contained in the order of June 29, 1908, was not mere surplusage, nor a mere reiteration of an element of a definition already judicially established, but rather an explicit statement of one of the conditions or restrictions contained in the order.

[2] This limitation became effective when the order went into force; it ceased to be effective when the order lapsed by expiration of time. Section 15, Act to Regulate Commerce, as amended by the Hepburn Act; National Hay Ass'n v. Ry. Co., 19 Interst. Com. Com'n R. 34, 37; Rates from Walsenberg's Fields, 26 Interst. Com. Com'n R. 85, 86, recognized in Southern Pac. Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498, 514, 31 Sup. Ct. 279, 55 L. Ed. 310; Southern Pacific Co. v. Commission, 219 U. S. 433, 452, 31 Sup. Ct. 288, 55 L. Ed. 283; N. Y. Cent. & H. R. R. Co. v. Interstate Commerce Commission (C. C.) 168 Fed. 131.

It follows, since the 10-day limitation was not in force during the period from May 1 to May 20, 1912, and a tariff was on file and published covering the charges, that plaintiff was entitled to recover for the services rendered during that period. It follows, further, that no recovery could be had for the charges accruing during the first period, September 1, 1911, to May 1, 1912, inasmuch as the 10-day limitation was then in force, and the record shows noncompliance therewith.

As to the third period, viz., subsequent to May 20, 1912, the record shows that, by action duly taken, the defendant's tariff in force prior to May 20, 1912, which covered these allowances, was canceled as of that date, and no new tariff substituted covering such allowances.

[3, 4] The facilities furnished by plaintiff were within the terms of the act to regulate commerce. If there ever existed any doubt as to this, such doubt was removed by the Hepburn amendment. Penn. Co. v. U. S., 236 U. S. 351, 362, 35 Sup. Ct. 370, 59 L. Ed. 616. Unless the allowances were covered by a published and filed rate schedule, they could not legally be collected. Railway Co. v. Kirby, 225 U. S. 155, 32 Sup. Ct. 648, 56 L. Ed. 1033, Ann. Cas. 1914A, 501; Railroad Co. v. Mottley, 219 U. S. 467, 31 Sup. Ct. 265, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671; Elwood Grain Co. v. Railway Co., 202 Fed. 845, 121 C. C. A. 153.

These cases are not overruled nor modified by the Arbuckle Case, 231 U. S. 274, 34 Sup. Ct. 75, 58 L. Ed. 218. The question of filing a tariff by the railway company was not directly in issue nor passed upon in that case. It was conceded that the charges there under discussion were covered by a published tariff on file. This appears both from the opinion of the Supreme Court (231 U. S. 289, 296, 34 Sup. Ct. 79, 82 [58 L. Ed. 218]), and also from the opinion of the Interstate Commerce Commission (Federal Sugar Refining Co. v. B. & O. R. R. Co., 20 Interst. Com. Com'n R. 200). Furthermore, the Kirby Case has been followed and approved in numerous decisions by the Supreme Court subsequent to the Arbuckle Case. Railway Co. v. Maxwell, 237 U. S. 95, 97, 35 Sup. Ct. 494, 59 L. Ed. 853, L. R. A. 1915E, 665; Railway Co. v. Prescott, 240 U. S. 632, 638, 36 Sup. Ct. 469, 60 L. Ed. 836; Railway Co. v. Blish Co., 241 U. S. 190, 197, 36 Sup. Ct. 541, 60 L. Ed. 948.

The contention of counsel for plaintiff, that the right of recovery is res adjudicata by reason of the decree in Peavey & Co. v. Union Pac. Ry. Co. (C. C.) 176 Fed. 409, cannot prevail. The allowances here sought to be recovered are for services in connection with transportation in interstate commerce, and, as above stated, they are within the purview of the act to regulate commerce. The allowances, though provided for in the first instance by contract between the parties, cannot be recovered, if at the time the services were rendered the provisions of the act to regulate commerce touching such allowances were not complied with. Both parties were bound to know what that act required, and whether compliance was being made. In the case of Peavey & Co. v. Union Pac. Ry. Co., supra, there was no suggestion made that the provisions of the act to regulate commerce requiring publication and filing of tariffs covering the charges in question had not been complied with, nor could such claim have been made in view of the facts. In the case at bar the situation is entirely different. The cancellation effective May 20, 1912, of the tariff containing these allowances, was a matter of record of which plaintiff was bound to take notice. What its remedies were it is not necessary here to determine. It is clear that it could not go on rendering the services, and recover therefor the allowances

which, though provided for in the contract, yet, by reason of existing circumstances, had come under the ban of the act to regulate commerce. New Haven R. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 398, 26 Sup. Ct. 272, 50 L. Ed. 515; Louisville & Nashville Ry. Co. v. Mottley, 219 U. S. 467, 31 Sup. Ct. 265, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671; Philadelphia, Baltimore & Washington R. R. Co. v. Schubert, 224 U. S. 603, 32 Sup. Ct. 589, 56 L. Ed. 911; Elwood Grain Co. v. St. Joseph & G. R. Ry. Co., 202 Fed. 845, 121 C. C. A. 153; Cudahy Packing Co. v. Ry. Co., 215 Fed. 93, 131 C. C. A. 401.

It therefore follows that there could be no recovery for charges accruing during the third period.

The findings and conclusions of the lower court were correct, and the judgment is affirmed.

CONSOLIDATED INTERSTATE-CALLAHAN MINING CO. v. WITKOUSKI et al.

(Circuit Court of Appeals, Ninth Circuit. March 5, 1918.)

No. 2998.

1. MASTER AND SERVANT ⟸103(1)—INJURIES TO SERVANT—DUTY OF MASTER.
   It is the nondelegable duty of an employer to furnish sufficient and safe materials, machinery, or other means by which service is to be performed, and to keep them in repair and order.

2. MASTER AND SERVANT ⟸209(1)—INJURY TO SERVANT—ASSUMPTION OF RISK.
   A servant does not assume the risks attendant upon the use of defective machinery, or other instruments with which to do his work, unless reasonable care and precaution have been exercised by the master in supplying such as are safe for the purpose.

3. MASTER AND SERVANT ⟸188, 190(9)—INJURIES TO SERVANT—"FELLOW SERVANTS"—"VICE PRINCIPAL."
   Whether one servant is a fellow servant of another does not depend upon the particular rank he sustains to that other in the service, but the specific character of the act performed, so a servant discharging the nondelegable duty of the master to furnish safe appliances is a "vice principal" instead of a "fellow servant."
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Fellow Servant; Vice Principal.]

4. MASTER AND SERVANT ⟸190(14)—INJURIES TO SERVANT—"VICE PRINCIPAL"—SAFE APPLIANCES.
   Where a cable used in mining hoist was removed and uncoiled on account of its kinking, the duty of tightening the screw or clutch-bolt for properly adjusting the clutch-band to the drum, so that the hoist could be safely operated, was a nondelegable duty of the master, and a negligent failure of the hoistman, who was under the charge of the master mechanic, to tighten the same, must be deemed the negligence of the master and such hoistman a "vice principal," warranting recovery for the death of a servant resulting from an attempt to use the hoist without tightening the clutch-band.

5. MASTER AND SERVANT ⊂=285(10), 286(19)—INJURY TO SERVANT—JURY QUESTIONS.
Whether the omission to adjust the clutch-band of a hoist in a mine before attempting to use the same was negligent, and whether the omission was the proximate cause of the death of a servant, *held* under the evidence for the jury.

6. APPEAL AND ERROR ⊂=263(1)—EXCEPTIONS—NECESSITY.
Where raised by motion for an instructed verdict for defendant when the case was finally rested, the question whether negligence asserted was that of the defendant master may be reviewed on writ of error, though no exceptions were reserved to instructions presenting such issue.

7. APPEAL AND ERROR ⊂=1078(1)—FAILURE TO URGE OBJECTIONS.
Assignments of error not pressed in the brief by appellant need not be considered by the appellate court.

8. MASTER AND SERVANT ⊂=289(38)—INJURIES TO SERVANT—JURY QUESTION.
In an action for the death of a miner, who, when the hoist on which he was being lowered commenced to fall, grasped a projecting beam in the shaft, from which he slipped and fell, the question of such miner's contributory negligence *held* for the jury.

In Error to the District Court of the United States for the Northern Division of the District of Idaho; Frank S. Dietrich, Judge.

Action by Bertha D. Witkouski and others against the Consolidated Interstate-Callahan Mining Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

This is an action in damages instituted by the defendants in error, who are the widow and minor children of Charles Witkouski, deceased, to recover for injuries arising from his death, which it is alleged was caused through the carelessness and negligence of the defendant (plaintiff in error here), its agents or employés.

The defendant was operating a mine, and had sunk a shaft some 300 feet in depth from a drift or tunnel. The mechanical appliance for lowering and raising the workmen and materials through the shaft consisted of a hoist provided with a drum, a wire cable, and a cage, bucket, or skip, as it is sometimes called, attached to the cable. For controlling the action of the cable and the movement of the bucket, a device known as a clutch-band was attached to and about the drum, and operated as a brake, according to the tension applied. This clutch-band was adjustable by means of a threaded nut or bolt. On being loosened, it allowed the drum to revolve freely. When tightened, the band served as a brake, which was controlled by a lever operated by a hoistman in the bucket. The movement of the bucket could also be controlled by an independent brake, or by application of the air. The miners worked in eight-hour shifts, consisting of five men each, among whom were a hoistman and a pusher. The duty of the hoistman was to operate the hoist and to lower and raise the bucket. The pusher's function was simply to direct the work and keep the men moving. A new cable had been attached to the hoist, and it became necessary occasionally to unwind it from the drum and then rewind it, on account of its warping and kinking while being used. The shift preceding the one of which deceased was a member had unwound the cable, and, in order to facilitate its movement and make it easier to unwind and rewind it, Mr. Lytton, the hoistman, loosened the clutch-bolt, which relaxed the tension of the brake-band. The shift had nearly completed the rewinding when the deceased's shift came on. The deceased directed that his shift take up the work of rewinding the cable and the operation of the hoist. The rewinding was completed. Lytton, the hoistman of the previous shift, did not tell Egbert, the hoistman of the deceased's shift, that he had loosened the clutch-bolt, and Egbert did not tighten it before attempting to use the hoist. The men thereupon got upon the bucket

by standing upon the rim thereof, which was the usual way of making descent into the shaft, and the hoistman managing the hoist started to lower the men into the shaft. He had not proceeded far until it was noticed that the cable was unwinding very rapidly, and that the bucket was dropping at an unusual rate. The deceased, becoming frightened, attempted to catch hold of a beam, but was unable to hold fast. He was precipitated to the bottom of the shaft and killed. The hoistman applied the brake, lightly at first but with greater force gradually, and succeeded in stopping the descent of the bucket within about 150 feet from the bottom of the shaft, and no one else was hurt.

One Norman McDonald was the foreman at the mine, and had authority to employ and discharge the men. The pusher of a shift, if dissatisfied with a member of his gang, would send him to the foreman, who would dispose of him in manner as seemed best, either by discharging him or transferring him to another shift.

Edward E. Hughes was the master mechanic, and had supervision over the hoist to see that it was in good and safe repair and condition. In small matters he intrusted the supervision to the hoistman. For instance, Mr. Hughes, when asked the question, "Were you ever called in to tighten up the nuts and bolts?" answered: "Well, not a little, trifling thing like that. The hoistman is supposed to be able, and is able, to take care of those things, and if he wasn't able to do those things he couldn't hold his job there as hoistman, because that is part of his duties." Hughes says, further, that the screw for adjusting the clutch-band could as well have been tightened when the cable had been fully uncoiled, and before commencing to rewind it, as at any time.

There is some contention in the evidence that the shaft upon which the drum was adjusted had become sprung slightly, and that that afforded a necessity for loosening the nut or screw when the cable was being uncoiled; also, that a key in the drum-shaft had become loose, and that that had some influence on the action of the hoist. Eventually, however, and by the instruction of the court, these matters were rendered wholly irrelevant in the consideration of the jury.

The verdict and judgment being against the defendant, it has prosecuted error to this court.

James A. Wayne, of Wallace, Idaho, for plaintiff in error.

Therrett Towles, of Wallace, Idaho, and Plummer & Lavin, of Spokane, Wash., for defendants in error.

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

WOLVERTON, District Judge (after stating the facts as above). In the end, the question of prime importance submitted to the jury was whether the defendant was careless and negligent in furnishing the deceased with reasonably safe instrumentalities and appliances with which to do the particular work in which he was engaged. The crucial inquiry revolves about the duty respecting the adjustment of the nut or screw for tightening or loosening the clutch-band. Was the duty a nondelegable one, for the master's discharge for the safety of the workmen, or was it one simply of detail, proper to be left to the workmen themselves, or, we may say, the hoistman, to perform? If the latter, then the act of the hoistman in allowing the bolt or screw to remain loose before attempting to lower the bucket was the act of a fellow servant with deceased, and plaintiffs could not recover. If it was a nondelegable duty of the master, and the leaving of the bolt loosened was the proximate cause of the accident, then the defendant

would be liable, unless it used reasonable care and precaution in making the appliance safe for the men to proceed with their work. The question is so near the margin as to require great care and discrimination in its solution.

[1, 2] It is a doctrine so well settled that it needs but slight reference to authorities that it is the duty of an employer to furnish sufficient and safe materials, machinery, or other means by which service is to be performed, and to keep them in repair and order. The duty cannot be delegated to a servant or other person so as to exempt the employer from liability for injuries caused to another servant by its omission. "Indeed," says the Supreme Court in Northern Pacific R. Co. v. Herbert, 116 U. S. 642, 647, 6 Sup. Ct. 590, 593 [29 L. Ed. 755], "no duty required of him for the safety and protection of his servants can be transferred, so as to exonerate him from such liability." Any attempt, whatever it may be, to delegate such a duty to a person in any rank or employment, is simply to make such person a vice principal. He discharges the master's service, and cannot be reckoned as a fellow servant with the common employé. Nor does a servant undertake to incur the risks attendant upon the use of defective machinery, or other instruments with which to do his work, unless reasonable care and precaution have been exercised by the master or principal in supplying such as are safe for the purposes and use to which they are adapted.

[3] It has come to be the settled rule of law also, of the Supreme Court, that the test as to whether one servant is a fellow servant of another is not the particular rank he sustains to that other in the service, but the specific character of the act performed. Says the Supreme Court, in B. & O. Railroad v. Baugh, 149 U. S. 368, 387, 13 Sup. Ct. 914, 921 [37 L. Ed. 772]:

"If the act is one done in the discharge of some positive duty of the master to the servant, then negligence in the act is the negligence of the master."

And, referring to the cases of Hough v. Railway Company, 100 U. S. 213, 25 L. Ed. 612, and Northern Pacific Railroad v. Herbert, supra, further says:

"The liability was not made to depend in any manner upon the grade of service of a coemployé, but upon the character of the act itself, and a breach of the positive obligation of the master."

See, also, Mast v. Kern, 34 Or. 247, 54 Pac. 950, 75 Am. St. Rep. 580, where the principle is ably discussed and approved in an opinion by Mr. Justice Bean. It is there affirmed that it is supported by the great weight of authority both in this country and in England. The case of Northern Pacific Railroad v. Hambly, 154 U. S. 349, 14 Sup. Ct. 983, 38 L. Ed. 1009, does not conflict with the authorities settling the rule. The question there discussed was respecting coservants engaged in different departments of the service.

[4, 5] Now, it being the duty of the master, the defendant herein, to furnish for the use of its employés a reasonably safe appliance, it may be inquired whether that duty extended to tightening the screw or clutch-bolt for properly adjusting the clutch-band to the drum, so

that the hoist could be safely operated. It is in evidence that Hughes, the master mechanic, inspected the machinery on the evening previous to the accident. That would be on the same night as the accident, which occurred at 11 o'clock p. m. The inspection, however, was evidently made prior to uncoiling the cable and loosening the nut for facilitating the work. It was necessary, for rendering the operation of the hoist safe, as it subsequently proved, that the nut be tightened again. Hence it would indubitably follow that the readjustment of the nut was a positive duty devolving upon the master, and, the duty having been intrusted to the hoistman to perform the particular service, he was constituted a vice principal, and was performing the absolute duty of the master. The necessity in the work for uncoiling and recoiling the cable from time to time, and loosening the nut for its facilitation, was a thing known to the mechanical department, and it was such as required supervision by that department. The idea that the office of attending to the readjustment of the clutch-bolt was a positive duty of the master is thus reinforced. So it will be seen that it was not a question of selecting careful and competent fellow servants for doing the particular service, but a question solely of whether the work of the master, the specific work being nondelegable, was carelessly and negligently done, and whether the omission to readjust the clutch-bolt before attempting to use the hoist for descending into the shaft was the proximate cause of the accident. These questions were for the jury, and not for the court, and were submitted to them by very clear and carefully prepared instructions. The court went further, and left it to the jury to determine whether Lytton and Egbert, in doing what they did in loosening the clutch-bolt and failing to readjust it, were acting in the mechanical department, and were therefore vice principals of the master, or whether they were the fellow servants of the deceased, after precisely explaining to the jury the principle that distinguishes the one class of servants from the other. We subjoin the instructions of the court respecting the latter inquiry:

"Now then, gentlemen, if from all of the evidence you find that Mr. Witkouski did not have control of the hoist, that he was not charged with the responsibility of keeping it in repair, if he did not have the direction of the hoistman as to what should be done from time to time in seeing that the hoist operated properly, but that he could only direct him in so far as giving him the signals and telling him when the hoist should go up and go down, and how rapidly, and so forth, and further that the hoistman, in so far as the mechanical work of keeping this hoist in condition was concerned, was under the control and direction of the mechanical department, ultimately the master mechanic, then you could not find that the hoistman is a fellow servant with the deceased, and therefore the negligence of the hoistman in loosening this screw and leaving it loose would not be a risk taken by the deceased, and if he was injured as a consequence of such negligence then the plaintiffs here could recover, provided—and here is the limitation upon that—provided Mr. Witkouski did not know or have reason to believe that the screw was loose at the time, and, further, was unable to appreciate the danger therefrom. Even if he was not to blame, and if no fellow servant of his was to blame, for leaving this screw loose, and yet he knew that it was loose, and, by reason of his experience or what he had been told, or by the use of his own common sense he was able to appreciate the danger, and

still, knowing the facts, and appreciating the danger, he for any reason, owing to his desire to get on with the work, or through recklessness, or for any other reason, went ahead and entered the hoist that evening for the purpose of being carried down, and lost his life, he could not recover, because then he would have assumed that risk. Upon that hypothesis, he knew of the danger, and, knowing of it, he took the chance. No man can, with an appreciation of a danger, go ahead and take the chance, and then recover from the person who is responsible for the peril."

The court's attention being called to another part of its instructions, it made some correction, and instructed as follows:

"If you find from the evidence that the witness Lytton, who was the hoistman upon the shift immediately preceding Egbert, and Egbert were under the direction and exclusive command and authority of the master mechanic or general foreman, or both, and that the deceased, and other pushers, as they are called, that is, occupying the same position that he did, with other shifts or crews, and you further find that Witkouski, the deceased, and other pushers, had no authority over or right to give orders to or direct said hoistmen as to matters and things incident to or pertaining to keeping said hoist in a reasonably safe condition of repair and efficiency, and that said Lytton, when he went off shift, left the same in an unsafe condition of repair and efficiency, without notifying the succeeding engineer, Egbert, of such condition, and that such conduct on his part was negligence contributing to or causing the injury, and his act in so leaving the screw and failing to notify Egbert constituted the proximate cause or contributed to the death of the deceased, then you should find for the plaintiffs, unless you further find that Witkouski knew or had reason to believe in the existence of the mechanical conditions which did exist, and which constituted the defective conditions of the hoist, and was further able to appreciate the risk incident to such condition, and notwithstanding such knowledge or information, and such ability to appreciate the risk, attempted to ride down upon the bucket, when the hoist was in such defective condition."

Certain authorities are relied upon for defendant's position, namely, that the readjustment of the clutch-bolt was not a positive duty devolving upon the master, but one co-ordinating with the common employment. These require notice.

Buckley v. Gould & Curry Silver Mining Co. (C. C.) 14 Fed. 833, turned upon the question of whether a man who was operating an engine, the negligent act of whom was the cause of the injury, was a fellow servant with the party injured. This pertained to a negligent act in operating the engine, not to whether the engine itself was a safe instrumentality for the workmen to use. The case of Hermann v. Port Blakely Mill Co. (D. C.) 71 Fed. 853, is distinguishable because the action was based upon the theory that the place was unsafe, and not upon the negligence of a servant whose duty it was to give warning to the men. The evidence failed to sustain the action upon that theory.

Spring Valley Coal Co. v. Patting, 86 Fed. 433, 30 C. C. A. 168, is a case of the same nature as Buckley v. Gould, supra.

Theleman v. Moeller et al., 73 Iowa, 108, 34 N. W. 765, 5 Am. St. Rep. 663, is evidently out of line, and cannot be regarded as stating the law applicable.

The case of Bradbury v. Kingston Coal Co., 157 Pa. 231, 27 Atl. 400, comes nearer on its facts to the present case. In that case the operator of the hoist engine attempted to stop the further descent

of the cage. The cage had descended only a few feet, and the engineer, instead of putting the lever to the center notch in the ratchet, which would have brought the cage to a standstill, pulled it past the notch, which caused the cage to shoot up rapidly. One of the persons therein jumped out, intending to make a landing on a platform, but, failing in his purpose, was precipitated to the bottom of the shaft and killed. The court held that the engineer was a fellow servant with the deceased, and there was no recovery. It was thought that the upward motion of the cage was the result of an accidental mistake on the part of the engineer in pulling his reverse lever too far, and it was further observed that the accident did not happen as the result of any defect in the machinery. It was contended that a cotter-pin had broken or fallen out of its position through the end of the fulcrum-pin or bolt of the throttle-lever, and that the fulcrum-bolt then worked out of place, and thus the engineer lost control of the throttle valve. The court disposed of the contention by affirming that the dropping out of the pin did not cause the accident; that ordinarily the injury or death resulting from defective machinery was immediately the result of the defective appliance, and therefore was the direct result of the negligence of the defendant; but that, in that case, neither the pin nor the lever which held it in place inflicted any injury upon any one. It is further stated that the dropping out of the cotter-pin only gave occasion for the engineer to arrest the further descent of the cage, which he did, and that what took place after that was only what might have taken place upon any occasion for stopping the cage. Then it is observed that it was the mistake of the engineer which was the proximate cause of the accident. In that operation it was held that the engineer was acting in the capacity of a fellow servant with the deceased, as the preceding cases herein noted hold. The feature which distinguishes that case from this is the dropping out of the pin while the hoist was being operated, a thing wholly unexpected. In the present case the clutch-bolt was loosened, and there was neglect to tighten it again before using the hoist. Here there was a known defect in the appliance, which it was the positive duty of the master to remedy before using the hoist. There was no carelessness in operating the hoist when it was discovered that the bucket was descending too rapidly, for the brake was scientifically applied, and the bucket stopped within reasonable limitations as to time. The damage ensued while there was careful operation of the hoist under the exigencies then present. In other words, the accident did not happen from careless operation of the hoist, but from the neglect to readjust the clutch-bolt. The operation of the hoist was a duty pertaining to a fellow servant with the deceased. The duty of readjusting the clutch-bolt was one pertaining to the mechanical department, and one, as we have ascertained, which was a positive duty of the master. The hoistman in discharging that duty was acting as vice principal and in the stead and place of the master, and in that capacity was not a fellow servant with the deceased.

It is unnecessary to examine other cases cited, as these are truly

illustrative of the distinction between those relied upon and the present case.

It follows that the adjustment of the clutch-bolt after recoiling the cable was something more than a simple detail of the work assigned to the hoistman; it was, as has been ascertained, a positive duty of the master, to be attended to for the protection and safety of the men employed about the operation of the hoist. Nor was the failure to readjust the clutch-bolt a mere transitory danger to which the men on the bucket were subjected by reason of carelessness of coservants.

[6] Objection is interposed by plaintiffs' counsel to the court's examining into the matters hereinbefore discussed at all, upon the ground that no exceptions were saved to the instructions of the trial court wherein the crucial question was involved. We think, however, the question was sufficiently raised on the motion interposed, when the case was finally rested, for an instructed verdict for the defendant. We are therefore not satisfied to dispose of the case upon the technical objection.

[7] There were two exceptions, however, reserved to the instructions: One to the effect that they leave out of consideration the question as to whether or not by virtue of the entire crew being at the time engaged in the common employment of rewinding the cable, they had all become for that time fellow servants employed in the mechanical department; the other relating to the burden imposed upon the defendant to show that the risk was assumed by the deceased. Neither of these objections was pressed in the briefs of counsel, and for that reason we might well disregard them. But the first is fully answered by what we have said touching the main issue, and, as to the latter, we are satisfied that the instructions correctly state the law pertaining to the subject.

[8] One other matter insisted upon is that the deceased was guilty of contributory negligence which was the proximate cause of his death. This was submitted to the jury, and we think properly, for their determination, and they resolved it against the contention, thus determining the issue.

The judgment of the trial court should be affirmed, and it is so ordered.

KENTUCKY BLOCK CANNEL COAL CO. et al. v. SEWELL et al.

(Circuit Court of Appeals, Sixth Circuit. March 5, 1918.)

No. 3074.

1. EVIDENCE ⟸596(3)—WEIGHT—PAROL—PURPOSE OF DEED.
A deed absolute on its face cannot be shown to be otherwise by anything less than explicit testimony.

2. ACKNOWLEDGMENT ⟸56—IMPEACHMENT OF CERTIFICATE.
A certificate of acknowledgment can be impugned by nothing less than fraud or duress.

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

3. PARTNERSHIP ⟸68(1)—LANDS—CONVEYANCE TO FIRM.
A deed to real estate, executed to a partnership in its firm name, vests the title in the partners as tenants in common, and in the absence of indebtedness the partners may divide the land, or convey their respective interests, and this, although the firm name consists of the surname of one of the partners, with the addition of "and company."

4. MINES AND MINERALS ⟸49—ADVERSE POSSESSION—POSSESSION OF SURFACE.
Where the ownership of minerals underlying land has been separated from that of the surface, possession of the latter does not necessarily carry with it possession of the minerals.

5. MINES AND MINERALS ⟸49—ADVERSE POSSESSION—MINERALS IN PLACE.
The mining of coal by a grantee of the surface of the land, although for such time as to give him title to the coal in place by adverse possession, did not give him title to oil and gas deposits not then known to exist, as against a prior grantee of the mineral rights in the land.

6. EQUITY ⟸72(1)—LACHES—RULE OF FEDERAL COURTS.
In the federal courts the defense of laches is an equitable one, and, to prevail, the lapse of time and the relation of the defendants to the rights must be such that it would be inequitable to permit plaintiffs to assert their rights.

Appeal from the District Court of the United States for the Eastern District of Kentucky; Andrew M. J. Cochran, Judge.

Suit in equity by J. W. Sewell, A. W. Sewell, and Hattie F. Sewell against the Kentucky Block Cannel Coal Company and others. Decree for complainants, and defendants appeal. Modified and affirmed.

S. Monroe Nickell, of Hazard, Ky., Finley Fogg, of Paintsville, Ky., and James Garnett and A. C. Van Winkle, both of Louisville, Ky., for appellants.

O'Rear & Williams, of Frankfort, Ky., Myers & Howard, of Covington, Ky., and McGuire & McGuire, of Jackson, Ky., for appellees.

Before KNAPPEN, MACK, and DENISON, Circuit Judges.

KNAPPEN, Circuit Judge. Appellees, hereinafter called plaintiffs, filed bill in equity to quiet their alleged title to the minerals (coal, oil, and gas) in a tract of land in Morgan county, Ky., lying on both sides of the Stone Coal or Prater fork of Caney creek. They base their claim of title upon a formal conveyance of such mineral rights, made in 1865 by John Sebastian to J. W. Sewell & Co., which was a partnership composed of John W. Sewell and Harriet Sewell—father and mother, respectively, of plaintiffs, whose rights descended in equal shares to plaintiffs, their children and heirs at law. Defendants claim the property in separate parcels, tracing their alleged title to a devise by Sebastian, subsequent to his conveyance to Sewell & Co., of the fee simple in the lands to his two sons, subject only to the widow's life estate. They make defenses (1) that the alleged conveyance of the mineral rights by Sebastian to Sewell & Co. was intended to be, and was in legal effect, merely a mining lease upon future payment of royalties; (2) that the conveyance, if effective as such, passed the legal title to John W. Sewell only; (3) that the latter sold and conveyed the mineral rights in question to Mary F. Gregory, whose claimed

rights are vested in one of the defendants; (4) that defendants' title, as against plaintiffs, has been finally and effectually adjudicated in a suit in a state court of Kentucky, to which plaintiffs were parties; (5) that plaintiffs' rights, if they ever had any, have been lost by adverse possession and laches. On hearing upon pleadings and proofs, the District Court concluded that the alleged deed of the mineral rights from Sebastian to Sewell & Co. was a valid and effectual conveyance thereof; that the title thereto was thereby vested in John W. Sewell and Harriet Sewell, as tenants in common; that John W. Sewell conveyed his rights to Mary F. Gregory, but that the latter subsequently reconveyed them to Sewell (Harriet Sewell never made conveyance); that the adjudication had in the state court was binding on but one of the appellees; that the defenses of laches and adverse possession had been established only as to the mineral rights in so much of the land as lies on the eastern or left-hand side of the fork, and as to the coal in the Asa Carter tract, so called, on the western or right-hand side. Each of the two appellees was accordingly decreed the owner of an undivided one-third of the minerals underlying the land on the western side of the fork, excepting therefrom the coal in the Asa Carter tract. Plaintiffs have not appealed.

[1, 2] 1. We agree with the District Judge that the conveyance from Sebastian to Sewell & Co. must be accepted as intended to convey absolutely the entire mineral rights in the lands in question. It is by its express terms and in clear and unambiguous language, a warranty deed, "for a true and valuable consideration to us paid," of "the entire oil and mineral privileges" in the land described. It was made at the grantor's house. It purports to be witnessed by Sebastian's son-in-law, and by the deputy clerk of the county, and to have been acknowledged before that officer. It was duly recorded as a deed on the day of its execution. It is persuasively established that the deputy clerk was present at the execution, together with John W. Sewell and one Amyx (who was assisting Sewell in buying land and mineral rights, as well as taking leases), as was also the son-in-law referred to.

At the time of the hearing Sewell, Amyx and the deputy clerk were all dead, as were also Sebastian and his wife. While there was testimony that the instrument was spoken of as a lease, and testimony tending to show that it was intended only as such, there was substantial testimony tending to the contrary conclusion, including the facts, as testified to, that Sewell then and there paid to Sebastian $25 in money, which cannot be said to have been regarded as wholly disproportionate to the then value of the minerals, having in mind their remoteness from transportation lines and the price recently paid by Sebastian for the fee simple of a portion of the land—together with other pertinent considerations, including the fact that the Sewells, one or both, during the five months period including the date of the deed in question, had taken in that district not only several deeds of lands in fee and several mining leases, but also 14 deeds outright of mineral interests. Sebastian's subsequent devise of the fee simple of the lands is not highly significant, especially as he still held the surface rights, and not improbably the mineral rights were regarded by

him as not very important. See in this connection Pond Creek Coal Co. v. Hatfield (C. C. A. 6) 239 Fed. 622, 630, 152 C. C. A. 456. It would serve no useful purpose to discuss the testimony in detail. Such discussion may be found in the opinion of the District Judge, before whom the testimony of several of the more important witnesses was taken, and who closes a detailed discussion of the testimony, with the statement that there is "no evidence of any weight sustaining the position that the agreement pursuant to which the grant in question was executed was for a lease and not a deed." A deed absolute on its face cannot be shown to be otherwise by anything less than explicit testimony, and a certificate of acknowledgment may be impugned by nothing short of fraud or duress. Johnson v. Van Velsor, 43 Mich. 208, 5 N. W. 265. Neither fraud nor duress were established.

[3] 2. Defendants say, in brief, that "from the evidence it appears that the firm of John W. Sewell & Co. [of course, meaning J. W. Sewell & Co.] was composed of John W. Sewell and Harriet M. Sewell, his wife." We agree with the conclusion of the learned District Judge, that the deed to J. W. Sewell & Co. vested the legal title in the partners as tenants in common. A deed to a copartnership in its firm name is not for that reason void. The modern authorities are practically uniform to the effect that a conveyance to a firm in its firm name passes to some one the legal title to the land as real estate. Partnership real estate is now regarded in equity as personalty only for the purpose of subjecting it to the payment of debts and adjustment of balances between partners (Riddle v. Whitehill, 135 U. S. 635, 10 Sup. Ct. 924, 34 L. Ed. 282; Stearns Coal & Lumber Co. v. Van Winkle [C. C. A. 6] 221 Fed. 590, 596, 137 C. C. A. 314); and in the absence of debts the partners have a right to personally divide the lands between them as real estate (Godfrey v. White, 43 Mich. 171, 179, 5 N. W. 243; Lovewell v. Schoolfield [C. C. A. 6] 217 Fed. 689, 703, 133 C. C. A. 449), or to convey their respective interests therein, subject to its being needed to pay creditors or adjust balances between partners (Taylor v. McLaughlin, 120 Ga. 703, 707, 48 S. E. 203). The Court of Appeals of Kentucky has more than once declared this rule. In Wilhite's Adm'r v. Boulware, 88 Ky. 169, 171, 10 S. W. 629, 630, it is said:

"The principle is universally recognized that at law real estate owned by a partnership, even if purchased in the name of the partnership, and with partnership funds, is held by the members of the firm as tenants in common."

And in Carter v. Flexner, 92 Ky. 400, 405, 17 S. W. 851, 853, the court said:

"The true rule, and the only one, that reconciles the conflicting views on this question, is that, where partners own real estate as such, it cannot be treated or considered as personalty, except for the purposes of the partnership, and then as assets for the payment of firm debts. It cannot be sold by one member of the firm in the firm name, but all the partners must unite in the conveyance."

Had the conveyance been to Sewell & Sewell, each would have taken legal title to one-half the property. Menage v. Burke, 43 Minn. 211, 45 N. W. 155, 19 Am. St. Rep. 235; Dwyer Co. v. Whiteman, 92

Minn. 55, 99 N. W. 362; Morse v. Carpenter, 19 Vt. 613. Defendants do not dispute this proposition. It is also established, at least by the better weight of authority, that a conveyance to a firm, consisting of a surname followed by the words "and Brother" or "and Son," passes the legal title as tenants in common to those conforming to such designation and shown to be actually members of the firm. In Hoffman v. Porter, 2 Brock. 156, Fed. Cas. No. 6,577, 12 Fed. Cas. 304, Chief Justice Marshall, sitting at the circuit, in an action for damages for breach of covenants in a deed to "Peter Hoffman & Son," held that the deed passed a present estate to the "Son," when identified as the one who was a member of the firm. In Carter v. Flexner, supra, this principle was at least impliedly recognized—the name of the firm, the heirs of one of whose deceased members were held to take his half interest, being "Carter & Brother." In Galbraith v. Gedge, 16 B. Mon. (55 Ky.) 631, the firm consisted of four members, under the style of Gedge & Bros. The share of the deceased partner in lands was held to descend to his heirs as real estate.

Defendants contend, however, that where the firm name contains the surname of one or more, but not of all, the partners, followed by the words "and Company," a conveyance of real estate to the partnership in such firm name vests the legal title in the partner or partners whose surnames so appear, in trust for the firm. Several cases declare this distinction. Among them are Percifull v. Platt, 36 Ark. 456, 464; Winter v. Stock, 29 Cal. 407, 89 Am. Dec. 57; Arthur v. Weston, 22 Mo. 378; Holmes v. Jarrett, 7 Heisk. (54 Tenn.) 506. The basis on which decisions of this nature rest seems to be that the word "Company" contains no certain designation of any other person than the one whose surname is given. We are unable, however, to see any logical distinction between the case where the surnames only are given, or where one surname is followed by the words "and Son" or "and Brother," and a firm name consisting of one surname, followed by the words "and Company." In neither case is there a certain designation of all the members. In either of the first-mentioned cases there is an ambiguity to be solved by parol testimony, not only as to the full name of the partner whose surname alone appears, but also as to the identity of the specific "Brother" or "Son"; and the difference between supplying by parol the partners' names in those cases and in that where it is represented by the words "and Company" is wholly unsubstantial. The language of Morse v. Carpenter, supra, in holding valid, in a suit in ejectment, a deed to a partnership, whose firm name consisted only of the surnames of the plaintiff members, is equally pertinent here:

> "There is, however, an important difference between a description which is inherently uncertain and indeterminate, and one which is merely imperfect, and capable, on that account, of different applications. To correct the one is, in effect, to add new terms to the instrument; while to complete the other is only to ascertain and fix the application of terms already contained in it."

The authorities do not uniformly observe the distinction urged. In Seymour v. Western R. R. Co., 106 U. S. 320, 1 Sup. Ct. 123, 27

L. Ed. 103, it was held, citing Hoffman v. Porter, supra, that in an action on a covenant with a partnership trading in the name of S. Seymour & Co. all the partners must join. In Walker v. Miller, 139 N. C. 448, 52 S. E. 125, 1 L. R. A. (N. S.) 157, 111 Am. St. Rep. 805, 4 Ann. Cas. 601, a conveyance of real estate to James Webb, Jr., & Bro. was held to be valid, although both James Webb and his brother were dead; the persons beneficially interested continuing to do business in the old firm name. In Brunson v. Morgan, 76 Ala. 593, it was held that a conveyance of the partnership realty by Stoudenmeier, of the firm of Stoudenmeier & Co., in fact composed of three members, carried only his one-third interest. The court said:

"The deed to Stoudenmeier & Co. vested the legal title in the several members of the firm as tenants in common, and not in the name of the partnership as such. Its legal effect was the same as if the deed had been made to the three partners in their individual names."

We think this the logical view. It is clear, to our minds, that the Supreme Court, by its treatment in Riddle v. Whitehill, supra, of the Arkansas decision in Percifull v. Platt, did not intend to commit itself to the doctrine of that case, unless to the extent that the decision of the Arkansas courts as to the title to lands in that state was binding on the federal courts. Stearns Co. v. Van Winkle (C. C. A. 6) 221 Fed. 590, 593, 137 C. C. A. 314; Ingersoll v. Crocker (C. C. A. 6) 228 Fed. 844, 847, 143 C. C. A. 242. Indeed, the question where the legal title rested was not necessarily involved in the decision in Riddle v. Whitehill. It may be that the Kentucky Court of Appeals, by the decisions already referred to (and by those cited in the margin [1]), intended definitely to adopt the rule which we have characterized as the logical one, but we prefer not to rest our opinion upon that ground.

3. December 25, 1871, John W. Sewell conveyed to Mary F. Gregory all his right, title, and interest "in any lands, oil, or mineral rights" in certain enumerated counties in Kentucky, including Morgan. Plaintiffs contend that this deed, considering all its various provisions, was not intended to convey the interests in question. We agree, however, with the District Judge, that it was so intended. This intention is to our minds made especially clear—first, by the fact that, although by an earlier clause of the deed Sewell is made to convey lands for the most part, at least, belonging to others, under powers of attorney therefor, yet, following the attestation clause, Sewell and his wife (she did not sign) in terms "quitclaim to the party of the second part all land, mineral, or oil privileges that they may own or possess in the several counties above named"; and, second, by the deed from Mary F. Gregory to Hughs, hereinafter mentioned.

Unless, then, these interests were reconveyed by Mary F. Gregory to Sewell, his one-half interest therein was lost to plaintiffs. On February 15, 1872, and less than two months after the conveyance to Mrs. Gregory, the latter made a conveyance to Sewell reciting his previous conveyance to her. The question is whether this latter instrument

[1] Lowe v. Lowe, 13 Bush (Ky.) 688; Flanagan v. Shuck, 82 Ky. 617.

reconveyed the rights here in question. Plaintiffs admit that "on the face of this deed much doubt is raised as to what it conveys." Judge Cochran recognized that the deed was ambiguous. He, however, thought it no more so than the deed from Mrs. Gregory to Sewell, and expressed the opinion that "either the deed from Sewell to Gregory did not cover them [the mineral rights] or the deed from Gregory to Sewell did." The learned judge concluded that "in either contingency the title to one-half the minerals was left to" Sewell.

Upon a careful consideration of the record, we are unable to agree with this ultimate conclusion. The District Judge rested his conclusion of an intent to reconvey to Sewell the mineral rights in question upon a declaration in the deed last referred to that the party of the first part does "grant and convey to the said party of the second part, his heirs and assigns, such lands, hereditaments or possessions in her vested situated in the county of Morgan and state of Kentucky." This statement, however, is immediately followed by a recital of the conveyance by Sewell to Gregory on December 25, 1871, of a large quantity of lands in Morgan and several other counties, the recital of the possible arising of a question as to the intent of Sewell in making that conveyance, and a declaration that the deed was intended to quitclaim to Sewell the title to all lands patented or granted by the commonwealth of Kentucky to either of the Sewells, and conveyed by them to Mrs. Gregory by the deed mentioned. The deed also contained a release of several tracts by numbers, as well as several other tracts by name. The lands in question are not included in the deed, unless in the general clause first quoted.

While this deed, standing alone, would perhaps make it more probable than otherwise that Mrs. Gregory intended by it to convey to Sewell the minerals in question, there is one consideration (not referred to in the opinions of the District Judge) which to our minds makes it highly improbable that either Mrs. Gregory or Sewell understood the deed to have such effect: On the 9th day of March, 1872, Mrs. Gregory conveyed to John Hughs, for a stated consideration of $480, the specific lands in question (and such lands only), not only by courses, metes, and bounds, but expressly identified as being the lands conveyed by Sebastian and wife to Sewell January 23, 1865, with reference to the place of record, "and the same as conveyed by J. W. Sewell et ux. to M. F. Gregory, deed dated 25th of December, 1871, and recorded" as specified. It seems to us incomprehensible that Mrs. Gregory, who was a member of the Sewell family, should have made this conveyance to Hughs less than a month after her conveyance to Sewell, if the conveyance to Sewell was intended to reconvey, or to continue to stand as a reconveyance of, the interests in question to him. It is, to say the least, highly probable that the conveyance to Hughs would not have been made without Sewell's knowledge and approval. Mrs. Gregory's explanation is that she has no recollection of ever making any deed to Hughs, and that the reason for her reconveyance to Sewell was that the deed was given to her as security for a loan of a few hundred dollars, which was repaid. But this explanation, given by deposition out of court more than 40 years

after the conveyance, is not convincing, when considered in connection with all the other evidence in the case, including the fact that Hughs in 1875 conveyed the interests in question, which by mesne conveyances have passed to one not a party here. We think plaintiffs have not sustained the burden of proof of showing a reconveyance of the interests in question to Sewell, and thus that appellees acquired by inheritance the one-half interest only belonging to their mother, Harriet Sewell, therein.

[4] 4. *Adverse Possession and Laches.* Section 2505 of the Kentucky Statutes prescribes a limitation of 15 years in actions for the recovery of real property. The section applies to actions for the recovery of mineral rights. Pond Creek Coal Co. v. Hatfield, supra, 239 Fed. 626, 152 C. C. A. 456. We are here concerned only with those rights (coal, oil, and gas) in the lands on the west side of the fork (aside from the Carter tract) and in the minerals other than coal in the Carter tract. The assertion of title, by adverse possession, to the minerals in lands other than the Carter tract, is but feebly made, if at all. We think it clear that such right is not established. The ownership of the minerals having been severed from the ownership of the surface, the possession of the latter did not necessarily carry with it possession of the minerals. The statute thus did not begin to run against plaintiffs' title to the minerals until adverse possession thereof by defendants (Ray v. Sweeney, 14 Bush [Ky.] 1, 29 Am. Rep. 388); and the bar would not be complete unless the adverse possession was continued for the full statutory period (Wickliffe v. Ensor, 9 B. Mon. [Ky.] 253; Pond Creek Coal Co. v. Hatfield, supra, 239 Fed. 627, 152 C. C. A. 456). The Sebastians parted with the Carter tract in 1875, only 10 years after plaintiffs' title accrued. As to the remainder of the Sebastian tract, it is not established, if, indeed, it is claimed, that there was ever any mining of coal thereon for domestic purposes. There was no commercial mining of coal on any part of the tract before 1901, and no oil mining before 1912; although Sebastian appears to have given in 1889 a 10-year oil lease, we are cited to no evidence of operation thereunder, and this suit was begun in 1913. We content ourselves with saying that we find no persuasive evidence of open, notorious, continuous, and hostile possession for the statutory period of plaintiffs' mineral rights outside of the Carter tract.

[5] As to the latter tract the situation is not the same. There was more or less mining for coal thereon both before and after 1875, not only for domestic purposes, but to some extent for purposes of sale, and leases for coal mining were given as early as 1888 and some prospecting done thereunder. The District Court has found such adverse possession of coal in place as to bar plaintiffs' title thereto, and his conclusion is not appealed from. We think the record such as fairly to require us to accept it as correct, apart from the effect of plaintiffs' failure to appeal. There is, however, no proof of actual adverse possession for the statutory period of the oil and gas. Indeed, it is asserted in defendants' brief that, "until about 1906, the only mineral that was known or supposed to exist upon this land was

the coal"; appellants' contention is that, as Carter and his predecessors in title were in possession of the land under color of title, claiming it and all interests therein, general and adverse possession for the statutory period of a mineral known to exist, viz. the coal, cut off the real owner's title to all other mineral interests, although not known to exist. But this contention, we think, loses sight of the fact that adverse possession must, in order to divest title, be so open and notorious as to afford to the owner of the right affected actual or constructive notice of such adverse claim. Were the respective minerals held by different owners, the title of the oil and gas owner thereto surely would not be cut off by an adverse possession of the coal interests; and it can, to our minds, make no difference in principle that the rights to the various minerals are held by one person and under one title, for an assertion of a claimed right to mine coal by no means necessarily carried with it an assertion of right to bore for oil and gas, especially in view of the radically different means employed in mining coal and in boring for oil and gas. The method employed in recovering coal is not an open assertion of a right to bore for oil or gas. Interests in these different minerals are not so generally held together as to justify a presumption of that nature. This record is replete with claims of interests in coal and of interests in oil and gas —wholly separate and distinct from each other.

[6] As to laches: In suits in equity in the federal courts relief is not barred by lapse of time, except as it amounts to laches or works an estoppel; and while, for the sake of uniformity, the federal courts accept state statutes of limitation whenever by so doing they are not required to abrogate their own principles, the ultimate question is whether, under all the circumstances of the particular case, the plaintiff is chargeable with want of due diligence in failing to institute proceedings before he did. The defense being an equitable one, the lapse of time and the relations of the defendants to the rights must be such that it would be inequitable to permit plaintiffs to assert their rights. Estep v. Kentland Coal, etc., Co. (C. C. A. 6) 239 Fed. 622, 627, 152 C. C. A. 451; Pond Creek Coal Co. v. Hatfield, supra, where the subject of laches was considered and discussed.

We agree with the conclusion of the District Judge that the defense of laches has not been established. The delay has been great, but in view of the well-known fact that there was until within comparatively few years no general or substantial development of mineral lands situated as were these in question, that commercial mining of coal was not begun there before 1901, nor boring for oil and gas before 1912, that plaintiffs did not live in the neighborhood, and that their testimony (presumably believed by the District Judge, who heard it) was that they had no knowledge of such development until about a year before this suit was begun, we cannot say that they are chargeable with such want of diligence in failing to earlier institute proceedings as to equitably deprive them of relief. The fact that they paid no taxes on their mineral rights, in the absence of a policy of separate assessment and taxation, is not alone enough to bar them.

5. The assignment addressed to the holding that the alleged ad-

judication of defendants' title by the decree of the Kentucky state court was binding on but one of the plaintiffs is not presented or argued in appellants' brief. It is enough to say that, regardless of any question of waiver, reference to the record, including the opinion of the District Judge, suggests no error in this respect. The same considerations apply to the defense of champerty asserted below.

It results from these views that the decree of the District Court was right, and should be affirmed so far as it adjudged appellants A. W. Sewell and Hattie F. Sewell to be the owners of two-thirds of the one-half interest held by Harriet Sewell in the minerals which are the subject of this appeal, but that the decree is erroneous, and should be reversed, so far as it extended such adjudication of ownership to the one-half interest originally held by John W. Sewell.

The record is accordingly remanded to the District Court, with directions to enter a decree as modified by this opinion. The costs of this court will be divided.

BEYER v. CITY OF ATHENS, TENN.

CLEMENS v. SAME.

(Circuit Court of Appeals, Sixth Circuit. February 11, 1918.)

Nos. 3049, 3050.

1. MUNICIPAL CORPORATIONS ⟸7—EXERCISE OF FUNCTION.
   Two lawfully organized municipal corporations cannot exercise their functions over the same population and territory.
2. ABATEMENT AND REVIVAL ⟸27—ABSENCE OF NECESSARY PARTIES—INVALIDLY ORGANIZED MUNICIPALITY.
   An action in a Tennessee court on bonds, brought against the town of Athens, an alleged municipality, and its officials, was defeated on the ground of the invalidity of the organization of the town. Prior to rendition of the judgment of the lower court, Act Tenn. March 25, 1891 (Acts 1891, c. 70), providing for the incorporation of the city of Athens, was approved by the Legislature; but the city was not organized until after the judgment of the trial court was affirmed. *Held*, in view of Milliken & V. Code Tenn. 1884, § 3559, now Shannon's Code Tenn. 1896, § 4568, declaring that actions do not abate by the death or other disability of either party, or the transfer of any interest therein, if the cause of action survives or continues, such judgments cannot be treated as nullities on the theory that, as the town was defectively incorporated, there was no one in existence to represent it, for the city of Athens, not having been organized, could not have been brought in as a party.
3. JUDGMENT ⟸682(2)—CONCLUSIVENESS—PERSONS CONCLUDED.
   A judgment in the state court, brought by plaintiff's predecessor, which denied recovery on bonds issued by a purported Tennessee municipality on the ground that it had not been validly organized, is conclusive on plaintiff, who took the bonds with notice of the judgment.
4. JUDGMENT ⟸681—CONCLUSIVENESS—PERSONS CONCLUDED.
   A judgment against plaintiff's predecessor, denying recovery on bonds on the ground that the town issuing them was defectively incorporated,

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

is not a conclusive adjudication that a subsequently incorporated city by the same name did not assume the liability of such bonds.

5. MUNICIPAL CORPORATIONS ⟸19—ASSUMPTION OF DEBTS—STATUTES.
Sp. Act Tenn. March 25, 1891, (Acts 1891, c. 70), providing for the incorporation of the city of Athens, contained no language in terms charging the city with any obligation, regardless of its validity purporting to have been created by the town of Athens, the incorporation of which was determined to have been invalid, while Act Tenn. March 26, 1903 (Acts 1903, c. 179), abolishing the charter of the city expressly provided for payment of the debts of the corporation so dissolved. *Held* in view of the silence of the first legislative act and of the fact that the defectively organized town had received no benefit from the bonds issued by it, it must be inferred that it was not intended that the city should assume any liability on account of such bonds.

6. MUNICIPAL CORPORATIONS ⟸935—VALIDATION OF BONDS—STATUTES.
Where bonds of a municipality have theretofore been judicially declared invalid, a distinct and unmistakable purpose on the part of the legislative body by statute to validate such bonds is essential to a recovery.

In Error to the District Court of the United States for the Eastern District of Tennessee; Edward T. Sanford, Judge.

Actions by George Wescott Beyer and by William J. Clemens against the City of Athens, Tenn., which were heard together. There were judgments in each case for defendant, and plaintiffs bring separate writs of error. Judgments affirmed.

W. D. Tatlow, of Springfield, Mo., and C. W. K. Meacham, of Chattanooga, Tenn., for plaintiffs in error.

J. A. Fowler, of Knoxville, Tenn., for defendant in error.

Before WARRINGTON, KNAPPEN, and MACK, Circuit Judges.

WARRINGTON, Circuit Judge. November 9, 1914, the plaintiffs in error each brought an action against the city of Athens in the court below to recover on certain bonds and attached interest coupons, negotiable in form and purporting to have been issued by the "town and corporation of Athens" on October 1, 1888, the bonds in terms maturing October 1, 1908, and the coupons semiannually. Nine pleas were interposed to each declaration, and issue was joined in each case by the usual replication. The cases were heard before the court and jury upon an agreed statement of facts and were treated as though the actions had been consolidated; but no formal order to that effect appears in the record, and on the contrary separate writs of error were allowed. However the cases were heard together here, and will be disposed of as one cause. The plaintiffs in error, hereinafter called plaintiffs, and the defendant, the city of Athens, moved respectively for peremptory instructions, and under direction of the court the jury returned a verdict finding the issues in favor of defendant. Motion for new trial was overruled, and judgment entered for defendant, January 9, 1917. The plaintiffs bring error.

The basis of both the directed verdict and the judgment in substance was: (1) That the court below regarded itself as bound by a deci-

sion of the Supreme Court of Tennessee holding these particular bonds not to be binding obligations of the town of Athens, for the reason that under the Tennessee statutes the steps which had been taken to incorporate the town were void (Ruohs v. Athens, 91 Tenn. 20, 18 S. W. 400, 30 Am. St. Rep. 858; and (2) that although during the pendency of Ruohs v. Athens the Legislature of Tennessee enacted a statute incorporating "the town of Athens * * * and the inhabitants thereof" under the name city of Athens, yet it did so without in terms charging the city with any obligation purporting to have been made by the old town of Athens, and the learned trial judge, while recognizing the class of decisions which in effect hold that such an incorporating act would impliedly impose liability on the city of Athens for such if any valid indebtedness as might then have existed against the town of Athens, ruled that the principle of those decisions could not be applied to any obligation which was not in any sense binding on the town of Athens.

[1-3] We think Judge Sanford was right in these rulings and, in spite of the great range of discussion and citations by counsel, this opinion may safely be confined to a consideration of the two questions so determined. In the first place, it is objected that Ruohs v. Athens, was not binding upon the trial court for the reason that the enactment of the statute incorporating the city of Athens operated to deprive the state courts of jurisdiction of the case; counsel urging that the town of Athens, "whether a de jure, de facto, or a void municipal organization," as also any right in the individual defendants officially to represent the town, ceased to exist upon the passage of this statute, and that in consequence the judgment was a nullity for want of necessary parties. It appears in the agreed statement of facts that on November 18, 1889, Ruohs, as the owner and holder of the identical bonds sued on herein, brought his suit in the chancery court of McMinn county, Tenn., against the town of Athens, describing it as a municipal corporation under the laws of Tennessee, and Virgil Turner, mayor, and James Gettys and others, constituting what was alleged to have been the board of aldermen of the town; that on January 23, 1891, Ruohs filed an amended bill against the same defendants and against various other defendants named as having been officially connected with the municipal government of the town at the time the bonds were issued. In their answer defendants alleged facts challenging the validity of the organization of the town as a municipal corporation under an act of 1877 (chapter 121) and likewise the power of the town to issue the bonds in suit. The defense thus made was sustained in both the court of first instance and the Supreme Court. In view of the report of the Supreme Court decision (91 Tenn. 20, 18 S. W. 400, 30 Am. St. Rep. 858) it is not necessary to allude further to the issues made in that suit, the point now being simply to show the presence of defendants (sued as the last municipal officials) in addition to the town of Athens. The scheme of the suit was, first, to hold the town of Athens upon the bonds in suit; and, second, to hold the officials individually who participated in the issue of the bonds, in the event that the town could not be held. It should also be stated that the decisions

in that case were rendered in the court of first instance April 11, 1891, and in the Supreme Court November 17th following, and that while the act to incorporate the town under the name of city of Athens was approved March 25th of the same year (Acts 1891, c. 70) still the city was not organized until 1892. According to the terms of the act the first election thereunder was not to be held until the third Monday of April, 1891; and in their brief plaintiffs' counsel call attention to a decision of the Supreme Court of Tennessee to the effect, and there is no dispute as to the fact, that on April 11, 1891 (date of decision of chancery court in Ruohs v. Athens), "there was no one in existence * * * authorized to represent the city of Athens which 'was in esse as a legal entity' at that time, as the mayor and aldermen had not qualified and did not do so until about the first of January, 1892." Burkett v. City of Athens (Tenn. Ch. App.) 59 S. W. 667. In other words, both decisions in Ruohs v. Athens, the one in the chancery court and the other in the Supreme Court, were rendered before the city of Athens was organized.

In this state of facts it is not easy to follow counsel in their contention, already pointed out, that the decrees of the Tennessee courts in Ruohs v. Athens were nullities because of the lack of necessary parties. Any effort to bring the city of Athens into the case as a defendant or to substitute it in place of the town of Athens would naturally have been met by the objection that the city was not an organized body and was not possessed of any accredited representatives; indeed this is the precise effect of the decision in Burkett v. City of Athens, before cited, 59 S. W. at p. 669. It is plain that the Supreme Court of Tennessee, as also the court of first instance, after issue was once joined, treated the town of Athens and its codefendants throughout the pendency of Ruohs v. Athens in the respective courts as in fact parties to the suit, and with the same degree of certainty and practical effect as they treated Ruohs himself as a party. Surely all these parties, plaintiff and defendants alike, were entitled to know whether recovery could be had upon the bonds or in consequence of their issue, and this could not be finally ascertained until the court of last resort of the state should determine the question; and until then there was as much reason for the presence of the defendants as there was at the beginning of the suit. Further, the very argument of counsel impliedly concedes that the town of Athens was an appropriate party until at least the statute incorporating the city of Athens was passed; and it hardly can be doubted that this remained true until the city of Athens, with its corporate right to be and to do, was organized so as to be efficiently represented.

It is true, as counsel claim, that two lawfully and fully organized municipal corporations cannot exercise their respective functions over the same population and territory at the same time (1 Dillon Mun. Corp. [5th Ed.] § 354, and note 2 with citations); but this rule does not meet the situation we have here. There was not even one lawfully and fully organized corporation in existence, much less one in the exercise of its corporate functions over the people and territory of the town of Athens, from the time Ruohs v. Athens was commenced until

after final judgment was entered therein; and we see no reason why the town of Athens and its codefendants were not the proper and necessary parties defendant until the city of Athens was organized so as to enable it to exercise its legitimate powers. This is fairly deducible from the decision in King v. Pasmore, 3 Term Rep. 97, 130, 131, since the absence of representatives of the old corporation and the consequent right to create a new corporation there found to exist are analogous to the absence of representatives of the city of Athens until its organization could be effected and the right meanwhile in the town of Athens and its codefendants to remain and be treated as parties defendant in Ruohs v. Athens. See, also, State of Florida v. Town of Winter Park, 25 Fla. 371, 380, 381, 5 South. 818, followed in Town of Enterprise v. State ex rel., 29 Fla. 128, 141, 10 South. 740. It would therefore be going too far to hold, under the conditions pointed out, that the failure to attempt to make the city of Athens a party to the suit operated to abate the suit; and yet this is what the argument for plaintiffs comes to be. We cannot assent to such a view. It is opposed even to the statutory provision of Tennessee which declares that "actions do not abate by the death * * * or other disability of either party, or by the transfer of any interest therein, if the cause of action survives or continues". (Milliken & V. Code 1884, § 3559, now Shannon's Code 1896, § 4568). Upon principle the instant case is not distinguishable in this respect from East Tennessee & Georgia R. R. Co. v. Washington Evans, 53 Tenn. (6 Heisk.) 607, 609, where it was held that the suit was "properly prosecuted to judgment in the names of the parties to the record." Swartwout v. Michigan Air Line R. R. Co., 24 Mich. 389, 403; Westwater v. Murray, 245 Fed. 427, 434, — C. C. A. — (C. C. A. 6). It must follow that each court had jurisdiction to render decree in Ruohs v. Athens. The validity of the bonds was there put to a severe test, since admittedly Ruohs had purchased them for value, without actual notice, though with constructive notice, of the fatal defect in the attempt to incorporate the town of Athens. It was not a case of irregularity in the issue of the bonds. The trouble was the total want of power in the town to issue or otherwise to bind itself upon the bonds. Ruohs v. Athens, 91 Tenn. 25–27, 18 S. W. 400, 30 Am. St. Rep. 858. This judgment was rendered before the bonds, though not before some of the coupons, matured; and it is vain to say that it was not binding upon Ruohs and his privies. The present plaintiffs obtained the bonds in suit through purchase from the heirs of Ruohs and admittedly with actual notice of the Ruohs suit and judgment. Since the very bonds now in issue were adjudged to be void as against the town of Athens, the issue presented upon that subject in the instant case must be treated as res adjudicata, and of course as binding both upon the court below and here.

[4, 5] We come in the next place to the question whether the incorporation of "the town of Athens * * * and the inhabitants thereof * * * under and by the name of the city of Athens" operated to charge the city with liability for payment of the bonds in

suit.[1] It must be conceded that the estoppel of the judgment in Ruohs v. Athens is not in itself conclusive of this question. It must, however, be accepted as a postulate that the bonds were void as against the town of Athens. We are therefore bound to look to the incorporating acts just referred to for a legislative purpose, if there be any so to charge the city of Athens; for it cannot be assumed that the legislative body intended to impose a liability of the character mentioned, unless it did so in clear and unmistakable language. It is not claimed, and we do not find, that any of the language contained in the legislation alluded to in terms charges the city of Athens with any obligation, regardless of its validity, purporting to have been created by the town of Athens. If in reality it had been the intent to impose such a liability upon the new corporation, it would have been easy to say so. When, on March 26, 1903, the Legislature abolished the charter of the city bearing date March 25, 1891, it expressly provided for payment of the debts of the corporation so dissolved (see reference before set out in margin); and the significance of this express provision is augmented by the fact that nothing in the nature of a curative provision has ever been enacted in respect of the bonds here involved. The reason for the silence of the Legislature in respect of these bonds may well be inferred from the fact that the town of Athens never received any consideration for the issue of the bonds. It appears in the agreed statement of facts that the bonds were executed by the acting mayor and board of aldermen of the town under proceedings regular in form and taken in pursuance of authority conferred by the statutes of Tennessee on municipal corporations that were "duly incorporated as such" under the act of 1875 (chapter 92), amended by the act of 1877 (chapter 121); and it is recited on the face of the bonds that they were issued "in payment of a subscription for stock in the Nashville & Tellico Railroad Company, pursuant to the statutes of said state authorizing towns and municipal corporations to subscribe for stock in railroads and to issue their bonds in payment therefor"; yet it is agreed that none of this stock was ever issued to the town of Athens or to any one in its behalf, and we find nothing to indicate that the railroad was ever constructed in or about the city of Athens, or for that matter elsewhere. Certainly, if we bear in mind the absence of anything in the incorporating acts to indicate a purpose to provide for payment of the bonds, the instant case cannot be treated the same as it

[1] This incorporating statute was a special act, approved March 25, 1891 (Acts 1891, p. 177). Another act was approved March 26, 1903, in terms abolishing this charter and empowering the board of mayor and aldermen, with the recorder, to pay the liabilities of the city, not the town, of Athens, from funds on hand and to be collected in the form of taxes, etc. (Acts 1903, p. 417); on the following April 7th another special act was passed to incorporate the city of Athens under the name of "the mayor and aldermen of the city of Athens," changing in some measure the territorial limits and investing the new corporation with powers similar to those created under the act of March 25, 1891 (Id., pp. 923 to 938); and again, on February 5, 1909, the previous corporate name, city of Athens, was restored (Acts 1909, p. 63), and it is agreed that the present defendant is the corporation that was created April 7, 1903, under the restored name given by the act of February 5, 1909, as stated.

might have been if the town of Athens had received, and the city of Athens were now in the enjoyment of, a full consideration for the bonds. It might well be that in such a situation the city of Athens could not both retain the benefits derived under the bonds and refuse to pay them; and, further, it may be conceded here as it was below, that if the bonds had constituted a valid debt of the town of Athens the subsequent incorporating act would have been sufficient to fix liability for them upon the city of Athens; but plainly these questions do not arise.

[6] We therefore have a case where a town, affected by a fatal infirmity in its attempt to incorporate, issued bonds which by reason of such infirmity were adjudged to be void instruments, and where nevertheless it is now sought to recover upon the bonds in the absence of any statutory provision tending to show a legislative purpose to validate them or in any form to impose liability for their payment. Such legislative omissions cannot, of course, be supplied by a court. It results, in our judgment, that the case is ruled by Hays v. Holly Springs, 114 U. S. 120, 126, 5 Sup. Ct. 785, 788 (29 L. Ed. 81). Certain bonds of the city of Holly Springs were there involved, together with a statute relied on as a curative act. Relief was denied, Mr. Justice Blatchford saying:

"The intention of the Legislature to confirm and ratify the subscription in question cannot be ascertained, with certainty, from the language of the act, which is too vague to form the basis of so important an authority as that sought to be deduced from it. As is said in State v. Stoll, 17 Wall. 425, 436 [21 L. Ed. 650], if the Legislature intended to do what is claimed, 'it was bound to do it openly, intelligibly and in language not to be misunderstood,' and 'as a doubtful or obscure declaration would not be justifiable, so it is not to be imputed.' Even a bona fide holder of a municipal bond is bound to show legislative authority in the issuing body to create the bond. Recitals on the face of the bond, or acts in pais, operating by way of estoppel, may cure irregularities in the execution of a statutory power; but they cannot create it. If, as in the present case, legislative authority was wanting, the bond has no validity."

We are the more content to deny relief because of the admitted fact that the bonds were obtained by plaintiffs nearly 6 years after their maturity, and, as we have in substance said, with actual notice of the fact that they had been declared void in Ruohs v. Athens more than 22 years before; the bonds were purchased for less than 3 per cent. of their face value, subject to a provision that the sellers should receive in addition 20 per cent. of any recovery, though it must be said that the sellers are not responsible for any of the costs or expenses of the suit.

The judgment is affirmed.

HARRIMAN NAT. BANK v. HUIET et al.

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

No. 1548.

1. EXEMPTIONS ⟸50(1)—LIFE INSURANCE—CONSTRUCTION OF STATUTE.
Civ. Code S. C. 1912, § 2721, provides that life insurance payable to a married woman, or to her and her children, shall be exempt from the claims of creditors of her husband, with a proviso that, if the premium paid in any one year from funds of the husband shall exceed $500, the exemption shall not apply to so much of said premium as shall be in excess of $500, but such excess, with interest, "shall inure to the benefit of such creditors." *Held*, that under such statute, construed in connection with section 3455, which makes every conveyance with intent to hinder, delay, or defraud creditors void as to creditors affected thereby, all premiums paid by a husband in excess of $500 in any one year are recoverable, with interest, by his creditors in case he dies insolvent, without regard to his solvency or insolvency at the time of their payment; but the insurance purchased with premiums up to $500 per year belongs exclusively to the wife, and cannot be taken to pay such claims of creditors.

2. EXEMPTIONS ⟸102—LIFE INSURANCE—FRAUD OF INSURER.
That a husband obtained money by fraudulent representations with which to pay premiums on life insurance policies payable to his wife does not render the proceeds of such policies subject to the claims of his creditors, where they are exempted by statute and the wife was not a party to the fraud.

3. EXEMPTIONS ⟸104—ASSIGNMENT OF LIFE INSURANCE POLICIES—RIGHTS OF BENEFICIARY.
A wife, who is beneficiary in life insurance policies procured by her husband, does not lose her interest therein by permitting their assignment as security to a creditor of her husband, and their reassignment to her by the creditor is not a diversion of assets by the husband in fraud of his creditors.

4. EXEMPTIONS ⟸50(1)—LIFE INSURANCE—PREMIUMS PAID BY BENEFICIARY.
Where a husband deposited bonds to secure payment of a premium on a life insurance policy payable to his wife, and after his death the wife redeemed the bonds and turned them over to his estate, she was equitably entitled to the amount of the premium paid for their redemption, although, if it had been paid by the husband, it would have been subject to his debts.

Knapp, Circuit Judge, dissenting in part.

Cross-Appeals from the District Court of the United States for the Eastern District of South Carolina, at Charleston; Henry A. M. Smith, Judge.

Suit in equity by the Harriman National Bank against Lucy C. Huiet, Katharine R. Huiet, the Franklin Sugar Refining Company, the Southeastern Life Insurance Company, and the Dime Savings Bank and George H. Moffett, administrators d. b. n. of Caleb B. Huiet, deceased. From the decree, complainant appeals, and defendant Lucy C. Huiet files cross-appeal. Modified and affirmed.

For opinion below, see 244 Fed. 216.

Augustine T. Smythe, of Charleston (Henry Buist and George L. Buist, both of Charleston, S. C., on the brief), for Harriman Nat. Bank and administrators d. b. n. of Caleb B. Huiet.

Walter B. Wilbur, of Charleston, S. C. (Alfred Huger, of Charleston, S. C., on the brief), for Lucy C. Huiet, Katharine R. Huiet, and Franklin Sugar Refining Co.

J. P. K. Bryan, of Charleston, S. C., for Lucy C. Huiet.

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

PRITCHARD, Circuit Judge. This is a suit in equity instituted in the District Court of the United States for the Eastern District of South Carolina by the Harriman National Bank, of the city of New York, to subject certain life insurance policies on the life of Caleb B. Huiet, an insolvent decedent, to the payment of certain debts.

It appears that the decedent was a merchandise broker in the city of Charleston, S. C., carrying on a large business there and in other markets; that he became insolvent prior to the 31st day of March, 1914, and on that day made a statement in writing of his financial condition to the Harriman National Bank, of New York, for the purpose of securing a loan. It is insisted that this statement, which purported to have been taken from his books of accounts, was not taken from the same, that the figures given at that time showing him to be a man of wealth were entirely false, and that he thereby practiced a fraud against the Harriman National Bank. It is further insisted that the Harriman National Bank, by virtue of such fraudulent statement, loaned to Caleb B. Huiet the sum of $30,000, without security, in two loans of $15,000 each. It appears that the notes representing these two loans were each renewed once. However, no payments of any kind were made upon the renewal notes, and they are still due and owing.

It further appears that at the time of this transaction decedent was investing heavily in life insurance, payable to his wife; his life insurance policies at the time of his death, April 8, 1916, amounting to $215,000 face value. It is insisted that at that time his assets were practically nothing. Lucy C. Huiet, the widow of the decedent and principal beneficiary of the policies, and Katharine R. Huiet, a daughter, were made parties respondent to the suit; also the Franklin Sugar Refining Company, which it is alleged was more or less involved in Huiet's financial affairs, and the Southeastern Life Insurance Company, which had not at that time paid two of the policies, were made joint respondents. It appears that these two policies have since been paid into the court, and the Southeastern Life Insurance Company no longer has any interest in this suit. George H. Moffett and the Dime Savings Bank, of Charleston, S. C., were subsequently brought in as administrators d. b. n. of deceased.

The appellee Lucy C. Huiet in her answer avers that she has no knowledge as to the exact amount or present status of her husband's indebtedness, and further alleges:

"That this defendant is informed and believes that said indebtedness was in no way or manner incurred by any false or fraudulent representations of the said Caleb B. Huiet."

She further denies on information and belief—

"that at the time that the said indebtedness arose Caleb B. Huiet was seriously financially embarrassed, and further avers that to the best of her knowledge, information and belief, the said Caleb B. Huiet was at the time of the making of such indebtedness fully solvent; and she further denies that she at any time conspired or connived with the said Caleb B. Huiet, or any other person or persons whomsoever, to cause any diversion of the funds of the said Caleb B. Huiet as alleged in the bill of complaint."

It is further denied by the defendant that she had any knowledge of the alleged insolvency of her husband at the time of payment on account of premiums due on the insurance policies in question. Numerous other averments are contained in the answer, but we think that those we mention are sufficient for the purposes of this opinion.

The court below rendered a decree, dated December 23, 1916, in which it was adjudged that the creditors were entitled to the sum of $1,725.13, with interest from the average date of payment of premiums in the year 1914, and refused all other relief to the creditors. Subsequently, none of the creditors having filed a supersedeas, the impounded fund was paid over to Lucy C. Huiet, excepting the sum above mentioned awarded to the creditors. This cause comes here on appeal and cross-appeal.

It is insisted by appellant that the court below erred in not decreeing that it was entitled to all the proceeds of the insurance where the policies were payable to the wife of decedent; the first assignment being in the following language:

"That his honor, the District Judge, erred in failing to find as a matter of law that, when assets of an insolvent are diverted to the purchase of insurance in fraud of creditors, the proceeds of the policies so purchased should be applied to the payment of the debts of those creditors—not merely the amount diverted."

By this assignment it is assumed that the decedent purchased insurance out of his assets while insolvent. It appears from the evidence that the policies of insurance on the life of Caleb B. Huiet at the date of his death, and payable to his wife as beneficiary, with the exception of the policy for $25,000 in the New York Life Insurance Company, were taken out prior to the date of the insolvency of decedent, as found by the court below. It also appears that at the time this policy was taken out decedent, not being able to pay the premium in cash, deposited two bonds as collateral security in payment of the same, but that after the death of decedent the widow redeemed these bonds and turned them over as part of the assets of the decedent. We will pass upon the legal effect of this transaction later on.

[1] The second assignment, in our opinion, raises the real and most important question involved in this controversy. This assignment is in the following language:

"That his honor, the District Judge, erred in failing to find as a matter of law that section 2721 of volume 1 of the Code of Laws of South Carolina, 1912, when construed with section 3455 of the same volume, means to exempt from the claims of creditors of the two insured such amount of a policy or policies of insurance as is purchased with premiums to the amount of $500 per annum."

Section 3455 of the Code of Laws of South Carolina (1912) is as follows:

"Every feoffment, gift, grant, alienation, bargain, and conveyance of lands, tenements, or hereditaments, goods, and chattels, or of any of them, or of any lease, rent, commons, or other profit or charge out of the same, by writing or otherwise; and every bond, suit, judgment, and execution, which may be had or made, to or for any intent or purpose to delay, hinder, or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties, and forfeitures, shall be deemed and taken (only as against that person or persons, his or their heirs, successors, executors, administrators, and assigns, and every of them, whose actions, suits, debts, accounts, damages, penalties, and forfeitures, by such guileful, covinous or fraudulent devices and practices as is aforesaid, are, shall, or might be in any ways disturbed, hindered, delayed, or defrauded) to be clearly and utterly void, frustrate, and of none effect; any pretence, color, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding."

Also section 2721 is applicable, and should be considered together with the section which we have just quoted. It is as follows:

"A policy of insurance upon the life of any person which has already been or may hereafter be taken out in which it is expressed to be for the benefit of any married woman, or of herself and her children, or of herself and children of her husband, whether procured by herself or her husband, shall inure to the use and benefit of the person or persons for whose use and benefit it is expressed to be taken out; and the sum or net amount of the insurance becoming due and payable by the terms of the policy shall be payable to the person or persons aforesaid, free and discharged from the claims of the representatives of the husband, or of any of his creditors, or any party or parties claiming by, through or under him or them or either of them: Provided, however, that if the premium paid in any one year out of the property or funds of the husband shall exceed the sum of five hundred dollars, the exemption from the claims of the creditors of the husband shall not apply to so much of said premium so paid as shall be in excess of five hundred dollars, but such excess, with the interest thereon, or so much thereof as may be necessary, shall enure to the benefit of such creditors if the same be necessary for their payment."

Section 3455 is practically a re-enactment of the statute of Elizabeth, which was intended to prevent one, by donation or otherwise, from disposing of his property so as to avoid the payment of his debts. However, this section is limited, as we will see, to a certain extent, by the second section which we have quoted.

The statutes of South Carolina clearly indicate a purpose to guard, as much as possible, the rights of married women. A striking illustration of this is the statute which prevents one from obtaining a divorce after once being lawfully married. These statutes, as we have said, should be considered in pari materia, in order that we may ascertain the extent of the limitation contained in section 2721. It was obviously the purpose of the Legislature to go as far as possible in protecting the rights of creditors as against one who might become insolvent by purchasing insurance for the wife; but when these two statutes are considered together it is clear that the Legislature also intended to safeguard the rights of the wife. The Legislature no doubt considered it improper to permit a husband to divert all of his assets under the guise of providing for his wife. Hence the provision in the stat-

ute that any money invested in insurance, together with the interest thereon, in excess of the sum of $500, should be subject to the payment of a husband's debts; that if the premium of any one year out of his property or funds should exceed this amount that the exemption in favor of the creditors "shall not apply to so much of said premium so paid as shall be in excess of five hundred dollars, but such excess, with the interest thereon, or so much thereof as shall be necessary shall inure to the benefit of such creditors if the same be necessary for their payment." This was intended to limit the provisions of section 2721, which, as will be seen, provides that, where insurance is taken out in favor of the wife and children, "it shall inure to the use and benefit of the person or persons for whose benefit it was secured," and further provides that the net amount of the insurance thus obtained shall be "free and discharged from the claims of the representatives of the husband, or any of his creditors, or any party or parties claiming by, through or under him or them or either of them."

Under the provisions of this statute it would be absurd to say that one could not, by taking out insurance and paying for the same out of his own money or property, by this method provide a sum sufficient to protect his wife and children after his death. This principle was annunciated in the case of Central Bank of Washington v. Hume, 128 U. S. 195, 9 Sup. Ct. 41, 32 L. Ed. 370. That portion of the opinion pertinent to this question is in the following language:

"Mrs. Hume was confessedly a contracting party to the Maryland policy; and as to the Connecticut contracts the statute of the state where they were made and to be performed explicitly provided that a policy for the benefit of a married woman shall inure to her separate use or that of her children; but if the annual premium exceed three hundred dollars, the amount of such excess shall inure to the benefit of the creditors of the person having the premiums. The rights and benefits given by the laws of Connecticut in this regard are as much part of these contracts as if incorporated therein, not only because they are to be taken as if entered into there, but because there was the place of performance, and the stipulation of the parties was made with reference to the laws of that place. * * * The obvious distinction between the transfer of a policy taken out by a person upon his insurable interest in his own life, and payable to himself or his legal representatives, and the obtaining of a policy by a person upon the insurable interest of his wife and children, and payable to them, has been repeatedly recognized by the courts. Thus in Elliott's Appeal, 50 Pa. 75 [88 Am. Dec. 525], where the policies were issued in the name of the husband, and payable to himself or his personal representatives, and while he was insolvent were by him transferred to trustees for his wife's benefit, the Supreme Court of Pennsylvania, while holding such transfers void as against creditors, say: 'We are to be understood in thus deciding this case that we do not mean to extend it to policies effected without fraud directly and on their face for the benefit of the wife, and payable to her; such policies are not fraudulent as to creditors, and are not touched by this decision.' In the use of the words 'without fraud,' the court evidently means actual fraud participated in by all parties, and not fraud inferred from the mere fact of insolvency; and, at all events, in McCutcheon's Appeal, 99 Pa. 137, the court say, referring to Elliott's Appeal: 'The policies in that case were effected in the name of the husband, and by him transferred to a trustee for his wife at a time when he was totally insolvent. They were held to be valuable choses in action, the property of the assured, liable to the payment of his debts, and hence their voluntary assignment operated in fraud of creditors, and was void as against them under the statute of 13 Elizabeth. Here, however, the policy was effected in

the name of the wife, and in point of fact was given under an agreement for the surrender of a previous policy for the same amount also issued in the wife's name. * * * The question of good faith or fraud only arises in the latter case; that is, when the title of the beneficiary arises by assignment. When it exists by force of an original issue in the name, or for the benefit of the beneficiary, the title is good, notwithstanding the claims of creditors. * * * There is no anomaly in this, nor any conflict with the letter or spirit of the statute of Elizabeth, because in such cases the policy would be at no time the property of the assured; and hence no question of fraud in its transfer could arise as to his creditors. It is only in the case of the assignment of a policy that once belonged to the assured that the question of fraud can arise under this act.' And see Ætna Nat. Bank v. U. S. Life Ins. Co. [C. C.] 24 Fed. 770; Pence v. Makepeace, 65 Ind. 345; Succession of Hearing, 26 La. Ann. 326; Stigler v. Stigler, 77 Va. 163; Thompson v. Cundiff, 11 Bush [Ky.] 567.

"Conceding, then, in the case in hand, that Hume paid the premiums out of his own money, when insolvent, yet, as Mrs. Hume and the children survived him, and the contracts covered their insurable interest, it is difficult to see upon what ground the creditors, or the administrators as representing them, can take away from these dependent ones that which was expressly secured to them in the event of the death of their natural supporter. The interest insured was neither the debtor's nor his creditors'. The contracts were not payable to the debtor, or his representatives, or his creditors. No fraud on the part of the wife, or the children, or the insurance company, is pretended. In no sense was there any gift or transfer of the debtor's property, unless the amounts paid as premiums are to be held to constitute such gift or transfer. This seems to have been the view of the court below, for the decree awarded to the complainants the premiums paid to the Virginia Company from 1874 to 1881, inclusive, and to the other companies from the date of the respective policies, amounting, with interest to January 4, 1883, to the sum of $2,696.10, which sum was directed to be paid to Hume's administrators out of the money which had been paid into court by the Maryland and Connecticut Mutual Companies. But, even though Hume paid this money out of his own funds when insolvent, and if such payment were within the statute of Elizabeth, this would not give the creditors any interest in the proceeds of the policies, which belonged to the beneficiaries for the reasons already stated. * * * If in some cases payments of premiums might be treated as gifts inhibited by the statute of Elizabeth, can they be so treated here?

"It is assumed by the complainants that the money paid was derived from Hume himself, and it is therefore argued that to that extent his means for payment of debts were impaired. That the payments contributed in any appreciable way to Hume's insolvency, is not contended. So far as premiums were paid in 1880 and 1881 (the payments prior to those years having been the annual sum of $196.18 on the Virginia policy), we are satisfied from the evidence that Hume received from Mrs. Pickrell, his wife's mother, for the benefit of Mrs. Hume and her family, an amount of money largely in excess of these payments, after deducting what was returned to Mrs. Pickrell, and that in paying the premiums upon procuring the policies in the Maryland and the Connecticut Mutual, Hume was appropriating to that purpose a part of the money which he considered being thus held in trust; and we think that, as between Hume's creditors and Mrs. Hume, the money placed in Hume's hands for his wife's benefit is, under the evidence, equitable as much to be accounted for to her by Hume, and so by them, as is the money paid on her account to be accounted for by her to him or them. * * * This argument in the interest of creditors concedes that the debtor may rightfully preserve his family from suffering and want. It seems to us that the same public policy which justifies this, and recognizes the support of wife and children as a positive obligation in law as well as morals, should be extended to protect them from destitution after the debtor's death, by permitting him, not to accumulate a fund as a permanent provision, but to devote a moderate portion of his earnings to keep on foot a security for support already, or

which could thereby be, lawfully obtained—at least to the extent of requiring that, under such circumstances, the fraudulent intent of both parties to the transaction should be made out. And inasmuch as there is no evidence from which such intent on the part of Mrs. Hume or the insurance companies could be inferred, in our judgment none of these premiums can be recovered.

"The decree is affirmed, except so far as it directs the payment to the administrators of the premiums in question and interest, and, as to that, is reversed, and the cause remanded to the court below, with directions to proceed in conformity with this opinion."

Also we find the following on page 3794 of volume 4, Cooley's Briefs on Law of Insurance:

"The question as to the effect of the insolvency of insured upon the distribution of the proceeds of a policy payable to insured's family has been treated by the courts as governed by the principles determining the effect of fraudulent conveyances, rather than by any part of the insurance law. There are, however, numerous cases treating the effect of statutes providing for an exemption of the proceeds of life policies from the claims of creditors, which may be properly considered here. And it may not be out of place to state the general rule that in the absence of a special statute the insolvency of insured will give the creditors no claim upon the proceeds of a policy procured without the expenditure of any money by insured during insolvency (First Nat. Bank v. Simpson, 152 Mo. 638, 54 S. W. 506), and that, though some of the premiums may have been paid during insolvency, this will not necessarily subject the proceeds of the policy to the payment of insured's debts, even to the extent of the premiums so paid (Central Nat. Bank v. Hume, 128 U. S. 195, 9 Sup. Ct. 41, 32 L. Ed. 370; contra Fearn v. Ward, 80 Ala. 555, 2 South. 114). All the statutes bearing on the exemption of life policies or their proceeds seem based on the theory that, in the absence of an expressed contrary intent, the object of an ordinary life insurance policy should be considered as the protection of insured's family after his death, and that this object and desire is laudable and in accordance with public policy. They provide, in substance, that the proceeds of life insurance policies taken out for the benefit of certain classes of beneficiaries shall be free from the claims of creditors; but in some states insurance in excess of certain specified amounts, or procured while the insured was insolvent, is declared not exempt."

The court below held, as we have stated, that creditors were only entitled to the premiums paid in any one year in excess of the sum of $500, and interest thereon, after the date deceased became insolvent, and while, technically speaking, appellants by assignment of error do not raise the question as to whether any premiums paid in excess of $500 at any time prior thereto, when deceased was solvent, should be treated as subject to the payment of the debts of deceased, however, to interpret this statute, in view of the facts set forth in the record, we feel called upon to pass upon that question also.

In enacting this statute the Legislature no doubt carefully considered the whole situation, with a view of adopting a plan by which it could prevent the husband from diverting more than $500 of his assets for the purpose of purchasing insurance for his wife by providing that after that amount had been purchased any additional money used for that purpose should be treated as a conversion of his assets, so that if he should become insolvent the creditors would be entitled to any such amount, together with interest on the same. This, we think, is a fair and equitable provision.

It is urged that, where one is solvent, during such time as he remains solvent he may dispose of his property as he sees fit. Ordinarily this is true, but the Legislature of South Carolina evidently intended by the enactment of this statute to provide against the contingency of insolvency in the interest of the creditors of the husband, and therefore, without mentioning insolvency or without fixing any particular time for the limitations contained in the statute to become effective, simply provided that only $500 of his assets should be exempt, so that in the event he should become insolvent that portion of his assets which he invested in excess of $500 in purchasing insurance should become subject to the payment of his creditors at his death.

It is also contended that the construction which we feel impelled to place upon this statute, in many instances, would work a great hardship upon the wife; that where one pays premiums on a policy for 20 years or more that such premium would, in the aggregate, absorb the face value of the policy at the death of the insured. In this connection it should be borne in mind that the whole amount of insurance purchased in any one year by the payment of premiums amounting to $500 belongs exclusively to the wife at the death of the husband. It is a matter of common knowledge that one may purchase as much as $8,000 or $9,000 of insurance by the payment of $500, and the probabilities are that in the majority of instances policies would not run for more than 10 or 15 years; but, even if they should, such fact would not justify us in reading into the statute a proviso which was not placed there by the Legislature for the purpose of avoiding a contingency which might arise under the statute.

By this legislation the wife is entitled, as against creditors, to the premium up to the amount of $500 and the face value of the policy. It is perfectly clear that any insurance that the husband might be able to purchase by paying premiums to the extent of $500 for any one year belongs exclusively to the wife, and is therefore not subject to the payment of any debts that the husband may have contracted; and we think this is true, even if the husband should be insolvent at the time that he takes out the insurance policy, inasmuch as the word "insolvency" is not contained in section 2721, which excludes the idea that it was the purpose of the Legislature to prevent the wife from enjoying the benefits accruing under the policy, subject to the limitations which we have already mentioned. It is clear, we think, that where policies are taken out in addition thereto that the wife is entitled to any and all insurance accruing thereunder, save the premiums and interest thereon, as we have stated. In other words, this statute clearly indicates a purpose on the part of the Legislature to permit the husband to purchase any amount of insurance, but to limit the amount of insurance that the wife would be entitled to at his death to such balance as might remain after deducting therefrom the premiums and interest thereon.

Decisions in other states where statutes somewhat similar to this are in force support this conclusion. The statute of South Carolina and that of New York bearing upon this question are identical as to the point involved herein, the statute of New York being in the following language:

"When the premium paid in any year out of the property or funds of the husband shall exceed $500, such exemption from such claims shall not apply to so much of the said premium so paid as shall be in excess of $500, but such excess * * * shall inure to the benefit of his creditors." Laws N. Y. 1870, c. 277.

The above statute was amended by the Legislature of New York in 1896, the following language being employed:

When the premium paid in any year out of the $500, and such excess shall inure to the benefit of insurance purchased by premiums in excess of $500 primarily liable for the husband's debts. Laws 1896, c. 272.

In referring to the statute before it was amended, in the case of Kittel v. Domeyer, 70 App. Div. 134, 75 N. Y. Supp. 150, the court said:

"* * * Only so much of the premium paid as was in excess of $500 should inure to the benefit of creditors; that is, not one, but all, of the creditors of the deceased husband, and such excess was evidently intended to be administered as part of his estate and in that way distributed pro rata among all the creditors according to their respective claims."

The court in that case, in construing the statute as amended, also said:

"The principal and substantially the only change which seems to have been made by the act of 1896 was that the excess of premium was not the fund which was to inure to the benefit of creditors, but that the insurance purchased by premiums in excess of $500 should be 'primarily' liable for the husband's debts, and should be no longer free from the claims of creditors and representatives of the husband."

In view of the amendment to the New York statute on this subject, wherein it is expressly declared that the insurance purchased by premiums in excess of $500 should be liable for the husband's debt, and the decision of the appellate court of that state as to the meaning of the original statute and the amendment thereto, it is easy to distinguish the case which we have just quoted from the case at bar, and when we consider the fact that the South Carolina Code was fashioned after the New York Code, and its provision in respect to this matter being in practically the same language, leaves little doubt, if any, as to the construction to be placed upon the South Carolina statute.

[2] It is expressly denied by Mrs. Huiet that she had any knowledge of the alleged fraudulent transactions of her husband, or that she entered into any conspiracy with him to defraud his creditors, and there is not a scintilla of evidence to contradict this averment. However, it is insisted by plaintiff that the decedent by false and fraudulent representations secured the money from appellant with which to purchase the insurance in question. The court below found as a fact, as we have already stated, that all the premiums paid for insurance by the husband, with one exception, were paid anterior to the time that he became insolvent, and we think the evidence amply justifies this finding. However, we fail to see how any fraudulent and false representations the decedent may have made to appellant to obtain money could affect the right of the wife to enjoy the benefit of the exemptions to which she was entitled under a legislative grant.

[3] The fifth assignment of error is in the following language:

"That his honor, the District Judge, erred in failing to find as a matter of law that when the Franklin Sugar Refining Company became willing to surrender the policies of life insurance in the Southeastern Life Insurance Company for $60,000, the act of C. B. Huiet in having these policies assigned to his wife rather than to his creditors (Huiet at that time having power of appointment over the policies), was a diversion of assets in fraud of his creditors."

It is also insisted that at the time this assignment was made, even though the wife before such assignment would have been entitled to receive the benefits thereunder at the death of her husband, that the assignment of the wife to the Franklin Sugar Refining Company as a creditor would have changed the contract of insurance so as to terminate any interest that she might have had therein, and, further, that the reassignment by the creditor of these policies in favor of the wife constituted a fraudulent conveyance on the part of Huiet.

It would be unreasonable to hold that a wife who had an interest in life insurance policies, as in this instance, by making an assignment to aid her husband temporarily to bridge over his financial troubles, thereby relinquished any right or title which she may have had to the insurance accruing thereunder, and it would be manifestly unjust under such circumstances to hold that any reassignment made by the creditor, so as to reinvest the wife with her interest therein, was a fraudulent transaction as respects the other creditors of the husband. We think that this is so plain that it is not necessary to cite many authorities in support thereof. In passing, however, we will cite the case of Palmer v. Mutual Life Ins. Co., 38 Misc. Rep. 318, 77 N. Y. Supp. 869; also the case of McNevins v. Prudential Ins. Co. of America, 57 Misc. Rep. 608, 108 N. Y. Supp. 745, wherein the Supreme Court held that the cancellation of the debt of necessity extinguished the creditors' interest, which, at most, was only conditional, and that by cancellation of the debt and the reassignment of the policy the beneficiary becomes reinvested with the title to the same, and occupies precisely the same position that she occupied at the time the policies were taken out in her favor. It follows that the court below was not in error as respects its ruling on this point.

[4] The court below held that, inasmuch as Mrs. Caleb B. Huiet redeemed the bonds which had been placed as collateral by her husband, as found by the court below, and returned these bonds to the estate, thereby increasing the assets of the deceased to that extent, that in equity she would be entitled to such premium as was paid thereon. We think that in view of the facts this ruling was eminently proper. We have carefully examined the numerous cases cited by appellant, but are of opinion that they do not apply to this question; the facts being easily distinguished from those of the case at bar.

Having disposed of the material assignments, from what we have said as respects the various contentions of the parties, it follows that the court below, in decreeing that the creditors were only entitled to recover premiums paid in excess of $500 for any one year from the date of the insolvency of the decedent, was in error. Therefore the decree of the lower court should be modified, so as to entitle the cred-

itors to recover all the premiums paid in any one year, except $500 and interest thereon.

It follows, therefore, that the decree of the court below, to this extent, must be modified and affirmed.

KNAPP, Circuit Judge (dissenting in part). I cannot agree to a construction of the South Carolina statute which takes from the wife and gives to the husband's creditors the excess over $500 of premiums paid by him "in any one year" when he was perfectly solvent. A single illustration will serve the purpose of argument. It is not uncommon to take out a "paid-up" life policy; that is, a policy for which a lump sum is paid at the time it is issued, in lieu of annual or other stated payments. At the age of 25, a husband insures his life for such amount, payable to his wife at his death, as $10,000 then paid will purchase. He is solvent at the time, and continues solvent for 40 years, when some misfortune overtakes him, and he dies heavily indebted, leaving little or no property. In such a case, if the majority are right, the husband's creditors, whose claims may not have accrued until within a year before his death, can take from the insurance money, as against the wife, the sum of $9,500, with interest thereon for 40 years, which might aggregate enough to exhaust the policy. It seems clear to me that the language of this statute does not require and should not receive a construction under which such a palpably unjust result is possible. I am of opinion that the creditors referred to in the proviso, the meaning of which is in dispute, are creditors whose rights are adversely affected by payments of premiums because of the insolvency of the debtor when such payments were made, or because the payments themselves contributed to his insolvency. True, the statute makes no mention of insolvency; but that would appear to be implied, since it has no application except to an insolvent condition. When that condition exists, the proviso comes in to limit the annual amount that may be paid for insurance, and I cannot believe that the Legislature ever intended to give to "such creditors" any right to premiums previously paid, when the insured was entirely solvent, although such premiums were more than $500 a year.

As I read it, the Domeyer Case cited in the majority opinion, is not in point. The report of that case (70 App. Div. 134, 75 N. Y. Supp. 150) states that the judgment of the trial court was sought to be sustained "upon the theory that, inasmuch as Domeyer for several years prior to his death was insolvent, and *during that time* (italics mine) the premiums on all of the policies referred to exceeded $500 a year, and such premiums were paid out of his own property, the plaintiff as a creditor is entitled to recover," etc. Apparently, therefore, the court was dealing with a case where the excess premiums were all paid after the insured became insolvent, and the question here considered was not involved.

I think the decree below was right, and should be affirmed without modification.

PIERCE v. HARPER.

(Circuit Court of Appeals, Sixth Circuit. March 5, 1918.)

No. 3090.

1. BILLS AND NOTES ⟸476(1), 493(3)—ACTION ON NOTE—DEFENSES—WANT OF CONSIDERATION.

An answer to an action on a promissory note, which merely avers that no consideration moved to the maker, is not sufficient; but, to constitute a defense, it must also aver that the payee did not thereby suffer a loss or detriment, and the pleading must be supported by proof.

2. BILLS AND NOTES ⟸518(1)—VALIDITY—CONSIDERATION.

Defendant purchased an interest in a partnership, giving a note therefor, payable out of the profits of the business. The partner to whom the note was given died, and defendant executed and delivered to his executor two notes for the amount due on his prior note, containing no conditions, one of which was payable to plaintiff, who was a legatee. The executor sent the note to plaintiff by mail, and she accepted it as part of her legacy, having no knowledge of the conditions under which it was given until long after its maturity. The firm became insolvent, and defendant received nothing from its assets. *Held*, that such facts did not sustain the defense that the note was without consideration.

In Error to the District Court of the United States for the Eastern Division of the Northern District of Ohio; John M. Killits, Judge.

Action at law by Cora H. Harper against F. C. Pierce. Judgment for plaintiff, and defendant brings error. Affirmed.

Suit by Cora H. Harper against F. C. Pierce upon a promissory note. Defendant Pierce purchased from E. L. Hart an interest in the firm of Hart & Co., of Cleveland, Ohio, and agreed to pay for such interest the sum of $10,000 "out of the profits of the business of Hart & Co." He gave his promissory note for $10,000, payable to E. L. Hart "out of the profits of Hart & Co." The sum of $1,500 was paid upon the note, leaving a balance of principal owing thereon of $8,500. E. L. Hart died, leaving a last will and testament, in which plaintiff's brother, F. W. Hart, was named as executor. The will directed that the estate of the testator should be converted into cash and so distributed. Plaintiff, Cora A. Harper, was entitled to a distributive share of the estate. At the solicitation of the executor, Pierce executed two notes to take the place of the original note belonging to the estate of E. L. Hart. One of the new notes was for $4,500, dated November 1, 1905, and payable to Cora A. Harper one year after its date. This note was in the usual form, and did not recite that it was to be paid "out of the profits of Hart & Co."; but the executor promised to inform Mrs. Harper that it was to be so paid. The executor sent the note to Mrs. Harper, without giving her such information, and without any previous agreement on her part that she would accept the same. However, she did accept it, and had no knowledge or information as to its origin, or of the agreement between Pierce and E. L. Hart for the payment of the original note out of firm profits. After the note was given to Mrs. Harper, the firm of Hart & Co. became insolvent and was dissolved. None of the partners received anything from the sale of the firm's assets. Defendant paid interest to Mrs. Harper for two years, but paid nothing upon the principal of the note. The declaration in this suit was the usual one upon a promissory note. The answer admitted the

execution of the note, set forth many of the facts above stated, alleged knowledge on the part of plaintiff at the time of the acceptance of the note of the agreement for its payment out of firm profits, and averred want of consideration. The reply denied such knowledge.

At the trial, the note was offered and received in evidence. Plaintiff testified that she was its owner, that she received it by mail from her brother, the executor, about the time of its execution, and that, until long after its maturity, she did not learn that the note, or any prior note of which it was a renewal, was payable out of the profits of Hart & Co. Defendant admitted "that he was unable to prove that plaintiff was not the original owner of said note, and had no proof of the allegation in defendant's answer that plaintiff accepted and took the note with knowledge that defendant had an agreement with E. L. Hart, or with Frank W. Hart, as executor of the estate of E. L. Hart, that said note was payable only out of the profits of Hart & Co." He offered proof of the other allegations in his answer. The trial court held that the proofs so offered, if received, would not constitute a defense, and directed judgment to be entered in favor of plaintiff for the amount of the note, both principal and interest.

Smith, Taft, Arter & Smith, of Cleveland, Ohio, for plaintiff in error.

Holding, Masten, Duncan & Leckie, of Cleveland, Ohio, for defendant in error.

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

SESSIONS, District Judge (after stating the facts as above). The defense pleaded was that the note was given and obtained without consideration. Hence the burden was upon paintiff to establish by a preponderance of the evidence a valuable consideration for the note. Ginn v. Dolan, 81 Ohio St. 121, 90 N. E. 141, 135 Am. St. Rep. 761, 18 Ann. Cas. 204. Has she sustained that burden?

[1, 2] The note itself, when produced and introduced in evidence, carried with it the presumption that it was given for a valuable consideration. Section 8129, General Code of Ohio. Such consideration may consist either of an advantage or benefit received by the maker, or of a disadvantage or detriment suffered by the payee. An answer to a suit upon a promissory note, which merely avers that no consideration moved to the promisor, is not sufficient, but, to constitute a defense, must also aver that the promisee did not thereby suffer a loss or detriment; and the pleading must be supported by proof. Dalrymple, Adm'r, v. Wyker, Adm'r, 60 Ohio St. 108, 53 N. E. 713. Tested by this rule, the facts which defendant pleaded and offered to prove did not overcome or counterbalance the prima facie case made by plaintiff, and did not constitute a defense to the action. It clearly appears that the conditional or contingent indebtedness of the defendant to the estate of E. L. Hart was partially canceled and discharged by the giving of the note to plaintiff. This in itself constituted, at that time, a valuable consideration moving to defendant. It is a fair inference, also, that plaintiff received and accepted the note in lieu of

cash to which she was entitled from her uncle's estate. If so, she suffered a detriment or loss, which constituted a valuable consideration for the note. In either case she was a bona fide holder for value.

The judgment is affirmed, with costs.

CHEW HOY QUONG v. WHITE, Immigration Com'r.

(Circuit Court of Appeals, Ninth Circuit. April 1, 1918.)

No. 3088.

1. ALIENS ⊂=32(4)—CHINESE PERSONS—DEPORTATION PROCEEDINGS.
A Chinese woman, applying for admission into the United States as the wife of a Chinese merchant, was denied a fair hearing where, pending the determination of her application by the immigration authorities, her attorneys were not allowed to interview her.

2. ALIENS ⊂=32(9)—CHINESE PERSONS—FAIR HEARING.
A hearing on an application of a Chinese person for admission into the United States is unfair, where the immigration authorities received and acted upon a confidential communication, the source and contents of which they did not disclose to the applicant or her attorneys, so as to allow any rebuttal.

Appeal from the District Court of the United States for the First Division of the Northern District of California; Wm. C. Van Fleet, Judge.

Petition by Chew Hoy Quong, on behalf of his wife, Quok Shee, for writ of habeas corpus against Edward White, Commissioner of Immigration at the Port of San Francisco, Cal. From a judgment denying the writ, petitioner appeals. Reversed, and cause remanded, with instructions to issue the writ.

The appellant, a Chinese merchant domiciled in the United States, appeals from an order of the court below denying his petition for a writ of habeas corpus on behalf of Quok Shee, whom he alleged to be his wife. The petition alleged that Quok Shee was unlawfully imprisoned and restrained of her liberty by the Commissioner of Immigration; that on May 15, 1915, the petitioner, who had been a Chinese merchant lawfully domiciled in San Francisco for more than 20 years, departed for China on a temporary visit, and was there married to Quok Shee, and that in company with his wife he returned to San Francisco on September 1, 1916; that a hearing was had before the inspector, who reported favorably on Quok Shee's application for admission to the United States as the wife of the petitioner, but that thereafter the Commissioner ordered a re-examination, the result of which was that Quok Shee's application was denied; and that upon her appeal from that decision, the Secretary of Labor ordered that she be deported. The petition alleged that the hearing was unfair, in that, after the appeal had been taken, the attorneys for Quok Shee were denied the privilege of interviewing her for the purpose of introducing further evidence in support of her appeal; also that in the records of the immigration authorities it appears that their decision was influenced by a confidential communication which they had received in reference to the right of Quok Shee to admission into the United States,

which confidential information was forwarded to the Commissioner of Labor, to be considered on the appeal, as is shown from the following extract: "'This is one of the three cases in which the department received apparently authentic confidential information going to show that the women involved were being brought to this country for immoral purposes.' And the petitioner alleged upon information and belief that the immigration authorities decided his wife's application for admission to the United States adversely by reason of such confidential information, which was not permitted to be of record, and was not known to the petitioner, or Quok Shee, or her attorneys.

Dion R. Holm and Roy A. Bronson, both of San Francisco, Cal., for appellant.

John W. Preston, U. S. Atty., and Casper A. Ornbaun, Asst. U. S. Atty., both of San Francisco, Cal., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1, 2] The denial of the right of the applicant's attorneys to interview her pending the determination of her application by the immigration authorities was, we think, in itself sufficient ground for holding that the hearing was unfair. Mah Shee v. White, 242 Fed. 868, 155 C. C. A. 456. Aside from that, we hold that the fact that the immigration authorities received a confidential communication concerning the applicant's right to admission, upon which they acted, and which was forwarded to the Department of Labor for its consideration, was sufficient to constitute the hearing unfair. However far the hearing on the application of an alien for admission into the United States may depart from what in judicial proceedings is deemed necessary to constitute due process of law, there clearly is no warrant for basing decision, in whole or in part, on confidential communications, the source, motive, or contents of which are not disclosed to the applicant or her counsel, and where no opportunity is afforded them to cross-examine, or to offer testimony in rebuttal thereof, or even to know that such communication has been received.

The judgment is reversed, and the cause is remanded, with instructions to issue the writ.

ATLANTIC FRUIT CO. v. A CARGO OF SUGAR.

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

No. 63.

SHIPPING ⟸58(3)—RETENTION OF VESSEL AFTER EXPIRATION OF CHARTER—DAMAGES.

Damages recoverable by a shipowner from a charterer, for the retention of the vessel and the making of a new voyage after the charter term expired, *held*, under the facts shown, properly measured by the current rate of hire.

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

Suit in equity by the Atlantic Fruit Company against a cargo of sugar and Edward M. Raphel & Co., Incorporated. Decree for libelant, and respondents appeal. Affirmed.

The following is the opinion of Augustus N. Hand, District Judge, on exceptions to the commissioner's report:

The special commissioner allowed the current rate of hire as damages for a retention by the charterer of the chartered vessel during the period of a new voyage after the expiration of the term of the charter party. That this voyage was undertaken by the charterer without knowledge that the charter party had not been extended cannot change the rule of damages.

It is urged that an exception to the general rule of damages should be made in this case because the libelant had intended the vessel for the banana trade and was able to secure a substitute ship at a rate of hire less than that allowed by the commissioner. It is impossible to say what the ship would have earned for the libelant in the banana trade. The use of the vessel for such a purpose might have been much more advantageous than an extension of the charter to respondents at even the prevailing high rate of charter hire. The respondents seem to have had notice of a proposed use of the vessel by the libelant at the time the unauthorized voyage was entered upon for the banana trade, but did not know of damage to any particular fruit by delay. Moreover, damages based upon the earnings from such a venture would have been as speculative as the alleged damage to fruit caused by the failure promptly to surrender the vessel at the end of the charter period which I rejected at the trial upon objection of the respondents. If the libelant is not to be allowed what it would have secured, had the vessel been employed in the banana trade as originally proposed by libelant, the only alternative, and I think clearly the customary and fair measure of damages, would be the current rate of hire as found by the commissioner.

The exceptions to the report should be overruled, and the report should be confirmed.

Raoul E. Desvernine, of New York City, for appellants.

Hunt, Hill & Betts, of New York City (Geo. Whitefield Betts, Jr., and George C. Sprague, both of New York City, of counsel), for appellee.

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

PER CURIAM. Decree affirmed.

ECONOMY FUSE & MFG. CO. v. CHASE-SHAWMUT CO.

(Circuit Court of Appeals, First Circuit. March 26, 1918.)

No. 1303.

1. PATENTS ⟸328—VALIDITY—INVENTION.
The Gibbs improvement patent, No. 797,054, describing an improved assembling of mechanical means for more securely holding in place terminal plates connected with electric fuse wires, which serve to break circuits under abnormal conditions, *held* valid, showing invention.

2. PATENTS ⟸178—RANGE OF EQUIVALENTS.
Where all a patentee did was to invent a way in which old mechanical means could be assembled for the purpose of doing something that had previously been done through different mechanical means, the patent should be narrowly construed; that is the inventor is entitled only to a range of equivalents commensurate with the scope of his invention.

3. PATENTS ⟸328—INFRINGEMENT.
The Gibbs improvement patent, No. 797,054, for improved method of assembling mechanical means for more securely holding in place terminal plates connected with electric fuse wires, on fusible strips, *held* not infringed by defendant's device, as the patent should receive a narrow construction.

Appeal from the District Court of the United States for the District of Massachusetts; Frederic Dodge, Judge.

Suit by the Chase-Shawmut Company against the Economy Fuse & Manufacturing Company. From a decree for complainant, defendant appeals. Affirmed in part, and in part set aside.

George L. Wilkinson, of Chicago, Ill., and Hervey S. Knight, of Washington, D. C. (Henry M. Huxley, of Chicago, Ill., and Henry F. Hurlburt, Jr., of Boston, Mass., on the brief), for appellant.

Guy Cunningham, of Boston, Mass., for appellee.

Before BINGHAM and JOHNSON, Circuit Judges, and ALDRICH, District Judge.

ALDRICH, District Judge. [1] The object of the Gibbs improvement patent (797,054), which describes and provides for an improved assembling of mechanical means for more securely holding in place terminal plates connected with electric fuse wires, or fusible strips, which serve to break circuits under conditions of abnormal and excessive electric currents, thereby affording protection to electrical apparatus, and protection to other property against danger of fires, was sufficiently set forth, and the means for doing it were sufficiently analyzed and elaborated by Judge Dodge, sitting in the District Court, with the result of sustaining the patent, and there seems to be no reason for disagreeing with that result, or for renewed discussion in respect to the patent, further than to look at the grounds upon which

the patent was sustained, so far as they are pertinent to the inquiry whether the finding of infringement should be sustained.

The learned judge in the court below said:

"The locking plates, whether notched or not, co-operating with notches in the terminal plates to hold the latter against longitudinal movement when themselves held in place between the cap and body, and, being the 'means' referred to in claim 1, I regard as constituting the distinguishing feature of the patented structure. In adapting these locking plates to operate in the manner described, in combination with the other above elements claimed, I think invention was displayed and a patentable novelty added to the prior art sufficient to sustain the patent. * * * It is true, however, that, in view of the structures of the prior art, the claims are not entitled to a broad construction. While I do not regard them as confined strictly to the exact specific construction shown and described, I think they can be permitted to cover only combinations including elements clearly equivalent in character and mode of operation."

After saying this, the learned judge further said:

"Whether the defendant's infringing device answers this description, I regard as a question not free from difficulty."

[2, 3] It must be observed that, in stating the grounds for sustaining the patent, there is no suggestion of discovery, or of using new mechanical means, and we think there was nothing of that kind involved. All the patentee did was to suggest a way in which old mechanical means could be assembled for the purpose of doing something that had previously been done through different mechanical means. Under such circumstances, it would seem sufficiently settled that the inventor is only entitled to a range of equivalents commensurate with the scope of his invention.

While there seems to be no occasion to disagree with the District Court's interpretation of the claims, or the proposition of that court that they are not to be confined strictly to the exact specific construction shown and described, and that they may be permitted to cover only combinations including elements clearly equivalent in character and mode of operation, it would seem that, under the circumstances of the patent, the protection should be limited pretty closely to the mechanical arrangement which the inventor has set forth in his specification. This is so because the merit of his invention resides in the device which he has described, and, whether it is called strict construction or narrow construction, the interpretation is, after all, based upon the idea that the patentee is protected to the extent of his invention. Doubtless, if this were a situation in which the rule of liberal construction were admissible, the finding of infringement might well enough be sustained, but tested under the only admissible rule, that of strict construction, we think the question which the learned judge said was one not free from difficulty should have been solved the other way.

Under the rule that the inventor is entitled only "to a range of equivalents commensurate with the scope of his invention," and

where there is no suggestion of original discovery, and no suggestion of an invention of a new machine or of new mechanical means, and where an invention resides in merely describing a mechanical assembling of old means to more securely hold old instrumentalities in place, the question of what is commensurate is largely influenced by the degree of merit involved in the invention, and there must be a considerable measure of merit to justify interpretations and findings which reach out and control trade and business as to things not clearly within the terms of patents.

The idea of breaking electric circuits through the instrumentality of zinc connections, and perhaps those of other yielding metals, was old in the art, and prior to both of the devices in question there were different mechanical arrangements for holding the fuse instrumentality in place. Gibbs particularly describes another arrangement, with nothing new except the manner in which the mechanical means are to be assembled, and the alleged infringer produces another where the assembling, in some particulars at least, is different from that of Gibbs.

Under such circumstances, to constitute infringement, there must be an employment of the same principle of assembling, or of substantially the same principle, if it can be called a principle, or, in other words, an appropriation of the substantial scheme of mechanical arrangement. It seems to us that the alleged infringer has not done that. His scheme of assembling is quite different from that described in the patented uncommercial device.

As the conception with which the patentee's invention was concerned, that of a fusible connection of zinc, or other soft metal, which yields under excessive electric current, thus breaking the circuit, was old in the art, and as his conception related only to holding the fuse more securely, and as, in view of the frail character of the fusible element, it was necessary to protect it from longitudinal strains, and from twists under rotation movement, he sought to furnish such protection through suggesting the mechanical arrangement which he described. For each end of the body containing the connection the inventor proposed a terminal plate, the inner end of which, when in place, is to be connected with fusible wires or strips, and the outer end adapted for outside connection with the circuit. These connections of course, were old. The terminal plate is to have notches on its edges to receive the inner edge of his holding plate, and he suggests thin sheet metal for his holding plate, to be installed, of course, at the end of the cartridge-like body. The end plate at two inner opposite points is to have notches of a width and depth to enable it to slip over the terminal plate, and when brought into position with the notches in the terminal plate the end plate is to be turned a part of a circle, thus causing its normal edges to enter the notches of the terminal plate. The notches in the so-called terminal plate thus receive the inner edge of the holding plate with the idea of the terminal plate's being held against longitudinal strain, and with the further idea of its being held from turning or rotating. But it must be noticed that the so-called end

holding plate does not secure the terminal plate against longitudinal pull, or even rotation motion, until it is held in place by an end cap, through a slot of which the terminal plate passes, and which slips over the ends of the cylindrical body which incloses the fuse, and to which the securing appliances are being attached. This cap having a slot corresponding to the width and thickness of the terminal plate and being thus superimposed and forced into position and the end plate with it, when secured by a pin, or in some other suitable manner, with its own function, that of its slot, co-operating with that of the holding plate, secures the terminal plate against longitudinal strain, and through its function and that of the holding plate operating together secures it against rotation.

Now, what is the mechanical arrangement of the alleged infringing device?

The fuse element and the inner and outer connections of the terminal bar, which are old, are the same as those of the Gibbs, but we think the scheme of assembling the mechanical means for safeguarding them is quite different from that involved in the Gibbs.

The starting point of the defendant's holding apparatus is an opening in the middle of the terminal blade; then three metal washers are employed, together with a leather washer, the latter having a function in respect to venting. There are cuts into the first and second metal plates which create tongues, each of which, from a side opposite the other, passes through the opening in the terminal plate. There are notches in either end of the cartridge-like body at opposite points. On the first, or inner metal plate, is a rib, or flange-like projection, which engages the two notches in the end of the cartridge-like body. This engagement, together with the locking which results from passing the tongues of the two plates through the opening in the terminal plate, operates both against longitudinal and rotation movement. Then a leather washer, on which is superimposed a metal plate to hold it in place. Then an outer cap, with inside threads, so constructed that it passes over the terminal plate without performing any function in respect to it, and without performing any function in respect to locking, other than when it is closely screwed on to the threads on the outside of the cartridge-like body it holds all the appliances and devices securely in position. While these features accomplish the same result as that of the Gibbs, they do it, in a mechanical sense, under a different principle of assembling and in a different way.

In Gibbs, principally, if not altogether, the single circular ring plate, which imposes its inner edges into the side slots of the terminal bar, when held in place by the superimposed end cap, holds the terminal bar against longitudinal pull, and the slot in the end of the cap through which the terminal bar passes holds it against rotation motion; while in the defendant's device, principally if not altogether, the tongues of the two plates, which are cut from their outer edges, and imposed through the central slot of the terminal bar from opposite sides, when the plates are forced into position by the superimposed cap, hold the

terminal bar against longitudinal pull, and the rib on the inner surface of the inner plate, which imposes itself into the notches on the edges of the end of the cylindrical body, under the holding function of the cap screwed closely onto the end of the body, secures the bar against rotation movement.

It should be noticed again that the sole object of Gibbs was to economically guard an old connection against pulls and twists, and that his plate is a single metal circular ring, without tongues, which slips over a bar, while the defendant's plates are not rings slipping over a bar, but plates—three metal plates and one washer, with two tongues cut from the outer edges of the two inner metal plates.

As has been said, all the mechanical means of both the Gibbs and the defendant's devices are old, and, without discussing further the differences, we think the scheme of assembling in the two instances is quite different, and so different as to put the defendant's device outside of the Gibbs claims interpreted, as they must be, under the strict rule of construction, which clearly applies to an invention like the one in question.

That part of the decree of the District Court sustaining the Gibbs patent is affirmed; that part which relates to infringement must be set aside; and it is so decreed, with costs of appeal to the appellant.

LUMINOUS UNIT CO. v. FREEMAN-SWEET CO.

(District Court, N. D. Illinois, E. D. March 27, 1918.)

No. 930.

1. PATENTS ⟸36, 45—VALIDITY—INVENTION.
   Where a device in an art crowded with a multitude of similar forms secures an immediate and notable success, that in itself is sufficient evidence of invention and conclusive evidence of novelty.
2. PATENTS ⟸328—INFRINGEMENT—WHAT CONSTITUTES.
   The Guth patent, No. 1,076,418, for an improved electric lamp for semi-indirect illumination, *held* infringed as to claim 1 by a device manufactured under the subsequent Adams patent, No. 1,121,577; the device therein described, while differing slightly in means used, accomplishing the same result.
3. PATENTS ⟸120—DOUBLE PATENTING—APPLICATION.
   The rule of double patenting, under which a subsequently issued patent for a device already patented is void, although application for the latter was first filed, applies to an earlier design patent and a later mechanical patent; and the rule is the same, though the patents be granted to the same or different persons.
4. PATENTS ⟸120—DOUBLE PATENTING—EFFECT.
   Where a design patent for a lighting fixture similar in appearance to the drawing of the mechanical patent asserted to be infringed was issued first, and plaintiff, which acquired the design as well as the mechanical patent, was defeated in a suit against defendants, wherein infringement of the design patent was charged, the rule of double patenting cannot be invoked as an estoppel against plaintiff's asserting an infringement of the mechanical patent; it appearing that the application for the mechanical patent was first in point of time, and that the patentee of the

design patent had no conception whatever of the discovery set forth in the mechanical patent.

In Equity. Suit by the Luminous Unit Company against the Freeman-Sweet Company for infringement of patents. Decree for plaintiff.

Dodson & Roe, of Chicago, Ill., for plaintiff.

Walter H. Chamberlin, of Chicago, Ill., and Paul Bakewell, of St. Louis, Mo., for defendant.

SANBORN, District Judge. This is an infringement suit on patents issued to Edwin F. Guth for an electric lamp, Nos. 1,076,418 and 1,082,322. Both patents were sustained in Luminous Unit Co. v. R. Williamson & Co. (D. C.) 241 Fed. 265, affirmed 245 Fed. 988, — C. C. A. —, and the second one held not infringed. The lighting fixture is fully described in the opinion of the District Court in the Williamson Case, and that description need not be repeated here.

[1] *The Question of Validity.*—Novelty and patentability are again vigorously attacked, but it is not necessary to discuss the questions again. It is enough to say that to enter an art crowded with a multitude of similar forms and secure an immediate and notable success is in itself sufficient evidence of invention and conclusive evidence of novelty. The very fact that there are many similar devices generally resembling the new one, which have had only a brief success, or none at all, instead of indicating a want of invention, is the best evidence to the contrary. Where many failed, one has succeeded, and in so brilliant a fashion as to suggest the presence of the magic touch which is invention. At once recognized by scores of practical men as something entirely new, simple, and attractive, and unique in its almost severe simplicity, promptly copied by competitors in almost every detail, it must be that Mr. Guth should have credit for something more than skillful copying or mere mechanical skill.

[2] *Infringement.*—The Freeman-Sweet lamp is similar in general style and appearance to that described in the Guth patent, but the underside of the canopy is not literally or wholly flat, as required by the two claims, and for this reason infringement is denied. The defendant's claim is made under the later Adam patent, No. 1,121,577. Adam distinguishes his structure from Guth's by the following description:

"In one form of semi-indirect lighting fixture that is now in use the top reflector is provided with a flat, horizontally disposed reflecting surface, and the shield or inverted bowl that is positioned under the lighting unit is formed from translucent material. The translucent shield or bowl reflects the secondary rays of light upwardly onto the top reflector, and these secondary rays are then projected downwardly through the translucent shield, and some of the direct rays that are reflected onto said top reflector are projected outwardly and downwardly without passing through the translucent shield. Owing to the fact that the reflecting surface on the top reflector is flat and is disposed in a horizontal plane, a large volume of the secondary rays which are projected downwardly through the translucent shield pass through the electric lamp bulb which constitutes the lighting unit, and if the bulb is old and blackened with age the rays fail to pass through same, thus causing a great loss of light. Furthermore, the rays that strike the top re-

flector at points outside the greatest diameter of the translucent shield are projected downwardly at a very slight angle to a horizontal plane, and consequently are thrown radially or outwardly from the fixture in planes that are inclined downwardly only slightly with relation to the ceiling of the room. The upper edge of the inverted bowl or shield that is positioned under the lamp bulb is lower than the top of the lamp filament, and consequently some of the direct rays pass over the upper edge of the shield without striking the top reflector, thus producing an intense glare on a horizontal plane, which is very objectionable. Still another objectionable feature of the lighting fixture above-mentioned is that it is not possible to form the top reflector of same, when said reflector is of considerable diameter, of porcelain enameled sheet metal owing to the tendency of the metal to twist and bend out of shape from the heat when it is being enameled, thus destroying the flat horizontally disposed reflecting surface which is an essential feature of the top reflector.

"The main object of my invention is to provide a semi-indirect lighting fixture of the general type above mentioned, but which is distinguished from the fixture of the particular form previously described, in that the top reflector is so designed that the direct rays will be thrown downwardly at a rather abrupt angle to a horizontal plane, and the secondary rays will be projected downwardly through the translucent shield without causing a large volume of the secondary rays to pass through the lamp bulb, thus causing the rays to be thrown where they are most needed and insuring an efficient light, even after the lamp bulb has become blackened with age. To this end I have devised a semi-indirect lighting fixture, in which the top reflector is provided with two independent reflecting surfaces, that are disposed at a slight angle with relation to each other and also with relation to horizontal plane; one of said reflecting surfaces, namely, the one that is located at the outer edge of the reflector, causing the direct rays to be projected outwardly and downwardly at such an angle that the rays are concentrated, instead of being thrown outwardly in a plane approximately parallel to the ceiling, and the other reflecting surface, which is located at the center of the reflector, causing a large volume of the secondary rays reflected from the translucent shield to be projected downwardly through said shield without striking or passing through the lamp bulb."

It will be seen from the description that Adam changes the shape of his upper reflector or canopy, by making the lower surface of two independent reflecting surfaces at a slight angle to each other, and he attributes to this change a different function and result from that of Guth, who specifies a flat surface. Thus there is in Adam's device a slightly different means, and, if there is also another function and a different result, infringement is avoided. This is really the true test.

In this question the testimony of the witness Vaughn, in respect to his repeated tests, together with his charts, exhibiting the result of such tests, clearly shows that defendant's canopy reflects substantially the same number of rays to a given point in the working plane where the light is needed as does the Guth device. More of the rays are reflected in the horizontal plane, but the difference is so slight as to be negligible. The two devices give substantially the same results, so that the slight angle in the canopy surface is of no importance. In view of the quite unusual advance in the art made by Guth, in a field literally swarming with light devices, it seems clear that the first Guth claim should have a sufficient range to take in a lamp which operates practically in the same way and gives also identical results. The first claim should therefore be held infringed, but not the second, which calls for a reflector which is wholly flat.

[3, 4] *Double Patenting—Estoppel.*—Another defense raised is that of an equitable estoppel by adjudication, depending upon the following facts: A design patent was issued to Raymond V. Owen March 4, 1913, for a lighting fixture similar in appearance to the drawing of the Guth patent. Guth was earlier in application, but later in date. In March, 1915, the plaintiff in this suit, having acquired the Owen patent, brought an infringement suit upon it against a Missouri corporation, the Frank Adam Electric Company, in the United States District Court at St. Louis. The fixtures claimed to infringe were substantially the same as those now held to infringe the Guth patent. At the time the St. Louis suit was brought the plaintiff (Luminous Unit Company) also owned the Guth patent in suit. The court decided there was no infringement and dismissed the bill. Plaintiff took an appeal, but it was dismissed. The Freeman-Sweet Company, defendant here, bought the infringing lamps from the Reflectolyte Company, successor in title to the Frank Adam Electric Company, defendant in the St. Louis suit. The Owen design patent expired before this present action was brought, and before the Freeman-Sweet Company purchased the infringing lamps from the Frank Adam company's successor in title. The public was then free to use the design of the Owen patent, and defendant could lawfully deal in it. Therefore the Luminous Unit Company, owning both patents and suing on one which has expired, having been beaten in the suit, is said to be equitably estopped to sue on the other, because they show devices which are alike in appearance.

This is the theory in support of the equitable estoppel claimed; and it is said that, to the extent the Owen patent discloses the same design and construction claimed in the Guth patent, defendant and the public have been set free to make use of and sell the design which was held not to infringe the Owen patent, although it may infringe the Guth patent. To simplify the matter, suppose Guth takes out a design patent on the drawings shown in the patent now in suit (two figures in which resemble the Owen design), and sues defendant on the design patent. The court holds that defendant's fixture does not look like the design, and dismisses the bill. Upon this Guth sues the same defendant under his main patent, after the other expires, on the theory that, although the fixtures do not look like its figures, yet in fact they read on his claims, and therefore infringe. In the case supposed it might be, if the design patent were earlier than the mechanical one, that the latter would be void.

The important point is that, if the design patent was first issued, although the mechanical one was first applied for, and if they are the same, the latter is void, because it is a case of double patenting; and when the design patent expires the public may freely use what it covers, and hence may use the mechanical patent also. Where two patents showing the same invention or device are issued, the later one is void, although the application for it was filed first. Under such circumstances it is the issue date, not the filing date, which determines priority between the two. Suffolk Mfg. Co. v. Hayden, 3 Wall. 315,

18 L. Ed. 76, reaffirmed in Miller v. Eagle Mfg. Co., 151 U. S. 197, 14 Sup. Ct. 310, 38 L. Ed. 121. The reason for the rule is:

"That the power to create a monopoly is exhausted by the first patent, and for the further reason that a new and later patent for the same invention would operate to extend the monopoly beyond the period allowed by law." Miller v. Eagle Mfg. Co.

It makes no difference whether the two patents be granted to the same or different persons. James v. Campbell, 104 U. S. 356, 26 L. Ed. 786; Caliga v. Inter-Ocean Newspaper Co., 215 U. S. 182, 30 Sup. Ct. 38, 54 L. Ed. 150. That the rule of double patenting may apply as well to an earlier design and later mechanical patent was decided in the horse-shoe case, Williams Calk Co. v. Neverslip Mfg. Co. (C. C.) 136 Fed. 210, affirmed 145 Fed. 928, 76 C. C. A. 466, and in President Suspender Co. v. Macwilliam (D. C.) 233 Fed. 438; Id., 238 Fed. 159, 151 C. C. A. 235.

The question presented here is therefore whether the Owen design patent is substantially for the same invention as the Guth mechanical patent. Owen shows a canopy and suspended inverted globe, much further below the canopy than is required by the Guth conception. Whether the lower surface of the canopy is flat or concave, or is made of transparent, translucent, or opaque material, does not appear. The inverted globe is also much more shallow. If equipped with a lamp, the structure would not work like the Guth device, even if the canopy were opaque. Apparently Owen had no conception whatever of Guth's previous discovery. Add to this the fact that Guth was really earlier in time, and it becomes absolutely clear that the technical rule of double patenting should not be applied.

The Patent for Suspending Means.—This invention is narrowly valid, but defendant does not use it. It should be held valid, but not infringed.

There should be a decree sustaining both patents, declaring the first patent infringed as to the first claim, the second one not infringed, and for injunction and accounting, without costs for or against either party.

In re STEINER.

(District Court, E. D. New York. March 28, 1918.)

BANKRUPTCY ⊜184(2)—CHATTEL MORTGAGE—VALIDITY—RECORDING.

Under Lien Law N. Y. (Consol. Laws, c. 33), §§ 232–235, requiring a mortgage of chattels in the city of New York to be filed in the county of the mortgagor's residence as well as in the county where the chattels are located, and declaring that the county of residence shall be the county "where the mortgagor alleges to reside at the time of the execution of the mortgage," a mortgage on chattels in New York county, filed in that county, but not in the county of the mortgagor's residence, is invalid, as a lien on bankrupt's property, under section 230, where the mortgage contained no statement as to the place of the mortgagor's residence, and, though the mortgagee asserted that the mortgagor orally stated he lived in New York county, it appeared the mortgagee com-

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

municated with the mortgagor over the telephone while the latter was in Brooklyn, which was his actual place of residence.

In Bankruptcy. In the matter of the bankruptcy of Henry Steiner, trading as Henry Steiner & Son. The chattel mortgage under which the mortgagee claimed the proceeds of the sale of certain property of the bankrupt held invalid as a lien.

Edward J. Dowling, of New York City, for petitioner.
Otterbourg, Steindler & Houston, of New York City, for trustee.

CHATFIELD, District Judge. A chattel mortgagee claims the proceeds of sale of certain property of the bankrupt, to the amount of the balance remaining open upon the mortgage, viz., $1,925. The special master has reported that the mortgagee had reasonable cause to believe that the bankrupt was insolvent at the time the chattel mortgage was executed, and that the chattel mortgage was intended as a preference. He has therefore found that the chattel mortgage was voidable and invalid as a preferential payment, and also invalid as security for past indebtedness as against creditors. The testimony plainly supports these findings.

The record shows, also, that a present consideration of $500 was paid at the time of giving the chattel mortgage, but additional security for this advance, in the form of a claim against a third party for $400, was assigned to the mortgagee and has been collected. Thus the mortgage is security for $100 of this present consideration, and an agreement was made to extend future credit, if needed. It is necessary, therefore, to consider whether the mortgage was properly filed, so as to be valid security for whatever part of the money was advanced at the time.

The law of the state of New York, as set forth in sections 232–235 of the Lien Law of the state (Consol. Laws, c. 33; chapter 38, Laws 1909) requires that a mortgage of chattels in the city of New York be filed in the county of the residence of the bankrupt, as well as in that county where the chattels are located. The bankrupt had been doing business in New York county, the chattels were located there, and the chattel mortgage was filed in that county. The law (section 232) provides that the county of residence shall be the county "where the mortgagor alleges to reside at the time of the execution of the mortgage." This provision amended the preceding law by introducing the word "alleges."

It is evident that the defect in the law as it formerly existed arose from contradictory statements of residence, or from conflicts between oral statements of the mortgagor and proof by creditors as to actual legal residence. The present statute was evidently intended to require a statement in the mortgage showing the place of residence of the mortgagor. If he resides in another county in New York City, or in some other county in the state outside of the city, the mortgagee's duty is completed if the mortgage is filed in that county where the residence is claimed. This may throw upon the mortgagee the burden of procuring an affidavit from the mortgagor as to his place of

residence, if this is not known to the mortgagee; but, so far as this case is concerned, we can assume that the creditors would be bound by the filing of the mortgage in the county in which the mortgagor states he resides.

In the case at bar, no place of residence was given. The mortgagee claims that the bankrupt stated orally that he lived in New York county, although he was in communication with him by telephone at his son-in-law's home in Brooklyn, where the mortgagee, as a matter of fact, actually resided. The evidence shows that the mortgagee was negligent, both in failing to require the mortgagor to state his place of residence and also in failing to take into account obvious facts before assuming that the bankrupt's place of residence was New York county. The special master's finding on this point is therefore correct, and the chattel mortgage was not filed in accordance with the statute, which by section 230 declares it to be absolutely void as against creditors.

An order will be entered, holding the mortgage invalid as a lien.

ROWE et al. v. KIDD et al.

(District Court, E. D. Kentucky. September 14, 1916.)

1. COURTS ⟸367—FEDERAL COURTS—PRECEDENTS.
A decision of the highest state court relating to title to land is a binding precedent in subsequent litigation in the federal court, in so far as the principles of law upon which the original decision was based have become rules of property in the state, and the application of such principles should be deemed prima facie correct, this being so though plaintiffs, because not parties, were not bound by the decision, and it was not officially reported.

2. BOUNDARIES ⟸3(8)—LOCATION—CALLS FOR QUANTITY OF LAND—PLAT.
The calls for quantity in a survey as well as the plat are merely evidentiary as to the true location, the plat being of greater force than the calls for quantity.

3. BOUNDARIES ⟸54(1)—DESCRIPTION—UNCERTAINTY.
A survey of lands which described one of the lines as running to a stake on the line of another parcel is not invalid for indefiniteness of the survey, even though there were several parcels which fitted the description of the one referred to, but it must be ascertained from all the circumstances which parcel was intended.

4. BOUNDARIES ⟸3(6)—LOCATION—CERTIFICATE.
In determining the location of an actual survey, the fundamental principle is that it should be located where the surveyor ran it, and, in case of conflict between the survey as actually made and the surveyor's certificate, the former controls.

5. BOUNDARIES ⟸3(3, 5)—CALLS—COURSES AND DISTANCES—MONUMENT—"IDEAL LINE."
A call for a fixed and ascertainable monument will, where the survey was actually run, control a call for courses and distances, and for the same reason a call for an ideal line, that is, one which is not actual or marked, as the unmarked boundary line of another survey, is inferior to a call for courses and distances, as the surveyor might well have been

mistaken as to the location of the ideal line, though being correct as to the distance.

6. BOUNDARIES ⊂=3(6)—CALLS—COURSES AND DISTANCES.
Where a survey was merely protracted, that is, the lines projected without being actually run upon the ground, a call for an ideal line, though it is an invisible line, will control a call for courses and distances, where the ideal line, by reason of recordation of other instruments, is susceptible of definite location, the whole matter resting in the mind of the surveyor.

7. BOUNDARIES ⊂=54(1)—SURVEYS—NATURE.
That there are two things which answer to a call of a survey, and it cannot be determined definitely which is the one called for, does not invalidate the survey, the rule being that the one which is most against the survey is to be taken.

8. BOUNDARIES ⊂=37(1)—RELOCATION OF SURVEY—EVIDENCE.
In a suit to quiet title, evidence *held* to show that defendants were entitled to the property in controversy, and that the relocation of the older survey under which they claimed, whereby such land was included, was substantially correct.

In Equity. Suit by J. W. Rowe and Hannah Rowe against Pinkie Kidd and others. Bill dismissed.

H. C. Gillis and B. B. Snyder, both of Williamsburg, Ky., for plaintiffs.

O. H. Waddle & Son, of Somerset, Ky., for defendants.

COCHRAN, District Judge. This cause is before me for final decree. It was before me once before therefor, and I dismissed the bill. My opinion then delivered is reported in Rowe v. Hill (D. C.) 196 Fed. 910. On appeal this judgment was reversed. The opinion of the Appellate Court is reported in 215 Fed. 518, 132 C. C. A. 30. That court, however, did not direct what judgment should be entered. It merely directed that the case should be reopened and heard again. This has been done, and it is upon such rehearing that it is now before me.

On the former hearing I held that the questions as to the validity and location of the patent to J. W. Mills, of date July 13, 1858, upon a survey made January 4, 1858, for 100 acres of land in Wayne county, Ky., in this district, involved herein, were res adjudicata, because of the judgment of the Wayne circuit court, affirmed by the Court of Appeals of Kentucky in the case of Alexander v. Hill (Ky.) 108 S. W. 225, and that if they were not, that I would not be justified in deciding the matter differently from the state courts. On the question of res adjudicata I thus expressed myself:

"I do not think there can be any question that the understanding between plaintiffs and their grantor, Alexander, was that he was to defend the land covered by their purchase against that claim as under his covenant of warranty he was bound to do so. It was in pursuance to this understanding that their grantor, Alexander, when the defendant brought her suit in the Wayne circuit court on January 11, 1904, the day before the deed was put to record, asserting her claims against him and J. W. Rowe, took charge of the defense of the suit and controlled and managed it and bore its expense until its determination. Nor have I any doubt of the fact that plaintiffs knew of the pendency of this suit, and that their grantor was defending it, and that they

were relying on his defending it pursuant to his understanding with them and in accordance with his covenant of warranty. They so knew and relied, through their attorney, who was on the ground and had full authority to look after the land, if not otherwise. In so doing, therefore, their grantor, Alexander, was acting on their behalf as well as of himself, and they are bound and concluded by the judgment therein. It is not open to them, now that that litigation has resulted in favor of defendant, to come into court and seek to reopen it."

This position was held to be erroneous by the Appellate Court. Judge Sanford, who delivered its opinion, said:

"Nor are they bound by said judgment, even if, as found by the court below, the defense made by Alexander to the suit was made both for himself and them, in pursuance of an understanding and agreement with them, since, whatever may have been Alexander's action in that regard, it was not open and known to the other party; and the estoppel arising by reason of assuming the defense of a suit must, as in other cases, be mutual."

The cases cited in support of this statement were cases where persons not parties to the suits defended them for the parties defendant, but unknown to the plaintiffs. He further said:

"It is true that if the plaintiffs knew of the pendency of said suit, and either through the agency of Alexander or by attorney actually participated in its defense in the name and under the guise of 'J. W. Rowe,' and through such representative filed the answer in such name, in which it was admitted that Alexander had made a conveyance to such 'J. W. Rowe,' thereby misleading the defendant as to the name and identity of the purchaser, and causing her to fruitlessly pursue her litigation against such fictitious vendee, they would now, in our opinion, be estopped from denying their identity with 'J. W. Rowe' as Alexander's vendee, and would, by reason of such estoppel be bound by the judgment rendered aganst 'J. W. Rowe' in the former suit, as if they had actually been parties. However, while the circumstances are such as to create a suspicion that the facts were as above suggested, yet, after careful consideration of the meager evidence in the record, especially in default of the testimony of either of the attorneys who represented 'Alexander and Rowe' in the former suit, one of whom apparently died before proof was taken, we are constrained to conclude that the evidence is sufficient to create such suspicion and not substantial enough to establish the fact."

It is to be noted, in this connection, that it is not said that if plaintiffs knew of the pendency of the suit, and that the defendant Pinkie Kidd, plaintiff therein, had brought before the court "J. W. Rowe" as Alexander's vendee, and that the answer filed in the name of Alexander and Rowe expressly admitted that he was such and with such knowledge kept silent, plaintiffs are estopped to deny their identity with "J. W. Rowe," and hence bound by the judgment rendered against "J. W. Rowe." As the matter is put, in order to this it is essential also that plaintiffs actually participated in the defense of the suit in the name and under the guise of "J. W. Rowe," through the agency of Alexander or by attorney, and through such representative filed the answers. It is clear that they did not so participate. But it is equally clear that they had such knowledge, and with it they took no steps to correct the error, but kept silent in regard thereto. Under the evidence, as it now stands, I think I was in error on my former hearing in holding that Alexander defended the suit pursuant to any understanding with plaintiffs. It is quite likely that there never was

any understanding between them as to Alexander's defending any suit in relation to the land.

At the time of plaintiffs' purchase the trespass suit of Alexander against Hill was pending, and the deferring of the payment of part of the purchase money may have been to await the outcome of that suit, and, upon its being determined in Alexander's favor in the December preceding the bringing of the suit by the defendants, the rest of the purchase price was paid, except perhaps for 83 acres, covered by the Mills patent, located according to courses and distances. The defense of the suit by Alexander was because he had warranted the title to the plaintiffs and was bound to defend it. That plaintiffs had such knowledge I think was the reasonable inference from the evidence as it stood on the former hearing and not a mere matter of suspicion. The plaintiff I. W. Rowe admitted that he had heard by letter from his attorney, Mr. Johnson, of the pendency of the suit. Mr. Johnson, therefore, must have known of its pendency. He could not otherwise have written plaintiff I. W. Rowe about it. As soon as he heard of it, as plaintiffs had relied on him in making the purchase, naturally he would at once take steps to ascertain exactly its character. And in determining the truth of things one has the right to take into consideration the way men act. It was convenient for him to find this out, as the suit was pending in an adjoining county, whose courts, no doubt, he attended. The inference that he did so was strengthened by the facts that his letter or letters conveying the information as to the pendency of the suit were not produced, and that Mr. Johnson did not testify as to what he knew concerning the matter. That he was then acting as plaintiffs' attorney in relation to the land was testified to by the plaintiff I. W. Rowe in his testimony. But, however this may be, such knowledge was proven directly on the present hearing by the testimony of Mr. Bertram and Mr. Sharp, who were Mr. Alexander's attorneys in the suit, and Mr. Snyder, Mr. Johnson's partner, he having died since the former hearing. Mr. Bertram testified that shortly after the suit was brought Mr. Johnson was in Monticello, the county seat of Wayne, and had a conversation with him about it, and how it was brought and the parties against whom it was instituted. Upon his (Bertram's) making some suggestion to Johnson about filing the answer or about the answer which had been filed, he then said that the suit had not been filed against his client, and that he knew nothing about J. W. Rowe, and that he would have nothing to do with defending the action. Mr. Snyder testified that Mr. Johnson in his letter to plaintiff I. W. Rowe told him that J. W. Rowe was a party defendant. The situation was not relieved by the request made of Mr. Sharp to have the answer withdrawn and his promise to do so. It was never withdrawn and no pains were taken to see whether the request had been complied with.

Furthermore, I am inclined to think that the Appellate Court, on further reflection, would hold that, in order to constitute the estoppel and bind plaintiffs by the judgment, it was not essential that they should have actually participated in the defense of the suit, but that such knowledge and silence on their part alone was sufficient to that

end. In the first statement quoted from Judge Sanford's opinion it was held that the judgment was not res adjudicata by reason of the fact that Alexander defended the suit pursuant to an understanding between him and plaintiffs, and, as heretofore stated, the decisions cited in support of this position were cases where persons not parties to the suit had actually participated in its defense without plaintiff's knowledge. And the typical instance of estoppel in pais is not where a party acts, but where he keeps silent when he should have spoken. It is hardly open to question that plaintiffs' conduct in allowing the defendant to proceed under the misapprehension upon which she was proceeding, and to be misled as she was by the answer, was inequitable. So that if this is sufficient to work an estoppel it is an end of the case, as there can be no question as to the facts.

But I do not feel justified in acting upon the idea that the Appellate Court would so hold. It included actual participation in the defense of the suit as a part of the estoppel, and it would rather be in the face of its decision for me to hold that it is not essential to the estoppel. Hence will I dispose of the case on the basis that the Appellate Court would not so hold.

[1] The decision, however, is binding as the Appellate Court recognized, in so far as the principles of law upon which it was based have become a rule of property in this state.

What, then, is the proper attitude to take towards the decision of the Court of Appeals in Alexander v. Hill? Thus far I have reached the conclusion not to treat it as binding save to the extent just stated. Should I go to the other extreme and treat it as if it had never been rendered? Judge Sanford said that, "regardless of its binding effect, we would with great reluctance feel ourselves constrained to differ from the highest tribunal of the state in a decision affecting title to real estate within its borders." This was said without reference to the fact that plaintiffs had knowledge of the pendency of that suit and of its character, and with such knowledge kept silent, which has now been made to clearly appear. This circumstance certainly should have the effect, if no more, of adding to the reluctance to depart from that decision. And another circumstance has transpired since the decision of the Appellate Court herein which adds thereto. That is that the Court of Appeals in the reported case of Rock Creek Property Co. v. Hill, 162 Ky. 324, 172 S. W. 671, which involved the location of a patent covering lands in Wayne county, and probably in the same general neighborhood as those covered by the patent involved here, and presented questions somewhat similar to those presented in Alexander v. Hill, cited with approval its decision in that case.

In this connection it may not be amiss for me to refer to a circumstance which affected me in handling it on the former hearing. I had theretofore refused to follow a decision of the Court of Appeals of Kentucky locating a patent. It was the case of Davis v. Commonwealth L. & L. Co. (C. C.) 141 Fed. 711, cited and relied on by plaintiffs. There, however, the Court of Appeals had been imposed on, by a trick as it were. There was no real controversy before it. The controversy before it was a sham one. And the party, for the pur-

pose of affecting whom it was brought about, never heard of it until after the decision had become final. The details which make this certain are referred to on pages 714 and 715 (141 Fed.) of my opinion. Being convinced that the decision of the Court of Appeals was wrong I refused to follow it, and followed, with a certain modification, the previous decisions of Judges Barr and Evans in the predecessor of this court, reported in Davis v. Farmer (D. C.) 141 Fed. 703, and Davis' Heirs v. Hinckley (C. C.) 141 Fed. 708, in the correctness of which some of the best lawyers in the state had acquiesced. On appeal to the Sixth Circuit Court of Appeals for this circuit my decision was reversed, and that of the Court of Appeals followed. Bramblet v. Davis, 141 Fed. 776, 72 C. C. A. 204. It held that I was right in the modification of the opinion of Judges Barr and Evans; but that we were all wrong in holding that it was the thought of the certificate of survey that the third line of the boundary ran with the top or crest of Cumberland mountain. It, as had the Court of Appeals, took it that this line so ran, not, however, because such was the thought of the certificate of survey, but of necessity. It could not run otherwise. The Court of Appeals had not considered what was its thought as to this matter at all. When confronted with the fact that the course and distance called for did not so run, but across Virginia into Tennessee, several miles south of Cumberland Gap, it did not take up the problem presented as to what was the thought of the certificate of survey as to where the line ran, and attempt to solve it, but reversed the lines from the beginning corner, and accepted so much of the top or crest of the mountain as lay between the fourth corner thus found and the third corner as the third line. The Appellate Court of this circuit did consider the problem, and held that the thought of the certificate of survey was that the third line ran according to course and distance called for, and not with the top or crest of Cumberland mountain; but as Kentucky had no right to grant land in Virginia or Tennessee, the third line had to be limited to such top or crest, the length of which was the same as that found by the Court of Appeals. As, then, necessity fixed that as the third line, it also fixed its length. But if the thought of the certificate of survey was that the third line so ran, as we held, its thought also determined the length which was the distance called for. As a rule I have not questioned the correctness of decisions of the Appellate Court reversing my judgments or decrees. I have been made to realize that for some reason or other—possibly for want of due deliberation—the truth has escaped me. But occasionally I have been unconvinced, and this is one of those cases. There can be no question that the Appellate Court was largely influenced in taking the position which it did by that of the Court of Appeals. Concerning it Judge Richards, without indicating any sensitiveness to the manner in which the decision of the Court of Appeals had been obtained or feeling that its value was thereby affected, thus expressed himself in regard thereto:

"Under the circumstances, we must hold that whether the location of the Ledford patent involved in Creech v. Johnson ought to have been heard and adjudicated was one for the Court of Appeals to pass upon, and, since it entertained jurisdiction and delivered a considered opinion, which appears in

the reports of the court prepared for publication, we must accept its conclusions as its deliberate judgment upon the location of the patent, entitled to the weight such judgments usually are."

When then this case came before me on the former hearing, and I was confronted with a decision of the Court of Appeals determining the validity of the patent involved here and locating its boundary as contended for by defendant, I could not help but feel that, if I could not safely refuse to follow a decision of the Court of Appeals obtained as that had been, I could not safely refuse to follow the one involved here obtained as it had been. Here the trick, if any there was, was on the other side, consisting in keeping silent with the view of claiming the benefit of the decision if favorable and disowning it if unfavorable. The fact that this decision had not been officially reported and that one had would make no difference. The not officially reporting a decision of the Court of Appeals affected its importance rather than its value. Hence it was that I did not have sufficient patience with the case on the former hearing, and did not give it the consideration which I would otherwise have done. I refrained from going deeply into the validity of the patent and placed the estoppel on a wrong basis.

Returning then from this digression, I may say that I do not think that I should treat that decision as if it had never been rendered, but accept it as at least prima facie correct, not only as to the principles of law therein applied, but also as to the application of them, and refuse to depart therefrom unless it is made clearly—I might say, but will not, beyond a reasonable doubt—to appear that the Court of Appeals was in error in one or the other of these particulars.

The Court of Appeals upheld Stanfill's location of the patent. The question then comes to this: Accepting that location as prima facie correct, is it made clearly to appear that it was incorrect?

[2] At the outset some considerations calculated to prejudice one against that location should be placed in their proper light. One is that according thereto the quantity of land covered by the patent is greatly in excess of that called for thereby. The patent calls for 100 acres. That location covers about 650 acres. Another is that the location departs radically from the plat, which accompanied the certificate of survey, at its northwestern end. Now the quantity called for and the plat are merely evidential, the latter more than the former, as to the true location. They are not controlling. In the case of Rock Creek Property Company v. Hill, supra, the patent called for 150 acres. The location thereof which was adopted covered 500 or 600 acres. And it is stated in the opinion that the location differed "materially" from the plat. It is possible, therefore, for the circumstances to be so strong in favor of the Stanfill location that it must be accepted notwithstanding it is in the face of the call for quantity and of the plat.

Another such consideration is that the Stanfill location necessitates so many mistakes in the original survey in the courses and distances called for. On the basis of its correctness in four of the lines—the first, eighth, tenth, and twelfth—mistake was made in both the course

and distance called for; and in three of them—the fifth, ninth, and eleventh—mistake was made in the distance called for. The mistake in each of these seven lines as to distance was in making it too little. In the Rock Creek Property Company v. Hill case it appeared that the surveyor who made the original survey, which was made in 1859, i. e., almost simultaneously with the making of the one involved here, purposely, and in order to conceal the acreage, cut down the distances in his certificate. Of the twelve lines then, for which courses and distances were given, only five—second, third, fourth, sixth, and seventh —were correct as to both. But it is to be noted that as to eight out of the twelve lines the call for course was correct, and as to the four in which there was a mistake as to course, in the case of one, to wit, the first, the mistake was very slight. It is to be noted, further, in each of the cases where there was a mistake as to the course and distance, or as to the distance alone, a change was required in order to reach or go with a thing called for in the certificate. The first, fifth, and eighth lines called to go to a stake at the river cliff, the ninth to a stake on Thomas Ryan's line, the tenth with that line to a stake on it, the eleventh to a stake on Isaac Foster line, and the twelfth to J. W. Mill's corner, a pine. Mistakes in giving the course and distance called for are not fatal. They are common occurrences in surveys in this state. And, as it is agreed in this case, no actual survey was made, nothing being done but to establish the beginning corner, it was to be expected that a mistake would be made in each of the lines calling to go to or with a thing. It would have been marvelous had the surveyor hit any one of the lines exactly. Still another such consideration is that the Stanfill location adds another line, to wit, the closing line from the beginning or northeast corner of the Parmley survey to the beginning corner, making the survey one of fourteen lines instead of thirteen lines. This line is but slightly out of line with the northwest or first line of that survey then owned by Mills. It may easily have been taken to be in line therewith, and the last call, with "Mills' old line to the beginning," does not necessarily mean that it continues with that line clear to the beginning. And it is to be noted that the course and distance of that line is not given.

I now proceed to take up the errors which it is claimed Stanfill made in making his location and to determine the effect thereof. There are two important particulars in which it is conceded by plaintiffs that he did not make any error which should be noted first. One is as to the location of the Thomas Ryan survey, to the fifth or closing line of which he ran the ninth line, and with which he ran the tenth line, and of such closing line. And the other is as to the location of the Isaac Foster survey, to the eleventh line of which he ran the eleventh line, and of such line of that survey. Those two surveys and those lines are well known and established. Alexander, under whom plaintiffs claim, ran to and called for them in his surveys. And it is true to say that these matters were well known and established when the Mills survey, here in question, was made. This is a fact that has never been disputed in this case, but always frankly conceded. It was because of this that no pains were taken on the former hearing to introduce the certificate of survey and patents in evidence.

The particulars in which it is claimed that Stanfill erred are quite numerous. They, and what I have to say as to them, are as follows, to wit:

1. That in running the second line he ran it a due north course as called for in the patent, and not N., 40 E., as called for in the certificate of survey. And defendant concedes that he did so err. The fact is that counsel and not Stanfill have erred here. When asked on direct examination as to whether he ran with the patent or the certificate of survey in running the second line, Stanfill's answer was that he did not recollect. This was all he said as to this on the present hearing. Though his testimony on the former hearing was not introduced on this, plaintiff relies entirely on what he said then in support of the claim that he so erred. On that hearing, on direct examination, his attention was called to the fact that the second call of the patent was N. 40 poles to a stake, and he was asked whereabouts he fixed that corner. His answer was at letter "C" on his map. He was then asked as to whether he extended the number of poles, and his answer was, "We simply run it on the degree and the number of poles called for"; neither counsel asking the question, nor did Stanfill have his attention directed to the fact, that the patent here did not conform to the certificate of survey, the latter of which two documents governs. It was assumed that the patent call conformed to the survey, and hence was correct, just as in the judgment of Alexander v. Hill the patent, and not the certificate, was followed. That Stanfill followed the latter, and not the former, is shown by his map, as was recognized by Mr. Blakeman in his testimony on the former hearing, which may be referred to if Stanfill's is to be considered. He testified that a map which he had made of the boundary given in the judgment in Alexander v. Hill did not conform to the Stanfill map in two particulars, one of which was in the course of the second line, there being a mistake in that line, in that the judgment followed the patent and not the certificate. And Kinnie testified that there was a stake at the Stanfill rock with pointers N., 40 E.

2. That he allowed no variation in the magnetic needle from the true meridian between the time of the original survey and that made by him and that he made his survey by surface not by horizontal measurement. It would seem that his measurement was as claimed. As to making allowance for variation, if we confine ourselves to the evidence on this hearing, as it would seem we are bound to do, it is not made absolutely certain that he did not make allowance. The evidence as to whether he made allowance for variation is confined to the first line. As to whether he failed to make such allowance there, depends on whether he first determined the point to which he ran as the river cliff to be the point called for, and then ran from the beginning corner to it, or whether he found that point and was led to fix on it as the point called for by running the course called for from the beginning corner. If the latter, then he failed to make such allowance, for it is shown that the line run making such allowance will run to the right or south of such point some little distance; if the former, then he did not so fail. There was in that case no occasion for making such allowance, as there was nothing to be done but run a line from the be-

ginning corner to such point, and take it for whatever it might be. In certain particulars he did determine the location of things called for before he began to survey the boundary in question. He so determined as to the Ryan, Foster, and Parmley surveys. It was not developed, as I recall the evidence, as to how he came to fix on the point to which he ran the first line as the point called for in the certificate. And in his testimony on this hearing he did not give it as his recollection that he failed to make such allowance here. It was a mere matter of belief and judgment that he so failed. This belief and judgment may have arisen from the evidence that the line, run with the proper allowance, would not strike the point which he fixed on as that called for. But it did not follow from this that he had erred in not making such allowance. If he had first determined on such point as that called for, there was no occasion to make any allowance, and the error made, if any was made, was in fixing on that point as that called for. Had he been asked the basis of his belief and judgment, and how it was he came to fix on that point as the point called for, something might have been elicited indicating more definitely whether he made any error in running this line, and, if so, whether it was in not making the proper allowance for variation or in fixing on such point as the point called for.

But conceding that he erred in not allowing for such variation as well as in the manner of his measurement, what follows? If the defendant were here seeking for the first time a location of its boundary and a judgment against plaintiff as to the land covered thereby, the court should, no doubt, refuse to uphold the location, and might require a location to be made with the proper allowance and measurement, with a view, if such location could be made, of upholding it. Such, however, is not the case. Plaintiffs are here seeking a judgment that the land covered by Stanfill's location belongs to them, and that under the circumstances under which plaintiffs appear here, as heretofore stated. It would seem that the court should not grant relief on this ground unless it is made to appear that a location cannot be made with proper allowance and measurement, or that, if it can, a location so made will cover less ground than Stanfill's location, and then only as to the excess. Neither one of these things has been made to appear.

3. That the "coffin poplar" is not the beginning corner. It is not necessary to consider the evidence bearing on this point. The Court of Appeals of Kentucky held that it was. No new evidence has been introduced here; and the Appellate Court, speaking through Judge Sanford, said:

> "The location of the poplar beginning corner is, we think, established by the preponderance of the evidence in accordance with the defendant's contention."

4. That the points which Stanfill fixed as the points on the river cliff called for as being reached by the first, fifth, and eighth lines were either not points on the river cliff at all, or, if so, not the points so called for. The Appellate Court seems to have been impressed with the idea that Stanfill had fallen down in his location of the points on the river cliff called for as being reached on the fifth and eighth lines

more than anywhere else. Judge Sanford said that the court was satisfied that Stanfill's map was "incorrect in substantial respects, especially in reference to the location of the river cliffs and their proximity to the Ryan tract." It was the river cliffs called for as being reached by those two lines that were in proximity to the Ryan tract. The one called for as being reached by the first line cannot be said to be in proximity to that tract. There is no other specification of a particular in which that map was incorrect in a substantial respect. As to the river cliff called for as being reached by the first line, plaintiff's claim that the point which Stanfill fixed as that so called for is not the river cliff. They urge that it is no more the river cliff than either of five branch cliffs crossed by the first line before it reaches that point. It is hard to have patience with this position. There is no possible room to compare these branch cliffs with this cliff. This cliff is at right angles to the branch and the water in the branch pours over it. It fronts the river, and though the cliff itself is 25 or 30 feet, possibly as much as 50 or 60 feet, high, the top of it is 500 feet above the river. Whereas, so far as the cliffs on either side of the branch from the cliff over which the branch flows are concerned, they have been made by the erosion of the water pouring over the cliff running parallel with the river, thereby cutting back from the river and making an indentation or cove. In the case of the branch cliffs of which so much is made, the branch runs parallel to them, and they have been made, not by a waterfall, but by the water as it ran in its course. Six different witnesses—Stanfill, Kinnie, Shearer, Swain, Bowermann, and Hays—testified that it was the river cliff. And the testimony of Blakeman, Wilson, Smith, and Neal, so far as it is to the effect that such is not the river cliff, is vitiated by the claim that the branch cliffs referred to are as much river cliffs as that is. Mr. Blakeman, when he surveyed the river cliffs in 1908—the first surveying he did—surveyed it as a part of the river cliff. He testified that, after meandering the river from Ryan's spring at the southeastern end of the Ryan tract to a point opposite Alexander's house site, he "ran directly to the figure 75 on the map, which is 'the river cliff' "; that he "then continued northeasterly for a distance, and then southerly along the top of the river cliff"; and that he "continued this meandering of the river cliff around to figure 61 on the map, then across the branch to figure 72, then to 64, then to 71, then to 57, then to 83, and then to figure 2." Figure 57 is the river cliff claimed by Stanfill and where he placed a rock to mark it; and Blakeman's map No. 2 shows it as a part of the river cliff; the only difference between it and the regular river cliff is that it runs around the cove formed by the erosion of the water from the branch pouring over the river cliff.

So far as the river cliff called for as being reached by the fifth and eighth lines are concerned, Stanfill testified that he ran each of these lines to the river cliff. His familiarity with that country was such as to place him in position to form an intelligent judgment as to whether he did in fact run to the river cliff, and he had no motive to run these two lines otherwise than to the river cliff. There is no evidence to the contrary, except Kinnie expressed doubt as to whether what he took to be the river cliff to which Stanfill ran was the river cliff because of its

distance from the river and the river could not be seen from it. Shearer testified that the Stanfill map laid down the river bluff practically or approximately correct, except that it might be a little incorrect as to the Ryan tract. No one has attempted to show by surveying just where the river cliff runs in this vicinity. Sullivan meandered what he calls the river bank. Blakeman indicates on his map where the river cliff runs nearly down to the Ryan tract. In one place in his testimony he says that he meandered the cliff at this point. But this may have been a slip. He gives in detail just what he did on both occasions, when he did any surveying in connection with this litigation. He testified distinctly, as heretofore noted, that on the first occasion he meandered the river only from Ryan's spring up to a point opposite the Alexander house, and then directly from there to 75 on his map, from which point he meandered the cliff up the river. If he ever meandered the cliff from that point down to the Ryan tract, he gave no indication as to when he did it. Stanfill certainly made a mistake as to the course of the river at the southern end of the Ryan tract. He has it bending to the east before it reaches the end thereof. He neither meandered the river nor the river cliff, and it was to be expected that his map might not show them correctly at all points. But if Stanfill did err in what he took to be the river cliff, the river cliff at these two points is in that neighborhood and closer to the river than he has it, and he erred against the survey, as Kinnie points out.

There is, however, room for holding that he did err in running the first line with reference to the river cliff. Not in that he did not run to the river cliff, but in that he did not run to the point thereon called for, which would be where a line run according to the course called for, making proper allowance for variation, would strike the river cliff, which, according to the testimony of Blakeman, was 585 poles from the beginning corner, taking the coffin poplar to be such corner. Possibly the testimony of Kinnie is to the effect that Hodges in so running that line struck the river at a distance of 403 poles. Otherwise Blakeman's testimony that it would not strike it short of 585 poles is uncontradicted. I take it that when a call is for a line to run to a point in an extended thing, it is only in case the line, when run according to the course called for, will not strike the extended thing at any point, that the course should be abandoned and a line run to the nearest point in such thing. If the line run according to the course called for will strike a point in the extended thing, then it is to be so run, though it will add greatly to the distance. Assuming, then, the first line to run as Blakeman has it, the error of Stanfill was against the survey and plaintiffs are not hurt thereby. Plaintiffs state that, taking this to be the first line, the boundary is impossible of location; but no attempt has been made to show that such is the case. On the contrary, it would seem that there would be no difficulty in locating it. In so doing it, the fifth and eighth lines should not be run so as to strike the river cliff from the outside, i. e., on the river side, but from the inside. It is the thought of the certificate of survey that those two lines strike the river cliff from the inside. This would carry the fifth line over to the river cliff on the north side of the big bend in

the river, and between the Thomas Ryan survey and the Alexander house, and of necessity the eighth line would have to go there also, for the ninth and tenth lines call for the Ryan tract and the eleventh for the Foster.

There is nothing, then, whatever in the error which Stanfill made in running the first, fifth, and eighth lines to the river cliff that is of any benefit to the plaintiffs.

[3] 5. That the Thomas Ryan tract, to and with the fifth or closing line of which Stanfill ran the ninth and tenth lines of the survey, was not the Ryan tract called for. Rather the position is that there were three other Ryan tracts in that vicinity, and it cannot be told which it was intended to run to, and hence Stanfill had no right to run to this one. They are the Rice and Ryan tract, the Huling survey, then owned by Ryan, and another Thomas Ryan survey. But there is no sufficient evidence of another Thomas Ryan survey to justify its being considered. All the surveyors who testify on the subject testify that there is no other Thomas Ryan survey than the one to which Stanfill ran. A Rice and Ryan tract is not a Thomas Ryan tract. So there is left only the Huling survey, then owned by Ryan, to create any uncertainty. But the fact that two or more tracts come within the designation of a tract called for cannot invalidate a survey. It is to be determined from all the circumstances which of them was intended. And so determining here, there cannot be the slightest question but that it was the Thomas Ryan survey to which the survey ran.

[4, 5] 6. That the line of the Thomas Ryan survey, to and with which Stanfill ran the ninth and tenth lines, and the line of the Isaac Foster survey, to which he ran the eleventh line, were ideal lines, and hence he should have run those lines according to the courses and distances called for, and not have altered them in order to reach those lines of those surveys. The contention is that where there is a call for a line to run a certain course and distance to an ideal line of another survey, and a line run according to the course and distance called for will not strike such line, the call for such line is to be disregarded, and that as to the course and distance followed. By ideal line is meant not necessarily one that was not run, but one that is not actual. It is an open line as contrasted with one not marked. Of course a line that was not run is always an ideal line. It is open and not marked. The fifth or closing line of the Thomas Ryan survey at the time of the Mills survey was an ideal line. It was open and not marked, and the reasonable inference is that it was not run. The first four corners called for were timber corners, most, if not all, of which have been identified. The fifth corner is a stake corner. This indicates that the surveyor did not run beyond the fourth corner. He merely protracted the fourth and fifth lines. Likewise the eleventh line of the Isaac Foster survey was then an ideal line. It was open and not marked, and the reasonable inference is that it was not run. The first nine corners called for were timber corners, a number of which have been identified. The five other corners are stake corners. This indicates that the surveyor did not run beyond the ninth corner. He merely protracted the next six, including the eleventh lines. So that plaintiffs have made this

point good if their proposition of law is sound. Is it sound? They cite in support of it these four decisions of the Court of Appeals of Kentucky, to wit: Mercer v. Bate, 4 J. J. Marsh. (Ky.) 334; Ralston v. McClurg, 9 Dana (Ky.) 338; Mathews v. Pursifull (Ky.) 96 S. W. 803; Jones v. Hamilton, 137 Ky. 253, 125 S. W. 695. In each of these cases the call for the line of another survey was disregarded and that for course and distance followed.

In Mercer v. Bate, Judge Robertson said:

"But there is, in this respect, a palpable and essential difference betwixt actual and an ideal line, or a marked and open line. And as in the one case, Madison might be bounded by the marked line, wheresoever it might be (if he made no mistake), so in the other he must be restricted to the line as it appeared to be, and as he believed it was when he called to adjoin it. In the first case, he would have a right to the marked line, because, being visible, he knew where it was, and therefore intended that, as marked, it should be his boundary. In the last case, for the very same reason, wherever he supposed the invisible line to run, he must be bounded, because he intended when he made his survey to be, and therefore was bounded by it."

In Ralston v. McClurg, Judge Marshall said:

"In determining now upon the manner in which it should be closed, the courses and distances should be adhered to and the call for the line disregarded. There is certainly no necessity here for abandoning course and distance, which are in themselves certain. There is no mistake in the courses and length of the lines actually run, and the remaining courses and distances lead with certainty to the beginning. Why then abandon them, and adhere to a vague and repugnant call for a stake in a line of which the surveyor knew nothing, and for running with that line in a direction widely variant from its course and for a distance greatly exceeding its whole length?"

In Mathews v. Pursifull, Judge Carroll said:

"The rule is well settled that courses and distances yield to natural objects mentioned in a deed as the boundary line thereof; but this well-established rule does not apply to this case, because the calls relied on by appellant are not natural objects or monuments. They are merely artificial lines named in a patent."

In Jones v. Hamilton, Judge Barker said:

"The rule is that, where natural objects and courses and distances vary, the natural objects prevail; but where lines are not marked and defined so as to be visible to the eye, being merely called or ideal lines, the rule is different. There the surveyed line will prevail, and the party claiming title will be confined to those lines, although he may have believed and intended them to be identical with the called lines."

In Mathews v. Pursifull, Judge Carroll cited the decisions in Mercer v. Bate and Ralston v. McClurg in support of the position there taken, and, in Jones v. Hamilton, Judge Barker cited the decisions in Mercer v. Bate and Mathews v. Pursifull in support of the position there taken. It would seem that both Judges Carroll and Barker thought that where there is a call for a line to run a certain course and distance to an ideal line of another survey, and a line run according to the course and distance called for will not strike such line, the call for such line is to be disregarded, and that as to course and distance followed, as contended for by plaintiffs, and that this had been held in the two cases

of Mercer v. Bate and Ralston v. McClurg. Judge Carroll used the epithet "artificial" in characterizing the lines which he had in mind, but it is not a correct epithet to designate ideal lines; for though ideal lines may be said to be artificial, so are marked lines. Ideal lines are open and invisible lines as distinguished from marked and visible lines. The antithesis of ideal lines is actual lines. So Judge Barker referred to called lines as synonymous with ideal lines. Such, however, is not the case. For though called lines are ideal lines, so are lines that were run, but not marked. Judge Sanford generalized these four decisions to this effect:

"That a course and distance called for in a survey, when not actually run and marked by the surveyor, will be controlled by a call for the line of another tract which was then actually marked and visible on the ground, so as to be assimilated to a natural object."

But they hardly yield such a generalization and are not relied on by plaintiffs as so doing. They are relied on as supporting their contention as I have stated it.

In determining the soundness of this contention there should be considered these four decisions cited and relied on by the defendant, to wit: Morgan v. Renfro, 124 Ky. 314, 99 S. W. 311; Alexander v. Hill, supra; Brashears v. Joseph (Ky.) 108 S. W. 307; Rock Creek Property Co. v. Hill, supra. In each of these four cases the call for course and distance was disregarded and that for the line of another survey followed.

In Morgan v. Renfro, Judge O'Rear said:

"In all such cases, where it comes to locate again the survey so made, the object is to reproduce if possible, or as near as may be, what was originally done in appropriating the land by the survey. * * * There are several means which may be adopted. The rule is to prefer the best evidence. Therefore marked corners, i. e., those clearly identified, and which are notorious objects, are seized upon as the most satisfactory; then natural objects not marked, such as a stream, a ridge, a cliff, or the like, for they, while not so exact, are nevertheless reasonably sure to afford satisfactory evidence of the location of the patent at or near that point; then calls for the lines of other patents which are of record, and which are susceptible of definite and certain location; then courses; and then distances, in the order named."

In Alexander v. Hill, Judge Lassing said:

"This patent calls for a tract of land bounded by certain natural objects and artificial lines and established points, and provides that by following certain fixed courses and distances these natural objects and artificial lines and fixed points will be reached. But when it is shown by actual demonstration that, when the lines are run according to the courses and distances called for, the natural objects and artificial lines and fixed points are not reached, what shall we do? Shall the courses and distances, as called for in the patent, prevail, or shall these be made to yield, and the courses so changed where required, and the distances extended as may be necessary so as to reach the natural objects, artificial lines, and fixed points? If this was a new question, we confess that a more difficult problem would be presented; but this court has many times passed upon this question, and the law is now well settled that, where there is a conflict between the course and distance and recognized objects establishing the boundary lines of a survey, course and distance must yield, and the natural objects and established boundaries of other tracts called for, and designated known points therein must be accepted as the true boundary of the land in question."

In Brashears v. Joseph, decided the same date as Alexander v. Hill, Judge Lassing said:

"Therefore the course and distance called for in the plat must yield, under the well-known rule that, where the patent calls for fixed, definite, and certain points or objects, the calls by course and distance must give way."

And in Rock Creek Property Company v. Hill, Judge Nunn said:

"The rule is well settled in this state that courses and distances must yield to calls for the lines of other patents which are of record and susceptible of definite and certain location."

It is thus seen that, if the four cases cited and relied on by plaintiffs support their contention, then these four cases cited and relied on by defendant are in conflict therewith; for an ideal line, i. e., an open and invisible line, whether actually run or only protracted, is susceptible of definite and certain location. It is to be noted that, though the decisions of Morgan v. Renfro, Alexander v. Hill, and Brashears v. Joseph were rendered and published before that of Jones v. Hamilton, no notice of them is taken by Judge Barker in his opinion therein. And in none of the four cases relied on by defendant is any reference made to the cases of Mercer v. Bate, Ralston v. McClurg, and Mathews v. Pursifull, though all were rendered and published before them, except that in Alexander v. Hill reference was made to Mercer v. Bate on another point. Brashears v. Joseph, Alexander v. Hill, and Rock Creek Property Co. v. Hill were built upon Morgan v. Renfro. This situation calls for an attempt at harmonizing these decisions, and, if it is found that they are incapable of harmonization, for a determination of which of them are right and to be followed. Particularly should pains be taken with the decisions in the early cases of Mercer v. Bate and Ralston v. McClurg. The opinions in them were delivered by great judges—Robertson and Marshall—and at a time when things were not so complex, i. e., more simple, and when judges, as well as other people, were less hurried and had more time for reflection. These decisions are very apt to have been sound. And it is to be seen whether there is any warrant in either one of them for the position which Judges Carroll and Barker took them to support. But before taking them up it will not be amiss to do a little thinking on our own account.

In determining the location of an actual survey, the fundamental principle is that it is to be located where the surveyor ran it. As it has been put, the thing to be done is to track the surveyor. This being so, it is where he ran and not where his certificate says he ran that governs. If there is a conflict between where he ran and where he thus says he ran, the latter must yield. In Dimmitt v. Lashbrook, 2 Dana, 1, Judge Robertson said:

"When a line is actually run, it must be, as so run, the true boundary."

In reflecting upon this I have been puzzled to reconcile it with the rule that parol evidence is inadmissible to vary a writing. I have reached the conclusion that there is no conflict here, because such a case does not come within the rule. The making of the certificate is not contemporaneous with the making of the survey, though made from notes taken at the time thereof. When it is made the making of

the survey is a thing of the past. It is a statement as to how the surveyor actually ran the lines. Just as, then, parol evidence is admissible as to what took place at a meeting of a board of directors or a town council by one who was present and heard what took place, and the minutes of the meeting made up from notes then taken, are not conclusive, so testimony of one, who was present at the survey, as to how the lines were actually run is admissible and the surveyor's certificate is not conclusive. The determining thing, then, in locating an actual survey, is to ascertain where the surveyor actually ran and not where he says he ran in his certificate. It is merely evidential as to where he actually ran. But, in the case of ancient surveys, no parol evidence as to where he actually ran the lines is obtainable, because of the death of all of those who may have been present at the survey. In such cases, in determining where the surveyor ran the lines, we are limited necessarily to his certificate except so far as may be affected by accompanying plat, and such marks as he may have made at the time of the survey, and, in the absence of such marks, to his certificate, except so far as it may be affected by the plat. In the latter case, of necessity, the certificate with such exception is conclusive. Where, however, there was no actual running, i. e., where the running was mental only, the certificate with such exception is always conclusive. Whilst here, as in the case of an actual survey, it is where the surveyor ran which is the determining consideration, there is no other evidence of where he so did than his certificate, apart from the plat. But it is to be construed in the light of then existing conditions and what he may be known to have done. Suppose, then, in a given case, according to the certificate, the surveyor ran from a certain point a certain course and distance to a certain thing, and a line from that point to that thing is not according to such course and distance, and the plat sheds no light, and there are no marks left by the surveyor, what is to be done? As it is not possible for the surveyor both to have run from such point to such thing, and from such point such course and distance, he must have made a mistake either in saying that he ran from such point to such thing, or that he ran therefrom such course and distance, and the thing to be done is to ascertain which of the two statements was a mistake. Two alternative cases present themselves for consideration. One is where the surveyor actually ran the line; the other where he protracted it, i. e., ran it mentally. And I take it that, in the absence of persuasive evidence that he did not actually run it, it is to be taken that he did. If, then, it is a case of actual running, and the thing to which he says he ran is a visible thing, either natural or artificial, he must have known whether or not he ran to such thing. He could not have been mistaken in thinking that he ran thereto if he did not. The only possible room for mistake in such case is in making notes of what he did or transcribing the notes into his survey, and there would be little chance of his making a mistake in this particular. In such case, therefore, that is, where the line was actually run, as the call is to run to a visible thing, the mistake is to be taken to have been made in the statement as to the course and distance. Such mistakes are readily made. So it is that we have the rule, as to which there is no question, that

where the call is for a natural object or a marked corner or line, the call for course and distance must give way to the call for such object, corner, or line. How, then, is it in case of actual running and the thing to which he says he ran is an invisible thing, i. e., an ideal or open line of another survey? In such case it is possible for him to have made a mistake in saying that he ran to such thing, if he did not run such line of the other survey, or otherwise know definitely where it was. If he did run it or otherwise knew, the likelihood of mistake is greatly lessened. Though, if he did not run it, the chance of mistake is greater, can it be said that the chance of mistake is greater than the chance of mistake in saying that he ran the course and distance? Possibly it is. If, then, there is a rule that, in a call for an ideal line of a survey, such call must give way to that for course and distance, here is a case for its application. And such case is where the line was actually run, and that of the survey called for was not run and he did not otherwise know where it was. But as, in such a case, it is well-nigh impossible to say whether the line of such survey was run, to see where it was located, or he otherwise knew, it is questionable, to say the least, whether any distinction should be made, where the line has been actually run, between a call for a visible thing and one for an invisible thing, and whether or not in both cases the call for course and distance should not yield to the call for the thing.

[6] Take, then, the other case, i. e., where there is evidence which persuades that the line was not actually run. If it was protracted, i. e., mentally run, is there any reason for a distinction between the call for a visible thing and one for an invisible thing? If the call is for a visible thing, as the surveyor did not run the line he was not at it. The fact that it was visible was of no value to him in knowing whether he ran to the thing. Unless he mentally ran to the thing, he would not have called for it. The chance for mistake in the course and distance to the thing over what it would have been had he actually run the line was much greater, and in some cases it would be marvelous whether he could give it correctly. There is therefore no reason for making a distinction, where the call is for a visible thing, between a case where the line was actually run and where it was not. And so the rule is that in case of such call always, i. e., whether the line was run or not, the call for course and distance yields to the call for the thing. If, then, where the line was not actually run, and the call is for a visible thing, the call for course and distance yields to the call for the thing, there is no conceivable reason why, in such a case, and the call is for an invisible thing, the rule should not be exactly the same. In such a case the call for a visible thing has no advantage, as a corrective, because of the visibility of the thing, over a call for an invisible thing. In neither case was the surveyor at the thing to determine whether he had gone to it or not. In the latter, as in the former, case, he would not have called for the thing if he had not mentally run the line to it. Such is the meaning of the call. It can have no other meaning. And the possibility of mistake in giving the course and distance is as great where the call is for an invisible thing as in a call for a visible one. I therefore see no reason why the rule should not be that in all cases,

whether the line was actually run or was not, and whether the thing called for was visible or invisible, that the call for the course and distance yields to the call for the thing.

There is reason, however, for an exception to this rule. This exception comes in only where the line was not actually run, and it makes no difference whether the thing called for was visible or invisible. The position thus taken that, if the line was not actually run, the call for the thing, whether visible or invisible, takes precedence over the call for the course and distance, is based on the assumption that the surveyor does not think that the thing called for is in a particular place. The exception comes in where he does think that it is in a particular place and hence mentally runs the line to that place. If it turns out that the thing called for at that place was not in fact there, i. e., the surveyor was mistaken in thinking that it was there, the call for the thing should give way to the call for course and distance; for the surveyor mentally ran the line to where he thought the thing was and not to where it in fact was. And the cases of Mercer v. Bate and Ralston v. McClurg were simply applications of this exception. In each case the line was not actually run, and the surveyor thought the thing called for was in a particular place, as to which he was mistaken. It was held in each case that the thing called for should give way to course and distance, because he had mentally run the line to where he thought the thing was and not where it actually was. It made no difference in the position there taken as to whether the thing called for was visible or invisible. A detailed consideration of these two cases will make this good.

In Mercer v. Bate the facts were these: Two surveys had been made in the then county of Kentucky of lands on the Ohio river some little distance below the falls at Louisville, one in the name of Mercer and the other in the name of Griffin. They were about 527 poles apart at the river bank. Mercer's survey was four-sided. Its upper corner on the river bank was three beeches and a sugar tree. The river line ran 350 poles to two beeches and some sugar tree saplings. The lower line ran from this corner S., 56 E., 1448 poles, to a sugar tree, buckeye, and linn. The back line ran from this corner N., 52 or 62 E., 350 or 340 poles, to a white oak on the edge of a hill near Harrod's creek, and the upper line ran from this corner N., 49 W., 750 poles N., 48 W., 540 poles, in all 1,270 poles, to the beginning. The lower corner of Griffin's survey on the river bank was an ash and elm. Its lower line ran therefrom 1,130 poles S., 38 E., to five ash trees, and from that corner the line ran N., 30 E. At 246 poles from the five ash trees in that line were a beech and elm. It is not necessary to refer to any more of the Griffin's boundary. Mercer's survey was made in 1774. That of Griffin some later. In 1785, the territory being then in Jefferson county, a survey was made in the name of Madison, including as it was thought all the land between the two surveys from the river back. It began at Griffin's lower corner—the ash and elm—and ran with the river bank to Mercer's upper corner—the three trees referred to as two beeches and sugar tree—427 poles. It called for this corner as Mercer's corner. The call for the next line was with Mercer's

corner S., 48 E., 540 poles, S., 49 E., 750 poles, in all 1,290 poles, to a white oak on the edge of a hill near Harrod's creek. It will be noted that the courses of these two parties of this line were the reverse of the courses given for Mercer's line. Mercer came to the river and Madison went back from it. The distances were exactly the same. Madison called to run with Mercer's line that far. Madison's lower corner back from the river was the same as Mercer's upper corner back therefrom, to wit, a white oak on the edge of a hill near Harrod's creek. The next call was "with Mercer's end (i. e., back) line S., 52 of 62 W., 116 poles to a beech and sugar tree in said line." From this corner the survey called for three lines, which took it to the beech and elm in Griffin's line, and to run from thence S., 30 W., 246 poles, to Griffin's lower back corner, the five ash trees, and from thence with Griffin's line N., 38 W., 1130 poles, to the beginning. It is thus seen that on the face of things Madison's survey covered all the land between Griffin and Mercer, and ran back of each to the extent of 246 poles of Griffin and 116 poles of Mercer. It turned out upon investigation that there was a mistake in the courses given for Mercer's upper line, connecting his upper corner on the river, the three beeches and sugar tree, and his upper back corner, the white oak on the edge of a hill near Harrod's creek. His upper and lower river corners and lower back corner were well marked. And the river line and lower line were also marked. For a distance of 380 poles, or 30 or 40 poles more than called for, his back line was also well marked. At the end of this marked line there was a white oak lying on the ground nearly rotten and so much decayed that it could not be told whether it was marked. It stood on the edge of a steep, rocky hill, near and in view of Harrod's creek, so precipitous towards the creek as to render a descent to the base difficult even on foot. There was from this point an ancient marked line for the distance of 30 poles towards the beginning corner. If the upper line was run from the beginning corner, according to the courses reversed and distances called for, it would reach a point 426 poles, i. e., or over a mile and a third beyond the end of 380 poles of the marked back line of Mercer, where the white oak was lying, and from which the 30 poles of marked line ran towards the beginning corner at the river, thus making Mercer's back line 806 poles long instead of 350 or 340, as called for. The court held that the call for course and distance had to be disregarded, and that Mercer's back line extended no further than 380 poles of marked line, where the white oak was lying, and that his upper line ran from this point with the 30 poles of marked line, and from that point N., 36 W., 720 poles, N., 35 W., 540 poles, to the beginning. This location of the Mercer survey gave rise to the problem which is pertinent here. Should Madison run from Mercer's beginning corner on the river according to the courses and distances called for or with Mercer's line as the court held them to be?

There were over 2,000 acres within those lines. Possibly the surveyor never ran the river line of Madison's survey, i. e., from Griffin's lower corner to Mercer's upper and beginning corner. Certainly he never ran Mercer's upper and closing line, between its beginning and

fourth corners, nor his back line, a portion of which was called for as being the first of the three lines of Madison running from the beech and sugar tree in Mercer's back line to the beech and elm in Griffin's back line. The court held that Madison should run from Mercer's beginning corner according to the courses and distances called and not with Mercer's lines as called for; in other words, that the calls for Mercer's line should yield to the call for courses and distances. In the language of counsel for the losing side in their petition for rehearing, it tore "Madison from Mercer." Why then did the court so hold? It was because the surveyor thought that Mercer's upper and closing line ran according to the courses and distances called for and that his back line extended to the point where so doing would fix his fourth corner. So thinking, that was where he mentally ran. That he was mistaken in so thinking was no reason for making the survey run with Mercer's lines as they actually were. The surveyor only ran the lines of Madison where he thought the lines of Mercer were, and it is where the surveyor ran that governs. It is true that Judge Robertson made a point of the fact that Mercer's upper or closing line was an ideal or open line, except as to the 30 poles next to the upper back or fourth corner, and not an actual or marked line, and said, in the paragraph heretofore quoted, that there was a palpable and essential difference between an actual and ideal line, or a marked and open line. But the decision was not based on any such difference. Madison was restricted to the courses and distances called for in connection with Mercer's lines because such "appeared to" and were "believed" to be his lines when the Madison survey was "called to adjoin" Mercer. For the very same reason he would have been so restricted even had Mercer's lines been marked their entire extent. After the paragraph quoted, he proceeded as follows, to wit:

"Is there anything, then, in the record which will show satisfactorily where Madison supposed Mercer's line was when he called for it? We think there is enough, and that it shows that he considered the courses and distances described in Mercer's patent as defining his true line."

He then referred to seven separate and distinct things in the record as so showing. The decision provoked a vigorous petition for rehearing. Because of the distinction drawn between actual and ideal lines or marked and closed lines, it was thought that the court had taken the position "that if the objects called for are ideal or the lines called for are not marked, then the adjoining survey shall stop short thereof, and has no right to extend to them, disregarding of other calls." This position, it was claimed, was "entirely new." It was said:

"It is a doctrine never heretofore applied in adjudicating on boundary in this country, so far as we know. It was not advanced by the learned counsel of the appellants, so that it might have met a reply. Its consequences are not easily foreseen, and as there are many lines left open, owing to the witchery in which surveyors acted and the dangers that surrounded them, it may be fatal; for it is a doctrine that will rend bounds and limits, hereafter to be fixed by a series of adjudications."

The reasoning against this position which was advanced was unanswerable. Attention was called to the facts that Mercer's upper back

corner was a marked corner; that 30 poles of the upper or closing line from Mercer's upper or back corner towards the beginning corner was marked; and that the whole of Mercer's back line for 116 poles, of which Madison's third line was called to run, from the white oak at the upper or back corner to the beech and sugar tree, was a marked line. It was argued that if the first line of Madison was to be run to Mercer's beginning corner, which was marked, though the distance was 100 poles more than called for, so ought its second line to be run to Mercer's upper or back corner, which was marked, and its third line be run 116 poles with Mercer's back line, which was also marked.

The result was that Judge Robertson had nothing further to say, in response to the petition for rehearing, about any difference between the actual and ideal or marked and open lines. But he did bring out clearly and distinctly the true basis of the decision, which was that the surveyor took Mercer's upper or closing line to run according to the courses and distances called for, and that his upper or back corner was at the end of such line so run. Hence that is where he ran the Madison survey, and, as where the surveyor ran is controlling in locating a survey, there is where it would have to be located, though the surveyor was mistaken in so thinking. This being the case, it would have made no difference had such upper or closing line been marked its entire distance. He said:

"Madison cannot be allowed to extend his survey beyond where he believed Mercer to be."

And again he said:

"The reason why Madison would not be allowed to expand his survey, so as to cover all the interjacent land between the line which he supposed to be Mercer's and the remote boundary which is ascertained by the judgment of court to be Mercer's true line, is only because there was an evident mistake in the opinion as to the location of Mercer's line."

And again he said:

"If Madison went to T A (i. e., the upper back corner of Mercer), or if, knowing where it was, he intended to go there, or if, without knowing where it was, he intended to go to it, wherever it was, he might be allowed to hold it. The opinion states some of the reasons why we believe that he intended that his line and corner should be where he supposed Mercer's were."

That it would not have necessitated a different decision, if Mercer's upper or closing line had been marked its entire extent, is apparent from the following statement in the response:

"If Mercer's line from his beginning to T A had been marked and actually run, then still Madison might not have a right to make it his boundary, if it clearly appeared that he was mistaken in calling for it. But then we should require much stronger evidence of mistake than we should do, when the line was defined by course and not by marks."

So it transpired that, as nothing had ever been said about any distinction between actual and ideal or marked and closed lines in the

reported decisions of the Court of Appeals of Kentucky before Mercer v. Bate, so afterwards nothing was said in regard thereto therein for over 75 years, when it was taken up by Judges Carroll and Barker.

I come then to the case of Ralston v. McClurg. Ham's survey, there involved, was a five-line survey. It called to begin at William Richard's northeast corner of his 50-acre survey, a large poplar and beech. The first line ran from there, a certain course and distance, to a beech; the second from thence, a certain course and distance, to a beech and buckeye; the third from thence, a certain course and distance, to three white oaks on a high ridge; the fourth from thence, a certain course and distance, to a stake in Richard's line; and fifth and last a certain course and distance with his line to the beginning. The surveyor in making the survey began at Richard's northwest, and not at his northeast, corner, as stated in his certificate, which threw the whole survey off the land described therein. He ran and marked the first three lines. When he came to the fourth corner, the three white oaks on a high ridge at the end of the third line, Ham informed him that a line the course called for, to wit, S., 45 E., from that place would strike Richard's line at the distance called for, to wit, 83 poles. He thereupon adopted that as the fourth line of the survey without any part of it being run. He then calculated the course and distance from the termination of this assumed line to the beginning corner, and adopted it as the fifth line, without running it. On running the Ham survey it was found that a line S., 45 E., from the fourth corner, the termination of the third line, which was actually run, would not strike Richard's line at the distance of 83 poles, but that, if continued, it would never touch any part of it. It was held that the fourth and fifth lines should be located according to the courses and distances called for and the calls for Richard's lines should be disregarded. The ground of the decision was that there was where the surveyor mentally ran those two lines. He ran them there because he thought the fourth line would strike Richard's line and the fifth would run with it. In this he was mistaken. But, notwithstanding such mistake, that is where he mentally ran the lines, and, as we have seen, the consideration which always controls in locating a survey is where the surveyor actually or mentally ran the lines. That the fact whether Richard's line was an actual or an ideal—marked or open—line had nothing to do with the conclusion reached appears from the following quotation from Judge Marshall's opinion, to wit:

"It does not even appear that the line of Richard's was itself a marked line. And that circumstance, though not essential to the conclusion to which we have come, certainly weakens the opposite construction of the survey, so far as it depends upon the position that an actual marked boundary, or a call for physical objects, must control the call for course and distance."

It must be admitted, however, that both Judges Robertson and Marshall seem to think that the fact that the line called for was not a marked line, whilst not essential to the positions there taken, strengthened them. I would submit that it did not do so. The advantage which a visible thing called for has over an invisible thing when the

line is actually run does not exist when it is not run. And both these cases were cases where it was not so run.

It is thus seen that there is nothing whatever in these two cases justifying the positions taken in the quotations from the opinions in Mathews v. Pursifull and Jones v. Hamilton. Whether Mathews v. Pursifull was correctly decided on its facts it is not necessary to consider. It would seem that it was not. But Jones v. Hamilton was. There the survey began at Wiley Jones' corner, and the first call was "thence with said Jones line S., 80 W., 163 poles, to a beech and cucumber, Levi Goins' corner." This call was widely variant from "Jones' line." But the surveyor had actually run it. It was decided that the line should be located as thus run, though the surveyor intended and the patentees intended him to make a survey of all the land which would be included with "Jones' line" as a boundary, and they thought Jones' line coincided with the call S., 80 W., 163 poles. There were some marks on trees which led the surveyor to suppose that it was Jones' line. And the cases of Mercer v. Bate and Ralston v. McClurg were authorities for the decision reached. The only difference between that case and those was that in that the line was actually run, whereas in those it was not. There was no occasion in the case for pointing out any distinction between a call for marked and visible lines and ideal lines. It is true that the Jones line was not a marked line, but an ideal one. But it could have made no difference if it had been a marked one. The surveyor had actually run the line called for according to the course and distance called for, and as we have seen that it is where the surveyor ran, actually or mentally, that determines where the survey should be located. The fact that he thought that such line was the line called for, but was mistaken in so thinking, cannot change the fact as to where he ran, and hence does not allow the line to be located in accordance with the line called for, and that whether such line is a marked or an ideal line.

These four cases cited and relied on by plaintiffs do not, therefore, support their contention. The fact is that the cases of Mercer v. Bate, Ralston v. McClurg, and Jones v. Hamilton do not have to do with the kind of case that we have here. They are cases where the line called for was thought or supposed to be in a particular place, and was run to or with as being in such a place—in Mercer v. Bate and Ralston v. McClurg it was mentally run, whereas in Jones v. Hamilton it was actually run—when in fact it was not in such place. The fact that it was not in such place did not alter the fact as to where the line was so run, and it was the fact as to where it was run, and not where it might or would have been run had the truth been known, which determined its location.

On the other hand, the four cases cited and relied on by defendant are directly in point, and they decide squarely that if the line called for is susceptible of definite and certain location, at least if the instrument by which the line is created is of record, the call for course and distance must yield to it. Whether it is essential that such instrument be of record it is not important to inquire, as here the Ryan and

Foster surveys and patents were of record. An ideal line is susceptible of definite and certain location, though possibly not so susceptible and certain as an actual one. In Morgan v. Renfro, the first of the four cases in which this was settled, Judge O'Rear made no reference to the cases of Mercer v. Bate and Ralston v. McClurg. He may not have known of them. It is more likely that he did, and made no mention of them because it did not occur to him that they had any reference to the case in hand. In none of the four cases was it considered whether the line called for was an actual or an ideal line. It was not conceived that this made any difference. In Morgan v. Renfro and Brashears v. Joseph it does not appear whether the lines called for were actual, i. e., marked, or ideal, i. e., open. In Alexander v. Hill they were ideal, and in Rock Creek Property Company v. Hill they were actual. And, for the reasons heretofore given, there can be no doubt that those decisions are sound upon principle.

I conclude, therefore, that Stanfill did not err in going to and with the fifth or closing line of the Ryan survey and to the eleventh line of the Isaac Foster survey, and disregarding the calls for courses and distances.

7. That Stanfill erred in the point to which he ran as the pine corner at the thirteenth corner of the survey. This is attempted to be made out in two ways. One is that, if it is taken to be the three pine trees called for in the Parmley survey, it was not capable of being definitely located, and that because it was not sufficiently identified. But the mere fact that it was not then standing, and no one could tell where it stood, did not prevent its being definitely located. At least two other corners of the Parmley survey were capable of identification. According to Shearer's testimony, the sixth corner, the beech, poplar, and spruce, and according to Kinnie the third corner, the two white oaks and two Spanish oaks, were then standing. And to a certain extent the beginning corner was capable of identification, though the three Spanish oaks were not then standing, by reason of the call for them at the head of one of the Devil creek hollows. All the surveyors seem to have been able to locate this Parmley survey and its second or pine corner.

[7] The other is that there is another pine-tree corner which may have been the one intended to be called for, to wit, the beginning corner—three pines—of the Mills' survey of December 9, 1856, and it is impossible to tell which of the two was called for. The fact that there are two things which answer to the call of a survey, and it cannot be determined definitely which is the one called for, does not invalidate the survey. The rule is that the one which is most against the survey is to be taken. It is not unlikely that the beginning corner of this earlier Mills' survey was the corner called for. The seventh or closing line thereof, reversed, called for a red oak in Mills' line, i. e., the beginning line of the Parmley survey, then owned by Mills, and it may have been that the surveyor intended that the survey should run from the point in Isaac Foster's survey to the beginning corner of the Mills' survey of December 9, 1856, thence with the closing line thereof to the red oak in the first line of the Parmley survey, and thence with that line so

far as it went, to the beginning. If he so intended, then the survey ran from this pine corner with Mills to the beginning corner of the Parmley survey. That this adds another line to the survey is not against it. In Morgan v. Renfro the survey was of six lines. The fourth line called for a stake in line of John Gilbert, Sr.'s, survey, and the fifth with said line to a stake in his line. Just one line, therefore, of Gilbert's survey was called for. As the survey was located, it ran with four of Gilbert's lines and three lines were added to it. The case of Bell v. Powers (Ky.) 121 S. W. 991, involved a survey made by the same surveyor who made the survey in question here within seven months after it was made. The second call of the survey was, "thence with James Burnett's old line S., 25 E., 250 poles, to his corner, a pine." The Burnett line, from the beginning of the call to the pine, was not a straight line, but traversed four lines and three marked corners not recognized in the survey. It was held that the survey ran with these lines. As, however, running to the second corner of the Parmley survey was against the survey, plaintiffs cannot complain of Stanfill so running.

[8] This, I think, covers all the particulars in which it is claimed that Stanfill erred. The result of my consideration of them has convinced me that Stanfill's location is substantially correct, and that the decision in Alexander v. Hill is sound.

In conclusion it is to be noted that plaintiffs have done nothing but criticize. They have put forth no constructive effort. They have made no sincere effort to locate Mills' survey by actually running all its calls on the ground, disregarding calls for courses and distances for the thing called for, when running according to course and distance did not go thereto. The only line which they actually ran was the first line. This disclosing that Stanfill had erred in locating the first line, there they stopped. Whether they were fearful that running from the correct termination of the first line a location would be made more favorable to defendant does not appear. It is certain that they ran no further.

In view of all I have said, I have no other recourse than to hold that the bill should be dismissed at plaintiffs' costs.

UNITED STATES v. WURSTERBARTH.

(District Court, D. New Jersey. May 13, 1918.)

1. ALIENS ⟸71½, New, vol. 7 Key-No. Series—NATURALIZATION—CANCELLATION OF CERTIFICATE OF CITIZENSHIP.
Where respondent, a native of Germany, was admitted to citizenship under Rev. St. § 2165, requiring an applicant for admission to make oath that he will support the Constitution of the United States, and that he absolutely abjures and renounces all allegiance to any foreign prince or sovereignty, proof that, when the United States and Germany engaged in war, many years later, respondent desired a German success, and recognized an allegiance to Germany superior to that due the United States, unexplained warrants cancellation of his certificate of citizenship, on the ground that it was procured by fraud, in that his oath to renounce allegiance to any foreign sovereignty was false, and excepted the land of his nativity.

2. ALIENS ⟸62, 71½, New, vol. 7 Key-No. Series—NATURALIZATION—GOOD FAITH.
Public policy requires that no one should be naturalized, except he exercise the utmost good faith in all of the essentials required of him, and where the government, in a proceeding to cancel a certificate of citizenship, has shown that good faith in any of the essentials is highly questionable, the burden is on the respondent to dispel the doubt.

3. EVIDENCE ⟸75—UNCONTROVERTED EVIDENCE.
Where respondent failed to deny testimony as to his remarks, such testimony may be accepted as true, though witnesses thereto testified from their unaided recollection.

In Equity. Petition by the United States to cancel the certificate of citizenship of Frederick W. Wursterbarth. Certificate canceled.

Charles F. Lynch, U. S. Atty., of Newark, N. J., for the United States.

Carl Lentz, of Newark, N. J., for respondent.

HAIGHT, District Judge. This is a proceeding instituted by the United States attorney for this district under section 15 of the Naturalization Act of June 29, 1906 (34 Stat. L. 596, 601, c. 3592 [Comp. St. 1916, § 4374]), to cancel a certificate of citizenship granted to Frederick W. Wursterbarth, the respondent, by the court of common pleas of the county of Passaic, in the state of New Jersey, on the ground that it was fraudulently and illegally procured. The certificate was issued on November 3, 1882; the respondent being a native of Germany and a subject of the German emperor. The fraud alleged is that the respondent declared under oath that he absolutely and entirely renounced and abjured all allegiance and fidelity to any foreign sovereignty, and particularly to the emperor of Germany, whereas in fact he did not do so, but, on the contrary, retained an allegiance to Germany and its ruler. The matter has come on for hearing on the issues raised by the petition of the district attorney (to which were attached affidavits supporting its allegations), and the answer of the

respondent. Upon the hearing the government proved, in substance, the followng facts, viz.:

Within a few days after the outbreak of the present war between the United States and the German Empire, the respondent was approached by two ladies interested in a local chapter of the American Red Cross, in an effort to induce him to contribute money to that organization, upon which appeal the respondent became angry, and replied in substance that he would not do so; that he would do nothing to injure the country in which he had been born, brought up, and educated. Subsequently, in the month of June following, another woman, who was likewise interested in the same chapter of the American Red Cross, visited him, and asked him to become a member. He angrily refused to do so, stating that he would give no money to send soldiers to the country where he was born and educated, and, in reply to some arguments which the solicitor advanced, stated that she did not know what it meant to be born in a country, and then have men go over and fight against that country. In the month of November, 1917, the respondent was approached by two gentlemen, in an effort to induce him to subscribe to the fund which the Young Men's Christian Association was then raising for war work. At that time he stated that he would do nothing to help defeat Germany, and in response to a question as to whether he did not want America to win the war he replied that he did not; that he had relatives in Germany. He made the same rejoinder to the question as to whether he did not want the American soldiers in camps and cantonments to be well taken care of; and, in reply to a statement made to him that he was better off than most Americans, he replied that he only came to this country on a vacation or visit.

[1] The respondent did not attempt to refute or explain any of that testimony. It thus appears, without contradiction, that the respondent, although a citizen of this country, on three separate occasions (several months having intervened between each), since the outbreak of the war with Germany, gave vent to expressions which clearly indicate that at this time he bears an allegiance to the country of his origin, superior to that which he recognizes to this country. While his present state of mind is, of course, not the main fact in issue, yet if, at the time the certificate of citizenship was granted to him he retained the same allegiance to Germany, as he now manifestly has, it is not contended, and, indeed, it would not seem to be debatable, that any other conclusion could be reached than that the certificate had been procured by fraud, because the provisions of the Naturalization Act, at the time the respondent's certificate was issued (section 2165 of the Revised Statutes), required that before he could be admitted to citizenship he should declare on oath that he would support the Constitution of the United States, and that he absolutely and entirely renounced and abjured all allegiance and fidelity to any foreign sovereignty.

The question, therefore, on which the decision of this case depends, is whether it may be legitimately inferred as a fact, from his present

state of mind, coupled with the circumstances to be hereinafter referred to, that he was of the same mind at the time he took the oath of allegiance and renunciation. In that aspect the case is one of first impression, so far as I am informed or have been able to ascertain. It must be borne in mind that the respondent did not express any dissatisfaction with the aims and purposes of this country in the present war, or with the reasons which had induced Congress to declare war, but that he boldly took the position that he would do nothing to injure the country of his birth, and did not wish this country to win the present war, because of the ties which bound him to Germany. As the years succeeding his naturalization passed, coupled with the fact that he continued to dwell in our midst, associate with our citizens, receive the benefits which this nation and its institutions have conferred upon him, acquire property here, and hold public office (as the proofs show that he did), it is natural to presume that his affection and feeling of loyalty and allegiance to this country would increase, and that any ties which bound him to the country from which he came would correspondingly decrease.

If, therefore, under such circumstances, after 35 years, he now recognizes an allegiance to the sovereignty of his origin, superior to his allegiance to this country, it seems to me that it is not only permissible to infer from that fact, but that the conclusion is irresistible, that at the time he took the oath of renunciation, he did so with a mental reservation as to the country of his birth, and retained towards that country an allegiance which the laws of this country required him to renounce before he could become one of its citizens. Indeed, for the reasons just stated, his allegiance to the former must at that time have been stronger than it is at present. Whatever presumption might otherwise arise in his favor from the apparent fact that during the intervening years he has lived as a good citizen of this country is of no weight, when it is considered that nothing has happened during that time to call forth a manifestation of his reserved allegiance, and that as soon as something did happen—i. e., the war between this country and Germany—he immediately manifested it.

It is argued that it is not legitimate to presume that his mental attitude to-day is the same as it was 35 years ago, because as a general rule presumptions do not "run backwards." I will readily concede that proposition. However, without attempting to differentiate, if indeed there is any real distinction, between a strictly legal presumption of fact, which constitutes at least prima facie proof of a matter in controversy, and the probative value of one circumstance in establishing another fact, there are many cases in which it is permissible to infer the existence of one fact from proof of subsequent facts. If the natural and probable inference to be drawn from a proven fact is the existence of another fact, it makes no difference whether the latter fact be before or after, in point of time, the fact from which the inference is to be drawn. The decisive point is whether the inference is a natural and probable one. That principle is recognized by all the authorities, and is supported by every consideration of reason.

It will be sufficient, I think, to refer to the remarks of the Supreme Court in Luria v. United States, 231 U. S. 9, 27, 34 Sup. Ct. 10, 58 L. Ed. 101, where this very section of the Naturalization Act was under consideration, and Ellis v. State, 138 Wis. 513, 119 N. W. 1110, 20 L. R. A. (N. S.) 444, 131 Am. St. Rep. 1022, a case relied upon by counsel for the respondent.

So the mere fact that it would not be permissible to find one's state of mind at a given time, from what he said or did at a subsequent time, under a certain set of circumstances, would by no means justify the conclusion that in all cases and under all circumstances the same rule must be applied. For instance, if this respondent had been naturalized in the month of March, 1917, and had expressed himself in April, June, and November of the same year, as the proofs in this case show that he did, it could scarcely be doubted that he had reserved an allegiance to the country of his origin at the time that he took the oath of renunciation in the naturalization proceedings; yet in such a case it would be necessary to find his state of mind at that time from his subsequent state of mind, as manifested by what he said. Many similar examples might be cited. The state of the respondent's mind at the time he was naturalized is, of course, a question of fact. If, instead of making the remarks which are relied upon by the government in this proceeding, he had then frankly stated that, at the time he received his certificate of naturalization, he reserved an allegiance to Germany, it could not be questioned that he had procured his certificate through fraud. The only difference between such a case and that actually presented is in the manner in which his state of mind thirty-five years ago is to be proved. In the one case the proof would be direct; in the other, it would rest on inference.

Moreover, allegiance to a country is necessarily, I think, in a class by itself; and to argue that, because it would not be permissible to infer one's previous state of mind on one subject from subsequent acts and deeds, it is also not permissible to do so in respect to one's state of mind regarding allegiance to a country would lead to illogical results. While, undoubtedly, it would not be permissible to infer that a man did not love his wife when he married her, from mere statements made 25 years after which showed that he did not then love her, it by no means follows that it is not natural and proper to infer in cases such as this, from a subsequently expressed allegiance to the country of his birth, that one did not renounce allegiance to that country when he was naturalized. If the respondent's present state of mind was different from what it was when he was naturalized, or if the expressions which he used did not properly express his feeling, an opportunity was afforded him to have so demonstrated. He did not attempt to explain or deny; his attitude was rather one of defiance.

In a case such as this, especially in the absence of explanation or denial, I am of the opinion that, if there were any doubt about the matter, it should be resolved in favor of the government. Such was the opinion of Judge Killits in a case (United States v. Griminger [D. C.] 236 Fed. 285) instituted under the same section of the Natural-

ization Act as this is, where the question was whether a person had "resided continuously" within the United States during the period required by the statute, which question the Circuit Court of Appeals of this circuit, in United States v. Cantini, 212 Fed. 925, 129 C. C. A. 445, has held to be one of fact.

[2] Public policy requires that no one should be naturalized, except he exercise the utmost good faith in all of the essentials required of him, and where the government has shown that good faith in any of the essentials is highly questionable, the burden should be cast on the respondent to dispel the doubt. He, as no one else, has the means of doing so.

[3] Whatever force there might have been in the argument of counsel for the respondent that, as the witnesses in this case were testifying from unaided recollection, their statements should be scrutinized with great care and hesitatingly accepted, is lost, because the defendant has not denied them. I accept them as true. The witnesses impressed me as conscientious and patriotic citizens, who were endeavoring to tell the truth, and who, in reporting the respondent's disloyal statements, were doing their duty.

It follows, therefore, that the prayer of the petition should be granted. A decree will accordingly be entered, setting aside and canceling the respondent's certificate of citizenship.

SETTLE et al. v. BALTIMORE & O. S. W. R. CO.

(Circuit Court of Appeals, Sixth Circuit. May 7, 1918.)

No. 3083.

1. COMMERCE ⟸33—TRANSPORTATION—INTERSTATE OR INTRASTATE—"INTERSTATE COMMERCE."

Whether a given transportation is interstate or intrastate must be determined by the essential character of the commerce, and an interstate character cannot be evaded by the mere device of billing to an intermediate point and then rebilling from that point; but a new shipment by a consignee of an interstate shipment in the cars in which received to other points of destination does not necessarily establish continuity of movement, nor prevent a reshipment to a point within the same state from having an independent and intrastate character.

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

2. COMMERCE ⟸33—TRANSPORTATION—INTERSTATE OR INTRASTATE—INTERSTATE COMMERCE.

Interstate shipments of lumber by carload were billed to a point where the cars were received by the consignee and the freight paid. The railroad company made a trackage charge for placing the cars on a house track, and from there they were rebilled to another point in the same state on a line of the same company, not having been unloaded. The company also charged demurrage if the cars were not reconsigned within the free time limit. *Held*, that the second shipment was a separate and intrastate shipment, governed by intrastate rates, although it was intended by the consignees when the original shipments were made.

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

Action at law by the Baltimore & Ohio Southwestern Railroad Company against W. H. Settle and George W. Clephane, partners as W. H. Settle & Co. Judgment for plaintiff, and defendants bring error. Reversed.

Harry C. Barnes, of Cincinnati, Ohio, for plaintiffs in error.

Harmon, Colston, Goldsmith & Hoadley, of Cincinnati, Ohio (Geo. Hoadley, of Cincinnati, Ohio, of counsel), for defendant in error.

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

KNAPPEN, Circuit Judge. The defendant in error, as plaintiff below, sued plaintiffs in error for the difference between the freight charges actually paid and those which plaintiff claims should have been paid on certain shipments of lumber. The pertinent facts stated in the petition are these: Plaintiff is engaged in interstate commerce as a common carrier by railroad, owning and operating a line from Cincinnati, Ohio, to Louisville, Ky., and other points. The shipments in question all originated south of the Ohio river, and were of two classes: First, those originally consigned to the defendants and billed directly to Oakley, Ohio, which is within the switching district of Cincinnati; second, those originally consigned to others at Cincinnati, or elsewhere,

purchased by defendants while in transit, and upon arrival at Cincinnati switched to Oakley. It was defendant's intention from the time of the shipments or of their purchase, as the case may be, that they would be received by the defendants at Madisonville. There were in force lawful interstate rates from the points of origin of the several shipments to Cincinnati and Oakley (the rates to Oakley being the same as to Cincinnati), as well as to Madisonville. There was a lawful local or intrastate rate (published by state authority) from Oakley to Madisonville. Defendants paid, in each case, to the railways bringing the lumber to Cincinnati, the interstate rate to that place—applicable to Oakley. Each of the cars was ordered by defendants to be delivered to them at Oakley, and upon its arrival at that place was "received by the defendants, although the lumber was not removed from the cars"; plaintiff making a trackage charge for placing the car on the public team track. Each shipment was "by the direction of the defendants moved to Madisonville, Ohio, under a new bill of lading or contract of shipment" made by defendants, at the local or intrastate rate. On all the cars not so reconsigned within 24 hours (the free time allowed for reconsigning carload freight) plaintiff charged defendants demurrage or car service at the rate of $1 per day per car for the time of detention beyond the free time limit. It also charged demurrage on all the cars at Madisonville after the free time allowed for unloading, viz. 48 hours. The interstate rate from the point of origin to Madisonville in each case exceeded the sum of the interstate rate and the local rate from Oakley to Madisonville, and the defendants took the course they did for the purpose of getting the lower rates. This suit is for the excess. The District Judge overruled a demurrer to the petition, and, defendants declining to plead over, rendered judgment against them for the excess claimed. This writ is to review that judgment.

[1] The case turns upon the question whether the shipments from Oakley to Madisonville were purely local, or whether, on the other hand, they retained their original interstate character as being merely continuations of the initial interstate movements from the points of origin to Oakley—in other words, whether defendants' original and continuous intention to rebill and ship to Madisonville, after arrival at Oakley, made the continued carriage, although local in form, essentially interstate. In the latter case the transportation was within the exclusive jurisdiction of the Interstate Commerce Commission, the interstate rate controlled and the judgment below was right. It is well settled that whether a given transportation is interstate or intrastate must be determined by the essential character of the commerce, and that an interstate character cannot be evaded by the mere device of billing to an intermediate point and then rebilling from that point. So. Pacific Term. Co. v. Interstate Commerce Commission, 219 U. S. 498, 31 Sup. Ct. 279, 55 L. Ed. 310; Ohio R. R. Com. v. Worthington, 225 U. S. 101, 32 Sup. Ct. 653, 56 L. Ed. 1004; Texas & N. O. R. Co. v. Sabine Tram Co., 227 U. S. 111, 33 Sup. Ct. 229, 57 L. Ed. 442; Louisiana R. R. Com. v. Texas & Pac. R. Co., 229 U. S. 336, 33 Sup. Ct. 837, 57 L. Ed. 1215; A., T. & S. F. Ry. Co. v. Harold, 241 U. S. 371, 36 Sup. Ct. 665,

60 L. Ed. 1050; Kanotex Refining Co. v. A., T. & S. F. Ry. Co., 34 Interst. Com. Com'n, 271; McFadden v. Alabama Gt. Southern Ry. Co. (C. C. A. 3) 241 Fed. 562, 154 C. C. A. 338. On the other hand, if the shipments from Oakley to Madisonville were purely local in character the intrastate rates were properly paid, and the judgment below was wrong.

[2] Does the case fall within, or is it distinguishable from, the cases above cited? So. Pacific Term. Co. v. Interstate Commerce Commission, supra, is of immediate pertinency only as declaring the broad proposition that the Interstate Commerce Commission has jurisdiction to regulate charges of a terminal company which is a part of a railroad and steamship system and operates terminals such as those of the Southern Pacific at Galveston, Tex. Among the prominent considerations recognized in that case, as establishing the interstate character of the shipments there in question, were that the Terminal Company's piers were facilities of import and export traffic—a means of transition from land carriage to water carriage; that they were controlled by the Southern Pacific Company through stock ownership; that the goods in question were destined for export, and by their delivery to the railway must be considered as having been delivered for transportation to their foreign destination, the terminal company being part of the railway for that purpose.

In Ohio R. R. Com. v. Worthington, supra, it was held that a rate fixed by a state railroad commission on that part of interstate carriage which includes the actual placing of the shipments into vessels, ready to be carried beyond the state destination, is, as to merchandise intended for points beyond the state (in this case Ohio coal destined for upper lake ports), a burden on interstate commerce, and beyond the power of the state to impose, even if the merchandise is billed from a point within the state to the point where the vessel is—in that case from the Ohio mines to an Ohio port on Lake Erie. Stress was laid on the fact that the intrastate rate was intended to and did cover an integral part of the interstate movement—"the transportation from the mine to the Lake Erie port, the placing upon the vessel and the trimming or distributing in the hold, if required, so that the vessel may complete such interstate carriage." 225 U. S. 109, 32 Sup. Ct. 656 (56 L. Ed. 1004).

In Texas & N. O. R. R. v. Sabine Tram Co., supra, it was held that shipments of lumber on local bills of lading from one point in a state to another point in the same state, destined from the beginning for export, were, under the circumstances of that case, foreign and not intrastate commerce. Among the facts specially found in that case were that the lumber was ordered, manufactured and shipped for export; that the shipper regarded the shipments in question as export shipments, and "demanded, expected, and received the use of terminal facilities, additional free time, and other privileges accorded to shippers of export freight under export tariffs" (227 U. S. 116, 33 Sup. Ct. page 231 [57 L. Ed. 442]), and all the lumber was in fact unloaded by the shipper from the cars into the terminal company's slips or upon its docks in reach of the ship's tackle and loaded into ships previously

chartered for the purpose by the shippers, and which carried the same themselves direct to Europe.

In Louisiana R. R. Com. v. Texas & Pacific Ry. Co., supra, it was held that staves and logs intended by the shipper to be exported to foreign countries and shipped from points within the state to a seaport, also therein, from which they were to be exported, were in interstate and foreign commerce, notwithstanding they were shipped on local bills of lading for the initial journey, and so were subject to interstate and not intrastate charges, and within federal and not state jurisdiction. This case is in the same class with the Sabine Tram Company Case, supra. Among the considerations mentioned, as indicating a continuous carriage, was the fact that "no demurrage was tendered by the shipper or consignee or received by the carrier on account of delays in handling beyond the four days allowed by the rules." 229 U. S. 340, 33 Sup. Ct. page 839 (57 L. Ed. 1215).

In Atchison, T. & S. F. Ry. Co. v. Harold, supra, it was held that, although the original interstate bill of lading of a car shipment was surrendered for an intrastate bill while the car was still in transit, yet, if the car moved in continuous interstate commerce shipment from its departure to its destination, delivery at an intermediate point and substitution of an intrastate bill of lading is not such a new and distinct shipment as takes the car out of interstate commerce.

In Kanotex Refining Co. v. A., T. & S. F. Ry. Co., supra, the company's refinery was at Caney, Kan., from which it shipped oil to one of its distributing stations at Woodward, Okl. In order to get the benefit of lower freight rates, it billed its shipments to Kiowa (the point in Kansas nearest Woodward) consigned to an agent, whose sole function was to act as consignee and to rebill the interstate shipments to Woodward, he occasionally paying freight charges therefor. "As a matter of fact, the cars were sometimes actually handled from Caney through to Woodward in the same train." No actual possession was taken by the agent and "no constructive possession other than that involved in the rebilling at Kiowa as described." 34 Interst. Com. Com'n, 272. The Commission held that what the shipper desired and received was "through movement," and that the billing and rebilling was done "without taking or intending to take a real possession of the shipments" at Kiowa, and "were mere pro forma and paper transactions without substance, except as they might be the means of getting the through service to Woodward at less than the lawful rates." 34 Interst. Com. Com'n, 276.

In McFadden v. Alabama Gt. Southern Ry. Co., supra, cotton was shipped from Albertville, Ala., by the N., C. & St. L. Ry. to Attalla, Ala., thence by the Alabama Great Southern to Birmingham, Ala., on through bill of lading to that point. At Birmingham the cotton was compressed (the right to interrupt the journey for that purpose existing under the original shipment), the original bill of lading surrendered and the cotton rebilled to points without the state, not, however, from Birmingham, but back from Attalla, the rate from which point to the point outside the state (minus the local rate already paid from Attalla to Birmingham, for which the shipper got credit) plus the local

rate previously paid from Albertville to Attalla, was less than the full rate from Albertville to the point outside the state. In affirming judgment for the difference between this latter through rate and the sum of the rates paid, stress was laid upon the facts that the cotton remained at Birmingham "always in the possession and control of the carrier," that it was never delivered there to the shipper "as it might have been," and no control taken by him, except by rebilling from Attalla cotton then physically present at Birmingham. 241 Fed. 564, 566, 567, 154 C. C. A. 338.

We are not cited to, nor have we found, any cases more favorable to plaintiff's contention than those we have discussed. Neither of these cases is on all fours with the instant case. In the three water carriage cases the shipments could not move beyond the port in question except in interstate or foreign commerce. In none of the cases cited was an actual delivery to the consignee, previous to reshipment, made or attempted. In at least two of the cases a lack of such delivery is emphasized. None of them involved the feature of making payment of actual demurrage charges for delay before reshipping. In one of them, as we have seen, the absence of payment or tender of such charge was commented upon, and in another the fact of the actual allowance of additional free time because of the nature of the shipment. All of them seem to have turned, expressly or impliedly, upon the question of continuity of movement, actual or constructive.

Is the instant case distinguished from the cases cited? The petition contains, as we have seen, an express averment of defendants' order for the delivery of the cars to them at Oakley, an implied averment of such delivery there on the team tracks, express averments of demurrage charges for detention thereon, the receipt by defendants of the lumber at Oakley, and a subsequent reshipment to Madisonville—prima facie indicating a physical possession taken by defendants at Oakley; the mere fact that removal of the lumber from the cars at Oakley was not required does not impress us as enough to convert, as matter of law, an otherwise actual delivery into one merely constructive, colorable or evasive. Considering the petition as a whole, we think its natural construction is that while defendants intended ultimately to receive and use the lumber at Madisonville, and so to reship from Oakley, yet the latter point was regarded by both parties as the ultimate destination and place of delivery of the particular shipment itself, as distinguished from the ultimate destination of the lumber. There is no averment of a rebilling while the lumber was in transit, nor that any of the shipments were or could have been handled, after rebilling at Oakley, in the same train which brought them into Cincinnati, so making an actually continuous shipment, as in the Kanotex Case. Indeed, the petition, by necessary implication, negatives a continuous movement in fact. The fact that defendants obtained switching from Cincinnati to Oakley does not indicate that they were getting something for nothing. The switching was not "free"; the charge therefor was merely absorbed in the rates from the southern point to Cincinnati.

A new shipment by a consignee of an interstate shipment in the cars in which received to other points of destination does not necessarily

establish continuity of movement or prevent reshipment to a point within the same state from having an independent and intrastate character. Gulf, Colorado & S. F. Ry. Co. v. Texas, 204 U. S. 403, 27 Sup. Ct. 360, 51 L. Ed. 540—the Texarkana Case; C., M. & St. P. Ry. Co. v. Iowa, 233 U. S. 334, 343, 34 Sup. Ct. 592, 58 L. Ed. 988. In the former of these cases it was held that the interstate shipment (in that case carload lots) on reaching the point specified in the original contract of transportation ceased to be an interstate shipment, and that its further transportation to another point within the same state, on the order of the consignee, is controlled by the law of the state and not by the interstate commerce act. In the other case it was held that shipments of coal when reshipped after arrival from points without the state (and acceptance by the consignees) to points within the state on new and regular billing forms constituted intrastate shipments and were subject to the jurisdiction of the state railroad commission. We have not overlooked the fact that in the Texarkana Case the consignee did not have full title to and control of the shipment until its arrival at the point of reshipment; nor that in the Iowa case the point beyond which the coal was to be shipped was not determined until after its arrival at the point where the reshipment occurred. In the Ohio Railroad Commission Case, supra, the Texarkana Case was expressly distinguished upon the ground that "there a new and independent contract for intrastate shipment was made, the interstate transportation having been completely performed." It was similarly distinguished in the Sabine Tram Company Case, supra (227 U. S. 130, 33 Sup. Ct. 229, 57 L. Ed. 442)—citing the language just quoted—as well as in others of the cases we have discussed. But neither of these two cases has been overruled or criticized.

While the question is not free from difficulty, upon a careful consideration of the authorities we are disposed to think that the character of the shipment from Oakley to Madisonville is to be ultimately tested by the consideration whether or not there was an actual good-faith delivery of the shipments to the consignees at Oakley, and actually a new and independent shipment therefrom by defendants to Madisonville while the lumber was physically present and in their possession, and that the effect of such good-faith delivery, possession and independent reshipment is not, as a mere matter of law, converted into an interstate shipment by the existence of an original and continuing intention to so reship in intrastate commerce for the saving of expense.

May not a passenger by rail, desiring to travel from a point in one state to a point in another state, lawfully pay the local fare to the state line (or the interstate fare to a point beyond the state line) and then pay the local fare therefrom to a point within the state; or, again, may not one, in the course of shipping freight from one state to another, lawfully ship to the state line or just beyond it, at the local or interstate rate, as the case may be, and there receive actual delivery of the freight and thereupon reship locally? Neither of the suggested cases seems, in principle, opposed to the Interstate Commerce Act, for, in each case, the passenger or shipper, as the case may be, loses the benefit

of a through shipment. The passenger may have to leave the train to buy a new ticket, or may be required to pay his fare, perhaps at an inconvenient time, or to take the risk of inconvenience otherwise, as in respect to rechecking baggage. The shipper of freight must personally or by agent go to the trouble of accepting delivery and making reshipment, perhaps submitting to delays and (if in carload shipment) perhaps to unloading and reloading and possibly to paying demurrage. He also loses the benefit of the liability of the initial carrier. In each case some benefit incident to through transportation is given up. That such transaction is not necessarily a mere evasion of the act, and so unlawful, finds express support in Gulf, etc., Ry. Co. v. Texas, supra, 204 U. S. at page 413, 27 Sup. Ct. 360, 51 L. Ed. 540.

As the petition stood, the demurrer thereto should, in our opinion, have been sustained.

The judgment of the District Court is reversed, and the record remanded to that court, with directions to take further proceedings not inconsistent with this opinion.

UNITED STATES v. KRAFFT.

(Circuit Court of Appeals, Third Circuit. April 23, 1918.)

No. 2323.

1. WAR ⇐4—ESPIONAGE ACT—INCITING INSUBORDINATION, ETC., IN MILITARY OR NAVAL FORCES.

To constitute an offense under the provision of Act June 15, 1917, c. 30, tit. 1, § 3, 40 Stat. 219, that "whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States" shall be guilty of a crime, it is sufficient that the accused did the acts charged, and that they were done willfully and with intent to cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces, and it is not necessary to show that they produced the effect intended.

2. WAR ⇐4—ESPIONAGE ACT—PROSECUTION FOR VIOLATION—TRIAL—INSTRUCTIONS.

In a prosecution under Act June 15, 1917, c. 30, tit. 1, § 3, 40 Stat. 219, for willfully attempting to cause insubordination, disloyalty, mutiny, and refusal of duty in the military and naval service of the United States, the court *held* to have properly submitted the cause to the jury, under instructions which correctly construed the statute and stated the questions of fact for determination by the jury, and the verdict of the jury, finding the defendant guilty, *held* sustained by the evidence.

3. WAR ⇐4—ESPIONAGE ACT—PROSECUTION FOR VIOLATION—EVIDENCE.

On such trial, evidence of opinions expressed by defendant at some previous time and place was immaterial, and properly excluded.

In Error to the District Court of the United States for the District of New Jersey; J. Warren Davis, Judge.

Criminal prosecution by the United States against Frederick Krafft. Judgment of conviction, and defendant brings error. Affirmed.

Certiorari denied, 38 Sup. Ct. 582, 247 U. S. —, 62 L. Ed. —.

Morris Hillquit, of New York City, and H. P. Lindabury and Henry Carless, both of Newark, N. J., for plaintiff in error.

Charles F. Lynch, U. S. Atty., of Newark, N. J., and Andrew J. Steelman, Asst. U. S. Atty., of Jersey City, N. J.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below Frederick Krafft was charged with the violation of section 3 of the Act of June 15, 1917, which provides:

"Whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, * * * shall be punished by a fine of not more than $10,000, or imprisonment for not more than twenty years, or both."

The indictment contained four counts, the first of which charged defendant with "knowingly, willfully, and unlawfully attempting to cause insubordination in the military and naval forces of the United States, in that he, the said Frederick Krafft, did then and there speak to Martin T. Gunning, corporal in Company K, First New Jersey Infantry, who had been duly mustered into the military service of the United States, and Albert Barton, corporal in the First New Jersey Infantry, who had been duly mustered into the military service of the United States, and divers other persons who were members of the military forces of the United States, and did then and there say: 'I can't see how the government can compel troops to go to France.' 'If it was up to me, I'd tell them to go to hell.' 'It's a damn shame.' 'I can't see why the Socialists here have not the same rights as in Germany.' 'They send their own Senators down to Washington, and they will not let the people do it'—and divers other words and sentences which are to the grand jury unknown." The count concluded with the averment that this was done "with the intent of him, the said Frederick Krafft, to influence, persuade, and cause the said persons, who were members of the military forces of the United States, to become insubordinate, contrary to the form of the statute," etc. The second count averred Krafft had used the same words and in like hearing with intent "to influence, persuade, and cause the said persons, who were members of the military forces of the United States, to become disloyal to the United States," etc.; the third count charged him with intent "to influence, persuade, and cause the same the said persons, who were members of the military forces of the United States, to mutiny, to the injury of the military service of the United States"; and the fourth count with intent "to influence, persuade, and cause the said persons, who were members of the military forces of the United States, to refuse to do the duties imposed on them as such members of the military forces of the United States, to the injury of the United States," etc.

To this indictment the defendant pleaded not guilty. The jury heard the proofs, which consisted of five witnesses, all of whom were enlisted men, and who were present on the occasion when Krafft is al-

leged to have used the words charged, and who were called on behalf of the government, and also the testimony of the defendant and twelve other witnesses, whose testimony was to the effect that Krafft had not used the language specified in the indictment.

[1] At the conclusion of the testimony the defendant, who was represented by able counsel, asked the court to direct a verdict of acquittal on the ground, inter alia:

That "the facts or statements charged in the indictment do not show any intent to cause the thing charged; that is, insubordination, disloyalty, mutiny, or refusal of duty. That, while they may produce certain results, there is nothing in the words themselves that tends to produce that result, to the extent of charging intent, which is a necessary element in the charge. That there is no proof in this case that the defendant made these statements with the intent to do the things charged in the four counts of the indictment; that is, with intent to cause insubordination in the army, or with intent to cause disloyalty in the army, or with intent to cause mutiny in the army, or with intent to cause refusal of duty in the army. And I submit that, without intent being established by the affirmative case of the government, no conviction can lie."

As further ground to support such request for binding instructions of acquittal, the defendant contended:

"That the evidence cannot be complete until it is shown that these things are to the injury of the service of the United States, * * * and that there is no evidence showing that such injury has occurred to the service of the United States. Assuming that the words were said, there is no evidence that the words had any more effect than to cause a disturbance in the crowd."

This request the court denied, saying:

"As I view it, there are really two questions, both of which are jury questions. The first question is whether or not the defendant spoke the words which are alleged in the indictment and which he is charged with speaking. If he did not, that ends the case. The jury will determine whether he did that or not. Second, if he did, what was the intent in his own mind in speaking them? What effect did he intend that they should have upon those who listened, who were already in the service, or might possibly be called into the service; and it seems to me that, under the circumstances, that should be determined by the jury. Therefore, your motion will be denied, and an exception granted."

This holding, viz. that there were two questions of fact involved, first, were the words charged spoken? and, secondly, if spoken, what was Krafft's intention in speaking them? what effect did Krafft intend they should have on those hearing them? were afterwards embodied in the charge which is printed in full on the margin.[1]

[1] "The action which you have been called upon to try is an indictment found by a grand jury in this district against the defendant, Frederick Krafft, for the violation of an act of Congress approved June 15, 1917, which provides, among other things, that whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval service, is guilty of the crime which this statute denounces.

"It has been admitted that the United States is at war. There are two considerations which enter into every verdict—the law and the facts. The law is exclusively for the court; the jury have not any business with it, except as it is laid down by the court, and it is the duty of the jury to accept the law as the court defines it. The court alone is responsible for accurately

In thus confining the jury to the two issues specified above, the court in effect denied the contention of defendant's counsel that, to constitute the crime, the government was required to go further, and show, not only that the words were used with the intent to effect insubordination, disloyalty, mutiny, or refusal of duty, but that they ac-

expounding the law to you. The facts are exclusively for the jury, and the jury are to find what the facts were from the evidence, and then determine whether or not, under the testimony and the law as laid down by the court, the defendant is guilty or not guilty. 'Insubordination' is defined by the Standard Dictionary, one of the best authorities, as being 'the state of being insubordinate; disobedience to constituted authority'—which under this statute, is the military or naval authority. 'Disloyalty' is defined by the same authority to be 'the state of being disloyal; unfaithful to one's government'—and in this case it would be disloyalty or unfaithfulness to the constituted military or naval authorities. 'Mutiny' means 'to rise against lawful or constituted authority, particularly in the naval or military service.' 'Refusal of duty' is 'to reject or refuse to perform the duties imposed by the military or naval authorities.' Now, the question for you gentlemen to determine is whether or not the defendant caused or attempted to cause insubordination, disloyalty, mutiny, or refusal of duty, as I have defined those words to you. In your consideration of the facts, and in reaching your verdict, I charge you that the defendant is presumed to be innocent until proved to be guilty beyond a reasonable doubt. A reasonable doubt means a doubt that is founded in reason and arises from the evidence. So, gentlemen of the jury, you are limited to the evidence in your consideration of this case, and your verdict should be founded upon nothing else than that—not upon prejudice, sympathy, or any outside, extraneous matter. Your finding of the facts should be determined by what you have heard in this courtroom from sworn witnesses whom you have seen. You have listened to them; you have watched them, both for the government and for the defense; and it is within your province to pass upon the credibility of those witnesses, whether you are going to believe this one or the other one—whether this one was deliberately misrepresenting or the other one, or whether this one or that one is mistaken. You are to pass upon their credibility, and upon the weight which you are going to give to their testimony, and find your verdict, not upon their names, not upon their politics, nor upon their creed, but upon the evidence which was presented before you. Politics here and there crept in; but, gentlemen of the jury, it has no place in your consideration. You are to shut your eyes to every last thing except the testimony which was presented before you, and in deliberating upon that use your common sense and all the brains that God has given you, without prejudice, without partiality, and mete out to this defendant what law and justice require.

"An indictment is a charge against a person. The government contends that the defendant violated this statute in causing or attempting to cause insubordination. That you will find in the first count. By 'count' I mean a separate charge. A bill of indictment is based on one or more charges, which charge that the defendant violated the law in this particular or in the other particular, and the separate charges are what are called counts. The first count charges as I have stated to you. The second count charges, in substance, that the defendant violated this statute in causing or attempting to cause disloyalty in the military or naval forces of the United States. The third count is that he caused or attempted to cause mutiny in the military or naval forces, to the injury of the government; and the fourth count is that he caused or attempted to cause refusal of duty in the military or naval forces of the United States, to the injury of the same. If he did that, gentlemen of the jury, he is guilty. If he did not do it, he is not guilty. It is for you to determine whether or not he did. In your deliberations there will be two questions which you will have to decide. The government charges that he violated the statute in the ways in which it is charged in the indictment by

tually did produce that effect, and injured the United States service. Did the court commit error in so holding? Was it necessary for the government, not only to show the defendant used the words, not only that he used them with intent to cause insubordination, but that his counsel and purpose actually caused mutiny, insubordination, disloy-

the utterance of these words at the time and place which has been testified before you: 'I cannot see how the government can compel troops to go to France. If it was up to me, I would tell them to go to hell. It is a damned shame. I cannot see why Socialists here have not the same rights as in Germany. They send their own Senators down to Washington to vote on conscription, and they will not let the people do it.'

"The first question, gentlemen of the jury, which you will have to determine, is whether or not the defendant said these words. If he did not, that ends the case, and your verdict should be not guilty. If you should reach the conclusion that he did say those words, then a further question arises, and that is: What did the defendant intend by the use of those words? As a matter of law, it would not be sufficient for him to say those words, without intending willfully to cause insubordination, disloyalty, mutiny, or refusal of duty, or some of them, in order to constitute guilt. In order to hold the defendant guilty, he must have said those words with the intention of accomplishing some one of those things. Now, that might be accomplished by speaking directly to soldiers who were in the military forces of the United States. It might be accomplished by speaking to a crowd partly composed of those who were subject to draft and might be called thereafter. It is for you, from all the facts which have been testified to, to determine, first, whether or not the defendant used the words which he is alleged and charged to have used. If you find that he did, then it is for you to determine with what intention he used those words, because, if he did not use those words willfully and intentionally to cause or to attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, as I have defined them to you, he is not guilty; but, if he did, then he is guilty.

"I have tried to make the law governing the case plain to you gentlemen. The court has no idea as to the facts. If he had, he would not tell you; that is your business. You will therefore retire and bring in your verdict.

"I have several requests here from the defendant. The first request I think I have covered; the second I have covered; the third, fourth, and fifth I have covered. In fact, I think I have covered all of them, except the last one. Is that right, Mr. Lindabury?

"Mr. Lindabury: Yes.

"The Court: Then, as I understand it, they are all withdrawn, except the last one, as having been substantially covered in my charge.

"Mr. Lindabury: Yes, your honor.

"The Court: Gentlemen, the last request is: 'If the jury finds that the defendant made the statements alleged in the indictment, and that the statements were made as the result of sudden anger and without deliberation, the defendant must be acquitted.' I so charge you. As I understand this point, it is directed to this phase of the law: That the defendant cannot be convicted unless he did what he did with intention. When he said those words—if he said them—if he intended willfully to cause one of those things which the statute denounces, then he is guilty; if he did not, he is not guilty.

"It is important, gentlemen of the jury, that nothing should interfere with the military and naval forces of the United States, when it is at war and in a death struggle. It is just as important, gentlemen of the jury, that at this time and all other times the liberty of individual citizens who have not committed crime be protected. So, in your deliberation, you will consider the fact, and the fact alone, as to whether this defendant made these statements, and, if he did, did he make them with intention willfully to cause insubordination, disloyalty, mutiny, or refusal of duty? But, gentlemen, the importance of noninterference, as I said a while ago, with the military and naval forces

alty, or refusal to obey orders? We cannot accept this view. Indeed, the clear statement of the defendant's proposition is its best refutation, for if that position be sound the defendant's guilt would be determined, not by what he did in the way of counseling disloyalty, but in what his hearers did in the way of following his directions. In other words, the defendant could do all in his power to bring about disloyalty, but as long as he did not succeed he committed no crime; but, if his counsel induced action, and that action resulted in insubordination or mutiny, then what the defendant did by way of counsel was later made a crime by the person who followed his counsel. Manifestly, Congress had no such purpose in view, nor can the simple and plain words of the act be given such meaning. In that regard the statute does not specify the writings, speech, or indeed the kind of means to be used; it makes one comprehensive, inclusive crime—"whoever, when the United States is at war shall cause." That means actually cause, succeed in causing; that is one crime the statute specifies, and also whoever shall willfully "attempt to cause" is put on the same status.

Both "willfully causing" and "willfully attempting to cause" are by the statute made alike criminal; and, such being the case, the attempt to cause being forbidden, as well as the causing, there is no ground to construe or apply this statute on the theory that insubordination, mutiny, or disloyalty must be effected. To so hold would be to defeat the whole purpose of the statute. For the purpose of the statute as a whole was not to wait and see if the seed of insubordination—in this case, sown in August in Newark; at a later date, in some camp—sprang into life and brought forth fruit, but it was to prevent the seed

when the United States is at war, should not influence you in the least to find a verdict that is not based absolutely upon the evidence, by the ordinary rules of logic and common sense; in other words, it should not make you convict a man more quickly than you would do in other times or under other circumstances. Your sole duty consists in finding just what the facts are, and the fact that we are at war only bears on that as giving rise to this statute. So, shut out everything but the evidence, as I have charged you, every influence of every kind, and use your common sense and the ordinary rules of logic, and weigh the testimony of all of these witnesses, both pro and con, as they have related what occurred that night at that place, and determine whether the defendant used those words, and, if he did, what his intention was—whether he used them willfully, with intent to cause insubordination, disloyalty, mutiny, or refusal of duty.

"Mr. Lindabury: Your honor said that it is important that the conduct of the war be not interfered with in any way. I feel that that leaves the impression that any interference is a violation of this statute, and I would like to have an exception to that part of your honor's charge.

"The Court: Do you want me to change that, or charge it over in any way?

"Mr. Lindabury: The point being that any interference is not a violation of law. It is only the things that are prohibited by the statute that the jury should consider as interference.

"The Court: Gentlemen of the jury, Mr. Lindabury has called my attention to the fact that I stated that it was important that the naval and military forces of the United States should not be interfered with in the discharge of their duty, or words to that effect. We have in this case nothing to do with that at all, unless it comes within the provisions of this statute—only that the defendant did or said something willfully and with intent to cause insubordination, disloyalty, mutiny, or refusal of duty."

from being sown initially. Moreover, it is clear that this new statute was to enable the civil courts to prevent the sowing of the seeds of disloyalty, for with the fruits of disloyalty, to which a misguided soldier might be led by the disloyal advice, the military court-martial already provided was sufficient. The statute was not addressed to the misguided man who was in the service, but was manifestly to include any one—for "whoever" is a broad inclusive word—who in any way willfully created or attempted to cause insubordination. Clearly the court below was right in holding that if in fact the defendant used the language alleged, and if his purpose was willful to cause insubordination, then the statute was violated. Clearly it was right in holding that, to constitute the crime at the start, it was not necessary for that willful purpose to succeed.

[2] Turning to the charge of the court, we note, first, that in pursuance of its duty to expound the law the court quoted the statute in full, and then explained to the jury, in words to which no exception can be taken, what constituted insubordination, disloyalty, mutiny, and refusal of duty, respectively, viz.:

"'Insubordination' is defined by the Standard Dictionary, one of the best authorities, as being 'the state of being insubordinate; disobedience to constituted authority'—which, under this statute, is the military or naval authority. 'Disloyalty' is defined by the same authority to be 'the state of being disloyal; unfaithfulness to one's government'—and in this case it would be disloyalty or unfaithfulness to the constituted military or naval authorities. 'Mutiny' means 'to rise against lawful or constituted authority, particularly in the naval or military service.' 'Refusal of duty' is 'to reject or refuse to perform the duties imposed by the military or naval authorities.'"

The jury were then instructed that the question for it to determine was "whether or not the defendant caused or attempted to cause insubordination, disloyalty, mutiny, or refusal of duty, as I have defined those words to you." The charge called the jury's attention to the presumption of innocence of the defendant, to their duty to give him the benefit of all reasonable doubt, and that their verdict should be founded wholly on the testimony of witnesses before them, and should not be based on prejudice, sympathy, or any extraneous matter. The jury were then instructed that the first question for them was to determine whether the defendant had used the alleged words, and, if they found he did not, that ended the case. If they found he did, then they were to take up the further question of Krafft's intent in using those words; the court in that regard saying:

"If you should reach the conclusion that he did say those words, then a further question arises, and that is: What did the defendant intend by the use of those words? As a matter of law, it would not be sufficient for him to say those words, without intending willfully to cause insubordination, disloyalty, mutiny, or refusal of duty, or some of them, in order to constitute guilt. In order to hold the defendant guilty, he must have said those words with the intention of accomplishing some one of those things. Now, that might be accomplished by speaking directly to soldiers who were in the military forces of the United States. It might be accomplished by speaking to a crowd partly composed of those who were subject to draft and might be called thereafter. It is for you, from all the facts which have been testified to, to determine,

first, whether or not the defendant used the words which he is alleged and charged to have used. If you find that he did, then it is for you to determine with what intention he used those words, because, if he did not use these words willfully and intentionally, to cause or to attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, he is not guilty; but, if he did, then he is guilty."

The court further charged that:

"If the jury finds that the defendant made the statements alleged in the indictment, and that the statements were made as the result of sudden anger and without deliberation, the defendant must be acquitted."

We have thus quoted from the charge at length, to show that the law was properly construed by the court, and the questions of fact were clearly and properly defined, and their determination left to the jury. The jury having found the words charged were used, and that Krafft used them with the willful intent charged, we are bound to accept this verdict and these findings as conclusive, if there was any evidence from which a jury could reasonably draw the findings it has made. Humes v. United States, 170 U. S. 210, 18 Sup. Ct. 602, 42 L. Ed. 1011.

This court has only appellate jurisdiction, and, no matter what our opinion of the facts may be, we cannot, as the court below could have, grant a new trial; but our province is to examine the evidence, and ascertain if there was evidence to submit to the jury, or, to put it in another way, whether it was the court's duty to withdraw the case from the jury and direct the defendant's acquittal. With that in view, the judges of this court have severally examined and collectively discussed all the evidence, and we agree that the court below was bound, under the proofs, to submit the case to the jury. As the record comes before us, while we find much testimony given by the defendant and the large number of witnesses called by him, which testimony, if believed, would have warranted the jury in finding the defendant had never used the words alleged, we also find the testimony of some witnesses, much fewer in number, but whose testimony, if believed, warranted the jury in finding the words alleged were spoken by the defendant. It is neither our province nor purpose to discuss that testimony. That was wholly for the jury, who saw and heard the witnesses, and they were the tribunal of the defendant's fellow citizens the law made judges of the truth of the testimony for and against the defendant. Our duty is to see whether the government produced any such material testimony against him that it had to be submitted to the jury.

Referring, first, to the proof that Krafft had used the words alleged and specified in the indictment: The record shows, if believed, such proof was given by two noncommissioned officers—Gunning and Barton. These two men were together, and had the same opportunity of seeing and hearing. Gunning's testimony was:

"I do not see why the government can compel troops to cross the ocean. It is not in the Constitution. It is a damned shame. Why the hell should we do it? Why have not the Socialists of America the same right as they have in Germany, to vote for or against the war? They send their own Senators to vote for conscription. Why don't the people have a chance?"

Barton's testimony was:

"When I first saw him, I had come down from the Mandarin, Corporal Gunning and myself, and he stopped to light a cigarette, and then all of a sudden I heard somebody hollering, 'If it was up to me, I would tell them to go to hell.' I said to Corporal Gunning, 'There is something the matter over there;' and we started over, and we got in the center of the crowd, and when we got there he was saying: 'I cannot see how the government can compel troops to go to France. If it was up to me, I would tell them to go to hell. It is a damned shame. Why have not the Socialists of America the same privilege as they have in Germany?' He said: 'They have their own Senators down there vote for conscription, instead of having the people vote.' The crowd was interrupting him all the time. Q. You have said 'he' and 'him' all the time. Whom do you mean? Who was doing this talking? A. Mr. Krafft."

In view of this proof, it was the court's duty to submit to the jury whether they believed the testimony of these men, or that of the defendant that he had not used the words, or of his many witnesses to the effect that he had not used them, that they had not heard them, or that they were used by men in the crowd, and not by the defendant. The jury had all these witnesses before them; they could judge of the weight to be given to each severally, the opportunity they had to see, their manner on the stand, and all those elements which enabled the jury to fairly and justly determine whether the words charged were spoken that night by Krafft. The jury having found the words were used, this court must go further, and inquire: Was there any evidence, any facts, or whether there were any circumstances or surroundings, from which the jury could fairly infer they were willfully used by the defendant, with the willful intent of causing or attempting to cause insubordination in the military forces of the United States?

In that regard the proofs tended to show the defendant was a man of mature years, well educated, accustomed to public speaking, and his purpose was to persuade people to the beliefs he espoused. He was a man of much public prominence, had been a candidate for Governor of New Jersey, a man whose vocation as an editor turned his attention to public affairs, and whose purpose and paid or volunteered occupation was to educate and persuade his hearers to his beliefs. The proofs also show that he was speaking from an elevated platform, in a central place in a populous city, to a large crowd, and that in the crowd were from 30 to 50 men in uniform, who were plainly distinguishable. The United States was at war; the conscription act had been passed, which subjected the men selected to the orders of the military authorities of the country. Under such circumstances, a jury could reasonably infer that a man who undertakes to lead his hearers to adopt his spoken views must, in reason, be held to have intended his words should have, if followed, the effect in action which his counsel in words advised.

As we have seen, the court instructed the jury that, if the words were spoken in sudden anger or without deliberation, they should acquit. The verdict must therefore be taken as a finding that the alleged words were not uttered in sudden anger, but with deliberation. A man who has thus spoken with deliberation must be held to have intended the natural and probable consequences of his words; "for by thy words thou shalt be justified, and by thy words thou shalt be condemn-

ed." Considering, then, the time, the fact of the country being at war, the audience (composed of both soldiers and civilians) to whom the words were addressed, the vehemence with which they were spoken, the duty of obedience which men in the service, or men liable to service, owed to the military authority, the impending conscription then in prospect, and the likelihood that all men in the service might be ordered overseas, can we say, as a matter of law, the language used at the time it was did not tend to cause, or was not an attempt to cause, insubordination? And, bearing on the relevance and significance of the time and circumstances words are spoken, we may repeat what was heretofore said:

"War is the dividing line. What was only foolish and unwise in word and deed last week, in peace, may be treason when war comes. Remember, when war comes, no man can serve two masters. As of old the message comes: 'Choose ye this day whom ye will serve.'" [2]

Clearly, then, this question of willful intent was one for the jury to determine, and by their verdict they have determined the willful purpose of the defendant was to cause insubordination. And in view of that finding, and under the law, we must accept the verdict of the defendant's twelve fellow citizens, which verdict in substance has found a matured and experienced public man advising younger and more impressionable men to insubordination in the military service. And we cannot close our eyes to the fact that such advice, if followed by these young men, might later subject them to court-martial and execution.

We have recited these facts at length, to show the defendant has had a court trial, a fair hearing, the aid of able counsel, and that the testimony of his witnesses has been heard and decided by a jury of his fellow citizens. Such being the case, there is no ground for this appellate court setting aside this verdict and the sentence imposed thereon, unless the court committed error in admitting or refusing to admit evidence. These latter assignments have had our thoughtful attention, but we find no error therein.

[3] The first was in the court's refusal to allow as evidence the testimony of a witness who had heard the defendant some time previously say he was in favor of the war with Germany. We fail to see how any expression of opinion on the part of the defendant at some other time and place was material to the present issue, which issue was: First, did the defendant use, on August 9, 1917, at Newark, the language alleged? and, second, if so, did he use it with the willful purpose to cause or attempt to cause insubordination? What he said or did at other times and places was not material to the issues on trial.

Another assignment referred to allowing the witness Gunning, in answer to the question, "How far could a person of ordinary sight recognize a soldier in that light, if standing upon a box of the height of the one on which the defendant was standing that night?" to testify, "With moderate sight he should recognize a soldier in uniform at a distance of 500 feet or more." The admission of such testimony must,

[2] Instructions given to applicants for naturalization in court at Philadelphia, April 6, 1917.

in the nature of things, be largely a question of judicial discretion, and unless we find an abuse of discretion, or that the defendant was prejudiced by such testimony, the cause should not be reversed. We are of opinion the court committed no error. This witness had already testified as follows:

"Q. And Market street to your knowledge is a sort of a great white way, well lighted up at night? A. Yes. Q. How is it lighted up at night? A. It is very bright. It is known as a white way. Q. Was it light enough for you to see uniforms in the audience around you? A. Yes, sir. Q. It was light enough for you to pick out so many uniforms around you? A. Yes. Q. How far away could you detect that a man was a soldier? A. I would know he was a soldier if he was 500 feet away. Q. In that light could you see a soldier's uniform 500 feet away? A. Yes. Q. Are you sure of that? A. Positive."

After this testimony the witness was then asked, "Could you tell that, if you were standing on the soap box that the defendant was standing on—could you see that far and detect the uniform?" and on objection being made the court itself suggested the question be put in the form in which it was allowed. Manifestly, this question, proper as we view it, lost any significance it had, when admitted, in view of the direction the proof on the part of the defendant took, for not only did the defendant, when he went on the stand, make no point of not being able to see the uniformed soldiers in the crowd, but the testimony given by some of his own witnesses was that the place was brightly illuminated.

Finding no error in the record to warrant reversal, the record must be remanded to the court below, and its judgment be affirmed.

BREITMAYER v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. March 5, 1918.)

No. 3105.

1. ARMY AND NAVY ⊜20—SELECTIVE DRAFT ACT—CONSTITUTIONALITY.
Selective Draft Act May 18, 1917, c. 15, 40 Stat. 76, is constitutional.

2. ARMY AND NAVY ⊜40—OFFENSES—FAILURE TO REGISTER—EVIDENCE.
In a prosecution for willful failure and refusal to present himself for, or to submit to, registration, as required by Selective Draft Act, § 5, and the presidential proclamation thereunder, evidence *held* sufficient to establish the corpus delicti, showing that defendant was within the draft age and that he failed to register in the precinct where he permanently resided.

3. CRIMINAL LAW ⊜430—CERTIFIED COPIES—ADMISSIBILITY.
As Act Mich. June 20, 1905 (Pub. Acts 1905, No. 330), providing that original birth certificates taken thereunder shall be transmitted to the secretary of state, was prospective, and made no provision as to records of births in the custody of county clerks under Act Mich. March 27, 1867 (Pub. Acts 1867, No. 194), a certified copy of a birth record in the custody of the county clerk is, under the general rules, admissible in evidence; there being no provision for the certification of such records by the secretary of state, as in case of birth certificates prepared under the act of 1905.

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4. CRIMINAL LAW ⊂339—EVIDENCE—IDENTITY OF ACCUSED.
In a prosecution for failure to register as required by Selective Draft Act, § 5, where defendant was indicted under the name by which he was known, instead of his real name, it was not error, and certainly was not prejudicial, to admit evidence identifying defendant with the person named in a birth certificate, which it was claimed was issued on the occasion of defendant's birth.

5. CRIMINAL LAW ⊂1186(4)—HARMLESS ERROR—DEFECTS IN INDICTMENT—PREJUDICE.
In view of Rev. St. § 1025 (Comp. St. 1916, § 1691), declaring that no indictment shall be deemed insufficient, nor shall the judgment be affected, by reason of any defect or imperfection in matter of form only, which shall not tend to prejudice the defendant, an inaccurate statement as to the voting precinct in which defendant resided, contained in an indictment charging failure to register as required by the Selective Draft Act, must, in view of the usual knowledge prevailing as to such locations, be disregarded.

6. CRIMINAL LAW ⊂535(½)—CONFESSION—CORROBORATION.
Where there is independent testimony tending substantially to prove the corpus delicti, the confession of the accused, as so corroborated, is admissible.

7. INDICTMENT AND INFORMATION ⊂111(2)—EXCEPTIONS—AVERMENTS.
Where a statute defining an offense contains exceptions in the enacting clause, an indictment found under it must aver that defendant is not within such exceptions.

8. CRIMINAL LAW ⊂315—PRESUMPTIONS—CONTINUATION.
Evidence that defendant, who was indicted for failure to register as required by the Selective Draft Act, had been a member of the National Guard some seven or eight years previous, raises no presumption that he was a member of the National Guard at the time he failed to register.

9. ARMY AND NAVY ⊂20—SELECTIVE DRAFT ACT—DUTY TO REGISTER.
An officer or enlisted man of a National Guard unit, not called into federal service until after the day fixed by presidential proclamation for registration in accordance with Selective Draft Act, § 5, does not fall within the provision excepting officers and enlisted men of the National Guard in the service of the United States from registration.

10. ARMY AND NAVY ⊂40—SELECTIVE DRAFT ACT—OFFENSES—EVIDENCE.
In a prosecution for failure to register as required by Selective Draft Act, § 5, evidence *held* sufficient to show that defendant was not a member of the National Guard in the service of the United States at the date of registration.

In Error to the District Court of the United States for the Southern Division of the Eastern District of Michigan; Arthur J. Tuttle, Judge.

Milton V. Breitmayer was convicted of willful failure and refusal to present himself for or submit to registration, as required by Selective Draft Act, § 5, and the presidential proclamation thereunder, and he brings error. Affirmed.

Joseph B. Beckenstein and Maurice Sugar, both of Detroit, Mich., for plaintiff in error.

John E. Kinnane, U. S. Atty., and J. Edward Bland and Louis W. McClear, Asst. U. S. Attys., all of Detroit, Mich.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

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

WARRINGTON, Circuit Judge. The plaintiff in error was indicted June 13, 1917, for willful failure and refusal to present himself for or submit to registration according to requirement of the President's proclamation, and of section 5 of the Selective Draft Act, each bearing date May 18, 1917. Proc. 1917, p. 20; Public No. 12, 65th Congress, c. 15, 40 Stat. pp. 76, 80, U. S. Comp. Stat. Supp. 1917, pp. 61, 66. The indictment in substance charges that defendant, a male person within the prescribed age limits, was required under the proclamation of the President to appear and submit to registration on June 5, 1917, between stated hours, in the city of Detroit at the place of registration in the precinct, being a specified voting precinct, in which defendant "lived and had his permanent home and actual place of legal residence and from which he was not temporarily absent," his residence being designated by street and number, but that he willfully failed and refused so to appear and submit to registration, and that defendant was not at the time "an officer or an enlisted man of the Regular Army or Navy or of the Marine Corps of the United States" nor "an officer or enlisted man of the National Guard or Naval Militia in the service of the United States," nor "exempted or excused from registering under the provisions" of the act of Congress before named.

Upon arraignment defendant waived the reading of the indictment and stood mute, whereupon a plea of not guilty was entered under direction of the court. The cause was heard before the court and a jury, and at the close of the evidence presented by the government, motion made in defendant's behalf for a directed verdict was denied, subject to exception. No testimony was offered for defendant, and no exception was reserved to the charge of the court. Defendant was found guilty as charged, sentence was pronounced, and error is prosecuted.

The scheme of defense relied on was, in the first place, to show constitutional invalidity of the Selective Draft Act, and, in the next place, to require the government strictly to prove the charges of the indictment.

[1] 1. The first feature of the defense must, of course, fail, since the Supreme Court, on January 7, 1918, held the act to be constitutionally valid (Arver v. United States, 245 U. S. 366, 38 Sup. Ct. 159, 62 L. Ed. ——), and this ruling was reaffirmed on the same day in Perkins v. Jones, 245 U. S. 390, 38 Sup. Ct. 166, 62 L. Ed. ——, and again, on January 14, in Goldman v. United States, 245 U. S. 474, 38 Sup. Ct. 166, 62 L. Ed. ——, Kramer v. United States, 245 U. S. 478, 38 Sup. Ct. 168, 62 L. Ed. ——, and Ruthenberg v. United States, 245 U. S. 480, 38 Sup. Ct. 168, 62 L. Ed. ——.

[2-4] 2. In the second branch of the defense it is insisted that the corpus delicti was not proved. Counsel's theory is that the corpus delicti included at least the elements of age and failure to register in the precinct where defendant permanently resided; that there was no substantive proof of either, and hence that admissions of defendant were not sufficient to sustain the conviction. We think there was sufficient proof, apart from the admissions, fully to show both of these elements. As to the question of age, a close relative, who lived near

defendant's place of birth and had known him ever since he was a child, testified in effect that, while he was not sure of defendant's age, yet that "he is about 27 or 28." This is in accord with a birth certificate which was received in evidence, showing the date of birth to have been April 24, 1889. Exception, however, was reserved to the admission of the certificate in evidence on the grounds, first, that it was not certified by the proper official; and, second, that it does not purport to be the certificate of defendant's birth.

These objections are not tenable. It appears in the record without dispute that the birth certificate was "duly certified by the clerk of Jackson county," Mich. Registration of births was provided for by statute approved March 27, 1867. Laws Mich. 1867, p. 266; Comp. Laws Mich. (Ed. 1897) p. 1451. Section 1 required the supervisors or assessors annually to ascertain the births occurring in their respective townships or cities and to make accurate returns of them to the clerk of the county in which the township or city was situated. Section 3 provided that the county clerk should record the births, prescribing the form of record, which included date of birth, name and sex of child, place of birth, and names, residence, and nativity of parents, etc., and requiring each clerk annually to make and transmit to the secretary of state a certified copy of the records in his office concerning births, etc., occurring during the year.

It is urged that the birth certificate should have been authenticated by the secretary of state, instead of the clerk of Jackson county. This claim is based upon a statute approved June 20, 1905. Public Acts Mich. 1905, p. 508. That statute, it is true, provides for the registration of births and the appointment of local registrars. Certificates of births, however, are made out by the attending physicians or midwives on blanks supplied by the secretary of state and distributed by the local registrars, who in turn transmit the originals to the secretary of state. This statute is in terms simply prospective. Thus the secretary of state is made the custodian of all original birth certificates required under the statute of 1905, just as the several county clerks were made custodians of those provided for under the statute of 1867. The statute of 1905, we observe, repealed so much of the act of 1867 as was "inconsistent with" the later act. Still there is no perceivable inconsistency between the two acts so far as the custody of the two sets of original birth certificates is concerned, since no provision was made for transferring the originals of birth certificates in the custody of the county clerks to the custody of the secretary of state. Further, the secretary of state is empowered to furnish certified copies of original birth records which have been transmitted to his office in accordance with the act of 1905, and such certified copies are made prima facie evidence in all courts of the "facts therein stated"; but this power is not extended to birth records held by the county clerks under the act of 1867, nor does any such power appear to have been created at any time respecting these latter birth records. How, then, are such county clerk records to be proved?

In situations similar in principle to this the rule was long since laid down in this country that a copy of a record, duly certified by a public

officer whose duty it is to keep the original, should be received in evidence. United States v. Percheman, 32 U. S. (7 Pet.) 51, 85, 8 L. Ed. 604; Meehan v. Forsyth, 65 U. S. (24 How.) 175, 176, 16 L. Ed. 730; Commonwealth v. Meehan, 170 Mass. 362, 363, 364, 49 N. E. 648; Childs v. State, 55 Ala. 28, 30; 3 Wigmore on Ev. § 1667, at page 2102; 2 Wharton, Crim. Ev. (10th Ed.) § 527c. We therefore hold that the present certified copy of birth certificate is an admissible instrument of evidence wherever relevant to the issue. We have in mind, of course, the objection that this instrument does not purport to be a certificate of defendant's birth. It is true that the certificate states the name of the child to be Vern W., not Milton V., Breitmayer; but the witness who testified to defendant's age, as pointed out, stated, "I know the defendant, Milton V. Breitmayer, have known him all my lifetime," and, further, that defendant's correct name is Vern William Breitmayer. Moreover, another witness closely connected with defendant and on most intimate terms with him testified, "I have known this defendant for the last twelve years by the name Milton V. Breitmayer." Thus, according to the effect of the testimony, defendant was indicted under the name by which he was known, instead of his real name; and we see no error, certainly no prejudicial error, in identifying defendant with the person named in the certificate.

[5, 6] Upon the question whether defendant failed to register, a printed copy of an election book, showing boundaries of election districts and locations of booths, and a map of the city of Detroit showing the wards and districts on the west side of the city, were received in evidence. Exceptions were reserved both to the copy of the book and the map. Neither appears to have been authenticated by any competent official or custodian. We need not, however, pass on the question of admissibility. The relevant parts of both book and map were otherwise proved, and so no prejudicial error arose through their introduction. The testimony shows that defendant had resided at No. 57 Baltimore, West, for nearly a year prior to the day fixed for registration, and that this residence is in the Second ward, Tenth district. It is to be noted that the indictment states that the voting precinct is the Thirteenth district of the Second ward; yet in view (a) of the usual knowledge prevailing as to locations of voting places within a resident's own ward, and (b) of the requirement of section 1025 of the Revised Statutes (Comp. St. 1916, § 1691) to disregard formal defects, etc., it is plain that this mistake in allegation of the indictment did not "tend to the prejudice of the defendant." Ulmer v. United States, 219 Fed. 641, 642, 134 C. C. A. 127 (C. C. A. 6); Simpson v. United States, 241 Fed. 841, 843, 844, 154 C. C. A. 543 (C. C. A. 6); Kasle v. United States, 233 Fed. 878, 883, 884, 147 C. C. A. 552 (C. C. A. 6). In truth no claim of prejudice on this account is made. Further, testimony was offered without objection or contradiction, showing that defendant was "not registered in the Tenth district of the Second ward. No such man is registered there."

Now, in addition to the evidence thus far considered, several witnesses testified to distinct confessions made by defendant shortly before the indictment; and conceding that an unsupported confession alone

cannot be received and treated as sufficient evidence of the corpus delicti, for instance, as laid down by Judge Cooley and his associates in People v. Lane, 49 Mich. 340, 341, 13 N. W. 622, yet the rule is, as that decision implies, that where there is independent testimony as here, tending substantially to prove the corpus delicti, the confession so corroborated is admissible. This is deducible from the decision in Isaacs v. United States, 159 U. S. 487, 490, 16 Sup. Ct. 51, 40 L. Ed. 229, and the rule is declared in Flower v. United States, 116 Fed. 241, 247, 53 C. C. A. 271 (C. C. A. 5); Rosenfeld v. United States, 202 Fed. 469, 474, 120 C. C. A. 599 (C. C. A. 7); Naftzger v. United States, 200 Fed. 494, 499, 118 C. C. A. 598 (C. C. A. 8); 3 Wigmore on Ev. §§ 2070, 2071. Defendant admitted that he was 28 years of age and that he had not registered. He is an artist, and would seem from his admissions to have the faculty of expressing himself with clearness. He said he was a Socialist, and that "it was against his principles to register"; and, although he was admonished against persisting in the mistake of not registering and also given opportunity to register, he refused to change his course, stating that he had been expecting to be arrested.

[7-10] 3. The next objection is that the government failed to prove that defendant did not come within the exceptions enumerated in section 5 of the Selective Draft Act. The portion of the act relied on is the language qualifying the requirement to register:

"* * * 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."

The objection is not that there is any defect in the indictment in this respect; as we have seen, its allegations expressly negative the exceptions. It is a general rule that where a statute defining an offense contains exceptions in the enacting clause, an indictment found under it must aver that defendant is not within such exceptions. United States v. Cook, 17 Wall. (84 U. S.) 168, 178, 21 L. Ed. 538; Ledbetter v. United States, 170 U. S. 606, 611, 18 Sup. Ct. 774, 42 L. Ed. 1162; Shelp v. United States, 81 Fed. 694, 696, 26 C. C. A. 570 (C. C. A. 9). However, whether negative averments contained in an indictment and involving such exceptions will be accepted as true, unless, as a consequence of the facts residing peculiarly within his knowledge, the defendant assumes the burden of disproving the averments, presents a question which, in view of the course pursued by the government and the instructions of the trial judge in the instant case, need not be decided.

Adverting to the evidence, one witness stated that defendant had been a member of the National Guard in Jackson, Mich., seven or eight years before, though he did not know whether the membership still existed. Another witness, who knew defendant intimately and in part of whose home (57 Baltimore, West) defendant had resided for nearly a year prior to registration day, testified that he knew nothing of defendant belonging to any military organization, or of his drilling or wearing any uniform. As respects the first of these statements, no presumption arose, as counsel claim, that defendant was still a member of the National Guard. As regards the second statement, it hardly is conceivable that the fact, if it was a fact, that defendant was in the

service of the United States as a member of one or another of these military or naval organizations, could have escaped the observation and knowledge of this intimate friend; and this improbable feature is accentuated by the statement of defendant, made after registration day, as before pointed out, that he was expecting to be arrested for not registering. More than this: It is shown that on registration day defendant had his studio in Detroit. Presumably his occupation as an artist was inconsistent with his holding a position as an officer or enlisted man in the Regular Army or the Navy of the United States. And while the Selective Draft Act, empowering the President to call the National Guard and the National Guard Reserves into the service of the United States, was, as we have seen, enacted May 18, 1917, yet the proclamation of the President calling the Michigan portion of those organizations into such service was not announced until July 3d, and did not require them actually to enter the service until the 15th of that month (Proc. 1917, p. 37); hence it scarcely need be said that, even if defendant was a member of the Michigan National Guard, no statutory exception excused him on that account from registering in June.

Thus the government assumed the burden of proving the negative averments of the indictment, and the trial judge instructed the jury in substance that the burden was upon the government to prove the truth of these averments beyond a reasonable doubt. It cannot be said that the evidence, circumstantially supported as it is, did not justify the verdict.

It must follow that the motion to direct a verdict for defendant, based on the objection just considered, as also upon the other objections, was rightly denied. All the assignments have not been mentioned, though they have been fully considered; and we find no material error in respect of any of them.

Accordingly the judgment will be affirmed.

YOUNG v. UNITED STATES. O'SULLIVAN v. SAME. LA CHAPELLE v. SAME.

(Circuit Court of Appeals, Sixth Circuit. April 2, 1918.)

Nos. 3134, 3135, 3137.

1. INDICTMENT AND INFORMATION ⊜111(1)—EXCEPTIONS—NECESSITY OF NEGATIVING.

An indictment charging the unlawful selling of intoxicating liquor to soldiers in uniform, in violation of Act May 18, 1917, c. 15, § 12, 40 Stat. 76, declaring that it shall be unlawful to sell any intoxicating liquor to any officer or member of the military forces while in uniform, except as herein provided, is sufficient, though it did not negative the exceptions which the Secretary of War is authorized to prescribe as to the sale of liquor at any military station, etc., for medicinal purposes; it appearing that the sales were made outside of any military reservation over which the Secretary of War has jurisdiction, and it not being shown that any exceptions had been prescribed.

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

2. CRIMINAL LAW ⟸556—EVIDENCE—CONCLUSIVENESS ON PARTY INTRODUCING—DATE OF OFFENSE.

In a prosecution for the sale of liquor to soldiers in uniform, where the government's evidence showed a sale on a date other than that laid in the indictment, it was proper to submit to the jury the question whether a sale occurred on the date testified to or on some other day; the jury considering the testimony as to the date on question of the witnesses' credibility.

3. CRIMINAL LAW ⟸1166(9)—REVIEW—HARMLESS ERROR.

Where defendant was convicted on other counts as well, and such conviction would in any event sustain the sentence imposed, the denial of a continuance to obtain testimony germane to only one of the counts, though improper, is no ground for reversal.

In Error to the District Court of the United States for the Northern Division of the Western District of Michigan; Clarence W. Sessions, Judge.

Harry Young, Cornelius O'Sullivan, and Charles La Chapelle were severally convicted of selling liquor to soldiers in uniform, in violation of Act May 18, 1917, c. 15, § 12, and each defendant brings error; the cases being heard together. Affirmed.

M. M. Larmonth, of Sault Ste. Marie, Mich., for plaintiffs in error Young and O'Sullivan.

Herbert L. Parsille, of Sault Ste. Marie, Mich., for plaintiff in error La Chapelle.

Myron H. Walker, U. S. Atty., and H. Dale Souter, Asst. U. S. Atty., of Grand Rapids, Mich.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge. These are three several convictions for selling liquor to soldiers in uniform. Violation of section 12 of the Act of May 18, 1917, which is quoted in the margin,[1] is charged. They present two questions which are common to all, and in one case there is another question. They may be considered together.

[1] "The President of the United States, as commander-in-chief of the army, is authorized to make such regulations governing the prohibition of alcoholic liquors in or near military camps and to the officers and enlisted men of the army as he may from time to time deem necessary or advisable: Provided, that no person, corporation, partnership, or association shall sell, supply, or have in his or its possession any intoxicating or spirituous liquors at any military station, cantonment, camp, fort, post, officers' or enlisted men's club, which is being used at the time for military purposes under this act, but the Secretary of War may make regulations permitting the sale and use of intoxicating liquors for medicinal purposes. It shall be unlawful to sell any intoxicating liquor, including beer, ale, or wine, to any officer or member of the military forces while in uniform, except as herein provided. Any person, corporation, partnership, or association violating the provisions of this section or the regulations made thereunder shall, unless otherwise punishable under the Articles of War, be deemed guilty of a misdemeanor and be punished by a fine of not more than $1,000 or imprisonment for not more than twelve months, or both."

[1] 1. The prohibitory clause of the statute, upon which the prosecution is based, contains an exception. It says:

"It shall be unlawful to sell any intoxicating liquor, including beer, ale or wine, to any officer or member of the military forces while in uniform, except as herein provided."

The indictment does not negative the exception, and so it is claimed to be insufficient under the rule recognized and discussed in our recent opinion in Breitmayer v. U. S., 249 Fed. 929 (filed March 5, 1918). We pass by any question dependent upon the precise location of the exception in the sentence, and, for present purposes, assume that the same rule must be applied as if this clause read:

"It shall be unlawful, except as herein provided, to sell, etc."

In spite of this assumption, we think the indictment good. The clause, "except as herein provided," has nothing to which it can refer, unless it be the regulations to be made by the Secretary of War permitting sales for medicinal purposes; and when we see that this is the nature of the exception, we find two satisfactory answers to the claim that the indictment is insufficient for lack of a negative averment. One is that the statute does not declare any exceptions, but only recognizes that in a certain contingency exceptions may come into existence—exceptions in nubibus; the other is, that there can be no exception unless the sale under attack was made within one of the described military establishments. Both of these merge into the one thought that this statute contemplates only certain peculiar exceptions which have no relation whatever to the crime here charged, and which do not really constitute exceptions thereto unless some contingently possible additional facts exist, which additional facts are not alleged in this indictment and are not indicated by the proof. There is nothing to show that the Secretary of War ever made any such regulations; and, if he had, they would be of no importance in this case because it appeared upon the trial without dispute that the sales complained of were made in an ordinary saloon, outside the limits of any institution for which the Secretary of War had power to make regulations. We do not find any principle in criminal pleading or any authoritative decision which requires an indictment to negative such a contingent and unattached exception; and we think it unnecessary.

[2] 2. The indictments, in each instance, alleged (e. g.) that the sale was made "heretofore, to wit, on or about the 17th day of August." The government's proof, if true, established a sale on August 16th. Defendants' testimony tended to establish an alibi for August 17th, and utterly denied any sale on the 16th. Under these conditions, defendants asked the court to charge that while the government was not bound by the dates alleged in the indictment, it was bound by its date as shown by its proof, and that if no sale was made on the only day to which the government's proof related, defendants must be acquitted. The court refused this request and charged:

"The exact date is not material. * * * It is not necessary that you should find that a sale was made on the precise date alleged, if you find in fact that about that date and about that time a sale was made as charged

in the indictment. * * * As I said before, the precise date is not very material. The date testified to should be considered by you carefully as bearing on the credibility of the witnesses, as bearing upon the question whether or not on that occasion described by the witnesses and on or about the date set forth a sale was made as claimed by the government; * * * but you should take into consideration and carefully consider this question of date as bearing upon the question as to whether or not intoxicating liquor was sold as described by the witnesses, as bearing on the credibility of the witnesses."

It is conceded that a variance between indictment and proof, as to date, is not fatal; but defendants' claim in substance is that a variance in date between the testimony of the government's witnesses and the fact is fatal. The charge quoted carefully preserved to defendants everything to which they were entitled on this subject. The important thing was not the date, but the occasion, and it was clearly competent for the jury to find that the government witnesses were right as to the things which occurred, but were mistaken as to the precise day fixed. There was no error in submitting the case to the jury upon that theory.

[3] 3. In one case, complaint is made that the District Judge abused his discretion in refusing a continuance. It would be a very extreme case in which a conviction could be reversed for such a reason; but, if we were to assume (which we do not intend to imply) that the facts presented made it the legal duty of the trial judge to give a sufficient continuance to get the testimony which was desired, the error would be without prejudice in this case. The desired evidence related only to certain counts of the indictment. The respondent was convicted upon the other counts as well; and this conviction would, in any event, have sustained the sentence imposed. Claassen v. U. S., 142 U. S. 140, 146, 12 Sup. Ct. 169, 35 L. Ed. 966. Only in a case where the evidence of which defendant was thus deprived could have had a substantial and direct influence upon the trial on the other counts could there be any reversible error in excluding the evidence; and such influence here would have been extremely remote.

4. Other points argued were not raised below, and are not of such character as to require consideration under rule 11 (150 Fed. xxii, 79 C. C. A. xxii).

The judgments must be affirmed.

THE WESTERLY.

DAILEY et al. v. WESTERLY TOWING CO.

(Circuit Court of Appeals, First Circuit. March 26, 1918.)

No. 1299.

1. TOWAGE ⟸15(2)—LIBEL—BURDEN OF PROOF.
Where a canal boat, being towed by a tug through a presumably safe and well-marked channel, was grounded and sunk, the tug has the burden of excusing failure in performance of her undertaking.

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

2. TOWAGE ⟸11(8)—NEGLIGENCE—DUTY OF TOWING VESSEL.
Where a channel was dredged in a river, marked and opened by the federal authorities, it is the duty of a tug, towing a vessel, to keep it in the channel; but, where the vessel was grounded in the channel on a hidden obstruction, the tug is not liable.

3. TOWAGE ⟸15(2)—LIBEL—EVIDENCE.
In a proceeding against a tug for the grounding of a canal boat in a channel dredged and opened by the federal authorities, a finding of the trial court that the canal boat grounded while in the main channel upon a hidden obstruction *held* warranted by the evidence.

Appeal from the District Court of the United States for the District of Rhode Island; Arthur L. Brown, Judge.

Libel by Hattie Dailey and others against the steam tug Westerly, claimed by the Westerly Towing Company. From a decree dismissing the libel, libelants appeal. Affirmed.

Pierre M. Brown, of New York City (James J. Macklin, of New York City, on the brief), for appellants.

Samuel Park, of New York City (Park & Mattison, of New York City, on the brief), for appellee.

Before DODGE, BINGHAM and JOHNSON, Circuit Judges.

DODGE, Circuit Judge. The steam tug Westerly undertook to tow the appellants' canal boat Elmer D. Walling, laden with paving stones, from Westerly, R. I., to Stonington, Conn. While proceeding up the Pawcatuck river, the tug having the canal boat lashed to her port side and projecting about 40 feet ahead of her bow, the canal boat grounded on an obstruction, which so damaged her bottom that she filled and sank thereon, with her cargo, thus sustaining the damages for which her owners seek to recover. This happened during the afternoon of November 22, 1913. The libel was filed January 10, 1914, the answer on March 10, 1914, but the case was not brought on for hearing until two years later; the trial beginning April 29, 1916. On December 18, 1916, the District Court dismissed the libel, from which decree the libelants appeal.

The canal boat was raised and taken to New London for repair by a wrecking company belonging to that place. Its operations were begun on the morning of November 26, 1913, the fourth day after the accident, and occupied two days. In them, the tug Carrie, belonging to the wrecking company, a steamer, and a lighter took part.

The testimony coming from witnesses who were on board the Westerly or the canal boat at the time the latter grounded and sank as above, or from witnesses who were on board any of the craft employed in raising her after her sinking, or from witnesses who saw her while she lay aground before her removal, as to her exact position at the time of grounding, was conflicting. Her master, on board her when she sank and present while she was being raised, one of her owners, also present while she was being raised, and the master of the wrecking company's tug Carrie, called as witnesses by the libelants, testified that she lay upon or close to the northerly edge of the dredged channel below referred to. On behalf of the Westerly, her master,

in command of her when the sinking occurred, and who visited her again on the day after the sinking, and the manager of the towing company to which the Westerly belonged, who also visited her on the day after the sinking, testified that she lay right in the channel and within a few feet of the line indicated by the government ranges as its center line. They also testified to soundings made by them around her at the time. In so locating her position, five fishermen, called as witnesses on the Westerly's behalf, familiar with the channel and living in the vicinity, who claimed to have passed near her at various times while she lay aground, agreed.

[1, 2] It is undisputed that there is a dredged channel leading from the mouth of the river up to Stonington, in which, at mean low tide, there was supposed to be a depth of not less than ten feet. The dredging had been completed and the channel opened for navigation on that assumption, by the federal authorities, during the summer of 1913. Outside this channel the bottom is rocky, the water shallow in many places, and therefore unsafe. It was the duty of the tug to keep the canal boat in the channel. If she was allowed to ground outside it, or on its edge, the tug was negligent, and therefore responsible for the sinking. The case turns, therefore, upon the question whether the canal boat, which sank, as is not disputed, upon the obstruction which stopped her, lay in or near the center of the dredged channel or on its edge.

The canal boat was drawing 8 feet 3 inches, according to her master's testimony. If there are indications that this somewhat understated her actual draft, there is nothing to show that she could not have gone safely wherever 10 feet of water, at mean low water, was to be found. An obstruction in the middle of the dredged channel, without sufficient water over it for her safe passage, would have been such an obstruction as no one could reasonably have been expected to find there, after the channel had been announced, as above, as completed and open for navigation. The master of the tug had been for many years a licensed pilot engaged in towing up the river; but he had on other occasions followed channels other than the dredged channel in the neighborhood of the place where the canal boat grounded, and was using the dredged channel at the time as a measure of extra precaution, because of having the canal boat on his port side. This was the first occasion upon which he had used it.

The tug had the burden of excusing the failure in performance of her undertaking to tow the canal boat safely through a presumably safe and well-marked channel. Boston, Cape Cod, etc., Co. v. Staples, etc., Co., 246 Fed. 549, 552, — C. C. A. —. It would be a sufficient excuse if the grounding was in fact caused by an obstruction in the channel over which there was not water enough for the canal boat, because her master would have been justified in believing that no such obstruction was to be found there; but it was for the tug to show the existence of such an obstruction, and therefore to show that she had the canal boat in the middle of the dredged channel when she grounded, and not outside of it or on its edge.

[3] The District Court found the tug's contention that the canal

boat struck while proceeding on government ranges, and sank wholly within the channel near its center line, supported by the preponderance of the direct testimony given by those who observed her exact location while aground after sinking. All the witnesses by whom direct testimony of this character was given testified in person before the court, with the exception of the master of the canal boat, whose deposition was taken in New York shortly before the trial. We find nothing in the record sufficient to warrant us in holding the District Court's conclusion erroneous as to the result of the testimony of this class.

Besides the above testimony based on actual observation of the canal boat's position while aground in November, 1913, there was conflicting evidence at the trial relating to various attempts to fix her then position, made long afterward, by a different method.

In April, 1916, two days before the trial began, the Westerly went to the scene of the accident, having on board, besides her master, above mentioned the master of the Carrie. Under their direction, the bottom of the 100-foot channel was searched at what was considered to be the place where the canal boat had lain aground 29 months before. There was evidence from them tending to show that the result of this search was the finding of a rock or obstruction, such as would have accounted for the sinking, about 30 feet north of the center line of the channel. The cross-examination of one of the fishermen above referred to (Clarke) also brought out testimony from him, not given in his direct examination, that he had independently made soundings at what he considered to have been the sunken canal boat's position, four days before the trial, and had there found a rock, believed by him to be that upon which she struck, 10 or 12 feet north of the center of the channel.

The hearing was continued for a joint examination of the supposed place of sinking, and this was made on Wednesday, May 3, 1916. In this the Westerly and her master took part on the respondent's behalf, and on the libelants' behalf the government engineer from New London, under whose supervision the channel had been dredged, who came there in a government launch, accompanied by the libelants' counsel. His testimony, given in rebuttal, was the only testimony regarding the results of this examination. It tended to show that he was unable to find any rock at the place indicated by the Westerly's master, though he spent several hours in sweeping and sounding there; also that he took Clarke, later on the same day, to the place, while the Westerly was still there, but found Clarke unable to show him where he could find a rock in the channel by using a sounding pole. It further tended to show that he returned alone next morning, and then found a rock 10 or 12 feet outside the northerly limit line of the channel, having over it 6.2 feet at mean low tide. But it also tended to show that opposite this rock, and nearly in the center of the channel, he found a "spot" with a minimum depth of 8.9 feet at mean low water.

Much of the argument before us has related to the reliability of the conflicting testimony regarding these examinations of the channel in 1916, and to the proper inferences therefrom, as claimed by the one party or the other. We are unable to regard it as affording a satisfac-

tory basis for any definite conclusion either for or against the contention that the canal boat grounded, in 1913, in mid-channel, and not on or beyond the northerly edge of the channel. The canal boat's actual location had become a matter of memory only. Three winters had intervened, and we cannot assume, in view of what appears regarding the general character of the material through which the channel was dredged, that its bottom in 1916 was as it had been in 1913. We think the District Court properly based its findings upon "the conflicting testimony of eyewitnesses given more than two years after the event," and the appellants fail to satisfy us that the evidence of that character required different findings, or that the conclusion reached below was erroneous.

The decree of the District Court is affirmed, and the appellee recovers its costs of appeal.

SEARLE et al. v. MECHANICS' LOAN & TRUST CO. et al.

In re STACK-GIBBS LUMBER CO.

(Circuit Court of Appeals, Ninth Circuit. April 1, 1918.)

No. 3110.

1. BANKRUPTCY ⊜317—ESTOPPEL—EQUITABLE ESTOPPEL—WHAT CONSTITUTES.

Where creditors, who signed an agreement that the debtor's property should be operated by a trustee, who was to make advances, assumed that the agreement had been signed by the requisite number, and the trustee operated the property for more than five months, making advances, those creditors who signed the agreement are estopped, on the debtor's subsequent bankruptcy, to assert that the agreement had not been executed by the requisite number.

2. BANKRUPTCY ⊜357—COURTS—JURISDICTION.

In view of the broad powers conferred by Bankruptcy Act July 1, 1898, c. 541, § 2, 30 Stat. 545 (Comp. St. 1916, § 9586), a court of bankruptcy, where an agreement between a majority of the creditors of the bankrupt and a trustee, who took possession of the bankrupt's property and made advances, gave the trustee an equitable lien on the interest of such creditors, has jurisdiction to order that dividends due and payable to such creditors be first applied to the satisfaction of the trustee's claim before any payment be made to the creditors.

3. BANKRUPTCY ⊜347—PREFERENCES—CREATION.

In such case, where the trustee did not make the advances from its own funds, but obtained the same from a bank with which it was affiliated, and all parties to the transaction knew that the money was advanced with the understanding that a lien would be created, both upon the trust property and upon the interests of the consenting creditors, those creditors, who were parties to the agreement, cannot attack the preference lien of the trust company, which the bank prayed should be allowed, because the trustee did not advance its own funds.

4. BANKRUPTCY ⊜52—COURTS—DISTRIBUTION OF PROPERTY.

The administration and distribution of estates in bankruptcy is a proceeding in equity, the property in the custody of the court being held in trust for those to whom it rightfully belongs, and its distribution should be conducted on equitable principles.

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

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

In the matter of the Stack-Gibbs Lumber Company, a corporation. From an order denying the claim of the Mechanics' Loan & Trust Company and the Exchange National Bank of Spokane to a preferential lien on all the assets of the bankrupt, but directing that dividends, thereafter to be determined by the court to be due and payable to the creditors who signed a certain contract, should be paid to the Trust Company and to the Bank jointly until the full amount of their advances to the bankrupt should be paid, I. F. Searle, Minnie A. Gibbs, and Merrill, Cox & Co., creditors of the bankrupt, appeal. Affirmed.

The Stack-Gibbs Lumber Company, a corporation, operated a lumber yard in Idaho, and handled the product of the Dryad Lumber Company, a corporation, which ran a sawmill. The two companies were substantially one. They will be referred to herein as the Lumber Company. In the year 1915 the Lumber Company was involved in financial difficulties. Among its creditors was the Exchange National Bank of Spokane, to whom it owed $6,000. In January, 1916, a meeting of the creditors of the Lumber Company was held at Minneapolis, which resulted in the execution of an agreement between the Lumber Company and the majority of its creditors, whereby all the property of the former was transferred to the Mechanics' Loan & Trust Company as trustee, and it was provided, among other things, that the trustee should take possession of the property, operate the same, collect the debts owing to the Lumber Company, sell the salable property thereof, and that the trustee should advance such sums of money as it should deem necessary to meet the present pay roll of the Lumber Company, and discharge the claims of creditors who had not executed the instrument, "not to exceed, however, the sum of $100,000," and that the trustee should have a first and preference claim upon said trust estate for the amount of such advancement, the same to be repaid to it out of the first proceeds of sales of the trust property, or any part thereof, or the first proceeds of the collected accounts or bills receivable, together with interest thereon. It was provided, further, that the instrument should not take effect until creditors representing 90 per cent. in amount of the indebtedness of the Lumber Company should have attached their signatures thereto. At that meeting a large number of creditors, whose claims aggregated more than $600,000, signed the agreement; but the amount of the claims so represented did not quite equal 90 per cent. of all the claims. One H. J. Aaron, an attorney, of Chicago, prepared the trust deed, and signed it on behalf of creditors whose claims were $328,250. It was desired by the creditors that no notoriety be given to the transaction, and they gave the trustee a letter of instructions that the trust agreement should not be placed on record until it was found necessary to do so to protect the creditors' rights. It was estimated by those present that, if the signature of Mrs. Tolerton of Chicago, who was one of the creditors, were attached to the instrument, it would then have been signed by creditors representing 90 per cent. of all the debts. All were desirous that the trust agreement be executed as soon as possible. On February 9th Aaron telegraphed to Coman, a director of the trustee, that the contract had been signed by Mrs. Tolerton, and Coman replied that the trustee would go ahead and make advances to take care of the pay roll due. The trust agreement contained the provision that one Sigmund Katz, of Chicago, should be made the secretary and treasurer, and a director of the Lumber Company, and Aaron suggested that Katz go to Idaho and run the business, since by reason of their large interests the creditors were entitled to have their man on the job. Accordingly Katz went to Idaho, and on February 15th he was elected director, secretary, and treasurer of the Lumber Company. As soon as the trustee knew that Mrs. Tolerton had signed the trust agreement, it commenced to advance

money in pursuance of the agreement. The business was carried on in accordance with the agreement until July 29, 1916, when three of the creditors filed a petition in bankruptcy against the Lumber Company. The trust agreement was then filed for record. Prior to that time advancements amounting to $100,000 had been made from time to time by the trustee in accordance with the terms of the trust agreement. The money for those advancements was obtained from the Exchange National Bank, and, after the trustee had filed in the court of bankruptcy its petition for the allowance of its preferential claim, the bank also filed a petition that the claim of the trustee for advances be allowed, and that it be adjudged to have a preference, and that the dividends of the various creditors who executed the Minneapolis contract be directed by the court to be paid to the trustee to the extent of the advances so made. The referee denied the right of either the bank or the trustee to a lien upon all the assets of the bankrupt, but ordered that all dividends thereafter to be determined by the court to be due and payable to the creditors who signed the Minneapolis contract be paid to the trustee and to the bank jointly until the full amount of the advances should be paid. The court below affirmed the decision of the referee.

Harry L. Cohn, of Spokane, Wash., Elmer H. Adams, E. C. Tourje, and Adams, Crews, Bobb & Westcott, all of Chicago, Ill., for appellant Merrill, Cox & Co.

Reese H. Voorhees and H. W. Canfield, both of Spokane, Wash., for appellants Searle and Gibbs.

Post, Russell, Carey & Higgins and F. T. Post, all of Spokane, Wash., for appellees.

Robert Weinstein, of Spokane, Wash., for trustee.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1] The appellants contend that the trust agreement never went into operation and effect, for the reason that 90 per cent. of the creditors of the Lumber Company failed to sign it. We may take it to be true that 90 per cent. of all the creditors of the bankrupt never signed the agreement. But the fact which controls decision here is that the trustee and all the creditors who did sign assumed that upon obtaining the signature of Mrs. Tolerton the assent of 90 per cent. would have been secured. They knew that the trustee took it for granted, as did they, that the conditions on which the agreement was to go into effect had been complied with. They knew that the trustee, acting on that assumption, was advancing funds to carry on the business. There is nothing to impugn the good faith of the trustee. The trustee was permitted to conduct the business for a period of five months, during which no creditor suggested that there had been failure of the necessary percentage of creditors to sign the agreement. Under those conditions we think the court below clearly was justified in holding that the creditors were estopped to make the objection which they now present.

[2] The appellants contend that the court below was without jurisdiction to order that dividends due and payable to the creditors who signed the trust agreement be applied to the satisfaction of the appellee's claim, and they cite cases, such as the decision of this court in Re Argonaut Shoe Co., 187 Fed. 784, 109 C. C. A. 632, to the proposition that dividends in the hands of the trustee, being a part

of the estate of the bankrupt in the custody of the court, cannot be reached by attachment, or on any process from another court, and they especially rely on In re Girard Glazed Kid Co. (D. C.) 136 Fed. 511, as sustaining the rule that a claim of indebtedness from one creditor of a bankrupt to another, growing out of transactions not connected with the bankruptcy proceeding, cannot be litigated in the bankruptcy court, or adjusted in the distribution of dividends. But those decisions do not answer the question which the record here presents. In the case last mentioned there was no equitable lien of one creditor upon any portion of a fund out of which a dividend was payable to another creditor. Judge McPherson said:

"It is an independent controversy, about the ownership of money that is not a part of the fund for distribution, and this court cannot take jurisdiction of the dispute, and decide it in the roundabout manner that has been suggested."

In the case at bar the appellants expressly stipulated by the terms of the trust agreement that the claim of the appellees should be first paid out of the assets of the bankrupt. Owing to the fact that not all of the creditors of the bankrupt signed the trust agreement, the appellees' lien was not enforceable against the whole of the fund realized on the disposition of the bankrupt's estate. But clearly the creditors who actually signed the agreement thereby created an equitable lien on their interest in the funds which thereafter came into the control of the bankrupt court for administration. That court had jurisdiction to protect the lien claimants in the distribution of the funds payable as dividends. In Whitney v. Wenman, 198 U. S. 539, 552, 25 Sup. Ct. 778, 781 (49 L. Ed. 1157), the court, in consideration of its own prior decisions, and the broad powers conferred in section 2 of the Bankruptcy Act to collect the bankrupt's estate, reduce it to money, and distribute the same, and to determine controversies in relation thereto, held:

"That, when the property has become subject to the jurisdiction of the bankruptcy court as that of the bankrupt, whether held by him or for him, jurisdiction exists to determine controversies in relation to the disposition of the same, and the extent and character of liens thereon or rights therein"

—citing, among other cases, In re Antigo Screen Door Co., 123 Fed. 249, 59 C. C. A. 248, in which the court said:

"We take it that any court, whether one of equity, common law, admiralty, or bankruptcy, having in its treasury a fund, touching which there is dispute, may, by virtue of its inherent powers, determine the right to the fund thus in its possession. Jurisdiction in that respect is an incident of every court."

[3, 4] We find no merit in the contention that, because the trustee did not make the advances from its own funds, but obtained the same from the Exchange National Bank, neither the trustee nor the bank can have a preference claim. The trustee and the bank were affiliated corporations, and the directors of both were substantially the same. Coman, the president of the bank, was a director of the trust company, and the president of the trust company was the vice president of the bank. The capitalization of the trust company was but $10,000. At

the time when the Minneapolis contract was discussed and signed, question was made of the responsibility of the trustee, and Coman stated to the creditors that, while the capital was only $10,000, yet through an arrangement with the bank the trustee could get money to carry out the terms of the contract. No objection was made to that proposition. The right of the trustee to this preference claim, however, does not depend upon that understanding, for it can make no difference to the rights of the appellants whether the trustee advanced its own funds or obtained the money from the bank. The bank filed its separate petition, stating the amount of its advances, and asking that the preference lien of the trust company be allowed. All the parties to the transaction knew that the money was advanced with the understanding that a lien was thereby created, both upon the trust property and upon the interests of the consenting creditors therein to the amount of the advancements. The administration and distribution of estates in bankruptcy is a proceeding in equity, and the property in the custody of the court is held by it in trust for those to whom it rightfully belongs, and its distribution should be conducted on equitable principles. Bardes v. Hawarden Bank, 178 U. S. 524, 535, 20 Sup. Ct. 1000, 44 L. Ed. 1175; In re Rochford, 124 Fed. 182, 59 C. C. A. 388; and Atchison, T. & S. F. Ry. Co. v. Hurley, 153 Fed. 503, 82 C. C. A. 453.

The contention is made that the trustee acted in bad faith, and that therefore its preferential claim should be denied. We have carefully examined the evidence, and we find no ground to disturb the conclusion of the court below that the trustee acted in good faith, used reasonable care, and conducted the trust in accordance with the letter and spirit thereof.

The order of the court below is affirmed.

BOOMER v. ROWE.

(Circuit Court of Appeals, Ninth Circuit. May 20, 1918.)

No. 3053.

CORPORATIONS ⟸349—DISSOLUTION—RIGHTS OF CREDITORS.

Under Rev. Codes, Mont. § 3837, forbidding directors from creating debts beyond the prescribed capital stock and declaring that for a violation they shall be liable in their individual and private capacity to the corporation and to the creditors thereof in the event of its dissolution, an insolvent corporation which had no property and assets, and which the directors themselves reported had ceased to be a going concern or to incur financial obligations because of its insolvency, must be deemed dissolved so as to enable a creditor to sue, though not judicially dissolved in accordance with those statutes prescribing the modes of dissolving corporations, for the purpose of the statute imposing liability on directors was not penal, but was to give creditors an additional remedy.

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

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

Suit by Laura A. Boomer against James H. Rowe. From a decree dismissing the bill (244 Fed. 307), complainant appeals. Reversed.

The Salmon Land Company is a Montana corporation. Rowe, the appellee, was one of the directors and was secretary. In 1910 the corporation became indebted in a sum in excess of its capital stock. Rowe, with other directors, executed and delivered to Mrs. Boomer, appellant, a promissory note for $20,520.73, and interest, and gave a mortgage to secure the note. Thereafter foreclosure of the mortgage was had, and a deficiency judgment of $4,963.10 remained unpaid after all of the property of the corporation was exhausted. Appellant owns this judgment, and alleges that the land company became insolvent on January 30, 1914, when the property was sold under foreclosure; that the corporation has no property; "that it has entirely ceased to do business. It is thereby dissolved." Appellant asked for judgment against the defendant for the amount of the deficiency judgment with interest. Rowe, the defendant, denied that the corporation was ever dissolved. It was proved that the note was signed by Rowe as secretary of the corporation, and that the transaction with Mrs. Boomer had been authorized by the board of directors of the corporation. The annual reports of the corporation, required by the statutes of Montana to be filed between the 1st and 20th of January of each year, showed, in January, 1915, an existing indebtedness of $5,075; 'and the January, 1916, report signed by Rowe, after giving the existing debts as $6,500, contained these words: "This corporation has ceased to be an acting concern and has ceased to voluntarily incur financial obligations because of its insolvency." The District Court dismissed the suit, and the plaintiff appeals.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

Lowndes Maury, Burton K. Wheeler, and J. O. Davies, all of Butte, Mont., for appellant.

Jesse B. Roote, J. A. Poore, Enos Alley, and Henry C. Hopkins, all of Butte, Mont., for appellee.

HUNT, Circuit Judge (after stating the facts as above). The question for decision is, Was the corporation dissolved within the meaning of section 3837 of the Revised Codes of Montana? We quote the section:

"3837. *Dividends to be Made from Surplus Profits.*—The directors of corporations must not make dividends, except from the surplus profits arising from the business thereof; nor must they divide, withdraw or pay to the stockholders, or any of them, any part of the capital stock; nor must they create debts beyond their subscribed capital stock, or reduce or increase the capital stock, except as hereinafter specially provided. For a violation of the provisions of this section, the directors under whose administration the same may have happened (except those who may have caused their dissent therefrom to be entered at large in the minutes of the directors at the time, or were not present when the same did happen) are, in their individual and private capacity, jointly and severally liable to the corporation and to the creditors thereof, in the event of its dissolution, to the full amount of the capital stock so divided, withdrawn, paid out or reduced, or debt contracted; and no statute of limitations is a bar to any suit against such directors for any sums for which they are made liable by this section. There may, however, be a division and distribution of the capital stock of any corporation which remains after the payment of all its debts, upon its dissolution or the expiration of its term of existence."

Other sections of the Codes of the state (3825) provide for the term of existence of corporations and for the methods by which corporations may be dissolved. Section 3905 provides that a corporation is

dissolved by expiration of time, by judgment of dissolution as provided by the Code of Civil Procedure, tit. 6, pt. 3, and chapter 5, tit. 10, pt. 2, or by legislative act. Title 6, pt. 3, of the Code of Civil Procedure provides for voluntary dissolution upon application by stockholders to the district court of the county where the principal place of business of the corporation is situated. The application must be signed by a majority of the directors and must set forth all claims and demands against the corporation which have been satisfied and discharged. Chapter 5, tit. 10, pt. 2, provides for dissolution by quo warranto in the name of the state: (1) When the corporation has offended against a provision of an act for its creation or renewal; (2) when it has forfeited its privileges by nonuser; (3) when it has committed or omitted an act which amounts to a surrender of its corporate rights, privileges, and franchises; (4) when it has misused a franchise or privilege conferred upon it by law or exercised a franchise or privilege not so conferred.

The position of the appellant is that when the corporation had no property and no assets, and when by the subscription made by the directors to the annual report for 1916 it was announced that the corporation had ceased to be an acting concern and had ceased voluntarily to incur financial obligations because of its insolvency, it was dissolved in contemplation of the statute quoted, and that a creditor can pursue the remedy against directors who have disobeyed the statute forbidding creation of debts beyond the subscribed capital. In support of this position it is said that the statute has reference to a practical and not to a judicially adjudged dissolution; that a corporation, by becoming inert for all practical purposes, without funds or assets, and in a position where legal remedies against it appear to be of no avail, is dissolved, and the liability of directors becomes certain, with the right and remedy in the creditor to enforce it. Among the decisions cited are: McDonnell et al. v. Alabama Life Ins. Co., 85 Ala. 401, 5 South. 120; Gibbs v. Davis, 27 Fla. 531, 8 South. 633; Central Agricultural & Mechanical Ass'n v. Alabama Gold Life Ins. Co., 70 Ala. 120; Moore v. Whitcomb, 48 Mo. 543; State Savings Bank Ass'n v. Kellogg, 52 Mo. 583; Stoltz v. Scott, 23 Idaho, 104, 129 Pac. 340, also cited, is less pertinent, in that there the directors were sued by the corporation through its receiver.

The better view is that a suit brought under such a statute as that under consideration is not one to administer a punishment against an offender against the state but is to enforce a private right given to a creditor. Such a statute is not strictly penal, but is intended to be for the benefit of creditors in the event of the dissolution of the corporation, and to afford creditors a remedy where there is violation of duty by the directors under whose administration the violations may have occurred. In Hornor v. Henning et al., 93 U. S. 228, 23 L. Ed. 879, the Supreme Court considered an act of Congress which authorized the formation of corporations for certain purposes in the District of Columbia, and among other things provided that if the indebtedness of any company organized under the act should at any time exceed the amount of its capital stock, the trustees of such com-

pany assenting thereto should be personally and individually liable for such excess to the creditors of the company, and in an action by a creditor against trustees who had assented to incurring an indebtedness in excess of the amount of capital stock of the corporation said:

"We are of opinion that the fair and reasonable construction of the act is that the trustees who assent to an increase of the indebtedness of the corporation beyond its capital stock are to be held guilty of a violation of their trust; that Congress intended that, so far as this excess of indebtedness over capital stock was necessary, they should make good the debts of the creditors who had been the sufferers by their breach of trust; that this liability constitutes a fund for the benefit of all the creditors who are entitled to share in it, in proportion to the amount of their debts, so far as may be necessary to pay these debts."

The case was approved in Stone v. Chisolm, 113 U. S. 302, 5 Sup. Ct. 497, 28 L. Ed. 991. In Fitzgerald v. Weidenbeck (C. C.) 76 Fed. 695, Judge Lochren, in the District Court for Minnesota, took a like view of the Montana statute providing that if the trustees of a corporation organized under the statute fail to make a report of the corporation's affairs as required, they shall be liable for its debts; so did Judge Townsend in Davis v. Mills (C. C.) 99 Fed. 39, who relied for the rule of liberal construction upon Huntington v. Attrill, 146 U. S. 676, 13 Sup. Ct. 224, 36 L. Ed. 1123. Ruling Case Law, vol. 7, § 494; Thompson on Corporations, § 1781.

The general purposes of the particular statute being determined, we ask, What is meant by the "event of dissolution"? To hold that a creditor must be put off in the pursuit of the remedy given until the life of the corporation shall have expired, or until there has been a dissolution by prescribed statutory method, would in practical effect take away the benefit of the statute, for creditors would not be able to bring about statutory dissolution, and surely the directors would not invite technical corporate extinction where it would mean their individual liability for debts which they have created beyond the subscribed capital stock.

It is therefore very reasonable to apply the doctrine of Huntington v. Attrill, supra, as to the construction of the statute by regarding it as affording substantial, efficient civil remedy at the private suit of the creditor whenever the directors of the corporation have violated their duty by acts which destroy and are intended to do away with the end and object for which the corporation was created. By the dissolution of the corporation the statute means a practical and not necessarily a judicially adjudged dissolution. The cases relied upon by appellant, cited above, sustain this construction, the better view being well expressed by the Supreme Court of Alabama in McDonnell v. Alabama Life Ins. Co., supra, where the court said:

"The pivotal period fixed by the statute for the accrual of this personal liability is for those debts due at the time of the dissolution of the corporation. Code 1867, § 1760. That the defendant corporation was dissolved, within the meaning of this statute by the assignment made by it for the benefit of creditors in October, 1886, and by its entire cessation of business, there can be no doubt. A practical and not a judicially adjudged dissolution is what the statute contemplates. This is evidenced by insolvency, and the turning of the corporate assets over to a trustee for distribution among

creditors, followed by complete abandonment of the business for which the company was organized."

In Central Agricultural & Mechanical Association v. Alabama Gold Life Ins. Co., supra, the court reaffirmed the earlier decisions and said:

"Whenever there is a practical dissolution, so far as the rights and remedies of creditors are concerned, whenever the corporation becomes 'a nominally inert body,' its property and funds gone, and it is reduced to insolvency, rendering legal remedies against it fruitless and unavailing, the liability of the stockholder or member becomes absolute, and the right and remedy of creditors to enforce it accrues."

We have examined the cases which sustain the view taken by the lower court. In Morley v. Thayer (C. C.) 3 Fed. 737, Judge Clifford referred to some of them, and adverted particularly to Slee v. Bloom, 19 Johns. (N. Y.) 456, 10 Am. Dec. 273, which was one of the earliest cases adopting the rule we approve, but the learned judge adopted the more literal construction. Daily v. Marshall, 47 Mont. 392, 133 Pac. 681, does not conflict with the views we have expressed. We also cite Keokuk & W. R. Co. v. Missouri, 152 U. S. 309, 14 Sup. Ct. 592, 38 L. Ed. 450; Pullman Palace Car Co. v. Missouri P. R. Co., 115 U. S. 595, 6 Sup. Ct. 194, 29 L. Ed. 499; Bruce v. Platt, 80 N. Y. 380.

The decree is reversed, and the cause is remanded, with directions to the District Court to enter decree in favor of the plaintiff below for $4,304.10, together with interest thereon from the date of the deficiency judgment, January 31, 1914, and costs.

Reversed.

BRIGHT et al. v. STATE OF ARKANSAS.

(Circuit Court of Appeals, Eighth Circuit. April 2, 1918.)

No. 4961.

1. RECEIVERS ⟸153—TAXES—PAYMENT.
   Where the property of a railroad company was operated by receivers, and the corporation, had it been operating the property, would have been liable for the franchise tax imposed by Laws Ark. 1911, p. 67, the receivers should be directed to pay such taxes accruing during the receivership.

2. COURTS ⟸96(1)—PRECEDENTS—DECISIONS OF CIRCUIT COURTS OF APPEAL.
   In deciding questions of policy and practice involving no vital moral issue, certainty in the law and uniformity of decision are often more essential to the wise administration of justice than a particular policy, and where the correct decision of a question is doubtful, and one of the United States Circuit Courts of Appeals has decided it in a considered opinion, the others should follow that decision, unless it clearly appears to them, or some of them, to be unfair or unwise.

3. RECEIVERS ⟸153—TAXATION—PENALTIES.
   Where the penalty due for nonpayment by a railway company of the franchise tax imposed by Laws Ark. 1911, p. 67, accrued within less than a month after receivers were appointed, and the state thereafter intervened before the penalty on the tax for the succeeding year had accrued, it is entitled to recover the penalties for both years.

Appeal from the District Court of the United States for the Western District of Arkansas; F. A. Youmans, Judge.

Petition by the State of Arkansas against R. C. Bright and J. E. Felker, as receivers of the Kansas City & Memphis Railway Company appointed in the case of Riley v. Kansas City and Memphis Railway Company. From a decree directing the receivers to pay certain taxes, with penalties, they appeal. Affirmed.

James F. Read and James B. McDonough, both of Ft. Smith, Ark., for appellants.

John D. Arbuckle, Atty. Gen., T. W. Campbell, Asst. Atty. Gen., and Hamilton Moses, Special Counsel, of Little Rock, Ark., for the State of Arkansas.

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

SANBORN, Circuit Judge. By Act 112 of the Acts of Arkansas of 1911, page 68, the state of Arkansas imposed an annual tax of $568, payable on or before August 10th, and an annual penalty of $142 for a failure to pay this tax by August 10th, on the Kansas City & Memphis Railway Company "for the privilege of exercising its franchise in the state of Arkansas" (sections 6 and 12), and provided that these taxes and penalties should be a first lien upon all the property of the corporation, whether employed by the corporation in the prosecution of its business, or in the hands of an assignee, trustee or receiver for the benefit of the creditors or stockholders thereof (section 14). On July 14, 1914, in a creditors' suit entitled Riley v. Kansas City & Memphis Railway Company, which owned and was operating a railroad in Arkansas, the court below appointed receivers, who took possession of and have since been operating the railroad of the defendant for the benefit of its creditors. In 1915 the state intervened in this suit, and prayed that the court would order the receivers to pay these franchise taxes for the years 1914 and 1915, and the penalties for the failure to pay them, and the court granted its request. This is the order challenged by the appeal.

[1, 2] The taxes in question are not taxes upon property. They are taxes for the privilege of exercising the power to do the business the corporation conducts in a corporate capacity, and if the question here presented were new the decision of the Supreme Court in United States v. Whitridge, 231 U. S. 144, 147, 149, 34 Sup. Ct. 24, 58 L. Ed. 159, to the effect that receivers were not required to pay the corporation tax for which the corporation would have been liable during the receivership in that case under the Corporation Tax Law (Tariff Act Aug. 5, 1909, § 38, 36 Stat. c. 6, pp. 11, 112–117), would have been persuasive by analogy, if not controlling. But the question whether or not receivers of the property of corporations should be required to pay the taxes accruing during the receivership against the corporations for the privilege of doing business in their corporate capacity, while the corporations can ordinarily do no business, has long been a subject of debate and of conflicting decisions. It is held that such re-

ceivers are not liable for, and ought not to be required to pay, such taxes in Johnson v. Johnson Bros., 108 Me. 272, 275, 276, 80 Atl. 741, Ann. Cas. 1913A, 1303, Johnson v. Monson Consolidated Slate Co., 108 Me. 296, 80 Atl. 750, State v. Bradford Savings Bank, 71 Vt. 234, 237, 44 Atl. 349, and Commonwealth v. Lancaster Savings Bank, 123 Mass. 493, 496, 497. On the other hand, it is held in a considered opinion by the Circuit Court of Appeals of the Ninth Circuit, in Coy v. Title Guarantee & Trust Co., 220 Fed. 90, 93, 135 C. C. A. 658, L. R. A. 1915E, 211, and by the great weight of modern authority, that courts of equity, operating the property and liquidating the debts of corporations, which would otherwise have been liable to pay such taxes, ought to direct the payment by their receivers of such taxes as would have accrued during the time the receivers were actually operating the property. Coy v. Title Guarantee & Trust Co. (D. C.) 212 Fed. 520, 524; Duryea v. American Woodworking Machine Co. (C. C.) 133 Fed. 329; Conklin v. United States Shipbuilding Co. (C. C.) 148 Fed. 129, 130; New York Terminal Co. v. Gaus, 139 App. Div. 347, 124 N. Y. Supp. 200; Philadelphia & Reading R. R. Co. v. Commonwealth, 104 Pa. 80, 86; Central Trust Co. v. N. Y. City, etc., Ry. Co., 110 N. Y. 250, 253, 257, 18 N. E. 92, 1 L. R. A. 260; New York Terminal Co. v. Gaus, 204 N. Y. 512, 517, 98 N. E. 11; 3 Thompson on Corporations (2d Ed.) § 2941; In re United States Car Co., 60 N. J. Eq. 514, 517, 43 Atl. 673.

In deciding questions of policy and practice which involve no vital moral issue, certainty in the law and uniformity of decision are often more essential to the wise administration of justice and to the interests of business men than a particular policy or practice. Where the correct decision of such a question is doubtful, and one of the United States Circuit Courts of Appeals has decided it in a considered opinion, it is the duty of the others to follow that decision, unless it clearly appears to them, or to some of them, to be unfair or unwise, and it is the duty of the courts at all times, in the consideration of such issues, to lean towards uniformity of decision and practice. In view of the uniform decisions of the federal courts upon the question here at issue, and of the great weight of authority in favor of the practice they have adopted, the conclusion is that receivers of the property of corporations, which would have been liable to pay taxes accruing during the receivership for the privilege of exercising their corporate powers, should be directed by the courts of equity controlling such receivers to pay such taxes as accrue while they are operating the property and before they surrender it to purchasers or others, and that there was no error in the order of the court below requiring the receivers to do so in the case in hand.

[3] Counsel for the appellants contend that, even if the court below was right in directing the payment of the taxes, it was in error in ordering the receivers to pay the penalties. It is true that there have been decisions that, where taxes are not paid, it is the duty of the state, or of the collector, to intervene in the court controlling the receivers, and to pray that court to order them to make the payments, and that where that duty is neglected for a long time, and many pen-

alties accrue meanwhile, the state or the collector is not entitled in equity to the payment of such penalties. Blakistone v. State, 117 Md. 237, 83 Atl. 151. But in the case before us the state intervened on May 28, 1915, set forth the fact that the franchise tax of 1914 became due on or before August 10, 1914, was not then paid, and $142 penalty accrued upon that day; that the tax of 1915 would fall due on or before August 10, 1915, and if not paid by that date another penalty of $142 would become due; and prayed for an order for the payment of these taxes and penalties. There was no failure of duty to apply for the payment of the tax of 1915, some months before the penalty for the failure to pay accrued, and the same considerations, founded on the weight of authority and the desirableness of uniformity of decisions, sustain the order of the court below for the payment of these penalties. Coy v. Title Guarantee & Trust Co. (D. C.) 212 Fed. 520, 524, 525; Coy v. Title Guarantee & Trust Co., 220 Fed. 90, 93, 135 C. C. A. 658, L. R. A. 1915E, 211; First National Bank v. Ewing, 103 Fed. 168, 188, 190, 43 C. C. A. 150; Gray v. Logan Co., 7 Okl. 321, 54 Pac. 485, 487.

There was, in our opinion, no error in the order of the court requiring the penalties which accrued for the failure to pay these franchise taxes to be paid out of the earnings or proceeds of the property of the corporation which came to the hands of its receivers under the order of their appointment, and the judgment below is affirmed.

BRIGHT et al. v. STATE OF ARKANSAS et al.

(Circuit Court of Appeals, Eighth Circuit. April 2, 1918.)

No. 4932.

1. TAXATION ⟸843—PENALTIES—RECEIVERS.

Real property of an insolvent railway company, taxable as such under Kirby's Ark. Dig. §§ 6941, 6942, 6945, cannot escape penalties attaching for nonpayment, because the entire property of the company was in the hands of receivers appointed under order of the court to take possession of the property for the benefit of creditors.

2. COURTS ⟸366(6)—DECISIONS OF STATE COURTS—AUTHORITY.

As the decisions of the highest state courts concerning state statutes are conclusive on the federal courts, in the absence of any question of commercial law or of right under the Constitution or statutes of the United States, a decision of the highest state court concerning state statutes regarding tax penalties is conclusive on the federal courts.

Appeal from the District Court of the United States for the Western District of Arkansas; F. A. Youmans, Judge.

Petitions by the State of Arkansas and others against R. C. Bright and J. E. Felker, receivers of the Kansas City & Memphis Railway Company, appointed in the case of Riley v. Kansas City & Memphis Railway Company. From a decree directing the receivers to pay certain taxes, with penalties, they appeal. Affirmed.

James F. Read and James B. McDonough, both of Ft. Smith, Ark., for appellants.

Troy Pace, of Harrison, Ark., and W. A. Dickson, of Bentonville, Ark., for appellees.

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

SANBORN, Circuit Judge. This is a companion case to No. 4961, of like title (249 Fed. 950, — C. C. A. —), in which the opinion is filed herewith. Reference is made to the opinion in that case for a more general statement of the facts and of the reasons for the conclusion in this case. Upon intervening petitions of the state of Arkansas, the county of Washington, and the collector of Benton county in Riley v. Kansas City & Memphis Railway Company, the court below ordered its receivers to pay the taxes for the years 1913, 1914, and 1915, and the penalties for failure to pay those taxes which accrued upon the railway company's property for the use and benefit of the state of Arkansas, of the two counties, and of certain municipalities and subdivisions thereof. Conceding the legality of the order for the payment of the taxes the receivers, by an appeal, challenge that part of the order which directs them to pay the penalties, upon the grounds (1) that receivers operating the property of a defendant railway company are not liable for the penalties imposed by state statutes for the failure to pay the taxes lawfully levied upon that property, and that the only proper method of collecting the taxes is by petition to the court which is in possession of the property, and not by the threat or imposition of penalties for failure to pay them; and (2) that if the receivers ought in equity to pay the penalties in this case the court erred in adjudging the amount thereof to be 25 per cent. of the taxes levied when it should have limited that amount to 10 per cent. thereof.

[1] Much the larger portion of the property of an operating railroad company is ordinarily real estate, and the statutes of the state of Arkansas declare that for the purposes of taxation in that state the whole railroad of a railroad company, including all side tracks, switches, and turnouts, the entire right of way, and everything of any character whatever, situated upon such right of way or appurtenant to the railroad, which adds to the value of such railroad as an entire thing, is real estate, and is required to be listed, valued, described, and sold as such. Kirby's Digest of the Laws of Arkansas 1904, §§ 6941, 6942, 6945.

It is the settled rule now that after the property of an insolvent corporation is taken into the possession or dominion of a court for the benefit of its creditors, and while it is held by the court for that purpose, a legal sale of it cannot be made without the permission of that court for the purpose of enforcing payment of taxes or penalties upon it. Wiswall v. Sampson, 14 How. 52, 14 L. Ed. 322; Barton v. Barbour, 104 U. S. 126, 26 L. Ed. 672; In re Tyler, Petitioner, 149 U. S. 164, 13 Sup. Ct. 785, 37 L. Ed. 689; In re Eppstein, 156 Fed. 42, 84 C. C. A. 208, 17 L. R. A. (N. S.) 465; Dayton v. Pueblo County, 241 U. S. 588, 590, 36 Sup. Ct. 695, 60 L. Ed. 1190. Counsel cite

the last case in support of their argument that the state, its municipalities, and subdivisions are not entitled to the penalties for failure to pay the taxes in this case; but that opinion does not sustain such a position. In that case the property had been sold for taxes to certificate holders while it was in custodia legis. The court held that the sales were void for that reason. The certificate holders sought reimbursement, not only to the amount which they paid for their invalid certificates and simple interest, but also for the higher rate of interest in the nature of a penalty provided by the laws of Colorado in case of a redemption from tax sales of land. The Supreme Court denied this excessive recovery on the ground that the sales under which they held the certificates were invalid.

But the penalties which the state, its municipalities, and subdivisions here seek are not invalid. They arose and fastened themselves as liens upon the real estate of the corporation, now in the hands of the receivers, by virtue of and in accordance with the statutes of the state, and, if the receivers and the creditors they represent are to have the benefit of that real estate, there is no better reason why they should escape the payment of the penalties than there is why an individual, who has been unable to pay his tax upon his homestead when due, should escape the payment of the legal penalty for that failure. The real property of an insolvent corporation is not relieved from the penalties lawfully attaching to it for failure to pay the taxes thereon by its seizure by receivers on the order of the court for the purpose of applying it to the payment of its debts, and there was no error in the direction of the court below that the receivers in this case pay the penalties imposed by the statutes of Arkansas upon the real estate of the corporation for the failure to pay the taxes thereon. First National Bank v. Ewing, 103 Fed. 168, 190, 43 C. C. A. 150, 173 (5th Circuit); Coy v. Title Guarantee & Trust Co., 220 Fed. 90, 93, 135 C. C. A. 658, 661, L. R. A. 1915E, 211, 218 (9th Circuit); Gray v. Logan County, 7 Okl. 321, 54 Pac. 485, 487; High on Receivers, § 394b, p. 508.

[2] Did the court below fall into an error in determining the amount of the legal penalties? It did if Act 415, p. 361, Public Acts of Arkansas 1911, now section 7069a, Castle's Supplement to Kirby's Digest of the Statutes of Arkansas, repealed sections 7083 and 7084 of Kirby's Digest. If it did not, the court committed no error. In Martels v. Wyss, 123 Ark. 184, 184 S. W. 845, the Supreme Court of Arkansas has held in a careful and exhaustive opinion that Act 415 had no such effect. As the decisions of the highest judicial tribunals of the states, determining the meaning and effect of the statutes of their respective states, are conclusive upon the federal courts, in the absence of any question of commercial law, or of right under the Constitution or statutes of the United States, nothing remains for this court to determine here, and the judgment below is affirmed.

THE GEORGE W. ELDER.

DOE v. COLUMBIA CONTRACT CO. et al.

(Circuit Court of Appeals, Ninth Circuit. April 1, 1918. Rehearing Denied May 13, 1918.)

No. 3073.

1. COLLISION ⊂⊃102—OVERTAKING VESSEL—LIABILITY.
As article 24 of the International and Inland Rules (Act Aug. 19, 1890, c. 802, § 1, 26 Stat. 327 [Comp. St. 1916, § 7863]; Act June 7, 1897, c. 4, § 1, 30 Stat. 101 [Comp. St. 1916, § 7898]) makes an overtaken vessel the judge as to when the overtaking vessel can safely pass, a steamer, which overtook on the Columbia river a vessel engaged in taking barges in tow, *held* wholly liable for a collision, where it continued on its course despite the refusal of the vessel overtaken to signal its consent; for, while the refusal of consent was a fault, it was the duty of the overtaking vessel not to attempt to pass at that point until consent was signaled.

2. COLLISION ⊂⊃69—VESSEL AT ANCHOR—WHAT IS—"UNDER WAY."
A vessel lying dead in the water, while taking in tow three barges which had been dropped by another vessel, must be deemed a vessel "under way," within Act June 7, 1897, c. 4, 30 Stat. 96 (Comp. St. 1916, §§ 7872–7909), not being at anchor, or made fast to the shore, or aground.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Under Way.]

3. COLLISION ⊂⊃69—PRECAUTIONS FOR PREVENTING—VESSELS ANCHORED.
Though a vessel taking in tow three barges, which had been dropped by another vessel, be deemed at anchor, instead of under way, the obligation of care on the part of an overtaking vessel is not lessened.

4. COLLISION ⊂⊃77—LIABILITY—DUTY OF MAINTAINING LOOKOUT.
A vessel cannot be held in fault for failure to maintain a lookout, where the absence of a lookout in no way contributed to the collision.

Appeal from District Court of the United States for the District of Oregon; Charles E. Wolverton, Judge.

Libel by the Columbia Contract Company against the steamship George W. Elder, her engines, etc., claimed by Charles P. Doe, who filed a stipulation, with the United States Fidelity & Guaranty Company as surety, upon which the vessel was delivered. There was a decree for libelant, and claimant appeals. Affirmed, with directions.

The facts in this case, as the court below found them to be, are in substance as follows: The Columbia Contract Company was engaged in transporting rock down the Columbia river to Ft. Stevens. The rock was transported on barges, about 150 feet in length and from 35 to 36 feet in beam. Two steamers were used for this purpose, the Kern and the Hercules. The barges were taken in groups of three, and it was the custom to transfer them before reaching the lower river from the Hercules to the Kern; the latter being of deeper draft. In towing position the steamers carried one barge directly ahead, and one on each bow overlapping the head barge. On the night of the collision the Kern was engaged in taking in tow three barges which had thus been dropped by the Hercules. The barges had swung around, so that they were heading toward the Oregon shore. The Kern, heading down the river, had gotten a line from her port bow to the port quarter of the starboard barge, when the Elder, an ocean-going passenger steamer heading down the stream astern of the Kern, blew a passing signal of one whistle, and the pilot of the Elder testified that at the same time he slowed

his engines, as requested by the Contract Company to do, when passing its barges. The Kern answered with the danger signal. The Elder repeated her passing signal, and the Kern again answered with the danger signal, and very soon thereafter, the Elder struck the Kern on her starboard quarter at an angle of about 34 degrees and 16 feet abaft her beam. At the time when the Elder blew her first passing signal, the vessels were about half a mile apart. The Elder was headed so as to show to the Kern her masthead and running lights. The night was dark, but clear. The river at the point of collision was about a mile in width, and was navigable for heavy draft vessels up to within from 40 to 100 feet of the Washington shore, and for a half a mile on the Oregon side of the Kern. The water was slack, with no appreciable current. When the Elder had approached to within 500 or 600 feet of the Kern, she put her helm hard astarboard and reversed her engines to full speed astern. This gave her a curving course to port. The court below held that, under the provisions of article 24 of the International and Inland Rules, it was the duty of the Elder to keep out of the way of the Kern, and that, having heard the response to her first passing signal, it was her duty not to attempt to pass the Kern until it could be safely done, and that the rule makes the overtaken vessel the judge as to when the overtaking vessel can safely pass, and that the collision was due solely to the fault of the Elder.

H. W. Glensor and Ernest Clewe, both of San Francisco, Cal., and Sanderson Reed, of Portland, Or., for appellant.

Joseph B. McKeon, Edward J. McCutchen, Ira A. Campbell, and McCutchen, Olney & Willard, all of San Francisco, Cal., and Wood, Montague, Hunt & Cookingham, Erskine M. Wood, and C. E. S. Wood, all of Portland, Or., for appellees.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1] It seems clear that the Kern was at fault in the first instance in not signaling her consent to the first passing signal of the Elder. The Kern and her tow lay in the channel way and at least 1,000 feet from the Washington shore. There was ample room for the Elder to pass to starboard, without danger to the Kern or her tow. The only reason which Moran, the pilot of the Kern, assigned for answering with the danger signal, was that the Elder was headed directly for him, and that there was going to be a collision, and that he could see no evidence that the Elder had started to turn to starboard. He did not think that it was unsafe for the Elder to pass, but that it was unsafe for her to come farther on her course. Moran, it appeared, was laboring under a misapprehension of the rule, and he thought that the law required the Elder to accompany her whistle by an alteration of her helm, so that the Kern could see what she was doing.

The fault of the Kern was a grave one. But for her pilot's refusal to assent to the passing signal, the Elder would undoubtedly have passed to starboard, and a collision would have been avoided. But we are not convinced that the court below erred in holding that the proximate cause of the collision was the fault in navigation of the Elder, and that the fault of the Kern was not a contributing cause. It was the Elder's duty, on hearing the first danger signal, to proceed no further in the attempt to pass. By the rules of navigation the pilot of the Kern was made the judge of the necessity for giving the

danger signal. Responsibility for the collision must be determined from the situation as it existed from and after the time when that signal was given. The duty was imposed upon the Elder "under no circumstances" to attempt to pass at that point, or until the Kern signified her consent. At that time, and for some appreciable time thereafter, it was obviously possible for the Elder to keep clear of the Kern, as it was her duty to do.

[2, 3] The appellant contends that the Kern was lying dead in the water, and was therefore not an overtaken vessel. It is not disputed that the side lights of the Kern were not visible to the Elder, and that the latter was not coming up from any direction more than two points abaft the Kern's beam. The appellant's answer admitted that the Kern was a vessel under way, and thus correctly stated the situation, for the Kern was "not at anchor, or made fast to the shore, or aground." Act June 7, 1897, c. 4, 30 Stat. 96; The Nimrod (D. C.) 173 Fed. 520; The Ruth, 186 Fed. 87, 108 C. C. A. 199. But, even if the Kern were to be deemed to have had the rights of a vessel at anchor, the obligation of care upon the part of the Elder would have been in no degree lessened. The Col. John F. Gaynor, 130 Fed. 856, 65 C. C. A. 340; The Lucile (D. C.) 169 Fed. 719.

[4] The contention that the Kern was at fault in not maintaining a lookout is answered by the fact that the absence of a lookout in no way contributed to the collision. The pilot, who was on the bridge of the Kern, saw the Elder immediately upon her sounding the first signal to pass. The mate and the deck hands were forward of the forecastle head, and a watchman was on the barges. The absence of a proper lookout is unimportant, when it has nothing to do with causing the disaster. The Fannie, 11 Wall. 238, 20 L. Ed. 114; The Nacoochee, 137 U. S. 330, 11 Sup. Ct. 122, 34 L. Ed. 687; The Blue Jacket, 144 U. S. 371, 389, 12 Sup. Ct. 711, 36 L. Ed. 469; The Havana (D. C.) 54 Fed. 411; The Livingstone, 113 Fed. 879, 51 C. C. A. 560; The Aurora, 198 Fed. 383, 117 C. C. A. 259.

The decree is affirmed, with directions to the said District Court to enter judgment for costs and interest against appellant and his stipulator on the appeal bond, and with costs in this court in favor of the appellees and against the appellant.

BRADSTREET CO. v. BRADSTREET'S COLLECTION BUREAU.

(Circuit Court of Appeals, Second Circuit. January 25, 1918.)

No. 157.

1. INJUNCTION ⟸230(1)—CONTEMPT PROCEEDING—CRIMINAL OR CIVIL.
A proceeding in a civil suit, instituted by an affidavit and an order requiring the defendant to show cause why it should not be punished for contempt, for violation of an injunction previously issued therein, is one for civil and not criminal contempt.

2. INJUNCTION ⟸230(1)—CONTEMPT PROCEEDINGS—MEASURE OF RELIEF.
Where the defendant in a civil suit in fact appears in response to an order to show cause why it should not be punished for contempt for

violation of an injunction, the court is not limited in granting relief by the prayer of complainant.

3. INJUNCTION ⊂=223(1)—ACTS CONSTITUTING VIOLATION.
An injunction restraining a defendant from using the name "Bradstreet's" in its corporate name, or from otherwise representing that its business was connected with complainant, was violated by the continued use by defendant of such name on its office door and in the telephone directory.

4. INJUNCTION ⊂=230(4)—PROCEEDINGS FOR PUNISHMENT—EFFECT OF ORDER.
An order made in a civil suit, declaring certain acts of defendant to be a contempt, as in violation of an injunction previously issued therein, *held* in fact a decree upon a contempt.

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

Suit in equity by the Bradstreet Company against the Bradstreet's Collection Bureau. From an order adjudging it in contempt, defendant appeals. Affirmed.

The suit depended upon diversity of citizenship, and had been brought to enjoin the defendant from the use of the name "Bradstreet's Collection Bureau" in carrying on a general collection and adjustment bureau. A decree was entered by consent of both parties on the 30th of December, 1914, which forbade the defendant from continuing to engage in the business of collecting and adjusting overdue accounts under the name of "Bradstreet's Collection Bureau," or any similar name, and from representing, by the use of the name "Bradstreet's," that their business was connected with the business of the plaintiff, and from using any stationery in the transaction of their business containing the name "Bradstreet's." A writ of injunction was issued and served, and thereafter, on April 30, 1917, the plaintiff obtained an order to show cause, directed against the defendant, and Bernard Cowen and A. Frank Cowen as its officers and agents, to punish them for misconduct in failing to obey the decree of the court, and for such other and further relief as should be proper. The plaintiff supported this order by an affidavit showing that the defendants and the two officers had continued to use the name "Bradstreet's," printed on the door of their office, at 111 Broadway, New York, and had continued to insert in the telephone directory of New York City the name "Bradstreet's Collection Bureau." One copy of the order to show cause was served upon Bernard Cowen, who had appeared as attorney for the defendant in the suit, and who was one of the respondents personally as aforesaid. Cowen appeared specially for the defendant on the motion for contempt, "solely for the purpose of traversing the service of the motion papers therein." He likewise filed an affidavit on his own behalf, alleging that he was not an officer of the company, and consisting chiefly of a criticism of the supporting affidavit of the plaintiff, but containing allegations in defense of the use of the name upon the door and in the telephone directory. It did not appear in the affidavit whether it was to be limited to the motion against Cowen individually, or included a defense of the defendant. Judge Hough upon the hearing concluded that the special appearance for the defendant was not authorized but that it was in effect a general appearance, and that there was no excuse for the acts of the defendant in maintaining its name upon its door and in the directory, but that there was no evidence on which to punish Bernard Cowen. He therefore entered the order appealed from, decreeing that the defendant was in contempt of the injunction for the acts mentioned, and that, unless the name were removed from the door and from the telephone directory within 10 days after the service of the order appealed from, further application might be made to the court.

Bernard Cowen, of New York City, for appellant.

Satterlee, Canfield & Stone, of New York City, for respondent.

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

LEARNED HAND, District Judge (after stating the facts as above). [1] The defendant's first point is that the order to show cause could be the basis only of a criminal contempt, and that therefore, under Gompers v. Bucks Stove Co., 221 U. S. 418, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874, it was irregular, because it did not state with sufficient distinctness what the contempt was, and because it was not served personally. We do not think that the contumacious acts relied upon were insufficiently set forth, even for a criminal proceeding. The order to show cause was no more than process and prayer, and in the absence of any statutory regulation might be read along with the supporting affidavit. Assuming that, if the proceeding was criminal, personal service was necessary, such is not the case when it is to punish for a civil contempt. Pitt v. Davison, 37 N. Y. 236. Now, this was in no case properly a criminal contempt, being brought in the suit, and by the plaintiff, and not in the name of the United States. Gompers v. Bucks Stove Co., supra. But it is urged that these were but formal irregularities, and that the purpose of the proceeding was clearly criminal. This is not true, in spite of the use of the inappropriate word, "punished." It was open to the plaintiff under that language at least to recover a remedial fine, enforceable by execution, and such relief would be aptly enough described as a punishment. The opinion in Gompers v. Bucks Stove Co., supra, did not hold, as the defendant urges, that the proceeding there was criminal. On the contrary, it held that, not being such, no punitive order could properly be based upon it. None such could have followed this order to show cause, for the reasons there given. If the defendant had understood the law, it could never have been supposed that the proceeding could be criminal, whatever the prayer for relief might be, for it was either a civil proceeding or it was a nullity.

[2] We need not consider whether the plaintiff might have been embarrassed, if the defendant had defaulted, in obtaining more than a remedial fine under such a prayer. Perhaps it could not have made any use of the general prayer in that case. In fact, the defendant did not default, but entered an appearance to test the validity of the service. Had the service been in fact invalid, such a course would have involved it in no determination upon the merits; but the service was good, since the proceeding was civil, as we have said. The appearance was therefore either a nullity or it was a general appearance, though not intended as such. In either event, the defendant had de facto appeared before the court, and was necessarily advised of any added relief which the plaintiff might claim under the facts. While the scope of the prayer might protect him, if he chooses to default, from any greater relief, that protection is at an end when, by presenting himself at the hearing, he has an opportunity to learn of the extent of the added relief which the plaintiff asks and the court con-

siders. We think, therefore, that Judge Hough was quite right, having the parties in fact before him, to disregard the limitation in the prayer, and proceed to such a determination as justice required.

[3] That the sign on the door and the name in the telephone directory did each constitute a violation of the injunction admits of no doubt. They represented the defendant's business as connected with the plaintiff's by the use of the name, "Bradstreet's," and they were each a specific instance of exactly that conduct which it was the purpose of the suit to prevent, and which the injunction forbade in general terms.

[4] The last question is whether the order was in fact a supplemental decree or a decree upon a contempt. It did no more than declare the continuance of the sign and the name in the directory to be a contempt. This it certainly was, and no decree could have done less. It left open to the plaintiff a further application, which, of course, was regular. We go further, and say that it was in the power of the court to enforce the abatement of such a continuing contempt civilly by an attachment against the officers of the defendant until they should remove the sign and the name. Such an affirmative act would effect a compliance pro tanto with the decree.

Order affirmed, with costs.

GAGE v. PENFIELD.

(Circuit Court of Appeals, Seventh Circuit. January 2, 1918.)

No. 2477.

1. BANKRUPTCY ⟸417(4)—REVOCATION OF DISCHARGE—NATURE OF ACT.
The discharge of a bankrupt is a judicial act, and revocation of a judgment of discharge is likewise a judicial act, authorized when the facts prescribed by statute as necessary to a revocation shall have been established by trial.

2. BANKRUPTCY ⟸417(2)—DISCHARGE—REVOCATION—DILIGENCE.
Under Bankruptcy Act July 1, 1898, c. 541, § 15a, 30 Stat. 550 (Comp. St. 1916, § 9599), declaring that the judge may, upon application of the parties in interest, who have not been guilty of undue laches, filed at any time within one year after discharge, revoke the same, if upon a trial it shall be made to appear that it was obtained through fraud of the bankrupt, and that knowledge of the fraud has come to petitioners since the granting of the discharge, a discharge cannot be revoked nine months after it was granted, on account of the bankrupt's failure to schedule certain property, including household goods, where it did not appear that creditors were not at all times well aware of the material circumstances, or that they extended credit on account of the bankrupt's possession of such property; the petition for vacation of the discharge merely alleging general conclusions that the petitioner received information, about six months after the discharge was issued, which caused him to investigate.

3. BANKRUPTCY ⟸417(4)—CONCEALMENT OF ASSETS.
Evidence on a petition to revoke a discharge, on the ground that the bankrupt fraudulently failed to list certain assets, *held* insufficient to show that the property claimed to have been omitted belonged to the

bankrupt; it appearing that it was purchased and owned by the bankrupt's wife.

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

Petition by Charles W. Penfield to vacate the discharge in bankruptcy of Harry W. Gage, who was adjudicated a bankrupt on his voluntary petition. From an order vacating the discharge, the bankrupt appeals. Reversed.

Morton J. Stevenson, of Chicago, Ill., for appellant.

F. A. Woodbury, of Chicago, Ill., for appellee.

Before BAKER, KOHLSAAT, and ALSCHULER, Circuit Judges.

ALSCHULER, Circuit Judge. [1] The controversy involves an order of the District Court vacating its previous order of discharge of the bankrupt, Gage. His voluntary petition in bankruptcy was filed November 1, 1915, and on proper notice to the creditors the order of discharge was duly made April 24, 1916. On January 24, 1917, the petition to vacate was filed. It alleged that Gage had fraudulently failed to schedule as his property an automobile and some household effects. On the subject of the petitioner's diligence it was stated in the petition:

"Your petitioner further shows unto your honors that, the latter part of 1916, more than six months after the said discharge was issued, he got information that caused him to investigate and satisfactory investigation has taken some little time, but has not been unduly delayed, but to be of use action should be taken at once, to the end that the said order of discharge be set aside, as it is the only method of getting relief."

Discharge of a bankrupt is a judicial act, and revocation of a judgment of discharge is likewise a judicial act, authorized when a trial shall have established the facts prescribed as necessary, by the statute which is the source of the court's power to revoke the judgment of discharge.

[2] Section 15a of the Bankruptcy Act provides:

"The judge may, upon the application of parties in interest who have not been guilty of undue laches, filed at any time within one year after a discharge shall have been granted, revoke it upon a trial if it shall be made to appear that it was obtained through the fraud of the bankrupt, and that the knowledge of the fraud has come to the petitioners since the granting of the discharge, and that the actual facts did not warrant the discharge." Comp. St. 1916, § 9599.

The petition here was filed nine months after the discharge. Beyond the paragraph quoted from the petition, the transcript discloses nothing on the subject of petitioner's laches or diligence, or the want thereof. No evidence appears bearing upon that subject. But, if the paragraph itself might be considered as evidence of the facts in this respect which it purports to charge, it falls short of stating facts which would warrant the conclusion that the petitioner was diligent, or free from laches, in failing to present in due time his objections to the discharge, or in waiting nine months thereafter before filing his petition. The paragraph states merely general conclusions, and no facts bear-

ing on that issue. There was no concealment or change in possession of the car, nor does it appear that any creditor extended credit to the bankrupt on account of his apparent ownership of it. His possession and acts of ownership, if any, were the same after as before his petition in bankruptcy. The car was not listed in his assets, and it would seem the creditors would have been apprised of this when the schedule was filed; and this would be particularly true of household goods, of which he scheduled none. No facts appear, either by way of allegation or proof, wherefore the petitioning creditors and the others were not all along well aware of all the material circumstances.

[3] But, beyond this, the evidence, as shown by the transcript, does not warrant the conclusion that the property referred to belonged to the bankrupt, or that he fraudulently failed to list it as his own. The automobile, which is the item mainly in issue, was bought nearly nine months before the petition in bankruptcy was filed. The agent who sold it says he sold it to the bankrupt's wife, that she was present and assisted in bargaining for it, that she paid for it with her check, and that it was stated at the time of purchase that it was she who was buying it. The books of a prominent Chicago bank showed that she had an account there, and it was testified that long before this purchase she had received money from the estate of her father. There is absolutely no contradiction of this, and the wife's ownership is entirely consistent with the fact that the husband used the car in his business of soliciting customers for oil, that he scheduled it for taxes and in his own name paid the state license, and even with the fact that his initials were painted on the car.

The evidence fails to show "that the actual facts did not warrant the discharge," and the order vacating the order of discharge of the bankrupt is reversed.

PENNSYLVANIA R. CO. v. ROSENFELD.

(Circuit Court of Appeals, Second Circuit. February 13, 1918.)

No. 146.

GAMING ⟸21(1)—LOAN TO PAY GAMING DEBT.

One who lends money to the loser in an illegal transaction, such as gaming or betting, can recover the loan, notwithstanding he knows that the loser is going to pay his indebtedness with it.

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

Action at law by Minnie Rosenfeld against the Pennsylvania Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Certiorari denied 247 U. S. ——, 38 Sup. Ct. 579, 62 L. Ed. ——.

Burlingham, Montgomery & Beecher, of New York City, for plaintiff in error.

Otto A. Samuels, of New York City, for defendant in error.

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

WARD, Circuit Judge. This was an action tried by Judge Manton against the Pennsylvania Railroad Company to recover the possession of two locomotives and damages for their detention. The Railroad Company defended on the ground that the plaintiff had no title. A verdict was rendered for the plaintiff, and judgment entered for $3,059.20. The parties stipulated:

"That the value of the property described in the complaint is as therein set forth, and, if plaintiff is entitled to recover, her damages are fixed at $25; also that plaintiff demanded the return of the goods from the defendant before the commencement of this action, and that plaintiff need not prove value or demand on the trial of this action."

The circumstances out of which the claim arose are peculiar. One Rodgers had what is known as a 'phone room, in which he made bets on horse races over the telephone. Philip S. Abrahams was in the habit of bringing him bets of third parties, for which service Rodgers paid him a commission of 5 per cent. December 11, 1915, Rodgers gave Abrahams a check for $1,632 to cover bets which he had lost to one Davis and the commission of 5 per cent. This check being unpaid, Abrahams paid Davis. Rodgers lost additional bets with Davis to the amount of $1,180, and on December 23, 1915, gave Abrahams a bill of sale, which was filed in the register's office, for two locomotives and other property, with instructions to raise enough money upon them to pay off the indebtedness of $2,812 and expenses, any surplus to go to Rodgers. December 24th Abrahams transferred this bill of sale by a separate writing, which was not filed, to the plaintiff, Minnie Rosenfeld, to secure the repayment of $2,000 previously advanced by her and applied by Abrahams to paying Rodgers' bets and a further present advance of $900 to Rodgers. Plaintiff knew that the

moneys advanced by her were to be used to pay indebtedness incurred in gaming. March 10, 1916, Abrahams sold the two locomotives to the General Equipment Company of New York for $3,000, with the approval of the plaintiff, who did not wish to appear in the transaction, but before delivery Rodgers sold them to the Vulcan Iron Works of Chicago, and delivered them to the Pennsylvania Railroad Company for shipment. The plaintiff demanded possession of them from the company, which refused to deliver them, whereupon this action was brought.

The real defense is that the plaintiff cannot recover, because of section 993 of the Penal Law of New York (Consol. Laws, c. 40), which reads:

"All things in action, judgments, mortgages, conveyances, and every other security whatsoever, given or executed, by any person, where the whole or any part of the consideration of the same shall be for any money or other valuable thing won by playing at any game whatsoever, or won by betting on the hands or sides of such as do play at any game, or where the same shall be made for the repaying any money knowingly lent or advanced for the purpose of such gaming or betting aforesaid, or lent or advanced at the time and place of such play, to any person so gaming or betting aforesaid, or to any person who, during such play, shall play or bet, shall be utterly void."

The theory is that the plaintiff could not make out her title without proving illegal transactions, but the fact is that she did make out her case without any reference to the nature of Rodgers' transactions, all the testimony relating thereto being brought out in the defendant's case. We see no violation of the statute in question by the plaintiff. One who loans money to a loser in an illegal transaction can recover the loan, notwithstanding he knows that the loser is going to pay his indebtedness with it. Armstrong v. American Exchange Bank, 133 U. S. 433, 469, 10 Sup. Ct. 450, 33 L. Ed. 747. The verdict of the jury establishes the fact that Abrahams did not lose these moneys in betting with Rodgers, but was acting as a broker for a commission, and that he advanced moneys borrowed from the plaintiff on account of Rodgers to pay Rodgers' indebtedness to Davis, which were to be repaid out of the proceeds of sale of the locomotives.

We discover no error in the other assignments, and the judgment is affirmed.

SKAGIT COUNTY v. PUGET MILL CO.

(Circuit Court of Appeals, Ninth Circuit. April 1, 1918.)

No. 3080.

1. TAXATION ⟸482(2)—CORRECTION OF ASSESSMENTS—NOTICE TO PROPERTY OWNERS.

Under Rem. & Bal. Code Wash. § 9200, as amended by Sess. Laws Wash. 1915, p. 343, authorizing the board of equalization on five days' notice to raise the valuation of real property believed to be returned below its full value, a notice to appear before a county board and show cause why the valuation of land should not be raised, which stated that the board would be in session Monday, Tuesday, and Wednesday during

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

the first three weeks of August and on Saturday of the third week, is insufficient, not fixing any date certain when the matter would be heard.

2. COURTS ⊂=366(6)—FEDERAL COURTS—DECISIONS OF STATE COURT AS PRECEDENT.

Where the Supreme Court of a state deliberately considered and construed a statute relating to notice to property owners of proposed changes in valuation, the federal courts will abide by the construction given, though it be questioned as dictum.

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

Action by the Puget Mill Company against Skagit County. There was a judgment for plaintiff (242 Fed. 333), and defendant brings error. Affirmed.

A. R. Hilen and Thomas Smith, both of Mt. Vernon, Wash., for plaintiff in error.

Hughes, McMicken, Ramsey & Rupp and Palmer & Askren, all of Seattle, Wash., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. The county assessor for Skagit county, Wash., assessed certain timber lands owned by the defendant in error, and thereafter the board of equalization for the county raised the valuation. A notice, dated July 3, 1915, was sent to the mill company to appear before the board and show cause, if any there was, why the assessed value should not be raised as outlined in the notice. The notice continued:

"You are further notified that the said board of equalization for the year 1915 will be and remain in session in the commissioners' rooms at the courthouse in Mt. Vernon, Skagit county, Washington, between the hours of 9 o'clock in the forenoon and 4 o'clock in the afternoon of each and every Monday, Tuesday, and Wednesday during the first three weeks of August, and will also be in session between the same hours as stated on Saturday of the third week in August, being the 21st day of said month, which day will be the last day of said session."

The taxes became delinquent, and the mill company paid under protest, and brought suit against the county to recover the difference between the tax assessed upon the valuation fixed by the board of equalization and the tax which would have been assessed on the valuation as returned by the county assessor. Judgment was ordered in favor of the mill company, and the county brought error.

[1] The single question presented is: Was the notice to appear before the board of equalization sufficient to give the board jurisdiction to raise the taxes of the mill company? Section 9200, Rem. & Bal. Ann. Codes & St. Wash., as amended by Sess. Laws Wash. 1915, p. 343, c. 122, after providing for the formation of a board of equalization of assessment, requires that the board shall meet for equalization purposes on the first Monday of August, and examine and compare the rates of assessment of property of the county, and proceed to equalize the same, subject to certain rules, one of which pre-

scribes that the board shall raise the valuation of each tract "which in their opinion is returned below its true and fair value, to such price or sum as they believe to be the true and fair value thereof, after at least five days' notice shall have been given in writing to the owner or agent." The point made by the mill company is that, under the statute just cited, the taxpayer was entitled to have a date certain fixed by the notice when the matter of its taxes would be heard. The point is well taken. In Everett Water Company v. Fleming, 26 Wash. 364, 67 Pac. 82, it was held by the Supreme Court of the state that the statute contemplates a notice given to the property holder, with a date certain fixed for his appearance, and that such certain date must be fixed more than five days from the service of the notice; that the property holder is not obliged by the law to be in constant attendance upon the board of equalization during its entire session, but has a right to have his day in court fixed and determined by the notice.

[2] It is urged that the view of the Supreme Court of the state upon the point under consideration should be regarded as obiter dictum. But, as the court deliberately considered and construed the clause of the statute which relates to a notice fixing a date certain for the appearance of the property owner, we abide by the construction given. Lewis v. Monson, 151 U. S. 545, 14 Sup. Ct. 424, 38 L. Ed. 265.

Affirmed.

EQUITABLE TRUST CO. OF NEW YORK v. GREAT SHOSHONE & TWIN FALLS WATER POWER CO. et al. (PLUMER et al., Interveners).

AMERICAN WATER WORKS & ELECTRIC CO. v. TOWLE et al. (PLUMER et al., Interveners).

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

On rehearing. Former decision, reported at 245 Fed. 697, 158 C. C. A. 99, adhered to.

See, also, 228 Fed. 516.

Murray, Prentice & Howland, of New York City, and Richards & Haga and J. L. Eberle, all of Boise, Idaho, for appellant Equitable Trust Co. of New York.

Wyman & Wyman, of Boise, Idaho, for appellant American Water Works & Electric Co.

Martin & Cameron, of Boise, Idaho, for appellees Plumer and Scull.

Alfred A. Fraser, of Boise, Idaho, for appellee Shank.

James H. Wise, of Twin Falls, Idaho, for appellee Hahn.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

PER CURIAM. Since the granting of a rehearing in these cases we have listened attentively to the arguments of counsel and have reexamined the statutory provisions of the state of Idaho, as well as

the decisions of the Supreme Court of the state upon the subject, and remain convinced of the correctness of the opinion and judgment heretofore announced.

The decree and orders appealed from are affirmed.

AMERICAN ELECTRIC WELDING CO. et al. v. LALANCE & GROSJEAN MFG. CO.

(Circuit Court of Appeals, First Circuit. March 18, 1918.)

No. 1315.

COURTS ⇐405(5)—SUPREME COURT—JURISDICTION.

Where a bill for infringement of a patent, brought under Judicial Code (Act March 3, 1911, c. 231) § 48, 36 Stat. 1100 (Comp. St. 1916, § 1030), was dismissed, and a preliminary injunction denied, on the ground that the defendant was not an inhabitant and had no regular and established place of business in the district wherein the suit was brought, the Circuit Court of Appeals is, under section 128 (section 1120), without jurisdiction of an appeal from the order of dismissal, and, the question being one primarily involving jurisdiction, the appeal must, under section 238 (section 1215), be taken to the Supreme Court.

Appeal from the District Court of the United States for the District of Massachusetts; Frederic Dodge, Judge.

Bill by the Electric Welding Company and another against Lalance & Grosjean Manufacturing Company. A preliminary injunction was denied, and the bill was dismissed for want of jurisdiction, and plaintiffs appeal. Appeal dismissed.

Alan D. Kenyon, of New York City (J. Lewis Stackpole and Van Courtlandt Lawrence, both of Boston, Mass., on the brief), for appellants.

Charles F. Choate, Jr., of Boston, Mass. (E. Henry Lacombe, of New York City, and Donald Mackenzie, of Flushing, N. Y., on the brief), for appellee.

Before BINGHAM and JOHNSON, Circuit Judges, and ALDRICH, District Judge.

BINGHAM, Circuit Judge. This is a bill in equity for the infringement of a patent, brought by the American Electric Welding Company, a New York corporation, and the Thomson Spot Welder Company, a Massachusetts corporation, against the Lalance & Grosjean Manufacturing Company, a New York corporation. The suit was begun in the United States District Court for Massachusetts, pursuant to section 48 of the Judicial Code, which provides:

"In suits brought for the infringement of letters patent the District Courts of the United States shall have jurisdiction, in law or in equity, in the district of which the defendant is an inhabitant, or in any district in which the defendant * * * shall have committed acts of infringement and have a regular and established place of business. If such suit is brought in a district of which the defendant is not an inhabitant, but in which such de-

fendant has a regular and established place of business, service of process, summons, or subpœna upon the defendant may be made by service upon the agent or agents engaged in conducting such business in the district in which suit is brought."

In the bill it was alleged that the defendant was an inhabitant and citizen of the state of New York, that it had a regular and established place of business in the district of Massachusetts, and that it had committed acts of infringement there. The bill having been filed in court and a writ of subpœna issued thereon, the process on June 12, 1917, was served "on the within-named Lalance & Grosjean Manufacturing Company, by giving in hand to George A. Bath, manager of Lalance & Grosjean Manufacturing Company, room 404, 261 Franklin street, Boston, in said district, a true and attested copy of this subpœna."

June 15, 1917, the plaintiffs filed a motion for a preliminary injunction and affidavits in support thereof. June 26, 1917, the defendant appeared specially, objected to the jurisdiction of the court, and filed a motion, together with affidavits in support thereof, to quash the service of process upon it and to dismiss the bill for the following reasons:

"(1) Because it has not been made to appear that the defendant has a regular and established place of business within the district of Massachusetts.

"(2) Because it has not been made to appear that acts of infringement have been committed by it within said district.

"(3) Because no service of process has been made upon any agent engaged in conducting its business in said district.

"(4) Because the service of the order to show cause is insufficient to require the defendant to appear and plead."

It thus appears that, as the defendant was not an inhabitant and citizen of Massachusetts, jurisdiction of the District Court was invoked and depended upon whether the defendant had committed acts of infringement and had a regular and established place of business in the district of Massachusetts, and whether the subpœna in question had been served upon an agent of the defendant engaged in conducting such business in the district.

A hearing having been had on the respective motions of the plaintiffs and the defendant, the District Court, on July 31, 1917, filed an opinion in which it made certain findings of fact and rulings of law. It found that the defendant had a place of business at room No. 404, 261 Franklin street, Boston, in charge of George A. Bath, as salesman, assisted by a clerk, Miss Edwards; that the business conducted there consisted only in taking orders and forwarding them to the home office of the company in New York for acceptance or rejection; that Bath had no authority "to complete transactions there on its behalf, or to represent it there in negotiations so as to bind it"; and that he never "assumed to exercise such authority there." It was ruled that the nature of the business conducted at the Franklin street office was such that the defendant did not maintain a regular and established place of business there within the meaning of section 48. It was also found that the course of business above pointed out did not involve acts of infringement by the defendant, and that the evidence disclosed but a single instance tending to show any departure from such course of business. This was on a certain occasion when

one Landeck, at the solicitation of the plaintiffs, went to the Franklin street office in Bath's absence and prevailed on Miss Edwards to let him leave an order for certain articles to be delivered to one Kamins, at his store in Cambridge; that she received from him $12.36, the amount which, at his request, she figured the articles to come to, the order being for articles welded according to the method of the patent; that, before signing the memorandum and receiving the money, she told Landeck she would have to submit the order to the company, who would be at liberty to refuse both the order and the money; and that the defendant, in accepting the money and filling the order, did this in New York. It was thereupon ruled that acts of infringement in Massachusetts were not shown. Having made these findings and rulings, it was further ruled that the service of the subpœna on Bath was not due service on the defendant, that the motions to quash and dismiss should be granted, and that, jurisdiction not appearing, no injunction was to issue. Pursuant to this opinion a formal decree was entered, the material portions of which are as follows:

"It is ordered and decreed that defendant's motion to quash the service of the subpœna herein be, and the same hereby is, granted; and it is

"Further ordered and decreed that defendant's motion to dismiss the bill of complaint herein for want of jurisdiction be, and the same hereby is, granted; and it is

"Further ordered and decreed that plaintiffs' motion for a preliminary injunction be, and the same hereby is, denied."

From this decree the plaintiffs appealed to this court, and in their assignments of error complain that the court erred in its various findings of fact and rulings of law above enumerated, including the dismissal of their bill for want of jurisdiction and the denial of their motion for preliminary injunction.

The case having been docketed here, the defendant filed a motion to dismiss the appeal for want of jurisdiction in this court to entertain the same; the court below having dismissed the bill for want of jurisdiction.

The appellate jurisdiction of Circuit Courts of Appeals and of the Supreme Court, so far as applicable to this case, is set forth in the Judicial Code, as follows:

"The Circuit Courts of Appeals shall exercise appellate jurisdiction to review by appeal or writ of error final decisions in the District Courts, * * * in all cases other than those in which appeals and writs of error may be taken direct to the Supreme Court, as provided in section two hundred and thirty-eight, unless otherwise provided by law." Section 128.

* * * * * * * * * *

"Appeals and writs of error may be taken from the District Courts * * * direct to the Supreme Court in the following cases: In any case in which the jurisdiction of the court is in issue, in which case the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision." Section 238.

No contention is made but that the facts in this case present a question of "jurisdiction" within the meaning of the statutes above quoted, and none reasonably could be in view of the decisions of the Supreme Court in considering a like state of facts involving the same question. Board of Trade of Chicago v. Hammond Elevator Co., 198 U. S.

424, 25 Sup. Ct. 740, 49 L. Ed. 1111; Kendall v. American Automatic Loom Co., 198 U. S. 477, 25 Sup. Ct. 768, 49 L. Ed. 1133; Remington v. Central Pacific R. R. Co., 198 U. S. 95, 25 Sup. Ct. 577, 49 L. Ed. 959; Greene v. Chicago, Burlington & Quincy R. R. Co., 205 U. S. 530, 27 Sup. Ct. 595, 51 L. Ed. 916; International Harvester Co. v. Kentucky, 234 U. S. 579, 34 Sup. Ct. 944, 58 L. Ed. 1479; Tyler Co. v. Ludlow-Saylor Co., 236 U. S. 723, 35 Sup. Ct. 458, 59 L. Ed. 808; Herndon-Carter Co. v. Norris & Co., 224 U. S. 496, 32 Sup. Ct. 550, 56 L. Ed. 857; Merriam v. Saalfield, 241 U. S. 22, 26, 36 Sup. Ct. 477, 60 L. Ed. 868; Phila. & Reading Ry. Co. v. McKibbin, 243 U. S. 264, 37 Sup. Ct. 280, 61 L. Ed. 710; St. Louis Cotton Compress Co. v. American Cotton Co., 125 Fed. 196, 60 C. C. A. 80; Peoples Tobacco Co., Ltd., v. American Tobacco Co., 246 U. S. 79, 38 Sup. Ct. 233, 62 L. Ed. —— (decided March 4, 1918); Mechanical Appliance Co. v. Castleman, 215 U. S. 437, 30 Sup. Ct. 125, 54 L. Ed. 272.

The question presented by the defendant's motion as to the jurisdiction of this court over the present appeal involves the inquiry whether the judgment of the District Court dismissing the suit is one reviewable here or only on a direct appeal to the Supreme Court, for, if the appeal is one that, under section 238, should have been taken directly to that court, its authority to review the question is exclusive. United States v. Larkin, 208 U. S. 333, 339, 340, 28 Sup. Ct. 417, 52 L. Ed. 517; American Sugar Refinery Co. v. New Orleans, 181 U. S. 277, 21 Sup. Ct. 646, 45 L. Ed. 859; United States v. Jahn, 155 U. S. 109, 15 Sup. Ct. 39, 39 L. Ed. 87; Excelsior Co. v. Pacific Bridge Co., 185 U. S. 282, 22 Sup. Ct. 681, 46 L. Ed. 910.

As to this question the plaintiffs' position is that the decree of the court below dismissing the suit did not alone relate to a question of jurisdiction, but also involved a determination on the merits of the plaintiffs' right to a preliminary injunction, and, such being the situation, they had a right of appeal on the whole case to this court.

In the case of United States v. Jahn, 155 U. S. 109, 15 Sup. Ct. 39, 39 L. Ed. 87, the Supreme Court has classified the circumstances which determine the respective appellate jurisdictions of the Supreme Court and the Circuit Courts of Appeals under the acts of Congress here in question, as follows:

"(1) If the jurisdiction of the Circuit Court is in issue and decided in favor of the defendant, as that disposes of the case, the plaintiff should have the question certified and take his appeal or writ of error directly to this court. (2) If the question of jurisdiction is in issue, and the jurisdiction sustained, and then judgment or decree is rendered in favor of the defendant on the merits, the plaintiff, who has maintained the jurisdiction, must appeal to the Circuit Court of Appeals, where, if the question of jurdisdiction arises, the Circuit Court of Appeals may certify it. (3) If the question of jurisdiction is in issue, and the jurisdiction sustained, and judgment on the merits is rendered in favor of the plaintiff, then the defendant can elect either to have the question certified and come directly to this court, or to carry the whole case to the Circuit Court of Appeals, and the question of jurisdiction can be certified by that court. (4) If in the case last supposed the plaintiff has ground of complaint in respect of the judgment he has recovered, he may also carry the case to the Circuit Court of Appeals on the merits, and this he may do by way of cross-appeal or writ of error if the defendant has taken the case there, or independently, if the defendant has carried the case to

this court on the question of jurisdiction alone, and in this instance the Circuit Court of Appeals will suspend a decision upon the merits until the question of jurisdiction has been determined. (5) The same observations are applicable where a plaintiff objects to the jurisdiction and is, or both parties are, dissatisfied with the judgment on the merits."

An examination of the cases involving like questions that have arisen since the decision in the Jahn Case shows that the rules there laid down have been followed without question. The Steamship Jefferson, 215 U. S. 130, 30 Sup. Ct. 54, 54 L. Ed. 125, 17 Ann. Cas. 907; Excelsior Wooden Pipe Co. v. Pacific Bridge Co., 185 U. S. 282, 22 Sup. Ct. 681, 46 L. Ed. 910; Id., 109 Fed. 497, 48 C. C. A. 349; Kendall v. Automatic Loom Co., 198 U. S. 477, 25 Sup. Ct. 768, 49 L. Ed. 1133; Davis v. C., C., C. & St. L. Ry., 217 U. S. 157, 172, 30 Sup. Ct. 463, 54 L. Ed. 708, 27 L. R. A. (N. S.) 823, 18 Ann. Cas. 907; Id., 156 Fed. 775, 84 C. C. A. 453; Board of Trade of Chicago v. Hammond Elevator Co., 198 U. S. 424, 25 Sup. Ct. 740, 49 L. Ed. 1111; Evans-Snider-Buel Co. v. McCaskill, 101 Fed. 658, 41 C. C. A. 577; Cabot v. McMaster, 65 Fed. 533, 13 C. C. A. 39; St. Louis Cotton Compress Co. v. American Cotton Co., 125 Fed. 196, 60 C. C. A. 80.

The plaintiffs rely particularly in support of their contention on the case of Morrisdale Coal Co. v. Pennsylvania R. R. Co., 183 Fed. 929, 106 C. C. A. 269. But we do not think that case should be followed for the reasons: (1) That the ground of dismissal in the District Court did not involve a question of "jurisdiction" within the meaning of the acts of Congress under consideration, but rather a failure to allege and prove facts essential to constitute a cause of action. This is pointed out in the case of Darnell v. Illinois Central R. R., 225 U. S. 243, 32 Sup. Ct. 760, 56 L. Ed. 1072, where the court, in considering a similar question says:

"It is clear that the question of whether the plaintiff was entitled to the relief prayed, in the absence of an averment of previous action by the Interstate Commerce Commission, involved merely the determination of whether there was a cause of action stated, and hence that under these circumstances this issue did not call in question the jurisdiction of the court below as a federal court"

—and (2) because we are of the opinion that, if the dismissal in the District Court could be said to present a jurisdictional question, on the facts as presented in that case the court in the majority opinion misapplied the rules laid down in United States v. Jahn, supra, with relation to the right of review.

We are also of the opinion that this case falls within the first rule stated in the Jahn Case. The jurisdiction of the District Court was put in issue by the defendant's motion to dismiss, and was decided in favor of the defendant. That disposed of the case, and left the question of jurisdiction as the only one open to review on appeal. The denial of the plaintiffs' motion for a preliminary injunction was not upon the merits, but was a mere incident of the decree dismissing the suit for want of jurisdiction. The verbal inclusion of the denial in the decree was at most mere surplusage; it added nothing to and took noth-

ing from it; and that such was the understanding of the District Court is shown from the statement in its opinion, where it says:

"Jurisdiction not appearing, of course no injunction is to issue."

Such being the situation, appellate jurisdiction to review the decision of the court below was vested in the Supreme Court alone by the provisions of section 238 of the Judicial Code. This court being without jurisdiction to review the judgment, the motion to dismiss the appeal must be granted.

Appeal dismissed.

F. I. A. T. v. A. ELLIOTT RANNEY CO.

(Circuit Court of Appeals, Second Circuit. February 13, 1918.)

No. 140.

1. PATENTS ⟸28—DESIGNS—INVENTION.
   The test of invention in design patents is precisely like that in mechanical; the question being whether the design was beyond the powers of the ordinary designer.
2. PATENTS ⟸328—INVENTION—DESIGN FOR AUTOMOBILE RADIATOR AND HOOD.
   The Cavalli design patent, No. 48,219, for design for automobile radiator and hood, *held* void for lack of invention, in view of the prior art.

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

Suit in equity by F. I. A. T. against the A. Elliott Ranney Company and another. Decree for defendant named, and complainant appeals. Affirmed.

The following is the opinion of Learned Hand, District Judge, in the court below:

In this cause the defendant's design seems to me an infringement, even under the rule in Ashley v. Tatum, 189 Fed. 357, 111 C. C. A. 279, because, though it is not a literal copy of the patented design, the differences are such as might escape the notice of any but a close observer. They consist only of the bead around the honeycomb and the straight line at the top. The question of validity, therefore, necessarily arises.

I agree that the exact combination nowhere appears, and invention depends, therefore, upon the changes necessary to produce the design out of the prior art. The general oval appearance of the radiator, when viewed in elevation and from the front, is disclosed in the F.A.B., the Fafnir, the Hansa, the Opel, the Oryx, and the Zedel, all disclosed in the periodical. The Autocar, of March 22, 1913. Some of these have a straight line at the top, like the defendant's; some do not; but the distinctions between them in appearance are not such as constitute invention. The same applies also to the Horch, as shown in the German periodical, Motor, of January, 1913, and the French Omnia, of November 16, 1912; to the Opel, in La Vie Automobile, Volume I, 1911, page 176; to the Oryx, in the German Motor, March, 1913, and to the Hansa, in the Autocar, June 29, 1912, page 1188. No variation in front elevation can be monopolized.

The curved top of the radiator when viewed in section, is clearly shown on the Peugeot, in The Automobile, volme XXVII, 1912, page 914, and in The Motor, April 15, 1913; on the Austrian-Daimler, in La Vie Automobile,

volume II, 1911, page 757, on the Loreley, in Der Motorwagen, June 30, 1914, page 429; on the Horch, in the citations above given; and on the Hansa. It is quite true that the Horch, Hansa, and Loreley have a projected brow or cowl, which protrudes beyond the "honeycomb" of the radiator proper; but this is not true of the Peugeot, nor of the Austrian-Daimler. Moreover, I do not distinguish between a true curve in section and a generally receding section, though in broken lines, as on Mathis, in La Vie Automobile, volume II, 1911, page 405.

[1, 2] The test of invention in design patents is precisely like that in mechanical (Steffens v. Steiner, 232 Fed. 862, 147 C. C. A. 56), and the question is whether it was beyond the powers of the ordinary designer to combine the oval elevation with the curved top in section or to compress the projecting brow or cowl, from Horch, Hansa, or Loreley, either of which adaptations would produce the defendant's radiator. There were 165 designs shown in the cited number of The Autocar alone and this number was probably not exhaustive. While I agree that such a number would bespeak unusual artistic skill in any substantially new or strikingly beautiful design, it seems to me to forbid the conclusion that mere variants upon the elements already disclosed, entitle one to a monopoly of any given form. There is no such striking beauty in the design of the patent, over the other such closely similar designs as Horch or the Austrian-Daimler as was beyond the most commonplace talents; none that justifies a monopoly, or requires a reward.

The bill is dismissed, with costs, for lack of invention in the patent.

Edwards, Sager & Richmond, of New York City (Clifton V. Edwards, of New York City, and F. A. Bower, of Washington, D. C., of counsel), for appellant.

Samuel E. Darby, of New York City, for appellee.

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

PER CURIAM. Decree affirmed.

THE DELI.

THE ROBERT PALMER.

(District Court, E. D. New York. March 22, 1918.)

1. SHIPPING ⊂=216—SUNKEN VESSEL—EVIDENCE—SUFFICIENCY.
   On libel for injuries to a sunken vessel, whose position was marked, evidence *held* to show that the steamer libeled in some way collided with the sunken vessel.
2. SHIPPING ⊂=216—SUNKEN VESSEL—LIABILITY—EVIDENCE—SUFFICIENCY.
   Evidence *held* to warrant a finding that a steamer was in fault in colliding with a sunken vessel, whose position was indicated by a spar and was known to the navigating officers of the steamer, though the spar used as a warning buoy had been fixed by the libelant without notification to proper authorities.
3. SHIPPING ⊂=216—SUNKEN VESSEL—DAMAGES—MEASURE.
   Where a steamer was at fault in colliding with a sunken vessel, the steamer is liable only for the damage resulting from the collision, and that does not include the expense of raising and drydocking the vessel.

In Admiralty. Libel by Henry H. Lee against the steamer Deli, claimed by Richard J. Barrett, in which the tug Robert Palmer was impleaded. Decree for libelant against the steamer Deli.

Foley & Martin, of New York City, for libelant.

Burlingham, Montgomery & Beecher, of New York City, for the Deli.

Harrington, Bigham & Englar, of New York City, for the Robert Palmer.

CHATFIELD, District Judge. The libelant claims for damages alleged to have been inflicted upon the steamer McDonough, on the morning of April 19, 1916, by the steamer Deli, which was at the time moving up the Bay Ridge Channel, just before high water, slack, and which was waiting for certain tugs previously engaged to dock the Deli along the southerly side of Pier 6 of the Bush Stores. The McDonough had sunk the previous forenoon, and evidently suffered considerable damage at the time of sinking, as her rail and the roof of her pilot house floated to the surface and were held by the stays of the smokestack, so that they were visibly floating upon the surface at the time the Deli approached.

The general facts as shown at the trial were then stated orally as follows:

"There is nothing to dispute the testimony that the McDonough was proceeding from the Hudson river into the Bay Ridge Channel on a course which is plainly indicated on the chart, so as to pass the mouth of the Gowanus Canal 500 or 600 feet from the shore. She then headed, with the wind at her stern, for Pier 2 of the Bush Dock. There is no question that the wind was so strong that ships could not be moved in that neighborhood during the afternoon and that the wind continued until midnight.

"The McDonough was swamped so quickly that her crew had no time to do anything except swim, and sank with her engines still running under a jingle bell, and with her helm to starboard in an attempt to head for the slip between Bush Dock 5 and Bush Dock 6. She sank stern first, and was located, when found, on the bottom between 250 and 300 feet out from the southerly line of Pier 6.

"The steamer Deli, coming up from Staten Island the following morning (that is, the 19th of April, 1916), according to her captain's testimony, reached the neighborhood at a little after 8 o'clock. The Sandy Hook pilot was on the bridge, and he had been informed, before leaving Staten Island, of the sunken wreck lying off the end of Pier 6. He proceeded up the Bay Ridge Channel until he reached a point above the sunken wreck. The Deli was then met by tugs which took her back, the tide still running flood, so that she was put into the dock around the upper corner of Pier 5, without coming in contact with Pier 6 until she was alongside.

"According to the testimony of the witnesses from the Deli and the witnesses from the tug, the Deli was carried by the tugs around the spot where this wreck lay, of which all the witnesses were aware. Floating wreckage had been seen, and also a spar, which is called a 'stick,' and which is described as having been merely 'wet' in color. This stick was of yellow wood, or yellow pine, and was at a point to the north of the course of the Deli when passing into the slip. These witnesses place this stick alongside of a derrick (that is, to the southerly side of the derrick), which they place at various distances outside of the pier; one of them saying that it was lying next to the pier with a line to the pier, while the captain of the Deli puts the spar some 300 feet outside of the pier at the time. This spar was evidently the buoy fixed by the owner of the McDonough.

"There is no dispute that this spar was weighted with chains at the lower end, fastened with rope to an anchor, and, on the afternoon of the 18th, after locating the wreck, was placed a few feet from the side of the tug as she was lying upon the bottom.

"The testimony is that this spar then projected a few feet above water, and had sufficient weights, so that it stood at an angle of about 60 degrees, with sufficient length of mooring to offset the rise of the tide.

"There is no question that the flood tide was running until just before the Deli passed into her slip, and it had been flood tide when the tug sank on the previous day.

"On this testimony, it is impossible to hold the tugs which had the Deli in charge, and which have been brought in on petition. The libelant had the opportunity to elect whether he would charge fault on the part of the Deli or on the part of the tugs, and, according to the libelant's testimony, as well as that of all the other witnesses, the Deli never passed over the location of the wreck after the tugs came alongside.

"The petition, therefore, to bring in the tugs, must be dismissed, and, in so far as the witnesses from the tugs offer evidence as to the issue between the libelant and the Deli, they would be witnesses for the Deli, and not for the tugs, so that, although called on behalf of the tugs, their testimony on these matters would be direct examination on behalf of the claimant, and not cross-examination in that respect."

[1] Thereafter the issues were argued from the basis of the facts indicated, the testimony has been written out, and a few further findings or conclusions must be stated.

The tugboat lay just above the line of the lower side of Pier 6. She was listed a little to port, and the smokestack was brought up by the derrick from her port side before the diver attempted to sweep a chain under the vessel herself. With the smokestack, the wreckers brought to the surface a part (some 12 or 15 feet) of the spar which had been used as a buoy, and which, according to the captain of the wrecking crew, had been in plain sight when he was waiting for the derrick boat before the passage of the Deli, which came up the river at about 8:15 a. m.

This captain testifies that he was then seated on the end of Pier 6, and saw the stern of the Deli swing around, so as to pass directly over this spar. He states that the spar disappeared. When it was raised, some half hour later, it had been cut in two, and some 10 feet had floated away. When the tug was raised it was seen that the main house and the pilot house had been shifted over to port enough to break some of the beams. The libelant alleges that all of the damage was inflicted by the Deli in passing immediately over the wreck. There was at least 42 feet of water at the spot at the time, and the Deli was drawing some 23 feet of water at the stern. The McDonough, when lying upon the bottom, had a total height to the top of her pilot house of 26 feet, and her smokestack extended up to within 5 or 6 feet of the surface of the water. The McDonough was running at full speed when she sank, and the survey shows no evidence of explosion or other accident, which would account for any injuries to the boat beyond those occasioned by the sinking or by collision thereafter.

The libelant produced two other witnesses, who were on Pier 6 the morning after the tug sank, and who saw the Deli pass up the river under her own power, but sometimes drifting with the tide, and with her stern angling in toward the shore. The Deli had come from Staten Island, and the Sandy Hook pilot was still on board. Evidently the tugs, which were to place her in the berth between Piers 5 and 6, had not yet reached the vessel, which was headed in toward the slip

as it approached. Then, in order to wait for the tugs, the Deli worked out into the river, but continued to back and fill, all the while being carried northward by the tide, until the tugs arriving took the boat in tow, turned her around, brought her back, and then worked her around the northerly corner of Pier 5, into the slip.

One of the witnesses testifies that he was in his office on the end of Pier 6, and saw the Deli go over the spar. After the Deli passed the spar had disappeared. Another witness testifies that he could not see the spar from where he was, but that he saw the Deli just as she passed over the spot where the wreck had been lying, and that from that time for a short distance the Deli was in his plain sight. Opposed to this is the testimony of the Sandy Hook pilot, and of the captain and officers of the Deli, who all saw the timber which they call a "stick," which was standing some 6 feet out of water, at an angle of some 60 degrees, but which they placed at various distances from the pier. These witnesses all state that the Deli was never near this particular stick, that she passed up some 600 feet outside of the pier, and some of them testify that the stick was still in sight when the Deli came back under charge of the tugs. The Sandy Hook pilot had been informed of the existence of the wreck, before leaving Staten Island. None of the foreign officers on the vessel recognized the buoy as a warning, but they apparently all saw the wreckage floating on the surface of the water or saw the spar which was used as a buoy.

The Sandy Hook pilot testifies that the Deli had been keeping to the westward of mid-channel, up to the point where she met the tugs. But he then immediately places the Deli at a point one length outside of the wreck, as the nearest to which he approached the stick or buoy marking the spot. If he were intending to go into the slip between Piers 5 and 6, it is inconceivable that he violated the channel rule and kept on the wrong side of the channel, all the way up the river, particularly as he was expecting to meet the tugs and to turn into the slip before he reached Pier 5. If he were but one length away from the wreck, then the stern of the Deli would be within striking distance of the wreck, if she swung broadside, as the witnesses testify that she did, when backing to delay her passage upstream. If, as seems practically certain, she had gone in closer to shore before learning that the tugs would not be ready and that the flood tide had not sufficiently stopped running, it is apparent that the Deli would be compelled to work further out in the stream, in order to avoid the wreck as she passed up the river. The entire weight of the evidence is too strong to escape the conclusion that the Deli, in some way, came in contact with the McDonough.

[2, 3] But the case cannot be closed with this finding. Ordinarily the extent of the damage can be safely left for the master upon the reference to compute the amount of damage. But to give the libelant a decree and then to pass on to the master a determination of the very issues which have been disposed of in the main case, would avail little. In fact, the parties themselves have gone further in their proof. It has been shown on the part of the libelant that the severe storm which sank the McDonough continued, so that no boats were shifted during

the balance of that day, nor through the night. On the morning upon which the Deli appeared, the various tugs operating in the neighborhood were shown by the testimony to have known about the presence of the McDonough and to have seen and observed the spar with its white lantern, which had been used as a warning buoy. The tugs which docked the Deli had earlier taken out a barge or a steamer from the slip above Pier 6. But they evidently were careful to avoid the wreck of the McDonough. There is nothing to indicate that the smokestack of the McDonough was touched by any of the small vessels moving around the neighborhood, and the testimony of the wreckers, showing that the spar and its cable were tangled up with the smokestack, shows with sufficient certainty that the smokestack was carried away when the spar was run down by the Deli.

It must be noted that the weight of the chain used to make the spar serve as a buoy, by holding its lower end submerged, was sufficient, when increased by the stack, to hold the remaining portion of the spar entirely under water. Thus we have an explanation of how the spar disappeared from sight, and it may be that the portion broken off by the screw of the Deli was later nearer the dock, and gave rise to the testimony of the witnesses as to the yellow pine stick which they saw close into the shore. But the libelant did not notify the proper authorities. He assumed to fix the warning buoy himself. The red buoy was nothing more than an old and dirty spar, which, when wet, might still be seen to be red in color, but which, nevertheless, was not a red buoy, such as is ordinarily used for the purpose.

If the pilots of the Deli and of the tugs operating around the spot had not known of the existence and location of the wreck, the libelant would have had a much greater burden in justifying his course and in sustaining the burden of proof. But on the case as it stands that burden has been sufficiently met, and a decree must be entered holding the Deli responsible for such damage as is shown to have been the result of the collision alone. This cannot include the expense of raising and drydocking the boat. Nor can it include such repairs as would have been necessary from the sinking if no collision had occurred. A reference will be ordered to fix the amount of damage from broken timbers and from correcting the displacement of the deckhouse and the pilot house and for resetting the smokestack.

Decree will be entered accordingly.

In re MICHIGAN FURNITURE CO.

Ex parte NATHAN.

(District Court, S. D. New York. April 8, 1918.)

BANKRUPTCY ⊂⇒188(1)—CREDITORS—TRADERS' DEBTS.

As the New York Lien Law (Consol. Laws, c. 33) and Personal Property Law (Consol. Laws, c. 41) do not extend to choses in action, and as the doctrine of reputed assets does not apply to traders' debts, a creditor of a New York bankrupt, which sold on credit, taking back chattel mortgages on the goods sold, and to secure loans, etc., assigned such accounts

and chattel mortgages, on its books marking the accounts as assigned, is entitled to the proceeds of such accounts, collected within four months by the bankrupt and used in its business.

In Bankruptcy. In the matter of the bankruptcy of the Michigan Furniture Company. The petition of Pincus Nathan, claiming from the trustee collections upon certain accounts assigned by the bankrupt as security, was granted, and one Marvin, as trustee in bankruptcy, petitions to review. Petition denied, and order affirmed.

Petition by Marvin, trustee in bankruptcy, to review an order of a referee in bankruptcy. The case was this: The bankrupts were traders in household furniture, selling to their customers in part on credit, and taking back chattel mortgages on the goods sold, which were properly filed as required by section 230 of the New York Lien Law. Some of their furniture the bankrupts bought of Pincus Nathan, and also borrowed of him money in substantial amounts. It did not appear certainly whether the loans were only credit for the purchases or separate transactions, but the last may be assumed. To secure himself for each loan, Pincus Nathan not only got notes or postdated checks, but assignments of the bankrupt's chattel mortgages, in amount three or four times the face of the loans. The documents the bankrupts delivered to Pincus Nathan, and appropriately marked on their books the accounts so assigned; but they collected the accounts themselves, without notice of the assignments to the mortgagors, and mingled the cash in their own bank account, from which they drew generally for the purposes of their business.

Pincus Nathan claimed from the trustee the collections upon the assigned accounts made within four months as security for his debt, and the referee awarded them to him. The trustee appealed by petition to review from that order.

William J. Carey, of New York City, for trustee.

Herbert A. Wolff and Morris L. Ernst, both of New York City, for Nathan.

LEARNED HAND, District Judge. The New York chattel mortgage statute (Lien Law, § 230) does not apply to choses in action, nor does the statute regulating charges other than mortgages (Personal Property Law, § 36). Each is confined to "goods and chattels." In general, the doctrine of reputed ownership, which in England extends to traders' debts (21 Jac. 1, c. 19; Ryall v. Rowles, 1 Ves. Sr. 348), does not in the United States include any kind of choses in action (Greey v. Dockendorff, 231 U. S. 513, 34 Sup. Ct. 166, 58 L. Ed. 339; Clark v. Iselin, 21 Wall. 360, 369, 22 L. Ed. 568; Sexton v. Kessler, 225 U. S. 90, 32 Sup. Ct. 657, 56 L. Ed. 995; Stackhouse v. Holden, 66 App. Div. 423, 73 N. Y. Supp. 203).

The appellant (petitioner to review) does not question this general doctrine, but relies upon the fact that the bankrupts had the right to use the proceeds in their own business. This, indeed, avoids a mortgage or charge on chattels in New York. Griswold v. Sheldon, 4 N. Y. 581, Edgell v. Hart, 9 N. Y. 213, 59 Am. Dec. 532. There are many subsequent cases, among the last of which are Skilton v. Codington, 185 N. Y. 80, 90, 77 N. E. 790, 113 Am. St. Rep. 885, and Zartman v. First National Bank, 189 N. Y. 267, 82 N. E. 127, 12 L. R. A. (N. S.) 1083. Indeed, the filing of the chattel mortgage will not prevail to save the lien, in the face of the mortgagor's right of disposal. Potts v. Hart, 99 N. Y. 168, 1 N. E. 605; Southard v. Benner, 72 N. Y. 424.

I have found no New York case in which the question here at issue arises, except Stackhouse v. Holden, supra, which was by a divided court; but upon principle there can be no doubt that there should be no distinction between the reputed ownership arising only from possession and that arising from the right to dispose of the property charged. The origin of the doctrine rested upon the putative credit which the possessor was enabled to enjoy by the display of the goods. Lord Hardwicke, in Ryall v. Rowles, supra, extended this to traders' debts; but it has gone no further in England, even under the Bankruptcy Act (46–47 Vict. c. 52, § 44), and it is at least questionable whether, in the absence of some specific deception, traders' debts are a source of putative credit. However that may be, the rule based upon the possessor's power of disposal in New York arose as an application of the doctrine of reputed ownership of a stock of goods, and should be as much so confined as that doctrine in its other applications. How far it accords with present commercial habits I have, of course, nothing to say.

Petition denied; order affirmed.

In re STERNBURG.

(District Court, D. Massachusetts. March 25, 1918.)

No. 24414.

1. BANKRUPTCY ⊂=407(3)—DISCHARGE—DENIAL—FAILURE TO KEEP ACCOUNTS.
Where the failure of a bankrupt to keep accounts during the five or six weeks preceding the appointment of a receiver was a part of his plan to prefer his relatives, and during that time he made preferential payments, but ceased making regular deposits in his bank, though the gross receipts of his business were large, a discharge must be denied.

2. BANKRUPTCY ⊂=407(4)—RIGHT TO DISCHARGE—GAMBLING LOSSES AFTER FILING OF PETITION.
The filing of a petition in bankruptcy, while not divesting the bankrupt of title to his property, constitutes him in effect a trustee for the benefit of his creditors, and though, prior to adjudication, he has power to dispose of his property in the ordinary course of business, it is improper for him to use his funds for gaming.

In Bankruptcy. In the matter of the bankruptcy of Israel Sternburg. On specifications of objections to discharge. Discharge denied.

Jacobs & Jacobs, of Boston, Mass., for petitioners.

Samuel Sigilman, of Boston, Mass., for respondent.

MORTON, District Judge, at the conclusion of the arguments gave judgment orally, in substance as follows:

It is evident that we are dealing here with a bankruptcy which was essentially fraudulent, and the bankrupt's acts and omissions are to be considered with that fact in mind. The failure was carefully prepared for weeks ahead. Up to November 13th there had been deposits of more or less regularity in the bank. Beginning on that date they

entirely ceased, with one exception (said to have been of borrowed money), which was made to meet a note coming due. As to how much money was taken in during the five or six weeks, between that time and the appointment of the receiver on December 29, 1916, there is not a scrap of written evidence, and no evidence at all except the oral testimony of the bankrupt. He was carefully forelaying for bankruptcy during this interval, paying up the notes on which his brothers-in-law had indorsed, giving bonds (which would be avoided by bankruptcy), with them or other relatives as sureties, to dissolve attachments, etc. Although the gross receipts of his business were about $250 a week, and he saw failure ahead, he kept absolutely no accounts of any kind. Even after the petition was filed, he continued to make preferential payments to protect relatives, and to use money which he then had for gambling at cards. The amount so lost was not, on his own statement, large, but it was substantial. See In re Shrimer (D. C.) 228 Fed. 794, 36 Am. Bankr. R. 404.

[1] In spite of the learned referee's finding to the contrary, I cannot escape the conclusion that the failure to keep anything in the way of accounts or memoranda during the important interval just preceding the failure was associated in the bankrupt's mind with his intention to go into bankruptcy in such a way as to advantage his relatives and himself at the expense of his creditors, and was, in part at least, for the purpose of having no statements or accounts which would prove troublesome. See McKibbon v. Haskell, 198 Fed. 639, 117 C. C. A. 343, 28 Am. Bankr. R. 588 (C. C. A. 8th Cir.).

[2] The filing of the petition, while not divesting the bankrupt of title to his property, constitutes him in effect a trustee for the benefit of his creditors from that time until adjudication when that follows. Bailey, Trustee, v. Baker Ice Machine Co., 239 U. S. 268, at 275, 276, 36 Sup. Ct. 50, 60 L. Ed. 275. Granting that he has power to dispose of his property in the ordinary course of business in the interval, and even that he may do so by making preferential payments not tainted with actual fraud (but without so deciding), he certainly has no right to use his property for gambling after the petition is filed, and it seems probable that property so used is fraudulently conveyed within section 14 (Act July 1, 1898, c. 541, 30 Stat. 550 [Comp. St. 1916, § 9598]); but it is unnecessary to decide this point.

The specification of objection based on failure to keep books of account is sustained, and the discharge must be refused.

Ex parte LARRUCEA et al.

(District Court, S. D. California, S. D. October 6, 1917.)

No. 1304.

1. TREATIES ⇐11—OPERATION AS TO INCONSISTENT LAWS.

It is the rule of decision in the United States that, in so far as the judicial department is concerned, a treaty occupies no position of superiority over an act of Congress, and that, when inconsistent or irreconcilable, the latest in point of time must control.

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

2. TREATIES ⊂⊃11—SELECTIVE SERVICE LAW—EXEMPTION—CONFLICT WITH TREATY.

Under the provisions of Selective Service Law, May 18, 1917, c. 15, 40 Stat. 76, 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 the ages of 21 and 30 years, both inclusive," and that all persons registered thereunder "shall be and remain subject to draft, * * * unless exempt or excused therefrom as in this act provided," a resident subject of Spain, within the registration age, who has declared his intention to become a citizen, is subject to the act, unless exempted as provided therein, and cannot be exempted by the courts, notwithstanding the provisions of the treaty between Spain and the United States of April 20, 1903 (33 Stat. 2108), that such subject shall in the United States be exempt from all compulsory military service.

Application of Victor Larrucea and three others for writs of habeas corpus. Writs denied.

A. V. Dalrymple, of San Francisco, Cal., and Gale & Cobb, of Los Angeles, Cal., for petitioners.

Clyde R. Moody, Asst. U. S. Atty., of Los Angeles, Cal.

BLEDSOE, District Judge. Pursuant to petitions filed, an order to show cause why writs of habeas corpus should not issue was entered. Upon the hearing it developed that the above-named petitioner, with three of his countrymen, are citizens of the kingdom of Spain; for some years they have been domiciled within the United States, and each of them has heretofore filed his declaration of intention to become a citizen of the United States under the naturalization laws thereof; they were arrested off the shore of Mexico by a United States war vessel, and are now detained under appropriate process by the marshal of the district as for evading the Conscription Act hereinafter referred to.

Petitioners claim that when taken into custody they were proceeding on their way to Spain. There is no issue as to the facts, and the single question presented is whether or not the petitioners are subject to the provisions of the Conscription Law. Their claim in that behalf is that, owing to a treaty between Spain and the United States, they are exempt from all forms of compulsory military service in the United States, and under the undoubted law of nations had the right, in spite of the Conscription Law, to leave the United States and return to the land of their nativity. Moore, International Law Digest, vol. 4, page 52.

The existing treaty between Spain and the United States, proclaimed April 20, 1903, provides in article 5 (33 Stat. 2108):

"The citizens or subjects of each of the high contracting parties shall be exempt in the territories of the other from all compulsory military service by land or sea, and from all pecuniary contributions in lieu of such, as well as from all obligatory official functions whatsoever." Malloy's Treaties and Conventions, vol. 2, page 1701.

The claims of petitioners are resisted by the government of the United States on the ground that the Conscription Law provides in

express terms for their subjection to compulsory military service, and that, being later in date than the treaty with Spain, it controls, and that, in consequence, they should be remanded for trial. With this contention, upon a careful reading of the law, I am constrained to concur.

[1] Article 6 of the federal Constitution provides that:

"This Constitution, and the laws of the United States which shall be 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."

It has long been the rule of decision in the United States, however, that in so far as the judicial department of the government is concerned a treaty occupies no position of superiority over an act of Congress. They are on a parity in so far as the provisions of the Constitution are concerned, and, like other expressions of the legislative will, when inconsistent or irreconcilable, the latest in point of time must control. Cherokee Tobacco Cases, 11 Wall. 616, 621, 20 L. Ed. 227; Head Money Cases, 112 U. S. 580, 598, 5 Sup. Ct. 247, 28 L. Ed. 798. In the event, then, of a conflict between an earlier treaty and a later act of Congress, the courts are bound to accord to the act of Congress compelling authority, and remit one who claims rights or privileges under the treaty, which are denied to him by the act of Congress, to the political department of the government. Tobacco Cases, supra. In other words, in such an exigency, if the country with whom the treaty has been ratified is dissatisfied with the action of the legislative department of our government, it may present its complaint to the executive head thereof, and take such other measures as it may deem necessary for the protection of its interests. The courts thereof, however, which are bound to act in conformity with the constitutional mandates of Congress, can afford no redress. Whitney v. Robertson, 124 U. S. 194, 8 Sup. Ct. 456, 31 L. Ed. 386.

[2] The Conscription or Selective Draft Law, being the act "to authorize the President to increase temporarily the military establishment of the United States," approved May 18, 1917, "in view of the existing emergency, which demands the raising of troops in addition to those now available," and authorizing the organizing and equipping of more than a million men under arms by selective draft, provided in section 2 thereof 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 21 and 30 years, both inclusive."

In section 4 certain federal, state, and other officers, ministers of religion, theological students, and members of the military and naval service of the United States are declared exempt; and it is also stated that nothing in the act contained shall be construed to require or compel the service of any member of a well-recognized religious sect, whose religious convictions are against war, etc. Provision is also made for partial exemption of other named classes. Section 5 provided 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 in 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: * * * Provided, further, that persons shall be subject to registration as herein provided who shall have attained their twenty-first birthday and who shall not have attained their thirty-first birthday on or before the day set for the registration, *and all persons so registered shall be and remain subject to draft into the forces hereby authorized, unless exempt or excused therefrom as in this act provided.*" (Italics supplied.)

Section 14, the concluding section of the act, is to the effect that:

"All laws and parts of laws in conflict with the provisions of this act are hereby suspended during the period of this emergency."

No provision is made anywhere in the act for positive exemptions from service other than those referred to; and no mention at all is made of any exemption because of treaties with any foreign nation. The language of the act requiring all male persons between the stated ages to register, and providing that all persons so registered shall be and remain subject to draft "unless exempted or excused therefrom *as in this act provided,*" makes it impossible for me to conclude that it was intended by the act to exempt citizens of Spain or of other countries possessing similar treaty rights.

The particular claim is made by the petitioners that the language of section 2, to the effect that the draft "shall be based upon *liability to military service,*" is conclusive of an intent upon the part of Congress in the passage of this act to exclude from the operation of the act those who were not liable to military service because of some treaty provision. It is perhaps difficult to appreciate just exactly what Congress had in mind in the use of the phrase "liability to military service"; there being no general law to which my attention has been called definitely establishing and fixing "liability to military service" under the laws of the United States. It has been the attitude of our State Department, from the time of Mr. Madison, when he was Secretary thereof, that resident aliens not naturalized are not liable to perform military service. Moore, International Law Digest, vol. 4, pages 51 to 65. Of course, the execution of a mere "declaration of intention" does not constitute naturalization. Moore's Digest, vol. 3, p. 336. The Congress, in the Draft Law of 1863 (Act March 3, 1863, c. 75, 12 Stat. 731), however enacted:

"That all able-bodied male citizens of the United States, and *persons of foreign birth who shall have declared their intention to become citizens* under and pursuant to the laws thereof, between the ages of 20 and 45 years, except as hereinafter excepted, are hereby declared to constitute the national forces and shall be liable to perform military duty in the United States when ordered out by the President for that purpose."

By Act April 22, 1898 (30 Stat. 361, c. 187, § 1 [Comp. St. 1916, § 1714]) it was provided:

"That all able-bodied male citizens of the United States, and *persons of foreign birth who shall have declared their intention to become citizens of the United States* under and in pursuance of the laws thereof, between the

ages of 18 and 45 years, are hereby declared to constitute the national forces, and, with such exceptions and under such conditions as may be prescribed by law, shall be liable to perform military duty in the service of the United States."

By the terms of the act passed January 21, 1903, which was subsequent to the negotiation of the treaty with Spain, though prior to its ratification or promulgation, it was provided that the militia should consist of "every able-bodied male citizen," and every "*able-bodied male of foreign birth who has declared his intention to become a citizen,*" between the ages of 18 and 45. 32 Stat. 775, c. 196. It may have been that the phrase "liability to military service" was borrowed from the previous acts. It would seem as if the present Draft Act were in completest harmony with other military service statutes in that behalf. Be that as it may, however, the act does provide in express terms that the draft shall be based upon liability to military service of all male citizens and all male persons not alien enemies who have *declared* their intention to become citizens, and, as above recited, contains the further provision that of all persons registered none shall be exempt from service, unless exempt or excused "as in the act provided." The language seems indicative of such a "positive repugnancy" (Chew Heong v. United States, 112 U. S. 536, 549, 5 Sup. Ct. 255, 28 L. Ed. 770) to the terms of the treaty with Spain as to leave no room for the conclusion that they can be read together, and that Congress was intending that citizens of Spain, as well as of other countries, who had declared their intention of becoming citizens of the United States under the naturalization laws, should be subject to the demands of the emergency. The conclusion here announced is confirmed in a degree by the concluding section of the act, suspending all laws in conflict with it during the period of emergency.

It follows that the court, conceiving it to be its duty to follow the intent of Congress, must needs remand the petitioners to such relief as may be accorded to them by the political department of the government. The order to show cause is discharged, and the writs petitioned for are denied.

UNITED STATES v. MILLER.

(District Court, S. D. Florida. April, 1918.)

1. ARMY AND NAVY ⇐40—SELECTIVE SERVICE LAW—EVASION—OFFENSES.

An indictment charged in count 1, that defendant, having been subject to registration under Selective Service Law May 18, 1917, c. 15, 40 Stat. 76, and duly registered thereunder, shortly afterward transferred property worth more than $25,000 and producing a yearly income of $1,700, in trust for the term of ten years, the principal and income to be invested and reinvested during the term, except $480 a year, which was to be applied to the payment of interest on a mortgage on defendant's residence; that having been selected for service, defendant claimed exemption and made and presented to the local board an affidavit that his wife was dependent upon him for support; that he had no property, except a small amount listed and his residence, subject to a purchase-money mortgage for $6,000, and no source of income,

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

except the earnings from his law practice; that by means of such affidavit defendant secured exemption, and thereby evaded the requirements of the act, and failed and neglected to perform a duty required of him by said act. Count 2 charged that such affidavit constituted a false statement "as to fitness and liability" of defendant for service, in violation of section 6 of the act; and count 3 that it constituted the crime of perjury, under section 125 of the Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1111 [Comp. St. 1916, § 10295]). *Held* that all three counts were good as against a demurrer.

2. ARMY AND NAVY ⟸20—SELECTIVE SERVICE ACT—REGULATIONS FOR ENFORCEMENT.

The regulations prescribed by the President under Selective Service Law May 18, 1917, c. 15, § 4, 40 Stat. 78, for ascertaining the status of persons selected thereunder, and their right to exemption, will be taken judicial cognizance of by the courts, and have the force of law.

Criminal prosecution by the United States against Oscar Samuel Miller. On demurrer to indictment. Overruled.

Herbert S. Phillips, U. S. Atty., of Tampa, Fla., and Fred Botts, Asst. U. S. Atty., of Jacksonville, Fla.

W. M. Toomer and John W. Dodge, both of Jacksonville, Fla., for defendant.

CALL, District Judge. [1] The first count of the indictment alleges that the defendant was subject to registration, and did register on June 5, 1917, under the Draft Act, and the proclamation of the President; that on July 19, 1917, the defendant conveyed to L. P. McCord for ten years, by a declaration of trust and assignment of mortgage, property of the value of $25,300, said property providing an income of $1,700 per annum, the principal and interest to be invested and reinvested for said term; that none of said interest or property be paid over to said defendant, or any one for him, until the expiration of said 10 years, except the payment out of the income of the semiannual interest on a $6,000 mortgage upon the home of the defendant; that after the execution of the trust above stated the defendant was regularly drawn and designated for military service; that after being so drawn and notified he made out on the 10th day of September, 1917, an affidavit and presented same to the local exemption board, claiming exemption because his wife was dependent on him for support and he had no source of income except his law practice, and wherein he alleged that he owned only the property listed and none other, to wit, his home, subject to a $6,000 purchase-money mortgage, unpaid, an automobile, small library, and office furniture; that his only source of income is his law practice; that the local exemption board exempted the defendant's said claim, which action was duly approved by the district exemption board. Wherefore the defendant evaded the requirements of the act and failed and neglected to fully perform a duty required of him in the execution of the act.

Second Count. The second count repeats the allegations above noted, and alleges that it was material for the local board to ascertain whether the defendant was fit or liable for military service or was entitled to exemption; that in determining these questions it was ma-

terial to ascertain whether the defendant had a wife dependent upon him for support under the law and rules and regulations made pursuant to the act; that it thereupon became material to ascertain whether the defendant possessed income-producing property, or any source of income, other than his earnings from the practice of law. It then alleges that the affidavit was false, in that the defendant had a source of income other than the practice of law, to wit, $480 per annum to be paid out of property placed in trust as interest of the mortgage on the home. Wherefore the defendant made a false statement and certificate as to his fitness and liability for military service.

Third Count. The third count, after repeating the allegations of the second count, alleges that the defendant went before an officer duly authorized to administer oaths and made the affidavit set out in said second count; that under the rules and regulations prescribed under the act it was authorized and prescribed that a person claiming exemption from service on the ground of a dependent wife might make, execute, and file with the exemption board affidavits of himself and others concerning the question whether or not said claimed dependent wife was in fact dependent for support; that said affidavit was made in a case in which the same was authorized by law, and in which the same was material; that it was a statement concerning the fitness and liability of the defendant for service under the act, which matter was then and there being inquired into by the local exemption board having jurisdiction of the matter, and was material to the question to be decided; that said affidavit was false, in that the declaration of trust provided for the payment out of the income of said trust $480 semi-annual interest on the $6,000 mortgage, and said defendant had therefore an income of $480 not earned in the practice of law, and this the defendant then and there well knew. Therefore that the defendant did commit willful perjury.

The defendant demurs to the indictment, and to each count thereof.

Section 2 of the act approved May 18, 1917, known as the Selective Service Law, among other things provides:

"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 21 and 30 years, both inclusive, and shall take place and be maintained under such regulations as the President may prescribe, not inconsistent with the terms of this act."

Section 4 exempts certain classes, and then provides:

"And the President is hereby authorized to exclude or discharge from said selective draft * * * persons of the following classes: * * * Those in a status with respect to persons dependent upon them for support, which renders their exclusion or discharge advisable."

Section 6 among other things provides:

"And any person who shall make or be a party to the making of any false statement or certificate as to the fitness or liability of himself * * * for service under the provisions of this act, or regulations made by the President thereunder, or otherwise evades * * * the requirements of this act or of said regulations * * * shall * * * be guilty of a misdemeanor."

Section 125 of the Criminal Code prescribes what shall constitute perjury and provides the punishment. The regulations promulgated by the President under section 4 of the act provides for the exemption of "any married man whose wife or child is dependent upon his labor for support." This includes mental or physical labor, and the dependent must be mainly supported by such labor.

The demurrer admits that all the facts well pleaded are true in each of the counts. The first count charges the facts set out therein, a résumé of which is set out above, and charges those facts constitute an evasion of the Draft Law. The second count sets out certain facts, and charges that those facts constitute the offense of making a false statement to evade the act. The third count charges perjury under section 125 of the Criminal Code. If the allegations contained in each of the first two counts, if true, would constitute an evasion of the Draft Law, then the demurrer must be overruled. In my judgment the demurrer is not well taken to those two counts.

[2] In regard to the third count, charging perjury, the truthfulness of that portion of the affidavit in which affiant swore that his only source of income was his professional practice, it is claimed that the fact that a fund of $480 per annum to pay interest on the mortgage was immaterial, and therefore the charge of perjury could not be based upon the falseness of that fact. But under the act in question the question before the local exemption board was whether the affiant was exempt from military service for the reason that he was a married man with a wife dependent on his labor for support, and the decision of this question was invoked by the affiant. In the decision of this question the financial condition of the applicant, his income, and sources of such income were material matters to be submitted to the board, the consideration of which would necessarily influence its decision. The exemption provided for in the statute is:

"Those in a status with respect to persons dependent upon them for support which renders their exclusion * * * advisable."

The regulations prescribed by the President, for the ascertainment of this status, required the showing to be made by affidavit. As I understand the law, courts will take judicial cognizance of these regulations prescribed pursuant to the law, for the procedure in claims for exemption, and that such regulations have the force of law.

I am therefore of opinion that the third count states a case of perjury against the defendant, and the demurrer to the third count will be overruled.

UNITED STATES v. DARMER.

(District Court, W. D. Washington, S. D. May 10, 1918.)

No. 82-E.

ALIENS ⊂=71½, New, vol. 7 Key-No. Series—NATURALIZATION—SUIT TO CANCEL CERTIFICATE.

A petition for cancellation of the certificate of citizenship of a former German subject, on the ground that he made a false oath of allegiance, and of renunciation of all allegiance to Germany and the German emperor, *held* sufficient on motion to dismiss, where it alleged that defendant, when asked to buy a Liberty Bond, emphatically refused on the ground that he was of German descent, and made other statements indicating allegiance and loyalty to Germany, rather than to the United States.

In Equity. Suit by the United States against Carl August Darmer. On motion to dismiss petition. Denied.

Geo. P. Fishburne, Asst. U. S. Atty., of Tacoma, Wash.

W. L. Sachse, J. J. Anderson, and Gordon & Easterday, all of Tacoma, Wash., for defendant.

CUSHMAN, District Judge. The petition of the United States district attorney prays the cancellation of defendant's certificate of citizenship, secured in a proceeding in the court of Washington Territory in 1888. The petition alleges fraud in its procurement, in that:

"Contrary to the spirit and letter of said section 2165, R. S. of the United States, the said Carl August Darmer, being the petitioner in the aforesaid proceeding for naturalization, for the purpose of becoming naturalized as a citizen of the United States of America, did fraudulently and illegally procure said certificate of citizenship, in that

"(a) Section 2 of section 2165, R. S. of the United States, provides that applicant shall, at the time of making his application to be admitted, declare on oath before the court before which he is being admitted that he absolutely and entirely renounces and abjures all allegiance and fidelity to every foreign prince, potentate, state, or sovereignty, and particularly by name to the prince, potentate, state, or sovereignty to which he was before a citizen or subject. And that, pursuant to said provision, the above-named defendant took oath as required, and absolutely and entirely renounced and abjured all allegiance and fidelity to Germany, and particularly William II, German emperor, of whom he was before a subject, and that as a matter of fact he did not absolutely and entirely renounce and abjure his allegiance and fidelity to Germany and to William II, German emperor, but there was a mental reservation, and at the time of the taking of the oath he was loyal to and retained his allegiance and fidelity to Germany and to William II, the German emperor, and never intended to renounce his allegiance to Germany and to William II, the German emperor.

"(b) That during the Second Liberty Loan drive, on or about October 17, 1917, a committee of three called on C. A. Darmer, at Tacoma, Wash., and one of the committee asked Darmer to buy a Liberty Bond, or more than one Liberty Bond, and that Darmer immediately told the committee that he was of German descent, and that, if he bought any Liberty Bonds it would be the same as kicking his own mother, and refused to buy a Liberty Bond on that ground; and when the committee called his attention to the attitude taken by Germany, and the things done by Germans to American citizens, said Darmer said he didn't believe a word of it, and he further said that

he would rather throw all his property into the bay than buy one $50 Liberty Bond. That on account of the foregoing words and conduct, and similar acts and conduct occurring on various other occasions within the last year, defendant has violated his oath of allegiance, and on account of all the matters hereinabove set forth his certificate of citizenship and order granting same should be set aside and canceled."

The defendant has moved to dismiss the proceeding. The allegations set out above, in subsection (b), are, in substance, those of the affidavit made under section 15 of the act of 1906 (Act June 29, 1906, c. 3592, 34 Stat. 601 [Comp. St. 1916, § 4374]), which, if sufficient to show "good cause therefor," required the district attorney to institute the proceeding.

It is not fitting upon this motion to consider any possible explanation of the expressions attributed to the defendant. The language charged to have been used by him, standing by itself, tends to show loyalty and allegiance to Germany, rather than to the United States. Such positive expressions of alien allegiance repeatedly made during a year's time, uncontradicted and unexplained, give rise to a presumption of some continuity and duration of existence. Whether the feeling expressed existed in a stronger or weaker state, or not at all, in 1888, cannot be determined merely from the allegations of the complaint. Evidence alone can establish that; but, as attachments generally are weakened by length of time and absence from the cherished object, the contention that it is more likely that it was stronger then than now cannot be said, in the absence of explanation, to be altogether unreasonable.

The showing of the affidavit is held sufficient to warrant the district attorney, in the exercise of his discretion, in bringing the suit. The allegations charging defendant with falsely taking an oath renouncing his allegiance to Germany and its emperor, by means of which false oath defendant secured his certificate of naturalization, are sufficient as against a demurrer or motion to dismiss. Luria v. United States, 231 U. S. 9, 34 Sup. Ct. 10, 58 L. Ed. 101.

The motion to dismiss is denied.

In re TASSINARI.

(District Court, D. Massachusetts. March 12, 1918.)

No. 24015.

BANKRUPTCY ⇐314(1)—CLAIMS—AGREEMENT OF CONTINUING PARTNER TO PAY FIRM DEBTS.

Where, after dissolution of a partnership, the bankrupt agreed with claimant, his former copartner, to pay the firm debts, which remained as joint obligations of both, claimant cannot, having paid none of such debts, prove the amount thereof against the estate of the bankrupt, for the contract was in reality one of indemnity.

In Bankruptcy. In the matter of the bankruptcy of Lindo Tassinari. On certificate of referee concerning right of creditor to make proof of claim. Order of referee affirmed.

William B. Sullivan, of Boston, Mass., for creditor.
John H. Blanchard, of Boston, Mass., for trustee.

MORTON, District Judge. As to the questions here presented, the partnership may be regarded as having ceased on the dissolution of the firm. Thereafter there was no joint property nor partnership estate. Its debts remained as joint obligations of the bankrupt and the claimant. In this situation, one of the two joint obligors promised the other to pay the debts, failed to do so, and later became bankrupt. May the co-obligor prove for the amount of the debts without having paid them?

To hold that he may do so puts the agreement to pay the debts on the same footing as the debts themselves, and permits a debtor to compete with his own creditors. It may lead to great confusion. For instance, suppose that there were four partners in the firm, that three withdrew, and that the continuing one promised each of them to pay the debts: Could each prove against the continuing partner's estate for the whole amount of the firm debts, never having paid any part of them? Not improbably the continuing partner would incur individual obligations subsequent to the dissolution. These would be at a great disadvantage on the claimant's theory of the law, because the old debts would be proved, in effect, four times, against once for the new ones.

Such a result seems obviously unsound. The fact is that, however contracts of this kind may be phrased, they are really contracts of indemnity, and in bankruptcy proceedings they should be so treated.

I fully agree with the views of the learned referee as stated in his certificate.

Order affirmed.

END OF CASES IN VOL. 249