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

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This is a Key-Numbered Volume

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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. GEORGE H. BINGHAM, Circuit Judge.....Manchester, N. H.
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Hon. W. H. SEWARD THOMSON, District Judge, W. D. Pennsylvania.....Pittsburgh, Pa.

[1] Died January 20, 1919.

[2] Appointed January 27, 1919.

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Hon. ARTHUR C. DENISON, Circuit Judge.....Grand Rapids, Mich.
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Hon. HOWARD C. HOLLISTER, District Judge, S. D. Ohio.....Cincinnati, Ohio.
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Hon. JOHN H. CLARKE, Circuit Justice .....Washington, D. C.
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Hon. JULIAN W. MACK, Circuit Judge.....Chicago, Ill.
Hon. SAMUEL ALSCHULER, Circuit Judge .....Chicago, Ill.

[3] Died December 13, 1918.

[4] Appointed March 5, 1919.

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Hon. KENESAW M. LANDIS, District Judge, N. D. Illinois ..... Chicago, Ill.
Hon. GEORGE A. CARPENTER, District Judge, N. D. Illinois ..... Chicago, Ill.
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Hon. WILBUR F. BOOTH, District Judge, Minnesota ..... Minneapolis, Minn.
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Hon. THOMAS C. MUNGER, District Judge, Nebraska ..... Lincoln, Neb.
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Hon. COLIN NEBLETT, District Judge, New Mexico ..... Santa Fé, N. M.
Hon. CHARLES F. AMIDON, District Judge, North Dakota ..... Fargo, N. D.
Hon. ROBERT L. WILLIAMS, District Judge, E. D. Oklahoma[6] ..... 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.
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Hon. WILLIAM W. MORROW, Circuit Judge ..... San Francisco, Cal.
Hon. WILLIAM H. HUNT, Circuit Judge ..... Washington, D. C.
Hon. WILLIAM H. SAWTELLE, District Judge, Arizona ..... Tucson, Ariz.
Hon. BENJAMIN F. BLEDSOE, District Judge, S. D. California ..... Los Angeles, Cal.
Hon. OSCAR A. TRIPPET, District Judge, S. D. California ..... Los Angeles, Cal.
Hon. WILLIAM 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. GEORGE 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.

[5] Appointed March 1, 1919.

[6] Confirmed January 7, 1919.

CASES REPORTED

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CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE DISTRICT COURTS

STERNBURG v. M. COHEN & CO. et al.

(Circuit Court of Appeals, First Circuit. December 18, 1918.)

No. 1375.

1. BANKRUPTCY ⊂⊃228—REFEREE—FINDING.
   No arbitrary rule can be laid down for determining the weight which should be attached to a finding of fact by a bankruptcy referee; but, as his position and duty are analogous to those of a special master, the rules applicable to a master's report apply to a referee's finding of fact, and if it is based on conflicting evidence, involving credibility, and the referee has heard the witnesses, the District Judge should not disturb his finding, unless there is most cogent evidence of mistake.
2. BANKRUPTCY ⊂⊃228—REFEREE—FINDING.
   A finding of the referee, which was mainly based on deduction from established facts, and which was to the opposite effect of an earlier report, may well be disregarded by the trial court.
3. BANKRUPTCY ⊂⊃414(3)—DISCHARGE—FAILURE TO KEEP BOOKS.
   On petition of a bankrupt for discharge, *held* that, under the evidence, a denial of the discharge, on the ground that, with intent to conceal his financial condition, the bankrupt concealed, destroyed, and failed to keep books, was warranted.

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

In the matter of Israel Sternburg, bankrupt. On objections of M. Cohen & Co. and others, creditors, the petition of the bankrupt for discharge was denied, and from the order refusing discharge (249 Fed. 980) he appeals. Affirmed.

Charles H. Dow, of Boston, Mass. (Samuel Sigilman, of Boston, Mass., on the brief), for appellant.

Joseph B. Jacobs, of Boston, Mass. (Jacobs & Jacobs, of Boston, Mass., on the brief), for appellees.

Before BINGHAM, JOHNSON, and ANDERSON, Circuit Judges.

ANDERSON, Circuit Judge. This is an appeal from an order of the District Court refusing the bankrupt his discharge. The appellees

set forth four objections to the petition for discharge, the first of which is:

"That with intent to conceal his financial condition he destroyed, concealed and failed to keep books of account or records from which such condition might be ascertained."

The District Court sustained the first objection, and on that ground refused the discharge. The remaining objections were not passed upon.

The essential facts are as follows: On December 19, 1916, an involuntary petition was filed by three friendly creditors against Israel Sternburg. Prior to adjudication terms of composition were offered which were referred to the referee to ascertain and report the facts. The referee reported against the offer, and the composition was not confirmed. The bankrupt's petition for discharge was referred to the same referee to ascertain and report the facts. In the referee's report concerning the discharge he incorporated by reference the report made by him in relation to the offer of composition.

It appeared that the bankrupt conducted a retail clothing store on Castle street, Boston, selling wholly for cash, his receipts averaging from $200 to $300 a week; that his expenses for rent, light, help, and his own drawing account of about $60 per week, were $125. In the spring of 1916 the bankrupt got hard up for money, and went to everybody he could to raise it, paying money lenders at the rate of one per cent. per month. He borrowed from relatives and others with whom he long had had friendly relations. As to the lack of books, the referee found in his first report, filed June 19, 1917, as follows:

"Although the bankrupt had some years before kept a book of account, I do not regard his failure to keep books in connection with his business conducted on a cash basis as sufficient to sustain the specification, but taken in connection with his failure to account for or deposit moneys after November 13, 1916, except for the one deposit of $307 on December 1, I regard such conduct as evidencing an intent to conceal his true financial condition. The transfer of a policy of insurance to his wife, on which he subsequently paid a premium in a substantial sum, the purchase for his wife of a valuable garment even after the filing of the petition in bankruptcy and payment therefor out of funds of which he was trustee for his creditors, and also the loss of at least $50 of such moneys in playing cards with Simons and Einstein, and the giving of a note to his nephew, Lew Goldman, for $250, the same being for certain commissions on sales extending over a long period on a percentage basis, which the bankrupt himself seemed in some doubt about, are important upon the question of good faith and proper conduct, which are essential elements in cases where composition is offered to one's creditors."

In his second report, filed March 5, 1918, the referee, dealing with substantially the same specifications, found as follows:

"As to the others (i. e., the specifications), as pointed out in my former report, there was here a clear preparation for bankruptcy by the transfer of a policy of insurance to his wife, and preferential payments (for, while the petition was not voluntary, it was friendly), but the policy had little or no paid-up value, and its transfer was a matter of record. Preferential payments, though in this case, I believe, clearly recoverable, and furnishing the basis for my recommending that the proposed composition was not for the best interests of creditors, will not in and of themselves bar a discharge.

"On the remaining specifications it comes to the matter of whether a cash

business, such as this was, requires the keeping of books, as the whole contention on the score of concealment of assets has to do with the disposition of a sum not exceeding $100, and probably even less, being the difference between undoubted expenses and receipts which have now to be established by oral evidence. It has been impossible for me to regard the transactions of this bankrupt in any other light than that of a man struggling to get out of his difficulties, and that there was from start to finish no actual intent to conceal his true financial condition. I think the case clearly distinguishable from In re Kaplan (D. C.) 245 Fed. 222, both as to the conduct of the bankrupt before as well as after the petition was filed."

The District Court at the conclusion of the arguments gave oral judgment (thereafter reduced to writing) 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. 791, 36 Am. Bankr. Rep. 404.

"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, 28 Am. Bankr. Rep. 588, 198 Fed. 639, 117 C. C. A. 343 (C. C. A. 8th Cir.).

"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, 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 intervals, 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; but it is unnecessary to decide this point."

[1] In behalf of the bankrupt it is urged that this court should follow the second finding of the referee and reverse the finding of the District Court. Conceding that "no precise quantitive weight is in this district assigned to the findings of fact made by the referee" (In re Swift [D. C.] 118 Fed. 348), the appellant contends nevertheless that, in so far as the referee's findings depend upon the credibility of witnesses seen and heard by him, that finding should not be disturbed unless he is clearly in error. We are content to follow the doctrine laid

down by the Circuit Court of Appeals for the Sixth Circuit in Ohio Valley Bank Co. v. Mack, 163 Fed. 155, 89 C. C. A. 605, 24 L. R. A. (N. S.) 184, in an opinion by Circuit Judge (afterwards Justice) Lurton:

"No arbitrary rule can be laid down for determining the weight which should be attached to a finding of fact by a bankrupt referee. His position and duties are analogous, however, to those of a special master directed to take evidence and report his conclusions, and the rule applicable to a review of a referee's finding of fact must be substantially that applicable to a master's report. Tilghman v. Proctor, 125 U. S. 137, 8 Sup. Ct. 894, 31 L. Ed. 664; Davis v. Schwartz, 155 U. S. 631, 15 Sup. Ct. 237, 39 L. Ed. 289; Emil Kiewert & Co. v. Juneau, 78 Fed. 708, 24 C. C. A. 294; Tug River Co. v. Brigel, 86 Fed. 818, 30 C. C. A. 415. Much in both cases must depend upon the character of the finding. If it be a deduction from established fact, the finding would not carry any great weight, for the judge, having the same facts, may as well draw inferences or deduce a conclusion as the referee. But, if the finding is based upon conflicting evidence involving questions of credibility and the referee has heard the witnesses, much greater weight naturally attaches to his conclusion, and the weight of authority is that the district judge, while scrutinizing with care his conclusions upon a review, should not disturb his finding unless there is most cogent evidence of a mistake and miscarriage of justice. Loveland on Bankruptcy, § 32a; In re Swift (D. C.) 118 Fed. 348; In re Rider (D. C.) 96 Fed. 811; In re Waxelbaum (D. C.) 101 Fed. 228; In re Stout (D. C.) 109 Fed. 794; In re Miner (D. C.) 117 Fed. 953."

[2] In the case at bar the question for determination is mainly, if not entirely, one of deduction from established facts. It does not turn chiefly upon questions of credibility arising in conflicting evidence. Moreover, the referee's conclusion in his second report that in this case "there was from start to finish no actual intent to conceal his [the bankrupt's] true financial condition," may be regarded as no more than offsetting his earlier conclusion to the opposite effect; nor does his later report set forth any very satisfactory reason for his changed view concerning the bankrupt's intent. Under these circumstances, the district judge was well warranted in drawing his own conclusions from the admitted facts and evidence, little influenced by the last conclusion of the referee.

[3] It is beyond dispute that the bankrupt against whom the friendly petition was filed in December, 1916, found himself in embarrassed circumstances as early as the spring of that year. It is a reasonable inference, as found by the District Court, that he had bankruptcy in contemplation for a considerable time before the friendly petition was filed. During that period he did what he could to exonerate the relatives from whom or on whose credit he had borrowed. He transferred an insurance policy to his wife on November 2, 1916, and thereafterwards, on or about December 10, 1916, paid a substantial sum as an overdue premium on that policy. Apparently that sum was $137; the record is not entirely clear as to the amount. Even after the the filing of the petition in bankruptcy he indulged himself in friendly games of poker with his relatives, losing to them at least $50 of money which obviously belonged to his creditors. Under these circumstances, inferences in favor of his good faith in changing his meager bookkeeping methods are not easily drawn.

While, as the referee finds, his mere failure to keep ordinary books of account for a cash sales business would not in and of itself be a bar to his discharge (compare In re Hodge [D. C.] 205 Fed. 824, 826, and In re Newbury and Dunham, 209 Fed. 195, 126 C. C. A. 207), yet the bankrupt's failure to make after November 13 any deposits in the bank account, which he did keep, is persuasive evidence that he intended thereby to conceal his real financial condition. A deposit book and a check book showing the disposition of cash may be most important means of determining the financial condition of a small merchant carrying on a business like that of the bankrupt. There is no adequate explanation of his failure after November 13 to make deposits as he had hitherto done. It is argued that he used the proceeds of his cash sales mainly in paying seven notes aggregating $1,625. Undoubtedly these payments would account for part of the proceeds of the sales; but the very fact that he paid these in cash instead of by check from deposits regularly made warrants an inference that he may have received, as the appellees claim, sums substantially in excess of the amounts thus accounted for. At any rate, as found by the District Court, his utter failure during this critical period, when he was in contemplation of bankruptcy, either to make any deposits from the proceeds of sales, or by any other method of bookkeeping to keep track of the amount of money which he received, and his disposal thereof, fully sustains the finding of the District Court "that his failure to keep books was with intent to conceal his financial condition."

The finding of the District Court sustaining the first specification and denying the bankrupt his discharge must be affirmed.

The decree of the District Court is affirmed, and the appellees recover their costs of appeal.

WING v. SEDGWICK.

SAME v. McCALLUM.

(Circuit Court of Appeals, First Circuit. October 3, 1918. Petition for Rehearing, December 11, 1918.)

Nos. 1334, 1335.

1. CORPORATIONS ⟸109(1)—SUBSCRIPTIONS TO STOCK—CONSTRUCTION OF CONTRACT.

Authority given syndicate managers by each several signer of an underwriting agreement for the stock of a corporation to borrow money to the amount of his subscription, to make immediate payment for the stock, "upon such terms" as they might be able to arrange with the lenders, and to pledge the agreement as security, *held* broad enough to empower them to execute their note to the corporation and to deposit the agreement with a trustee as collateral.

2. CORPORATIONS ⟸92—CAPITAL STOCK—LEGALITY OF ISSUE.

Under General Corporation Law N. J. § 48, providing that nothing but money shall be considered as payment for capital stock of a corporation, except in case of purchase of property, where a note was made to a corporation in which it sold participation certificates for cash, stock issued to the amount of such cash was full-paid and valid.

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3. CORPORATIONS ⟸148(2)—STOCK UNDERWRITING AGREEMENT—CONSTRUCTION.

Where an underwriting agreement for stock of a corporation authorized syndicate managers to borrow money to pay for the stock, and to pledge the agreement as security, "without the duty on the part of such lender to inquire into the performance by the syndicate managers of any of their obligations hereunder," the rights of lenders could not be affected by the fact that the money borrowed was not all applied to the purchase of stock.

4. CORPORATIONS ⟸123(10)—STOCK UNDERWRITING AGREEMENT—ACTION BY PLEDGEE.

The declaration in an action by a trustee on an underwriting agreement for stock of a corporation, which in accordance with its terms was pledged with plaintiff to secure a note in which participation certificates were issued and sold, *held* to state a cause of action in favor of the holders of such certificates.

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

Actions by Thomas E. Wing, trustee, against Alexander Sedgwick and against Alexander McCallum. Judgments for defendants (244 Fed. 199), and plaintiff brings error. Judgments vacated, and cases remanded.

Burt D. Whedon, of New York City (Philip W. Russell and Wing & Russell, all of New York City, and C. A. Hight and Coolidge & Hight, all of Boston, Mass., on the brief), for plaintiff in error.

Hector M. Hitchings, of New York City, and William R. Sears, of Boston, Mass. (Whipple, Sears & Ogden, of Boston, Mass., on the brief), for defendants in error.

Before BINGHAM and JOHNSON, Circuit Judges, and BROWN, District Judge.

BINGHAM, Circuit Judge. These are writs of error from judgments in favor of the defendants in the United States District Court for Massachusetts upon demurrers to declarations. Each action was brought against an underwriter to recover his individual subscription to an underwriting agreement which was pledged with the plaintiff, as trustee, to secure a certain loan or loans provided for in the underwriting agreement, as will hereafter more particularly appear.

The declarations in each action were the same, the only difference being in the amount of the individual underwriter's subscription and the sums due thereon. In No. 1334 it was alleged: (1) That the plaintiff was a citizen of the state of New York; (2) that the defendant was a citizen of Massachusetts; (3) that on or about the 1st day of September, 1907, the defendant, desiring to provide for the purchase of certain shares of the capital stock of the Refugio Syndicate, a New Jersey corporation, made a contract, in writing, with George W. McElhiney and Ernest A. Wiltsee, called therein "syndicate managers," whereby the defendant undertook to pay $9,200 to the said McElhiney and Wiltsee as such syndicate managers, at the times and upon the terms and conditions therein set out (a copy of the contract, marked "Schedule A," was annexed to the declaration and

made a part thereof); that within 90 days from the date of said contract subscriptions to the amount of at least $500,000 were made thereto, so that the said contract, in accordance with its terms, became binding and effective, and thereafter subscriptions to the full amount of $800,000 were made to said contract; (4) that thereafter, and pursuant to the contract (Schedule A), and to carry out the purpose and provisions thereof, the said McElhiney and Wiltsee subscribed as such syndicate managers, and agreed to take and pay for 8,000 shares, of the par value of $100 each, of the capital stock of Refugio Syndicate; (5) that the said syndicate managers, being by the contract (Schedule A) authorized to borrow the sum of $800,000 and to incur a liability for the interest thereon as such syndicate managers, for the purpose of paying for the aforesaid stock so subscribed for, did, pursuant to the terms of said contract, make and execute and deliver, as syndicate managers, their promissory note, payable on March 1, 1909, to bearer, for the sum of $800,000, and said syndicate managers, as therein authorized, pledged said contract (Schedule A) as collateral security for the payment of their said note, together with the capital stock of Refugio Syndicate held by them as syndicate managers, with the Guardian Trust Company of New York, as trustee under a certain agreement in writing dated March 2, 1908, a copy of which is annexed hereto, made a part hereof, and marked "Schedule B"; that the aforesaid note was duly certified by the trustee in accordance with the provisions of said Schedule B; (6) that on the same day, to wit, March 2, 1908, Refugio Syndicate, desiring to realize upon the said $800,000 note before the date of its maturity, in accordance with a plan and agreement arrived at between it and the said syndicate managers before the execution and delivery of said note under which participations in said note could be advantageously sold, made an agreement in writing with the Guardian Trust Company of New York, under which agreement it deposited with the Guardian Trust Company of New York the said $800,000 note and provided for the issue by the said Guardian Trust Company of New York of certificates of participation in said note to purchasers thereof (a copy of the agreement, called the "deposit agreement," marked "Schedule C," was annexed to the declaration, and made a part thereof); (7) that after January 1, 1909, and at least 30 days prior to March 1, 1909, the syndicate managers called upon defendant to pay on March 1, 1909, the amount agreed to be paid by him in his said contract (Schedule A); (8) that the defendant failed and refused, and still refuses, to pay the said amount, except the sum of $1,150 on or about July 15, 1909, and the sum of $1,150 on or about March 18, 1910; (9) that on March 1, 1909, the aforesaid note for $800,000 matured, was duly presented for payment, and was not paid, and is still unpaid; (10) that on or about the 28th day of September, 1910, there were outstanding certain participations in the said $800,000 note, and at that time, by agreement between the Guardian Trust Company of New York, Refugio Syndicate, and the holders of such outstanding participation certificates, the so-called deposit agreement, a copy of which is marked "Schedule C," was canceled, and the said $800,000 note was redelivered by the Guardian Trust Company of New

York to Refugio Syndicate, and the then holders of participations therein accepted from Refugio Syndicate its certificates of participation in the place and stead of certificates of participation theretofore issued to them by the Guardian Trust Company of New York; (11) that on September 28, 1910, the Guardian Trust Company of New York, by instrument in writing and in accordance with the provisions of agreement, Schedule B, resigned as trustee, which said resignation was duly accepted and consented to, and upon the same day, to wit, September 28, 1910, the plaintiff was duly appointed trustee in the place of Guardian Trust Company of New York, duly qualified as substituted trustee, and is now, and ever since has been, acting as such substituted trustee; (12) that on September 28, 1910, Consolidated Gold Fields of South Africa, Limited, a corporation duly organized and existing under the laws of the kingdom of Great Britain, loaned to said Refugio Syndicate the sum of $300,000 upon the promissory note of said Refugio Syndicate dated the same day, wherein it promised to pay the sum of $300,000 to Consolidated Gold Fields of South Africa, Limited, on or before one year from date thereof; (13) that as collateral security for the payment of said note, said Refugio Syndicate delivered to said Consolidated Gold Fields of South Africa, Limited, the said $800,000 note of the syndicate managers (subject to outstanding participations therein), which said note was, and still is, secured by the trust agreement, Schedule B, hereto annexed; (14) that on October 25, 1911, the said $300,000 note of Refugio Syndicate being past due and unpaid, Consolidated Gold Fields of South Africa, Limited, sold the said $800,000 note of the syndicate managers at public auction in the city of New York, and the same was bid in by James McDougall, the highest bidder, at such sale, for the account of said Consolidated Gold Fields of South Africa, Limited, the present owner and holder of said note, subject to the said outstanding participations therein; (15) that the plaintiff has at all times since September 28, 1910, been ready, able, and willing, and he hereby offers, to transfer and deliver to defendant upon payment of the balance due under his said agreement (Schedule A) the amount of stock in Refugio Syndicate which, under paragraph second of said agreement, he is entitled to receive; (16) that the payment of the amount due and owing as alleged in paragraphs seventh and eighth herein—namely, $6,900—was further demanded of the defendant by the plaintiff, duly acting as trustee for the holders of the aforesaid note and participations therein (for whose benefit this suit is brought) on November 1, 1911, but no part thereof has been paid; (17) that all the acts of said syndicate managers in connection with the making and delivery of their said $800,000 note to Refugio Syndicate, the pledging of the contract (Schedule A) and the stock of Refugio Syndicate as security for said note with Guardian Trust Company under the agreement, Schedule B, and the deposit of said note by Refugio Syndicate with Guardian Trust Company and the issuance and sale of participations therein under the agreement, Schedule C, were done with the full knowledge and consent of the defendant, who afterwards ratified and approved the same.

The grounds of demurrer assigned by the defendant are: (1) The

declaration does not state a legal cause of action; (2) that it fails to state a legal cause of action substantially in accordance with the provisions of chapter 173 of the Revised Laws of Massachusetts; (3) that it fails to state a legal cause of action for the reason that it appears therefrom that the plaintiff brings the same as trustee appointed in the place of Guardian Trust Company of New York under an alleged agreement or agreements, and that it appears from said declaration that upon the same day upon which the plaintiff alleges that he was appointed the agreement or agreements aforesaid were canceled and a certain $800,000 note therein dealt with was delivered up, so that it appears that from and after said 28th day of September, 1910, it was impossible for the plaintiff to be trustee by reason of said agreement or agreements, or otherwise, in the premises, so that he has no standing to bring this action; (4) that it fails to state a legal cause of action for the reason that it appears therefrom that the plaintiff brings the same as trustee appointed in place of Guardian Trust Company of New York under an alleged agreement or agreements, and that it also appears from said declaration that Guardian Trust Company had sold the $800,000 underwriting agreement, therein referred to, to Consolidated Gold Fields Company, Limited, therein mentioned, and that by and through said sale it had parted with all power over said underwriting agreement and with all power or right to sue on the same, so that it appears that the plaintiff could have no power as its successor to bring suit thereon.

We do not find it necessary to say more with reference to the third and fourth grounds of demurrer than that they are not well founded in fact. The declaration does not set forth, as the defendant states, that upon the same day upon which the plaintiff was appointed trustee the trust agreement, under which his appointment was effected, was canceled. Nor is it alleged in the declaration that the Guardian Trust Company of New York, which preceded the plaintiff as trustee, had sold the underwriting agreement to the Consolidated Company prior to plaintiff's appointment. The sole question, therefore, is whether the declaration states a legal cause of action.

[1] The action is brought upon the underwriting agreement of September 1, 1907, which was entered into between McElhiney and Wiltsee as syndicate managers and the defendant and others as underwriters. In this agreement it appears that a corporation known as the "Refugio Syndicate," having an authorized capital stock of $1,000,000, consisting of 10,000 shares of the par value of $100, had been organized under the laws of New Jersey; that each underwriter had paid for and owned such proportion of 2,000 shares of the stock of the company as his subscription to the underwriting agreement bore to the total subscriptions thereto; that the underwriters were desirous of providing for the purchase of the remaining 8,000 shares of the stock, and in view of that entered into the agreement whereby they appointed the syndicate managers their agents, with certain powers as to borrowing money and as to pledging securities therefor. In this agreement each underwriter bound himself to assign to the managers the number of shares of stock then owned by him in the 2,000 shares previously purchased, and to receive therefor from the

managers a certificate showing his interest in the syndicate. He also agreed to pay the amount of his subscription as it appeared upon the contract, and was to receive for each $800 of his subscription "$1,000 face value in said capital stock." The subscription of each underwriter was to be paid in cash upon the call of the managers, and indorsed on the aforesaid certificates of interest, but no call was to be made prior to January 1, 1909, except in a certain case not necessary to mention. After January 1, 1909, calls were payable upon 30 days' notice. Each subscriber severally, and not jointly, authorized the managers to borrow from any lender or lenders "a sum not to exceed in principal indebtedness his cash subscription" for such period as would make the same due not earlier than March 1, 1909, and "upon such terms" as the managers should be able to arrange with the lenders, and to secure such loan or loans each subscriber severally authorized the managers to pledge therefor his subscription to the underwriting agreement duly assigned, his shares of the stock previously paid for and the new capital stock therein underwritten. It was also provided that the note or obligations of the managers should be binding upon the underwriters in favor of the lender or its assigns, without the duty on the part of such lender to inquire into the performance by the managers of any of their obligations thereunder. The managers were authorized, upon the written approval of a majority in interest of the underwriters, to sell the whole or any part of the stock for cash at 125 per cent. of its par value, but in case they did not sell the same prior to March 1, 1909, then said stock, upon full payment in cash of the underwriters' subscriptions, was to be divided among the underwriters. In case of the default of an underwriter in the performance of any of his agreements the managers had the right to exclude him from further interest in the underwriting agreement and to forfeit any payment he may have made thereunder, and in case of default in the payment of any amount agreed to be paid by the underwriter thereunder, the lender or lenders had the right to sell the stock pledged at public or private sale, and the proceeds, after payment of the expenses incident to the sale, were to be applied by the lender to the payment of the obligation of the defaulting underwriter, who was to remain liable for any deficiency. The agreement was not to become binding unless subscriptions to the amount of $500,000 were made within 90 days from its date. The managers were to have the sole direction, management, and conduct of the syndicate, and the enumeration of particular or specific powers was not to be considered as in any way limiting or abridging the general power or discretion intended to be conferred upon and reserved to them for the purposes of the agreement.

According to the allegations of the declaration, the managers, having entered into the foregoing contract, in pursuance thereof and for the purpose of carrying it into effect, subscribed and agreed to pay for 8,000 shares of the stock of Refugio Syndicate. Thereafter, on March 2, 1908, they made their promissory note for $800,000, payable to bearer March 1, 1909, and delivered the same to Refugio Syndicate for the purpose of paying for said stock in accordance with a plan and agreement between them and the company entered into be-

fore the delivery thereof, whereby participations in said note could be sold and sums realized for the payment of the stock, and as collateral to the note and the borrowing thereon, they pledged with the Guardian Trust Company of New York, as trustee under a trust agreement of the same date, to wit, March 2, 1908, the underwriting agreement, Schedule A, and all of the capital stock of the Refugio Syndicate (the terms of the pledge are set out in the trust agreement, Schedule B), and that on the same day, to wit, March 2, 1908, the Refugio Syndicate, in accordance with the plan and agreement arrived at between it and the managers before the execution and delivery of the note under which participations in said note could be advantageously sold, made an agreement with the Guardian Trust Company of New York under which it deposited with the Trust Company the $800,000 note and provided for the issue by the Trust Company of participation certificates in the note to purchasers thereof (this is the deposit agreement, Schedule C).

[2] The chief contentions of the defendant are that the arrangement, under which the $800,000 note was deposited by the managers through the Refugio Syndicate with the Trust Company and the issuance of participation certificates thereon, was not a borrowing within the powers conferred upon the managers under the underwriting agreement, Schedule A, and consequently the pledging of the underwriting agreement and of the stock was unauthorized within the terms of that agreement, and further that, inasmuch as the general corporation law of New Jersey (section 48), under the laws of which state the Refugio Syndicate corporation was organized, provided that "nothing but money shall be considered as payment of any part of the capital stock of any corporation organized under this act, except as hereinafter provided in case of the purchase of property," the stock issued was illegal, and was not a consideration for the note or the borrowings obtained through the participation certificates issued thereon, that the stock was not only illegally issued, but that it was not full-paid stock, and that the underwriting agreement contemplated that the defendant's liability to pay his underwriting subscription was conditioned upon his receiving full-paid stock legally issued.

We have heretofore pointed out that, by the underwriting agreement, each subscriber for himself, and not jointly, authorized the managers to borrow for him a sum not to exceed "in principal indebtedness" his subscription, and that it was within their discretion to determine whether the borrowing should be on a single note for $800,000 or on notes for different amounts in the aggregate not exceeding $800,000, and that in either event the liability of an individual underwriter therefor should not exceed in principal indebtedness his individual subscription, and that they were not confined to any particular method of borrowing. The declaration alleges that participation certificates in the $800,000 note were issued by the Guardian Trust Company to the Refugio Syndicate, under which borrowings were had, and that the suit was brought by the trustee for the benefit of the holders of the participations and the note. Such being the case, we are of the opinion that, so far as money was obtained on participation certificates by the Refugio Company under the arrangement above set forth,

borrowings were made by the managers within the terms of the underwriting agreement, and that the stock issued by the Refugio Syndicate to an amount equivalent to the money thus received was full-paid stock.

But the defendant says that the managers were not authorized by the underwriting agreement, Schedule A, to pledge the underwriting subscriptions and the stock with the Guardian Trust Company as trustee in the manner and according to the terms provided in the trust agreement, Schedule B; that the underwriting agreement only contemplated a pledge to the lender or lenders, and not the payment of expenses of a trustee for rendering services as provided for in the trust agreement, Schedule B. The underwriting agreement, however, authorized the managers to borrow on behalf of each underwriter "upon such terms as the syndicate managers may be able to arrange with the lenders," and to pledge for "said loan or loans his subscription hereto duly assigned to the satisfaction of the lender or lenders," and also the capital stock. As they were authorized by each underwriter to borrow "a sum not to exceed in principal indebtedness his cash subscription" (in the aggregate $800,000), in such sums and from such number of lenders as they deemed best, and "upon such terms as they were able to arrange with the lenders," and to pledge the securities in a manner "to the satisfaction of the lender or lenders," it cannot be doubted but that the parties contemplated a trustee might be appointed with whom the securities might be pledged to secure the loan or loans, and that provision might be made for paying the trustee for his services.

[3] It is evident that the underwriters hoped and expected to receive full-paid stock on payment of their subscriptions, but it is equally evident that their hopes and expectations were based upon their confidence in their agents, the managers, in seeing that the money raised through the borrowings reached the hands of the Refugio Syndicate; for they expressly stipulated in their underwriting agreement, that "the note or other obligations of the syndicate managers shall be binding upon the subscribers and their assigns in favor of the lender and its assigns, and without the duty on the part of such lender to inquire into the performance by the syndicate managers of any of their obligations hereunder." The lenders being under no obligation to see that the money borrowed was applied to the payment of the stock, the underwriter's obligation to pay his subscription was not conditioned upon his receiving full-paid stock.

It is alleged that on September 28, 1910, the Guardian Trust Company resigned as trustee and that the plaintiff was duly appointed in its place. Article 13 of the trust agreement, Schedule B, provided for and authorized such action, and rightly, as we think, within the contemplation of the underwriting agreement.

It is further alleged that on September 28, 1910, by agreement between the Guardian Trust Company, the Refugio Syndicate and the holders of the then outstanding participation certificates, the deposit agreement, Schedule C, was canceled, and the $800,000 note was turned over to the Refugio Syndicate, and that the Refugio Syndicate then issued, in exchange for participations then outstanding, its partici-

pation certificates. It is not alleged that the cancellation of the deposit agreement was with the agreement and consent of the managers who were the agents of the underwriters. It would seem that, inasmuch as the deposit agreement, under which the note was deposited with the trustee and the participations were issued, was authorized by the managers, and their authorization was essential to constitute a borrowing by them under the authority conferred by the underwriting agreement, its cancellation in the absence of their consent could not have been effected. Its attempted cancellation, however, would not affect the rights of the then holders of outstanding participations to the extent that they had advanced money on the certificates.

[4] It is further alleged that, after the cancellation of the deposit agreement, Schedule C, the Refugio Syndicate borrowed $300,000 of the Consolidated Gold Fields Company and pledged the $800,000 note, subject, however, to the participations then outstanding, to secure said loan; that this note not having been paid, the Gold Fields Company sold the $800,000 note at public auction for the purpose of foreclosing the security, and became the purchaser at the sale. This transaction, to the extent that borrowings were had on the $800,000 note, if entered into with the consent of the managers and for the purpose of paying for the stock, would not contravene the authority conferred upon them by the underwriting agreement, but, to the extent that it put it in the power of the Gold Fields Company to acquire an interest in the $800,000 note beyond the sum so loaned, it would be in contravention of the underwriters' agreement, and, whether done with or without the consent of the managers and for the purpose of paying for the stock, the Gold Fields Company would acquire nothing in the $800,000 note, over and above the sum actually loaned. It is not alleged, however, that the $300,000 was borrowed to pay for the stock and with the managers' consent. In the absence of such allegations this loan could not be regarded as a borrowing by the managers within the contemplation of the underwriting agreement, and the underwriting subscriptions would not be collateral thereto. While we think the declaration does not state a cause of action as to the $300,000 loan, we are of the opinion that it does state one in so far as recovery is sought in behalf of the owners, legal or equitable, of participation certificates issued for sums loaned upon them.

The defendant Sedgwick's subscription was for $9,200, and the managers were authorized to borrow for him that amount, and, as by the terms of the underwriting agreement he bound himself to pay that sum, we think the plaintiff is entitled to recover the same, less the payments he had made; but, inasmuch as it is apparent that the borrowings had did not equal the sum of $800,000, the plaintiff would be bound to hold and pay over to the managers for the Refugio Syndicate such part of the sum recovered as exceeded the amount required to pay Sedgwick's proportionate part of the borrowings actually made. We also think Sedgwick is bound to pay the interest on his proportionate part of the loan and his proportionate part of the reasonable expenses incurred by the trustee, the managers having been authorized to fix the terms of the borrowing and pledge.

It does not seem to us that the New Jersey statute prevents the

plaintiff from maintaining this action. If it be assumed that the stock was illegally issued, that would not invalidate the underwriting agreement for that agreement did not contemplate the procurement of an illegal issue of stock. The lenders had nothing to do with the procurement of the stock or with seeing that it was legally issued. This was a matter that the underwriter intrusted to the managers, and the lenders, through the trustee, were bound only to turn over, on the payment of his subscription, the underwriter's proportionate part of the stock pledged.

What we have said as to No. 1334 applies with equal force to No. 1335. The demurrers in each action must be overruled.

The judgments of the District Court are vacated, and the cases are remanded to that court for further proceedings not inconsistent with this opinion, with costs to the plaintiffs in error.

On Petition for Rehearing.

PER CURIAM. In our opinion handed down the 3d day of October, 1918, the questions intended to be decided were only such as were raised by the demurrer to the declaration. No question was presented, or could have been presented, as the pleadings then stood, as to whether the defendant had a defense which he might set up to defeat the plaintiff's right to recover any surplus due on Sedgwick's underwriting agreement over and above the amount borrowed on participation certificates for his benefit, and nothing in our opinion precludes him from making such defense. The declaration stated a prima facie case entitling the plaintiff to recover the full amount of the subscription, holding the surplus, if any, for the benefit of the managers or the Refugio Syndicate, and this is all that was meant by the passages in our opinion referred to in the defendant's petition for rehearing.

The plaintiff's declaration alleged that Sedgwick's underwriting subscription was for $9,200, and that he had paid thereon the sum of $2,300. It did not appear how many certificates of participation were outstanding or the amount held by Sedgwick, and we did not consider his right to set them up as a defense to the action.

What is here said with reference to Sedgwick applies with equal force to McCallum.

The petition for rehearing is denied.

BOSTON & M. R. R. v. STEWART.

(Circuit Court of Appeals, First Circuit. December 6, 1918.)

No. 1345.

TRIAL ⊜232(3)—INSTRUCTIONS—DUTIES OF JURY.

An instruction approved that, while a juror should not lightly surrender an opinion which he conscientiously holds, when he finds himself in minority he should stop and consider whether he is more likely to be surely right than the majority upon a question about which there can be no absolute certainty.

⊜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 District of New Hampshire; Edgar Aldrich, Judge.

Action at law by Thomas Stewart against the Boston & Maine Railroad. Judgment for plaintiff, and defendant brings error. Affirmed.

See, also, 241 Fed. 991, 154 C. C. A. 663.

Edward K. Woodworth, of Concord, N. H. (Streeter, Demond, Woodworth & Solloway, of Concord, N. H., on the brief), for plaintiff in error.

Alexander Murchie, of Concord, N. H. (Hollis & Murchie, of Concord, N. H., on the brief), for defendant in error.

Before BINGHAM and JOHNSON, Circuit Judges, and MORTON, District Judge.

JOHNSON, Circuit Judge. The defendant in error, hereinafter called the plaintiff, suffered a very severe injury at Manchester, N. H., on October 6, 1914, which resulted in the loss of one leg below and the other above the knee, by reason, as he alleged, of the negligence of the plaintiff in error, hereinafter called the defendant. He was employed in the dye house of the Amoskeag Manufacturing Company, and had left his home a little before 7 o'clock in the morning to go to his work, and while on his way through the yard of the Amoskeag Company was using a part of the track of the defendant company, where the space between the rails was planked over and used by employés of the Amoskeag Company in passing to and from their places of employment. He was proceeding toward the north, and had reached a point in the vicinity of the northwest corner of the boiler house of the Amoskeag Company when he saw a shifting train, composed of an engine and several cars, coming south on the same track on which he was walking. He testified that when the engine was within about 100 feet from him he attempted to step from the track over the east rail, but that his left foot was caught and securely held by what he thought at the time was a switch; and, although he claimed he shouted, he did not attract the attention of the engineer or the fireman on the engine, both of whom testified that they did not see him and did not know an accident had occurred until after they had stopped the train upon a signal from one of the trainmen.

The negligence alleged by the plaintiff was the failure of those operating the train to discover his situation and stop the train before it reached him. The plaintiff introduced the evidence of two witnesses who saw him just before the accident when he was trying to extricate his foot, and one of whom started to go to his assistance, but did not reach him before the accident happened.

The defendant claimed that the plaintiff was not injured because his foot was caught, but that he was struck by one of the cars of the passing train as he attempted to pass between the train and a railing at the northwest corner of the boiler house; that the distance between this railing and a large freight car was only about 3 inches, and that the plaintiff was struck at this point by a wide car—a Pennsylvania Railroad car—and knocked down under the wheels of that car. It intro-

duced evidence to show that the plaintiff was not upon the track in front of the engine as the train approached, but had reached the railing at the corner of the boiler house after the engine went by and several cars had passed; the Pennsylvania Railroad car being the thirteenth car in the train from the engine. It became, then, a disputed question of fact whether the plaintiff received his injuries as he claimed, or whether they were the result of his own lack of care in placing himself where he could be struck by one of the passing cars.

There was no switch near the northwest corner of the boiler house and the maximum distance here between the planking and the east rail was 2½ inches, which was the exact width of the heel of the shoe worn by the plaintiff at the time of the accident; but the sole of his shoe was 3⅞ inches wide. South of the northwest corner of the boiler house there was a guard rail next the east rail, the distance between which and the east rail was much wider than between the planking and the rail.

The case was tried twice in the District Court, and at the first trial a verdict was returned for the defendant, which was set aside and a new trial granted by the trial judge because of newly discovered evidence. At the second trial the plaintiff testified that he thought he was a little north of the corner of the boiler house at the time of the accident; that he thought his foot was caught in a switch, but could not swear to it; that he thought the whole of his foot was caught, but was not certain, but that it was firmly held, so that he could not move it. On cross-examination, when shown a photograph of the tracks and seeing there was no switch near the northwest corner of the boiler house, he testified as follows:

"And when you first told about this accident, and for some time afterwards, you stated that your foot was caught in a switch, didn't you? A. I did, and I thought that.

"And when you were asked if that was so, when you were asked if the plank, the boards, or the planking between the rails had anything to do whatever with your foot being caught, you were very sure it did not? A. I don't think it did.

"As a matter of fact, you now think that your foot was caught between the planking and the rail, do you not? A. It must be because there is no switch there, what you call it, I don't know the names.

"A switch? A. It must have been something of that kind."

The witness was then shown a mark "like a sort of a double cross in pencil on the planking" in the photograph, which it was claimed by counsel was made by the plaintiff at the first trial as indicating where he thought the accident occurred, and was asked if that did not "indicate about the place where you were when your foot was caught," and his answer was:

"Oh, well, that might be a little this way or that way; but that is as near as I can—I couldn't say it was there in a certain place, you know; but that is as near as I can tell it."

The defendant requested the presiding judge to instruct the jury, first:

"There is no evidence to warrant a finding that the plaintiff was caught by anything except between the east rail and the planking."

Second:

"There is no evidence to warrant a finding that the accident happened at any point except opposite some portion of the railing extending north from the corner of the boiler house and at a point north of the boiler house."

The failure of the court to give these instructions is assigned as error. The court correctly instructed the jury that the principal question was whether the plaintiff was caught at all, either between the planking and the rail or between the guard rail and the rail; that the negligence alleged was not in the construction of the roadbed in any particular place, but the failure of those in charge of the train to see the situation of the plaintiff and stop the train before it reached him.

Whether the plaintiff was caught at all, and where he was caught, were questions of fact for the jury under all the evidence in the case, and the instructions requested, if given, would have taken their determination from the jury. We think there was no error in refusing to give them. Whether the plaintiff was caught and held so he could not extricate himself, or received his accident as claimed by the defendant, was a pure question of fact whose determination was peculiarly within the province of a jury. Neither the plaintiff nor any of the witnesses could locate the exact spot where the accident occurred, which is not strange in view of the excited condition in which they must have been.

After the jury had had the case under consideration from 3:30 p. m. on the day when it was committed to them, until 10 o'clock the next day, they were called in by the presiding judge and given further instructions, and to these instructions the defendant seasonably excepted, and assigns them as error. The court called the attention of the jury to the case of Commonwealth v. Tuey, 8 Cush. (Mass.) 1, which he told them had been adopted by the Supreme Court of New Hampshire in the case of Ahearn v. Mann, 60 N. H. 472; and also that in the Massachusetts case and in the New Hampshire case it was held:

"That those in the minority should not unreasonably stand upon their own opinions, but should be admonished by the fact that the majority of their associates were assembled with them for the same purpose, and with the same responsibility."

He also made it plain that a juror was not to yield his honest opinion, for he said:

"The logic of that does not mean that a juror should lightly surrender an opinion which he conscientiously finds himself holding, but it does admonish the juror or jurors in minority to stop and consider whether it is probable that he who is here under oath to help decide this case, and finds himself confronted by men of equal intelligence and responsibility in the majority against him, is more likely to be surely right than they upon this highly disputed question about which no man can be absolutely certain anyway. Is it probable I am right or that the majority are right?"

The instructions given were quite lengthy, and were in substance that, in a large proportion of cases, absolute certainty could not be expected, and while the duty of a minority to listen to the arguments of a majority was impressed upon the jury, the jury were told:

"The logic of that does not mean that a juror should lightly surrender an opinion which he conscientiously finds himself holding."

Part of the charge in the New Hampshire case which the judge quoted to the jury made it evident that no juror was to yield his honest and well-settled convictions for the sake of reaching a verdict, and was as follows:

"Absolute certainty cannot be attained, and is hardly to be expected in the majority of civil causes; and while no juror is required to yield his honest and well-settled convictions to the judgment of others for the sake of reaching a verdict, it is the duty of a juror, when he finds himself differing with the majority of his fellows, equally honest and capable as himself of judging of the weight of evidence, to examine thoroughly and carefully the ground of his own opinion."

These instructions were very similar to those sustained in Allen v. United States, 164 U. S. 492, 17 Sup. Ct. 154, 41 L. Ed. 528, which were in substance:

"That in a large proportion of cases absolute certainty could not be expected; that although the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows, * * * if much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself. If, upon the other hand, the majority were for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority."

And the court said:

"While, undoubtedly, the verdict of the jury should represent the opinion of each individual juror, it by no means follows that opinions may not be changed by conference in the jury room. The very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves. It certainly cannot be the law that each juror should not listen with deference to the arguments and with a distrust of his own judgment, if he finds a large majority of the jury taking a different view of the case from what he does himself. It cannot be that each juror should go to the jury room with a blind determination that the verdict shall represent his opinion of the case at that moment; or, that he should close his ears to the arguments of men who are equally honest and intelligent as himself."

We think there was no error in the instructions given, qualified as they were by the statement that each juror should not lightly surrender an opinion which he conscientiously found himself holding, and also by the language in the New Hampshire case from which the presiding judge quoted and adopted in which the jury was told that the juror who was in the minority was not required to yield his honest and well-settled convictions to the judgments of others for the sake of reaching a verdict.

The judgment of the District Court is affirmed; the defendant in error to recover his costs of appeal in this court.

DIEGO v. ROVIRA et al.

(Circuit Court of Appeals, First Circuit. December 6, 1918.)

No. 1275.

1. EVIDENCE ⟸341—DOCUMENTS—WATER RIGHTS—MAYOR'S REPORT.
A copy of a report by the mayor of a town in Porto Rico, made in 1867, in response to a circular sent out by the department of public works, of a concession of the water of a stream to a person named, but which stated that the date and nature of the concession were unknown, *held* not admissible as evidence of a concession.

2. WATERS AND WATER COURSES ⟸152(8) — WATER RIGHTS IN PUBLIC STREAM—PRESCRIPTION.
The right of defendants *held* established by prescription under Rev. St. Porto Rico, 1913, § 3486, to use the waters of a public stream to the extent impounded by a dam maintained since 1868, with the right to maintain the dam in repair and at the same height.

Appeal from the District Court of the United States for the District of Porto Rico; Hamilton, Judge.

Suit in equity by Pedro de Diego y Gonzalez against Jose Rovira and another. From the decree, complainant appeals. Modified and affirmed.

Francis E. Neagle, of New York City, for appellant.

Joseph B. Jacobs, of Boston, Mass. (Hugh R. Francis, of San Juan, Porto Rico, and Jacobs & Jacobs, of Boston, Mass., on the brief), for appellees.

Before BINGHAM and JOHNSON, Circuit Judges, and BROWN, District Judge.

JOHNSON, Circuit Judge. This is an appeal from a decree of the District Court of Porto Rico enjoining the appellees, Jose and Joaquin Rovira, doing business under the firm name and style of Rovira Hermanos, as lessees, and the succession of Juan Ignacio Capo, as owners, of certain real estate, from maintaining a dam at its present height across a small stream called the Quebrada Caimital. That part of the stream with which the case is concerned lies in the municipality of Guayama in the island of Porto Rico. The land of the Capo estate lies a short distance above the land of the appellant, and both border upon the Quebrada Caimital, also known in this part of it as Quebrada Arriba.

The testimony was undisputed that from about 1850 down to the date of the bill a dam of some sort had been maintained on the site of the present dam, with a canal leading from the dam to the land of the Capo estate, which had been used for purposes of irrigation. The stream is a very small one, and very little water flows in it, particularly during the seasons of drought, which are common on the south side of the island, where it is located. The dam was constructed of brick, about 30 feet long, extending across the whole width of the stream and but little more than a foot high. The canal that leads

from the dam is only about one foot wide and one foot high. The appellant, as owner of the lower estate upon the stream, makes use of his property for a dairy and for pasturing cattle. In the great hurricane of 1868 the dam and canal were partially destroyed; but from the evidence it appears that the greater damage at this time was done to the canal.

The appellees claim the right to use all the waters of the stream for purposes of irrigation by virtue of a concession to one Don Juan Donzac before the year 1853, and also by prescription. The appellees, Rovira, received a sublease of the property August 11, 1914, and soon after they entered into occupation of the land, made some repairs upon the dam, and some time in February, 1916, added to its height several inches, by placing a construction of concrete on top of the brick work, and also repaired the leaks in the dam, so that the dam thereafter entirely stopped the flow of water to the land of the appellant during the dry season, when it was all used for irrigation on the Capo estate. The appellant claimed that he had enjoyed the right from time immemorial to water his cattle in the stream below the dam adjacent to his property, and to use the waters there for dairy purposes. The parties agree that the waters of the Quebrada Caimital are public waters.

By the Civil Code of Porto Rico, § 416 (section 3486 of the Revised Statutes of Porto Rico), it is provided that the use of public waters may be acquired in two ways:

(1) By administrative concession.

(2) By prescription after 20 years.

"The limits of the rights and obligations of these uses shall be those shown in the first case by the terms of the concession, and in the second case by the manner in which the waters have been used."

It is also further provided by section 432 of the Civil Code (section 3502 of the Statutes of Porto Rico) as follows:

"Anything not expressly determined by the provisions of this chapter shall be governed by the special law of waters."

The Law of Waters was a Spanish statute, which was extended over Porto Rico by royal order, February 5, 1886, and in the compilation of the Revised Statutes of Porto Rico appears as sections 2387 to 2645, both inclusive. It is clear that the rights of the parties are governed by the Civil Code, if expressly determined by its provisions, and, if not, by the special law of waters.

[1] To prove a concession of all the waters of the Quebrada Caimital, the appellees introduced in evidence a copy of a record of the report of the mayor of Guayama, made in accordance with royal orders issued on July 11, 1867, and February 29, 1868, relative to water concessions. This record was produced by the keeper and librarian in the department of the interior of the government of Porto Rico.

Because of the royal order of July 11, 1867, providing for a statute of irrigation in the island of Porto Rico, a circular was sent out by the department of public works to the mayors of the different towns on the island, asking for a report on the water concessions that had been

granted in their municipalities, for the purpose of organizing a hydrological service.

In response to this circular the mayor of Guayama made a report, part of which applies to the waters of the stream in question. The copy of the record of the report offered is as follows:

"Department of Guayama. Statement of Water Concessions Existing in this department: Districts—Guayama.

"Source of the waters—stream of Quebrada Arriba. Purpose of the waters—irrigation of canes and water supply to the steam engine. Nature of the concession—unknown. Date of the concession—unknown. Name of the first grantee—Don Juan Donzat. Volume of water granted—the whole creek. Extension of land irrigable under the concession—more than 100 hectares. Remarks—from this irrigation the plantations of Don Jose Sabater and the Curet sisters participate on certain days."

To the introduction of this evidence the appellant objected, and the receipt of it in evidence is assigned as error. It is not in dispute that Don Juan Donzac (also written Donzat) was the original owner of the property where the dam in question is located, and that title has passed from him by several mesne conveyances and leases to the appellees, and in the deed of the property given by the beneficiaries under the will of Don Juan Donzac, September 27, 1853, the water rights are conveyed in the following terms:

"One irrigation canal, the irrigation rights and concession from the creek called Arriba or Caimital."

We think the copy of the record of the report of the mayor of Guayama to the board of public works was not competent to prove a concession to Don Juan Donzac. It does not purport to be a record of any concession, but only of the information which was gained by the mayor of Guayama in regard to concessions from the Quebrada Arriba. Nor does it purport to be based upon an examination of records or upon documentary evidence, since it expressly states that the nature and date of this alleged concession are unknown, although it does state that the volume of water granted by it is the whole creek. It would seem to be nothing more than an expression of opinion by the mayor of Guayama, and was not competent to prove that a concession had been granted.

[2] The appellees also claim, however, to have acquired by prescription a right to use all the waters of the creek, by virtue of section 416 of the Civil Code, which provides that a right to the use of water may be acquired by an uninterrupted use for 20 years, and that the limits of the rights and obligations of these uses shall be shown "by the manner in which the waters have been used," and also by article 149 of the Law of Waters, which is as follows:

"Art. 149. He who shall have enjoyed the use of public waters for a period of twenty years without opposition on the part of the authorities or a third person shall continue to enjoy it, even though he cannot prove that he obtained the proper authority."

Although the testimony is contradictory and confusing as to the extent of the use of the waters stored by the dam and its periods of interruption, there was evidence that since 1868 a dam has been main-

tained on its present site, and the waters stored by it used each year for the purpose of irrigating the land of the Capo estate.

A careful reading of the whole record convinces us that in times of drought the dam, as maintained from 1868 down to 1914, the date of the sublease to the appellees, Rovira, deflected all the waters of the stream into the canal, except what might have leaked through the dam or seeped through the soil in subterranean channels and reached the surface in pools opposite the land of the appellant, but that in time of excessive rainfalls and during a wet season the canal was not sufficiently large to carry all the waters of the stream, and that some flowed over the dam. There is no evidence in the case to show an uninterrupted use of any definite quantity nor for any definite time by the appellant.

Section 418 of the Civil Code provides:

"The right to make use of public waters is extinguished by the lapse of the concession and by nonusage during twenty years."

The appellant claims that the dam and canal were wholly destroyed by the great hurricane of 1868, and thereafter until 1914, when the dam was repaired by the appellees, Rovira, it afforded practically no obstruction to the flow of water to the appellant's property, and that no repairs were ever afterward made upon the dam until the sublease to the appellees, Rovira; but it nevertheless appears from his own witnesses that in quite recent years, before any repairs were made by the defendants, Rovira, the Capo estate obtained irrigation water from the Quebrada Caimital by means of the dam and canal.

Evidence was introduced by the appellees that from 1868 down to 1914 water was used whenever desired for irrigation upon the Capo estate, and that when it was not desired to use it for irrigation the canal was closed, and the water flowed over the dam, and that some water leaked through the dam.

The presiding judge below saw the witnesses and had an opportunity to judge their credibility. He also had the advantage of a view of the dam and the section of the stream near it and opposite the land of the appellant. He found that while there was at that time, which was a time of drought, very little water on the surface, there was evidently water beneath the surface available by pools, whether natural or artificial; but—

"after the Quebrada leaves the plaintiff's property it is practically a dry bed, although quite wide and stretching with well-defined banks past the Ceiba and other trees for hundreds of yards until it joins the larger Quebrada, called in evidence the 'Minondo.'"

While he did not pass upon the question whether the appellees had obtained the right to the use of the waters of the stream by prescription, yet he did find insufficient proof that the concession granted to Don Juan Donzac had been lost by nonusage for the period of 20 years.

We think the appellees and those under whom they claim did enjoy the use of the waters of the Quebrada Caimital for the period of 20 years; that this right by section 418 of the Civil Code of Porto Rico

could not be lost, except by nonusage during 20 years, which was not proven; and that the decree of the court below that the appellees are entitled to use for purposes of irrigation the waters of the stream which can be stored by a dam of the height of the one that existed there prior to August 11, 1914, was justified by the evidence.

We find it unnecessary to resort to the special law of waters to determine the rights of the parties, for they are governed by the Civil Code, and it is only when rights cannot be determined by it that they are to be governed by the special law of waters. The questions presented in this case, as we view them, are the acquisition by prescription the right to the use of the waters of a public stream, and whether these rights when acquired have been lost by nonuser, and upon both the provisions of the Civil Code furnish all the means necessary for their determination. It is true that the amount of water which was being used by the appellees and those in privity with them has not been determined, nor has that used by the appellant; but the height of the dam, as it has existed for more than 60 years, would determine the amount of the waters of the stream which the appellees could legally use, and provides the fairest test of the amount of water that has been used by the parties, in the absence of proof as to the extent of use by either.

We are of the opinion, therefore, that the learned judge in the court below arrived at a correct conclusion in holding that the appellees had the right to maintain a dam of the height which had existed there before August 11, 1914, and that all additions which have been made to its height should be removed by them at their own expense. While we do not place our decision upon the same ground as the District Judge placed his, that the appellees "are the lawful owners of a water concession, originally made to one Don Juan Donzat, and as such are entitled to the use of all the waters of the Quebrada Caimital," we do concur in that part of his decree in which he finds that they are entitled to the use of all the waters of the Quebrada Caimital which may be diverted by the dam described in the pleadings, "but only at the height of the said dam prior to the change of August, 1914." We find that the appellees had acquired this right by the use of the waters of the stream which were stored by the dam as it originally existed, for a period of more than 20 years, that they had not lost this right by nonusage, and that the appellant, neither by a temporary use, nor by participation in the common use of the waters of the stream, has acquired any right adverse to this right.

We think, under the authority of article 186 of the Law of Waters, the appellees had the right to repair their dam. It is true that the article provides that the governor of the province must be informed of these repairs; but the failure to give this information does not work any forfeiture.

The fact that the dam was in a leaky condition did not prevent the appellees from stopping the leaks in it by repairs, and no decision by the courts of Porto Rico was cited to show that the owner of a dam may not repair it and stop leaks in it, making a tight dam of the same height, in place of the leaky dam which may have existed before.

The appeal is dismissed. The decree of the District Court is modified, to conform to this opinion, by striking out from the second paragraph thereof the words "are the lawful owners of a water concession originally made to one Juan Donzac, and as such," and, as thus modified, is affirmed; the appellees to recover their costs in this court.

CREWDSON v. SHULTZ.

(Circuit Court of Appeals, Ninth Circuit. December 2, 1918.)

No. 3176.

1. JUDGMENT ⊂⊃725(6)—RES JUDICATA—MATTERS CONCLUDED.
   The judgment in an action to recover past-due interest on a note not matured *held* conclusive between the parties in a subsequent action to recover the principal in so far as the issues were in substance identical.
2. BILLS AND NOTES ⊂⊃357—ACTION BY PLEDGEE—EXTENT OF RECOVERY.
   Under Rem. Code Wash. 1915, § 3418, providing that, where the holder of a negotiable instrument has a lien thereon, he shall be deemed a holder for value to the extent of his lien, as construed by the Supreme Court of the state, in an action on a note by a pledgee, where there is a question as to the right of the maker to recover thereon, the recovery should be limited to the interest of the plaintiff.

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

Action by Frank W. Shultz against Charles N. Crewdson and another. Judgment for plaintiff, and defendant Crewdson brings error. Modified and affirmed.

Shultz, appellee, brought action against Crewdson, appellant, and one Outcault, to recover principal, $5,000, and interest from August 10, 1915, at 6 per cent. per annum upon a promissory note made by them at Spokane, Wash., on August 10, 1912, to the order of J. B. Valentine, due five years after date, and before maturity indorsed and delivered by Valentine to Shultz. Crewdson answered, admitting indorsement, but denying delivery to Shultz, or that Shultz was the owner, admitting that no part of the principal or interest had been paid, except interest due to August 10, 1915, and denying any indebtedness to Shultz. He also pleaded three affirmative defenses: (1) That Shultz was not a bona fide holder for value before maturity. (2) That plaintiff took the note with full knowledge of these infirmities: (a) That the note was given for land purchased by defendants from Valentine "upon representations which were false and untrue, and known by said Valentine to be false and untrue, and by reason of which there was a failure of consideration for said note, and that said Valentine could not collect the same"; (b) that Shultz took the note to shield Valentine and aid him in collection, knowing that Valentine could not maintain action against defendants; (c) that Shultz brought this action, not as the real owner and holder of the note, but solely to enforce payment upon the obligation, which could not be enforced by Valentine; (d) that he has refused to make Valentine a party to the action, because he is carrying it on for Valentine, and not for himself; (e) that he knew that Valentine was solvent and able to pay. (3) That as Shultz claimed the note was given as collateral to secure a debt of Valentine to Shultz, defendant alleges the note belonged to Valentine; but that, if Shultz claims still to have a debt due to him by Valentine, then defendant asks the court to order that Valentine be made a party, and that

before any judgment may be rendered against defendant the amount of the debt from Valentine to Shultz, and for which the note may be security, be determined, and that until such ascertainment the proceeding be stayed as against defendant.

To this answer Shultz replied, denying the allegations of the first, second, and third affirmative defenses, and also pleaded as follows: That in 1915 Shultz brought an action in the state court to recover interest upon the note involved up to August 10, 1915; that in such action Crewdson appeared and answered as set forth in an exhibit made part of the replication herein; that Shultz replied to this answer as set forth in an exhibit to the replication; that trial was had upon the issues formed by the pleadings, and judgment rendered in favor of Shultz; that on appeal to the Supreme Court of the state the judgment was affirmed; that all the defenses set forth in the defendant's answer in this case were in the case in the state court; that the parties herein were the identical ones involved in the suit in the state court, and that the action is upon the same promissory note. Shultz also avers that he holds the note described as collateral security for five promissory notes made by Valentine to Shultz on August 1, 1913, aggregating $4,825, with interest from date, upon which there had been paid as interest $990, and no more, and that the plaintiff acquired the note sued on in good faith, without notice of infirmity, or of any of the defenses set forth by the defendant in his answer in this case.

The answer (made an exhibit in the replication) filed by Crewdson in the state court was as follows: He denied on information and belief that he and Outcault, for a valuable consideration, made the note in writing as set out in the complaint; admitted that by the terms of the note defendants agreed to pay interest at 6 per cent., payable annually, and that they had failed to make the payments, except $60 paid October 1, 1913; denied that the note was assigned and delivered and pledged to Shultz for value about March 26, 1914, and that Shultz was the owner thereof; and admitted that he had refused to pay interest. He then set forth that Shultz became the holder of a note as collateral security to an obligation owing from Valentine, the payee of the note, and that Shultz has made no effort to collect the original obligation, although Valentine was then able to pay any judgment which might be secured; avers that, when Shultz secured the note, it was on the express understanding with Valentine, and with the makers of the note, that the security would not be resorted to until the plaintiff had exhausted his rights as against Valentine; that therefore Shultz should be estopped from proceeding further until steps were had to secure the payment of the obligation of Valentine. He also set up that Valentine should be made a party, and the rights of all parties determined, in order that suitable judgment might be entered, and that the court should require Shultz first to establish his claim against Valentine; that Shultz, when he came into the possession of the note, knew of the facts and circumstances under which the note was given to Valentine, and that the note was procured by Valentine under "false and fraudulent representations as to the value of the property for which, as part consideration, said note was given," and that defendant had a complete defense to the note and was not liable thereon, and that therefore Shultz was not a bona fide holder for value before maturity; that Shultz and Valentine were intimate, and that Shultz knew of the relations between Valentine and Crewdson and was familiar with the fact that Crewdson has claims against Valentine which are offsets and counterclaims to the obligation in question, and that Shultz knew of these offsets when he received the note; that Shultz and Valentine made an agreement whereby Valentine was to transfer the note to Shultz as collateral security, and for the purpose of having it appear as if Shultz had become a bona fide holder for value, and in order that Crewdson should not be able to interpose the defenses now interposed as against any liability to a claim by Valentine against Crewdson; and that such agreement was made for the purpose of depriving Crewdson of his rights against Valentine, and to assist Valentine in his efforts to defeat Crewdson in the collection of his just claim against Valentine. The replication to the answer filed in the state court admitted that Shultz became the holder of the note as collateral security to an obligation owing from Valen-

tine, admitted that Shultz was friendly with Valentine, and denied every other allegation made in the answer.

Upon these pleadings the present action came to trial before a jury. Counsel then stipulated that the facts pleaded in plaintiff's affirmative reply were true and correct, whereupon the court granted plaintiff's (Shultz's) motion for a verdict for the full amount prayed for, and upon direction the jury returned a verdict in favor of Shultz against Crewdson for $6,393.75, and judgment was entered accordingly.

Samuel R. Stern, of Spokane, Wash., for appellant.

Hamblen & Gilbert, of Spokane, Wash., for appellee.

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

HUNT, Circuit Judge (after stating the facts as above). [1] By the principle of estoppel as laid down by the authorities our opinion is that the former judgment rendered in the action between the same parties who are now at issue in this case, and which is set forth in the reply of the defendant in error herein, is conclusive against Crewdson upon the issue of Shultz being a bona fide holder for value.

In the former action Shultz described the same note as that now sued upon. It is true the first action was brought to recover only interest due up to the time of bringing suit, and that the principal sum was not then due; but the defenses went to the integrity of the note, for Crewdson set up that Shultz was not a holder of the note for value and before maturity; that the note was procured by Valentine under false and fraudulent representations as to the value of the property for which as part consideration the note was given; that the note was taken to shield Valentine and aid him in the collection thereof; that Shultz was not the real owner of the note; that Shultz had refused to make Valentine a party to the action; that Valentine could respond to any judgment; and that the plaintiff should first be required to exhaust his possible rights as against Valentine.

The fact that Shultz brought this action for the principal of the note and such interest as has accrued since the former action was instituted does not improve the position of the maker Crewdson. His grounds of defense to the former suit for interest having been identical in substance with those he has pleaded herein, the conclusions of the state court which tried the issues must be accepted as controlling between the parties. Wilson v. Deen, 121 U. S. 525, 7 Sup. Ct. 1004, 30 L. Ed. 980; Black River Bank v. Edwards, 10 Gray (Mass.) 387; Lumber Co. v. Buchtel, 101 U. S. 638, 25 L. Ed. 1073; Edgell v. Sigerson, 26 Mo. 583; Cleveland v. Creviston, 93 Ind. 31, 47 Am. Rep. 367.

It is argued that, in the present action for the principal, defenses might be interposed which could not have been available in the first suit upon the interest; as, for example, that, after the institution of the former action for interest, litigation was pending between the appellee herein and the payee of the note, Valentine, wherein Shultz sought to recover from Valentine a debt of only $2,500, without setting up any indebtedness upon the note herein involved. Just how the doctrine of res judicata might apply to such a state of supplementary facts is not necessary for decision, for here, of the defenses plead-

ed, none is sufficient to deprive Shultz of the benefit of having been adjudged a bona fide holder for value, at least to the extent of his lien. Shultz v. Crewdson, 95 Wash. 266, 163 Pac. 734.

[2] This further question then arises: Was it error to award judgment for the full amount of the note which is admitted to be more than the amount of the debt due by Valentine to Shultz, to secure which the note in question was given as collateral security?

Many decisions hold that, where a note is held as collateral security for a debt and the holder is held entitled to recover, he is limited to the amount of the debt which the collateral secures, where there is a valid defense against the transferer of the note. In such case the holder is a bona fide holder, entitled to stand on a better footing, only pro tanto; but if there be no defense to the collateral note the holder may recover the full amount and become a trustee for the balance over what is due to him. Daniel, § 832a, and the cases cited.

On the other hand, there are decisions which permit of full recovery by the holder, notwithstanding equities as between maker and payee. Gowen v. Wentworth, 17 Me. 66; Smith v. Isaacs, 23 La. Ann. 454; Tooke v. Newman, 75 Ill. 215; Gold Glen Milling & Tunneling Co. v. Dennis, 21 Colo. App. 284, 121 Pac. 677.

But as applicable to the present case discussion of general doctrines need not be had, because in Washington a positive statute (section 27 of the Negotiable Instrument Act [Rem. Code 1915, § 3418]), declares that, "where the holder has a lien on the instrument arising either from contract or by implication of law, he is deemed a holder for value to the extent of his lien," and because the Supreme Court of the state has construed the statute, and held that one who for value has taken a note as collateral is a holder for value "only" to the extent of the lien arising from the contract. Citizens' Bank & Trust Co. v. Limpright, 93 Wash. 361, 160 Pac. 1046. In that case the court, in reversing a judgment which dismissed a bill for the whole amount of a note taken as collateral, directed a judgment for the amount of the sum remaining due to the holder, together with interest.

Whether the defendant here may have any defense in a direct action against him by Valentine, the payee, for any surplus, is not a vital issue herein. We agree that his averments of fraud are merely conclusions, and wholly insufficient to create an issue. But as the decision of the Supreme Court in Shultz v. Crewdson, supra, was that Valentine was neither a necessary nor a proper party to the action for interest, and as the maker, Crewdson, was not permitted to implead Valentine in the present action, it seems but a just application of the statute that the holder should be limited in his recovery to what is justly due to him upon the note held as collateral, and that any controversy over any further sum should be determined as between Valentine and Crewdson.

Our conclusion is that the construction of the state statute by the Supreme Court of Washington is reasonable and just, and that under it the District Court should have limited the amount of the judgment in favor of Shultz to the amount of debt due to him by Valentine, payee of the note, together with lawful interest.

The judgment of the District Court will therefore be modified to conform with this opinion, and, when so modified, it will be affirmed, with costs in favor of appellant.

VANE v. UNITED STATES.*

(Circuit Court of Appeals, Ninth Circuit. December 2, 1918.)

No. 3170.

1. CONSPIRACY ⊂⊃43(6)—CRIMINAL CONSPIRACY—INDICTMENT.
An indictment for conspiracy by force and violence to rob a person named of certain mail matter, constituting a part of the United States mails under control of the post office establishment, and in the lawful custody of such person, considered, and *held* sufficiently specific.

2. INDICTMENT AND INFORMATION ⊂⊃86(3)—CRIMINAL CONSPIRACY—PLACE.
In an indictment for conspiracy to commit an offense against the United States, where the conspiracy is alleged to have been formed within the district of indictment, it is not necessary to set forth the place of performance of the object of the conspiracy.

3. CRIMINAL LAW ⊂⊃619—TRIAL—CONSOLIDATION OF INDICTMENTS.
The consolidation for trial of an indictment for conspiracy to commit a crime against the United States and one against the same defendants for commission of such crime *held* proper, under Rev. St. § 1024 (Comp. St. 1916, § 1690).

4. CRIMINAL LAW ⊂⊃1169(7)—HARMLESS ERROR—EVIDENCE.
The admission in evidence in a trial for conspiracy of affidavits made by certain of the defendants, which were competent evidence against them, *held* not prejudicial to the rights of a codefendant tried jointly with them; the evidence not being admitted as against him.

5. CRIMINAL LAW ⊂⊃95—JURISDICTION OF FEDERAL COURT—DEFENDANT ON BAIL FROM STATE COURT.
That a defendant, when indicted, tried, and convicted in a federal court, was under sentence for crime by a state court, and at large on bail pending an appeal, nothing further appearing from the record, did not deprive the federal court of jurisdiction.

In Error to the District Court of the United States for the Northern Division of the District of Idaho; Frank S. Dietrich, Judge.

Criminal prosecution by the United States against William Vane and others. From a judgment of conviction, defendant Vane brings error. Affirmed.

See, also, 254 Fed. 32.

R. L. Edmiston, of Spokane, Wash., R. E. McFarland, of Cœur d'Alene, Idaho, and O. J. Bandolin, of Sandpoint, Idaho, for plaintiff in error.

J. L. McClear, U. S. Atty., and J. R. Smead, Asst. U. S. Atty., both of Boise, Idaho.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. This is a writ of error to review the conviction of Vane, plaintiff in error, upon an indictment for a violation of section 37 of the Penal Code (Act March 4, 1909, c. 321, 35 Stat.

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

*Rehearing denied February 10, 1919.

1096 [Comp. St. 1916, § 10201]), in conspiring to commit an offense against the United States.

The indictment charged that Vane and certain others, on or about September 6, 1914, in Bonner county, Idaho, and within the jurisdiction of the United States District Court for the District of Idaho, did willfully, unlawfully, and feloniously conspire, combine, and agree by force and violence to—

"rob one Hugo De Witz of certain mail matter which mail matter constituted a part of the United States mails under the control of the post office establishment of the United States, and in the lawful charge and custody of him, the said Hugo De Witz, and which said robbery of the aforesaid mail matter was then and there agreed among them, the said William Vane and Joe Bossio, * * * to be effected by force and violence, and by placing the life of him, the said Hugo De Witz, in jeopardy by the use of certain dangerous weapons, to wit, certain pistols and certain rifles loaded with gunpowder and leaden bullets, with which said dangerous weapons it was then and there agreed by the said William Vane and Joe Bossio * * * to threaten him, the said Hugo De Witz, and to put his life in peril and thereby to take, steal, and carry away from the possession of said Hugo De Witz, and against his will, the aforesaid mail matter."

It is charged that in pursuance of the conspiracy the defendants did "by force and violence" rob the said Hugo De Witz of the said mail matter, and "did threaten him, the said Hugo De Witz, and put his life in peril." There was no demurrer to the indictment, no motion in arrest of judgment, and there is no bill of exceptions in the record. The scope of our examination is therefore limited.

[1] Plaintiff in error contends, however, that the indictment does not state facts constituting an offense against the laws of the United States: (1) In that there is no status of De Witz stated in the indictment; (2) that there is a failure to set forth the character, identity, and destination of the mail matter; (3) that there is no allegation that Vane knew the certain mail matter, alleged to have been the object of the alleged conspiracy to rob, constituted a part of the United States mails; (4) that there is no allegation of knowledge or intent as to the object of the conspiracy; and (5) that there is no place of performance of purpose set forth.

In our opinion it was not necessary to set forth with technical accuracy the relationship of De Witz to the mail. The allegation that the conspiracy was by force and violence to rob him of certain mail, which constituted part of the United States mails under the control of the post office establishment and in his lawful custody, was sufficient to inform him fairly what he had to meet. It would not be a reasonable understanding of words to gather any meaning from the language referred to other than that the mail was part of the United States mail under the control of the postal authorities and by law in the custody of De Witz. The indictment being for conspiracy to commit an offense, it is to be kept in mind that the gist of the crime is the conspiracy, and therefore, as was held by the Supreme Court in Williamson v. United States, 207 U. S. 425, 28 Sup. Ct. 163, 52 L. Ed. 278, a "certainty to a common intent, sufficient to identify the offense which the defendants conspired to commit, is all that is requisite in stating the object of the conspiracy."

Nor was it requisite that the indictment should specify the nature of the mail matter or its destination. In a combination to take forcibly a quantity of mail in the keeping of a mail custodian, by holding a loaded gun at his head and threatening to kill him, it would seem very probable that those engaged in the conspiracy would not have in mind taking any specific piece of mail. They could not well know what there was in the mail sacks; they are taking the chance that they will find mail matter containing money or other valuable things. It might be that the intention in this case was to take only such letters as had money in them; but, if the agreement or conspiracy was by violence to steal the mail in the custody of the person named by putting his life in jeopardy, it is immaterial whether the mail matter was in letters, boxes, packages, or other form, and to whom and to what place it might be addressed.

The contention that it was necessary to allege that the defendants knew that the mail was part of the United States mail is not sound, because such knowledge was not an essential element of the particular offense charged. The most material averment was that defendants willfully, unlawfully, and feloniously conspired violently to rob the person in custody of the mail, by stealing and taking the same from his person. In substance, however, persons charged with having willfully and feloniously combined to carry out such an act as the object of the combination are sufficiently charged with knowledge that the conspiracy, the gist of the crime, is to rob as set forth, and are charged with guilty intent in the general purpose of the combination. Felton v. United States, 96 U. S. 699, 24 L. Ed. 875; Burton v. United States, 202 U. S. 344, 26 Sup. Ct. 688, 50 L. Ed. 1057, 6 Ann. Cas. 392; Dunbar v. United States, 156 U. S. 195, 15 Sup. Ct. 325, 39 L. Ed. 390; Tapack v. United States, 220 Fed. 445, 137 C. C. A. 39; Bowers v. United States, 148 Fed. 379, 78 C. C. A. 193.

[2] Lastly, the point that there is no allegation of the place of performance of the purpose of the conspiracy must also fail, for the reason that, if the criminal agreement was formed about the time and within the jurisdiction as alleged, and had for its object the robbing of the mails in the custody of De Witz, it was not at all necessary to set out or prove the place where the robbery was to be executed. It might be that a conspiracy would be formed in a jurisdiction of one of our courts, with the definite purpose of being executed in a foreign land, yet the conspirators could be indicted and tried in the jurisdiction where the unlawful combination was formed.

[3] It is said that there was an improper joinder of defendants and consolidation of charges. It appears that the defendants jointly indicted in this, the conspiracy case, were also jointly indicted for robbery committed about September 8, 1914, against Hugo De Witz, in custody of mail matter of the United States (section 197, Penal Laws of the United States [Comp. St. 1916, § 10367]), and that the court, under the authority of section 1024, Revised Statutes (Comp. St. 1916, § 1690), ordered the two indictments consolidated. We find no error in this course. Furthermore, as defendant went to trial without objection to the order of consolidation, he is in no position now to

complain of the order. Logan v. United States, 144 U. S. 263, 12 Sup. Ct. 617, 36 L. Ed. 429.

[4] It is said that error was committed because upon the trial the court admitted in evidence the affidavits of two of the other defendants, wherein they stated that they, together with Vane and others, planned the robbery of the mail stagecoach, and that in pursuance of such plan and under the directions of Vane the robbery was carried out. There is no contention that these affidavits were offered or admitted in evidence against this plaintiff in error, and inasmuch as they were apparently competent and relevant to the case against the defendants jointly tried, who had made the affidavits, it cannot be held that the admission of the evidence was prejudicial to the rights of the plaintiff in error.

[5] It is argued that the United States District Court in Idaho was without jurisdiction over Vane, because the record herein shows that at the time of the indictment, June 2, 1917, and of the verdict, November 23, 1917, and judgment thereon, November 24, 1917, Vane had been previously convicted of perjury in the superior court of the state of Washington in the county of Pend Oreille, and was under sentence to the penitentiary in that state. The judgment of conviction in the state court is dated April 30, 1917; but it also appears that after conviction in the state court Vane gave notice of appeal to the Supreme Court of the state, and an appeal bond under which he was permitted to go at large until the Supreme Court should render its judgment upon the appeal, and there is no showing of any action by the Supreme Court of the state. While the record fails to show that this matter was ever brought to the attention of the District Court, or that any ruling thereon was had, we are clearly of the opinion that it cannot be held that upon the face of the record the defendant could not be proceeded against in the federal courts in Idaho. It might be that a charge of robbery was filed before a United States commissioner in Idaho, and that defendant was arrested thereunder in Washington, and voluntarily consented to removal from Washington to Idaho; that he gave bond for his appearance before the federal tribunals in Idaho, and was in Idaho awaiting action by the United States grand jury upon the charge against him, and that after indictment by the United States grand jury he voluntarily appeared, pleaded not guilty, and made no objection to jurisdiction because of the conviction in the state court, proceeded with trial, never presented to the federal court any record of conviction in the state court in Washington, or made any question of the power of the court to try him, and was convicted. Under such a state of facts, surely the federal court would have jurisdiction over his person. Courts will wisely recognize that, where one is answerable to two different jurisdictions for offenses against the laws of each, the one will yield to the other for the time being; but the necessity for such a practice is a matter of comity, and not a rule of law, to be applied to a case with such a meager record as we have before us.

We have carefully considered all the points made in the argument and brief of plaintiff in error, and our judgment is that the record fails to show that any substantial rights have been denied him.

The judgment is affirmed.

VANE v. UNITED STATES.*

(Circuit Court of Appeals, Ninth Circuit. December 2, 1918.)

No. 3166.

1. POST OFFICE ⟸48(8)—ROBBERY OF MAILS—AIDERS AND ABETTORS—INDICTMENT AS PRINCIPALS.
Under Penal Code, § 332 (Comp. St. 1916, § 10506), making one who aids and abets the commission of a crime a principal, an indictment under Penal Code, § 197 (section 10367), directly charging defendant with robbery of the mails, is supported by evidence that he aided and abetted such robbery.

2. ROBBERY ⟸17(2)—INDICTMENT—AVERMENT OF INTENT.
An indictment charging that defendant did willfully, unlawfully, and feloniously commit a robbery is sufficient, and need not allege the specific intent.

In Error to the District Court of the United States for the Northern Division of the District of Idaho; Frank S. Dietrich, Judge.

Criminal prosecution by the United States against William Vane and others. From a judgment of conviction, defendant Vane brings error. Affirmed.

R. L. Edmiston, of Spokane, Wash., R. E. McFarland, of Cœur d'Alene, Idaho, and O. J. Bandolin, of Sandpoint, Idaho, for plaintiff in error.

J. L. McClear, U. S. Atty., and J. R. Smead, Asst. U. S. Atty., both of Boise, Idaho.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. This case is related to Vane v. United States, 254 Fed. 28, — C. C. A. —, where plaintiff in error was convicted of conspiracy to rob. By this writ of error, brought by William Vane, he seeks a reversal of conviction of robbery under an indictment which charged:

> That he and three others did, on or about September 8, 1914, in the county of Barnum, Northern district of Idaho, "willfully, unlawfully, and feloniously" make an assault, and then and there "willfully, unlawfully, and feloniously did rob the said Hugo De Witz of certain mail matter; that is to say, they * * * then and there willfully, unlawfully, and feloniously as aforesaid, and by force and violence, did take, steal, and carry away from the possession of, and against the will of, him, the said Hugo De Witz, the aforesaid mail matter, which said mail matter then and there consisted of letters and parcels constituting a part of the United States mail then and there under the control of the post office establishment of the United States, and then and there in the lawful charge and custody of him, the said Hugo De Witz; and they, * * * in effecting the robbery of such mail matter as aforesaid, did then and there put the life of the said Hugo De Witz in jeopardy by the use of dangerous weapons, to wit, a certain pistol and certain rifles then and there loaded with gunpowder and leaden bullets, with which said weapons the said William Vane * * * did then and there threaten him, the said Hugo De Witz, and did put his life in peril."

There is no bill of exceptions in the record, and it does not appear that there ever was a demurrer to the indictment, or a motion in ar-

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

*Rehearing denied February 10, 1919.

rest of judgment; but, for use upon the writ of error, a stipulation was made wherein it was agreed that at the trial of Vane and others there was no testimony offered or admitted tending to show that Vane was present at the scene of the alleged robbery, or that Vane took part in any of the overt acts constituting the actual commission of said robbery; that there was testimony tending to show that on the day and at the time of the alleged robbery Vane was at his home in Idaho about 10 miles distant from the place of the robbery, and that there was conflicting testimony tending to show that Vane provided masks and guns to his codefendants prior to the alleged robbery, and planned the robbery, and counseled and induced the other defendants to commit the robbery.

[1] The first assignment of error presents this question: Vane not having been present at the actual robbery, was it error in the court to hold that he could be convicted under section 197 of the Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1126 [Comp. St. 1916, § 10367]), which reads as follows:

"Whoever shall assault any person having lawful charge, control, or custody of any mail matter, with intent to rob, steal, or purloin such mail matter, or any part thereof, or shall rob any such person of such mail or any part thereof, shall for a first offense be imprisoned not more than ten years; and if in effecting or attempting to effect such robbery he shall wound the person having custody of the mail, or put his life in jeopardy by the use of a dangerous weapon, or for a subsequent offense, shall be imprisoned twenty-five years."

The position of the plaintiff in error is that upon the face of the indictment, and upon the stipulation of facts, there was a fatal defect in the indictment, and that there was a fatal variance of proof, from which it must follow that plaintiff in error has been deprived of his constitutional rights to be advised of the nature and cause of the accusation against him. But there is a section (332) of the Penal Code which provides that:

"Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal." Comp. St. 1916, § 10506.

It being the law that one who aids or induces the commission of an act made an offense under the law of the United States is a principal, distinctions which once existed between classes of offenders, accessories before the fact and principals, are abrogated, and therefore an indictment which charges one with doing the overt act substantially informs him of the nature and cause of the accusation against him. In Rosencranz v. United States, 155 Fed. 38, 83 C. C. A. 634, and Rooney v. United States, 203 Fed. 928, 122 C. C. A. 230, the question was discussed and the authorities cited. The Supreme Court, in Ruthenberg v. United States, 245 U. S. 480, 38 Sup. Ct. 168, 62 L. Ed. 414, has recently held that under section 332, heretofore quoted, an indictment which charged a defendant as an aider and inducer and abettor of the one who did the direct act made a crime states the offense against him as principal, even though the offense be a misdemeanor and though at common law there was no accessory to a mis-

demeanor. It would naturally follow, we think, that where, under facts alleging that one is an aider and abettor, he is charged as a principal, under facts directly alleging that he is a principal, facts which make him such can be shown, though they prove that he has really only aided and abetted the doing of the main act.

[2] It is urged that there is a failure to set forth facts showing intent to rob, steal, and purloin. The indictment, however, charges robbery of the custodian of the mail, and not an assault with intent to rob him. There is an allegation of an assault, but the charge itself is robbery, and the words that defendants did willfully, unlawfully, and feloniously rob are sufficient. Felton v. United States, 96 U. S. 699, 24 L. Ed. 875; Commonwealth v. Adams, 127 Mass. 15; Allen v. Inhabitants, 3 Wils. 318; Bishop's New Cr. Proc. § 1003.

By the statutes of Idaho (section 7980, Idaho Revised Code) it is provided that after a verdict of guilty, if the judgment be not arrested or a new trial granted, the court must appoint a time for pronouncing a judgment, which in cases of felony must be at least two days after the verdict, if the court intend to remain in session so long, but, if not, then at as remote a time as can reasonably be allowed. Error is assigned because it is said the court passed sentence upon plaintiff in error on the same day that the verdict was received, and within less than two days after return of the verdict against the plaintiff in error. Assuming, but not conceding at all, that the statute quoted governed the practice of the federal court sitting in Idaho, the statute itself is not mandatory, except where the court intends to remain in session for two days or more after rendition of the verdict, and there is nothing in the record to show when the District Court adjourned.

The other principal points made in behalf of the plaintiff in error are sufficiently covered by the opinion in Vane v. United States, supra.

The judgment is affirmed.

KREUZER v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. October 28, 1918. Rehearing Denied January 20, 1919.)

No. 4582.

1. INDICTMENT AND INFORMATION ⟸130—JOINDER—OFFENSES.
A number of charges of violations of the oleomargarine laws may under Rev. St. § 1024 (Comp. St. 1916, § 1690), be joined in one indictment; the several charges being based on acts connected with the other and for transactions of the same class of crime.

2. CRIMINAL LAW ⟸984—SENTENCE—DIFFERENT COUNTS.
Where sentences on two counts were to be executed concurrently with that imposed on an earlier count, so that but one punishment was imposed, it is only necessary to determine the sufficiency of the earlier count on which sentence was based.

3. CRIMINAL LAW ⟸1178—APPEAL—ABANDONMENT OF ASSIGNMENTS.
An assignment of error complaining of the overruling of objections to testimony, which failed to set out the testimony or its substance as re-

quired by court rule 11 (188 Fed. ix, 109 C. C. A. ix), will be treated as abandoned; it not being discussed in the brief.

4. CRIMINAL LAW ⟸478(1)—EVIDENCE—OPINION EVIDENCE—EXPERT TESTIMONY.
In prosecution for violating the oleomargarine laws, a witness *held* to have qualified as an expert to testify whether the oleomargarine in tubs was factory packed.

5. CRIMINAL LAW ⟸1129(5)—ASSIGNMENTS OF ERROR—AMENDMENT.
Amended assignment of errors, filed several months after the writ of error had been granted, although by leave of the trial court, cannot be considered.

6. CRIMINAL LAW ⟸1169(1)—HARMLESS ERROR.
In a prosecution for violating the oleomargarine laws, the overruling of objections to testimony by a deputy collector of internal revenue, who took part in the raid, as to what another participant in the raid said about the barricade, etc., *held* not prejudicial error, where he also repeated what he saw and heard the defendant say and do.

7. CRIMINAL LAW ⟸753(2)—TRIAL—SUBMISSION TO JURY.
Where defendant made no motion for directed verdict, the submission of the case to the jury was proper.

8. CRIMINAL LAW ⟸1056(1)—CHARGE—EXCEPTIONS.
Alleged errors in the charge of the court cannot be considered, in the absence of exceptions.

9. CRIMINAL LAW ⟸1172(7)—HARMLESS ERROR—INSTRUCTION.
A charge that the fact defendant did not testify should not be considered against him, but he was entitled to stand on the presumption of innocence, *held* in no way prejudicial, but favorable, to the defendant.

10. CRIMINAL LAW ⟸984, 1209—TRIAL—SENTENCE.
Where defendant was indicted for violating Act Aug. 2, 1886, § 8 (as amended by Act May 9, 1902, § 3), and section 13 (Comp. St. 1916, §§ 6220, 6225), the fact that the court after having sentenced defendant on those counts charging violation of section 8, which relates to tax on oleomargarine, etc., sentenced him under section 13, relating to destruction of stamps on emptied packages, did not nullify the first sentence, constituting a double punishment, though the latter was not imposed until after writ of error and supersedeas was obtained.

In Error to the District Court of the United States for the Eastern District of Missouri; John C. Pollock, Judge.

David J. Kreuzer was convicted of violating the oleomargarine laws, and he brings error. Affirmed.

The plaintiff in error, hereafter called the defendant, was convicted of a violation of several sections of the oleomargarine laws. The indictment contained 10 counts, all parts of the same transaction and connected together. Three of the counts charged were misdemeanors, and the others felonies. A demurrer was filed to the indictment, alleging as grounds:

First. That said indictment, and each and every count thereof, fails to state facts sufficient to constitute an offense against him under the laws of the United States.

Second. That said indictment, and each and every count thereof, is invalid on the ground of duplicity.

Third. That said indictment, and each and every count thereof, contains contradictory averments.

Fourth. Because said indictment, and each and every count thereof, is too vague, general, indefinite, and uncertain to afford the accused proper notice to plead and prepare their defense, and sets forth no specific offense under the laws of the United States.

Fifth. Because said indictment, and each and every count thereof, fails to show that said defendant in any way committed, or undertook to commit, an offense against the laws of the United States.

Sixth. Because there is a misjoinder in the same indictment of charges of misdemeanor and felony.

The demurrer was overruled, and upon a trial to a jury a verdict of guilty on each count was returned. The court on January 30, 1915, sentenced the defendant on the second, third and fourth counts, and deferred sentence on the remaining counts until the March term of the court. A writ of error was allowed on Feb. 2, 1915, and a supersedeas bond approved. At the March term the court sentenced the defendant on the fifth count. No sentences have been imposed on the other counts.

The judgment and sentence on January 30, 1915, was a fine of $5,000 and costs, and imprisonment for two years in the penitentiary on the second count. On the third and fourth counts the sentence was two years' imprisonment on each count, "to run and terminate concurrently with the sentence on the second count." No fine was imposed on these two counts. The judgment and sentence on the fifth counts was a fine of $100 and 30 days' imprisonment in the county jail. After serving the 30 days' imprisonment, he was discharged on his affidavit of poverty, without payment of the fine. By certiorari the record of the last judgment was made a part of the record in this cause.

The assignment of errors filed when the writ of error was granted assigned three errors. These were as follows:

First Assignment of Error.

The court erred in overruling the demurrer of defendant to each and every count of the indictment herein against him.

Second Assignment of Error.

The court erred in overruling the objection made by defendant to the testimony of witness L. P. Mattingly, and allowing him to testify that in his opinion Exhibit 29 had not been packed in a licensed factory, on the ground that the witness was not a qualified expert, and on the ground that it was a question for the jury.

Third Assignment of Error.

The United States has improperly joined in the indictment herein alleged charges which cannot properly be united in one proceeding.

On June 18, 1915, an amended assignment of errors was filed by leave of the District Court, but for reasons hereinafter stated it is not necessary to set it out herein.

On January 12, 1916, by leave of this court, 6 additional assignments of error were filed. These were as follows:

(28) The said District Court erred at the trial in allowing witness Daly to testify for plaintiff that government witness Mattingly's statement about the barricade was correct.

(29) The said District Court erred at the trial in submitting each of the counts to the jury, because there was not sufficient evidence as to each to warrant such submission.

(30) The said District Court erred at the trial by charging the jury that defendant had not testified in his own behalf.

(31) The said District Court erred in not charging the jury that defendant was presumed to be innocent until proven to be guilty beyond reasonable doubt, and the court's remarks on that subject were inadequate, and not up to the measure of the defendant's immunity under the Constitution.

(32) The said District Court erred at the trial in charging the jury that they might under the evidence find the defendant guilty "of all the charges in this indictment."

(33) The said District Court erred in entering judgment and sentence as to each finding, and as to each count whereon such judgment and sentence were entered herein.

Wm. R. Orthwein and Shephard Barclay, both of St. Louis, Mo. (S. Mayner Wallace, of St. Louis, Mo., on the brief), for plaintiff in error.

Robert W. Childs, Sp. Asst. Atty. Gen. (Arthur L. Oliver, U. S. Atty., of St. Louis, Mo., on the brief), for the United States.

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

TRIEBER, District Judge (after stating the facts as above). [1] It is urged that there was a misjoinder of charges, but the contention is without merit. Section 1024, Rev. St. (Comp. St. 1916, § 1690), permits such joinders, as each of the counts is for acts connected together, and for transactions of the same class of crimes. Logan v. United States, 144 U. S. 263, 295, 12 Sup. Ct. 617, 36 L. Ed. 429; Pointer v. United States, 151 U. S. 396, 403, 14 Sup. Ct. 410, 38 L. Ed. 208; Ingraham v. United States, 155 U. S. 434, 436, 15 Sup. Ct. 148, 39 L. Ed. 213; Dolan v. United States, 133 Fed. 440, 446, 69 C. C. A. 274; McGregor v. United States, 134 Fed. 187, 69 C. C. A. 477; Rooney v. United States, 203 Fed. 928, 122 C. C. A. 230; Norton v. United States, 205 Fed. 593, 123 C. C. A. 609. None of the authorities cited by counsel for the defendant is in point. In McElroy v. United States, 164 U. S. 76, 17 Sup. Ct. 31, 41 L. Ed. 355, it was held that indictments against several defendants for assault cannot be consolidated with an indictment against only some of the defendants for arson and another indictment for arson committed two weeks later. The other authorities cited do not pass upon this question.

[2] As the sentences on the third and fourth counts are to be executed concurrently with that imposed on the second count, and therefore but one punishment has been imposed, it is only necessary to determine the sufficiency of that count. Evans v. United States, 153 U. S. 608, 14 Sup. Ct. 939, 38 L. Ed. 839; Billingsley v. United States, 178 Fed. 653, 662, 101 C. C. A. 465; Norton v. United States, supra, 205 Fed. 602, 123 C. C. A. 609.

Should the demurrer to the second count have been sustained? May v. United States, 199 Fed. 42, 117 C. C. A. 420, rules this contention, and upon the authority of that case we hold it untenable. See, also, Marhoefer v. United States, 241 Fed. 48, 154 C. C. A. 48.

[3] The assignment that the court erred in overruling the objection to the testimony of Mr. Mattingly, because he had not qualified as an expert, fails to set out the testimony admitted or its full substance, as required by rule 11 of this court (188 Fed. ix, 109 C. C. A. ix). Nor is this assignment discussed in the elaborate brief of counsel for the defendant. It may therefore be treated as abandoned.

[4] But, aside from this, he did qualify as an expert. After testifying that he had been working for three years on other oleomargarine cases and had examined the contents of many tubs during that whole period of time, he further testified:

"Generally speaking, I can tell what a tub that is factory packed looks like, though it may be possible for a tub that is not factory packed to be packed almost as perfectly as a factory packed tub."

This was sufficient to permit him to testify as an expert, and it was for the jury to determine the weight to be given to his testimony. The general rule, as determined by the Supreme Court and this court, is found in Gillespie v. Collier, 224 Fed. 298, 301, 139 C. C. A. 534, 537, where the court quoted and followed what was said by the Supreme Court in Gila Valley R. Co. v. Lyon, 203 U. S. 465, 475, 27 Sup. Ct. 145, 148 (51 L. Ed. 276):

"In the cases of all witnesses, we think the question of the admissibility of their evidence was one within the reasonable discretion of the trial court, and that the discretion was not abused. All the witnesses had had practical experience on railroads, and were familiar with structures and the character of bluffers mentioned in the evidence. There was certainly enough to call upon the court to decide upon the admissibility of their opinions under these circumstances, and we ought not to interfere with the decision of the trial court in this case."

[5] This disposes of the assignments of error filed when the writ of error and supersedeas were granted. The amended assignment of errors filed several months after the writ of error had been granted, although by leave to the District Court, cannot be considered, as that court had no power to grant such leave at that time.

[6] The additional assignments of error filed by leave of this court are properly before us. The first is that the court erred in permitting the witness Daly to testify that "the witness Mattingly's statement about the barricade was correct." But, while the witness did testify to that effect, he repeated what he saw and heard the defendant say and do; the witness being a deputy collector of internal revenue, taking part in the raid with Mr. Mattingly.

The court committed no prejudicial error in overruling the objection. The other assignments are clearly without merit.

[7] As no motion for a directed verdict was made on behalf of the defendant, the court committed no error in submitting the case to the jury. Besides, a careful reading of the testimony satisfies that there was substantial evidence to justify a verdict of guilty, and even if a motion for a directed verdict had been made, the refusal would not be error.

[8, 9] As to the alleged errors in the charge of the court, it is sufficient to say that no exceptions were taken to any part of the charge; but, in view of the fact that the defendant's liberty is at stake, we have carefully read it, and find no prejudicial error. The only part of the charge complained of, which it is proper to refer to, is that part in which the court told the jury:

"The defendant in this case has not testified in his own behalf. That is not to be considered by the jury in any respect whatever. In our courts of justice, the defendant has a right to stand on the presumption of innocence of the offense, and he cannot be convicted unless the government has proven the offense or offenses charged against him, beyond all reasonable doubt, as I have defined the term to you."

This it is claimed, is prejudicial error. To us it seems these remarks were, if anything, favorable to the defendant, as it cautioned the jury against any presumption of guilt, which may arise in their minds from the fact that the defendant did not avail himself of the

privilege of testifying granted by Act March 16, 1878, c. 37, 20 Stat. 30 (Comp. St. 1916, § 1465). Hanish v. United States, 227 Fed. 584, 142 C. C. A. 216.

[10] By the supplemental proceeding, brought up on the writ of certiorari, the claim is made that the action of the court, sentencing the defendant on the fifth count, at a term after the writ of error and supersedeas had been obtained, which sentence had been executed, nullifies the former sentence, constituting a double punishment. The fifth count charges an entirely different offense from that charged in the second count. The latter charges "mixing artificial coloration with white or uncolored oleomargarine, and thereby making a product resembling butter of a shade of yellow, for sale * * * in an attempt to defraud the United States of the tax imposed by law upon colored oleomargarine," etc.

It charges a violation of section 8 of the Act of August 2, 1886, c. 840, 24 Stat. 210, as amended by Act May 9, 1902, c. 784, § 3, 32 Stat. 194 (section 6220, U. S. Comp. St. 1916). The fifth count charges a violation of section 13 of the Act of August 2, 1886, 24 Stat. 211 (section 6225, U. S. Comp. St. 1916). This contention is therefore without merit.

Finding no error, the judgment is affirmed.

THOMS & BRENNEMAN et al. v. GOODMAN.

In re HAMILTON GAS & ELECTRIC CO.

(Circuit Court of Appeals, Sixth Circuit. August 3, 1918.)

No. 3159.

1. BANKRUPTCY ⟸455—APPEAL—MATTERS REVIEWABLE.
In a bankruptcy proceeding, where stockholders are contesting right to levy assessments against them, in which some were not formally made parties, Circuit Court of Appeals will nevertheless proceed to the merits, where both sides have assumed that the order of assessment was a final appealable order.

2. CORPORATIONS ⟸544(2)—SUBSCRIPTIONS—LIABILITY OF STOCKHOLDERS.
Subscribed, but unpaid, capital stock of a corporation, becomes, upon its insolvency and the suspension of business, a trust fund for all creditors, and, even before insolvency, it so far has that inchoate character as to prevent it from being surrendered or given away by the corporation.

3. COURTS ⟸372(1)—FEDERAL COURTS.
In the absence of any controlling state statute, a federal court is not justified in declining to adopt the general rules of corporate law, approved by the Supreme Court of the United States, unless there is a clear, definite, and settled rule to the contrary in the state.

4. CORPORATIONS ⟸232(1)—LIABILITY OF STOCKHOLDERS—STATUTES.
Ohio Constitution and statutes, to the effect that a stockholder shall be liable for the amount unpaid upon his stock, do not prevent the application of the rule that persons buying necessarily issued additional stock of a corporation at its market value are not liable for the difference between the par value and the purchase price.

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5. CORPORATIONS ⟸232(1)—LIABILITY OF STOCKHOLDERS.

Where an Ohio corporation, on account of impairment of its capital stock, necessarily issues additional stock, stockholders who purchase such stock below par at its market value will not be held liable to creditors or other stockholders for the difference.

Appeal from the District Court of the United States for the Western Division of the Southern District of Ohio; Howard C. Hollister, Judge.

In the matter of the Hamilton Gas & Electric Company, a corporation, bankrupt. From an order of the District Court, affirming an assessment against stockholders by the referee on petition of S. M. Goodman, trustee, Thoms & Brenneman and others appeal. Reversed and remanded.

In November, 1904, the Hamilton Gas & Electric Company was organized under the laws of Ohio, with an authorized capital stock of $1,000,000, and with an authorized bond issue of the same amount. More accurately speaking, this was a consolidation and reorganization of existing companies; but for all purposes now involved there is no distinction. Seven hundred thousand dollars of bonds and the same amount of stock were issued in payment for the various properties and enterprises which became the property of the corporation and for working capital, and the stock and bonds were considered fully paid by the transfer of these properties and by the cash paid in. For the purposes of this case, the full payment of this $700,000 of stock is unchallenged. The remaining $300,000 of bonds and the same amount of stock were issued at intervals over a period commencing November, 1905, and ending October, 1907, for the purpose of acquiring additional funds needed in the operation of the company, and after it had been in active operation from one to three years. Part of this capital was needed for the reconstruction of a plant destroyed by a tornado, and it is to be assumed, in the lack of present dispute, that it was all necessary to enable it to carry on its business. These 300 bonds, of $1,000 each, and each accompanied by the same amount of stock, were mostly sold for par. The sales were made to the directors or those active in the management of the corporation, many of whom had already advanced considerable sums by way of loan.

In December, 1911, the company became an involuntary bankrupt. Its indebtedness consisted of $1,000,000 of mortgage bonds, about $110,000 of loans and advances by or through the personal relations of directors and an amount of general indebtedness so trifling as to be negligible. The sale of the mortgaged property realized sufficient to pay $495 on each bond. For the deficiency of $505,000, some of the bondholders filed general claims. The assets not mortgaged seem to have been not large enough to make material change in the situation. Thereupon the trustee filed with the referee a petition, asking that he be authorized to make an assessment against the holders of the $300,000 of stock as if it had been subscribed for and remained wholly unpaid. In his petition, and a supplemental petition, he named the holders of this stock, as far as known, and eventually notice was given them, and they made a contest before the referee. Although there was no pleading before the referee in opposition to the petition, the matter seems to have been treated on both sides as if there had been formal appearance and issue. The referee found that, after excluding debts not entitled to share in such an assessment, there remained $86,000 of debts which should be paid in this manner, and which he accordingly assessed, pro rata, against the holders of this stock. Those who had been assessed to the amount of about $50,000 filed a petition for review. The District Judge affirmed the referee in the main, and ordered an assessment to the same general effect. Six of the parties named, and who were thus assessed for about $47,000, bring this appeal.

Robert Ramsey, of New York City, for appellants.

Slayback & Harr, of Hamilton, Ohio, and Ralph R. Caldwell, of Cincinnati, Ohio, for appellee.

Before KNAPPEN and DENISON, Circuit Judges, and WALTER EVANS, District Judge.

DENISON, Circuit Judge (after stating the facts as above). [1] We pass by any question whether an order, made as this was, when the persons to be assessed were not parties to the record in any formal way, is a final order subject to appeal. It has been so assumed upon both sides, and there is no such obvious lack of jurisdiction as should prevent us from proceeding to the merits. See Marin v. Augedahl, 247 U. S. 142, 38 Sup. Ct. 452, 62 L. Ed. 1038.

[2] The doctrine that the subscribed, but unpaid, capital stock of a corporation, becomes, upon its insolvency and suspension of business, a trust fund for all creditors, and that, even before insolvency, it so far has that inchoate character as to prevent it from being surrendered or given away by the corporation, finds universal acceptance. The underlying reasons for the rule and the persons by whom and the manner in which the resulting rights are to be enforced are not now and here important. No less well settled, as a matter of general corporate law and rule of equity, is the (seeming or possible) exception to the universality of the general rule, by which exception a corporation, the value of whose capital stock has become impaired, and which finds it necessary to sell additional capital stock, may sell the same at the real worth or market value thereof, in which case the purchaser does not incur the liability of a subscriber under the general rule. This was most explicitly declared in Handley v. Stutz, 139 U. S. 417, 11 Sup. Ct. 530, 35 L. Ed. 227, and the care with which the question was considered and decided is evidenced by the dissent of two judges, and by the simultaneous consideration and decision of analogous problems, with corresponding result. Clark v. Bever, 139 U. S. 96, 109, 11 Sup. Ct. 468, 35 L. Ed. 88; Fogg v. Blair, 139 U. S. 118, 126, 11 Sup. Ct. 476, 35 L. Ed. 104.[1] When the present case is viewed in the aspect which it must have on the record, there is not merely analogy, but identity, between its facts and the facts of Handley v. Stutz, so far as the latter related to the group of stockholders who bought bonds and stock to-

[1] The same rule has either been expressly adopted, or referred to with apparent approval, quite generally by federal and state courts, where there was no controlling statute. Grant v. East & West Co. (C. C. A. 5, Ala.) 54 Fed. 569, 575, 4 C. C. A. 511; Toledo Co. v. Continental Co. (C. C. A. 6, Ohio) 95 Fed. 497, 515, 36 C. C. A. 155; Ingraham v. Commercial Co. (C. C. A. 8, Mo.) 177 Fed. 341, 343, 101 C. C. A. 317; Granite Co. v. Titus (C. C. A. 5, S. C.) 226 Fed. 557, 570, 141 C. C. A. 313; Clark v. Johnson (C. C. A. 8, Ark.) 245 Fed. 442, 447, 157 C. C. A. 408; Stein v. Howard, 65 Cal. 616, 4 Pac. 662; Dummer v. Smedley, 110 Mich. 466, 476, 68 N. W. 260, 38 L. R. A. 490; Hospes v. Northwestern Co., 48 Minn. 174, 197, 50 N. W. 1117, 15 L. R. A. 470, 31 Am. St. Rep. 637; Woolfolk v. January, 131 Mo. 620, 634, 33 S. W. 432; Van Cott v. Van Brunt, 82 N. Y. 535; Speer v. Bordeleau, 20 Colo. App. 413, 421, 79 Pac. 332; McDowell v. Lindsay, 213 Pa. 591, 595, 63 Atl. 130; and see note in 8 L. R. A. (N. S.) 263, 265.

gether (139 U. S. 428, 11 Sup. Ct. 534 [35 L. Ed. 88]), and so far as concerns the form and manner of stock issue—not necessarily as to the justification for the discount. The Hamilton Company was a going concern; the circumstances indicate that its existing stock was worth less than par; it needed additional capital; it is at least probable that bonds could not be sold for par, in such amounts and so quickly as needed; and the case is plainly one where bonds and stock were sold together for a gross sum. It is not alleged that they were worth any more than was received.[2] There is no room for doubt that the petition and the proofs herein fail to make a case, unless Handley v. Stutz ought not to be followed; and the claim that it ought not to be followed rests upon the proposition that the law of Ohio is otherwise and that the Ohio law must control. Whatever might be true as to some of the matters argued (see Clark v. Bever, supra, 139 U. S. at page 117, 11 Sup. Ct. 468, 35 L. Ed. 88), it has been recently held in this court that, upon the underlying question of liability, the Ohio law must be ascertained and applied (Kiskadden v. Steinle [C. C. A. 6] 203 Fed. 375, 378, 121 C. C. A. 559; Courtney v. Croxton, 239 Fed. 247, 249, 152 C. C. A. 235).

[3, 4] Clearly, in the absence of any controlling Ohio statute, we can be justified in declining to adopt the general rules of corporate law approved by the Supreme Court of the United States only in case we find a clear, definite, and settled rule to the contrary in Ohio. The Ohio constitutional and statutory provisions referred to in the Ohio cases hereafter mentioned say only that the stockholder shall be liable for the amount unpaid upon his stock, and it was said, in Clark v. Bever, 139 U. S. 116, 11 Sup. Ct. 475, 35 L. Ed. 88:

"The recognition in the Iowa statute of the right of creditors of corporations to look to unpaid installments of stock subscriptions to obtain satisfaction of their demands did not confer a new right, but is a recognition of a right existing before the statute in virtue of the relations between a corporation and its creditors and stockholders."

Comparison of the Ohio with the Missouri statute, quoted in Fogg v. Blair, supra, 139 U. S. at page 125, 11 Sup. Ct. 476, 35 L. Ed. 104, shows at least as strong a case of statutory liability in Missouri as in Ohio, yet the Missouri statute does not prevent the full application of Handley v. Stutz in that jurisdiction. Ingraham v. Commercial Co. (C. C. A. 8) 177 Fed. 341, 343, 101 C. C. A. 317. Hence we must conclude that the Ohio statute furnishes no effective distinction.

[5] It cannot be said of the Ohio decisions that they establish any such clear and settled rule. Their distinct tendency is the other way. All cases of stock issue resolve themselves into two classes: First, those which are incidental to the organization of the corporation on the launching of its business. All persons who take this stock are the original and voluntary associates. As to this class, it may well be, as has often been held, that the form adopted for their association is not controlling and that they may be treated as subscribers solely through the

[2] The proof is that the bonds, "as marketed," were worth what they brought, but they were "marketed" with the stock accompanying them; and this amounts to saying that they together were worth the price received.

effect of their acceptance of stock, issued as if on a subscription—provided that the acceptance of stock in good faith exchange for property at an agreed valuation or as incidental to a bond purchase does not by the local law bar further liability. The second class comprises those incidental to the raising of additional capital for a going concern. In many of these cases, the issue of stock is characteristically a compulsory sale of a corporate interest rather than a mere subscription or voluntary joinder in a new enterprise; and while the underlying principles in the two classes applicable to the issue—subscription or sale?—do not furnish entirely satisfactory distinctions, the practical difference is often convincing and controlling. The undoubted fact, known to all, is that the capital stock of a corporation which needs additional working capital is often, if not typically, impaired in value, and that when the capital stock is thus impaired in value it is wholly impossible to sell new stock at par, and the corporation, as a matter of practical necessity, must sell it for what it is worth, or else not sell it at all. The Supreme Court seems to have considered that such possible theoretical injury as might come to creditors through permitting sales of stock at less than par and without liability for the balance, in those cases where the stock could not be sold for par, was a lesser evil than compelling every corporation to wind up its business or reorganize, if it had sustained some losses and needed more invested capital. The decision in Handley v. Stutz rests essentially upon the classification above stated between original associates and those who buy at its real value treasury stock in a going concern. When we come to consider the Ohio decisions, it is clear that those pertaining to an original association, or cases of the first class, cannot be taken—no matter what general language they use—as laying down a rule for cases of the second class, so as to obliterate the distinction which the Supreme Court of the United States has drawn.

The Ohio decisions are said to begin with and rest upon Henry v. Vermillion Co., 17 Ohio, 187. This contains nothing now pertinent, save the rather casual statement that since the charter required stock subscriptions to be paid in cash, an agreement by one subscriber to pay in something other than cash would be invalid as a fraud upon the other stockholders. Noble v. Callender, 20 Ohio St. 199, 208, is to the same effect. When subscribing, the stockholder took a collateral agreement providing that the subscription was to be paid in land. Without any discussion, it was held that this could not be enforced to the prejudice of creditors or costockholders. In Rouse v. Bank, 46 Ohio St. 493, 22 N. E. 293, 5 L. R. A. 378, 15 Am. St. Rep. 644, the court first had occasion to discuss the general principle, upon which depend all the points now involved, that the capital stock of a corporation, upon insolvency, becomes a trust fund for the benefit of creditors; but the extent and character of the liability for—or as if for—unpaid subscriptions were in no way involved. Gates v. Tippecanoe Co., 57 Ohio St. 60, 48 N. E. 285, 63 Am. St. Rep. 705, is the first decision brought to our attention or which we have found in which payment, as upon a subscription, has been enforced against one who received stock purporting to be fully paid. It had to do with a transaction by which a corporation was launched and continued in business

with a stated paid-up capital of $75,000, of which, in truth and according to property values fixed by the court, only one-half had been paid. Such distinctions as there may be between stock so originally issued at an inflated value and stock afterwards issued upon the basis of actual value at the time of issue were not involved and were not considered. Handley v. Stutz was not mentioned, though it is not to be doubted that some things said in the course of the opinion would apply as well to the latter as to the former class of stock issues. In Trust Co. v. Ford, 75 Ohio St. 322, 332, 79 N. E. 474, 8 L. R. A. (N. S.) 263, there is considerable discussion of the general rule; but it is expressly said that the decision did not reach a case where the stock was sold after commencing business and at its real value.

We find nothing else to support the claim that the Ohio rule is inconsistent with Handley v. Stutz; on the contrary, there are two decisions tending to support the opposite conclusion. In Peter v. Union Co., 56 Ohio St. 181, 46 N. E. 894, there had been capital stock issued at a discount after the corporation had been in business for some time and when it needed additional capital. Upon insolvency, a suit was brought to compel a holder of this discount stock to pay the difference between this purchase price and par. After an exhaustive and fully reported argument of counsel, in which Handley v. Stutz was cited, it was held that the liability did not exist. It is true that the court relied upon, as more or less controlling, the fact that the complaint was made by another stockholder rather than by a creditor, and it is true that this distinction has later been noted by the same court (Trust Co. v. Ford, supra, 75 Ohio St. at page 338, 79 N. E. 474, 8 L. R. A. [N. S.] 263); but, with all deference, we cannot see that this is a distinction in principle. The court expressly holds, in this Peter Case, 56 Ohio St. 197, 46 N. E. 894, that if these unpaid subscriptions are assets of the corporation, the other stockholders are entitled to have them paid in and turned over to the creditors before the statutory double liability of the other stockholders is enforced; and, as it was held in the Gates Case, at almost the same time, that these unpaid subscriptions are corporate assets, the decision in the Peter Case necessarily leads to the conclusion that, under the facts of that case, there was no liability, even for the direct benefit of creditors. The latest reference to the general subject by the Ohio Supreme Court is in Niles v. Olszak, 87 Ohio St. 229, 234, 100 N. E. 820, Ann. Cas. 1913E, 1020. The specific question involved was one of set-off, but the court discussed the controlling principles, and cited, with apparent approval, Clark v. Bever, supra, to the effect that where an additional stock issue was accepted at 20 cents on the dollar, when that was more than it was worth on the market, there was no liability for the remainder as upon a subscription. It clearly did not occur to the court that the Ohio rule was inconsistent with Clark v. Bever. When we remember that the Gates Case and the trustee's claims here are founded on the trust fund theory, and that the United States Supreme Court has consistently maintained and applied that theory, but has decided that it does not reach facts like those now assumed which, upon the present record must be considered to show a case like the Peter and not like the Gates Case, and, when we make this review of the Ohio decisions, we cannot escape concluding that

the rule of Handley v. Stutz, as to purchasers of stock and bonds, should be applied to Ohio corporations wherever the facts make it appropriate by showing a sale of stock based upon honest dealings and financial necessity. The present petition is based solely on the theory of a subscription for the full amount, upon which nothing has been paid; the facts do not fit that theory, and the proceeding, in its present form, must fail. Whatever liability, if any, there may be must depend upon allegation and proof that the capital stock was depleted through sales of bonds and stock at a price less than could be justified. If the trustee wishes to propound a case with this aspect, and is advised that the right of action therefor is in him, the present petition may be amended, and the question presented. We intimate no opinion as to the force of an order of assessment made against stockholders who have not joined issue, but who reserve their defense for that plenary suit which must eventually be brought. Kiskadden v. Steinle, supra, 203 Fed. at page 382, 121 C. C. A. 559.

Rickerson Co. v. Farrell Co., decided by this court in 75 Fed. 554, 23 C. C. A. 302, is not pertinent to the issue we have been discussing. In that case the stock issued to Fox was in connection with what was practically the launching of the business ("to begin the business for which it had been organized" [75 Fed. 558, 23 C. C. A. 306]), and the opinion distinctly shows that the case was classified under that part of the opinion in Handley v. Stutz which declares a liability as against original subscribers and differentiated from that part of the opinion which refers to a later issue of stock at its market value. Kiskadden v. Steinle, supra, likewise involved only a case of original organization and its accompanying stock issue. Altenberg v. Grant (C. C. A. 6) 85 Fed. 345, 29 C. C. A. 185, was not only of the same class on its facts, but depended on a statute which, as construed, forbade any sale at less than par.

The record suggests numerous questions that will arise, if further efforts are made to enforce a liability, upon the theory that these bonds and stocks were sold for less than their known and fair value. Upon that theory, is the right of action in the trustee, as for the recovery of a corporate asset, or in the creditors who are injured, as for a fraud? Is the actual value of the stock sold, or the good faith exercised in fixing a price, the controlling criterion? Whatever the rule as to ordinary commercial creditors, is there a presumption that one who buys a mortgage bond does so upon the faith of a supposed liability to pay the capital stock, if it has not been paid; and, if there is such presumption, is it merely prima facie, or is it so violent as to be conclusive? Are the customary and natural investigations made by or for one about to buy mortgage bonds in large amount likely to disclose the truth as to its capital stock, so as to raise any presumption of knowledge or of ignorance on that subject? Upon this theory, is the rule of set-off the same as upon the theory of a subscription? Upon the subject of estoppel as against a creditor who knew that the capital stock was issued as fully paid, is one who buys a mortgage bond in any better position than his vendor? Whatever the rule as to the second purchasers of subscribed stock or the original takers of additional stock later sold at a discount, are those who later purchase the latter class of stock,

supposing it to be full paid, liable if it is not? We think it would be premature to discuss these and other suggested questions, until the facts are more fully developed.

The order appealed from is reversed, and the case remanded for further proceedings in accordance herewith.

VIRGINIA BOOK CO., Inc., v. SITES.

In re MAGEE.

(Circuit Court of Appeals, Fourth Circuit. April 30, 1918.)

No. 1618.

BANKRUPTCY ⊂=140(3)—PROPERTY PASSING TO TRUSTEE—GOODS HELD ON CONSIGNMENT.

Under Code Va. 1904, § 2877, providing that all property or stock acquired or used in the business of a trader, doing business in his own name and not displaying by a sign the name of any partner or principal, shall be liable for his debts, the trustee in bankruptcy of such a trader takes title to his stock, including goods held on consignment.

Appeal from the District Court of the United States for the Western District of Virginia, at Roanoke; Henry C. McDowell, Judge.

In the matter of C. H. Magee, bankrupt; D. P. Sites, trustee. From a decree confirming an order of the referee requiring the Virginia Book Company, Incorporated, to surrender property, that company appeals. Affirmed.

E. W. Poindexter, of Roanoke, Va., and S. S. P. Patteson, of Richmond, Va. (Poindexter, Hopwood & Poindexter, of Roanoke, Va., and J. H. Rives, Jr., of Richmond, Va., on the brief), for appellant.

Robert W. Kime, of Roanoke, Va., for appellee.

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

KNAPP, Circuit Judge. On September 8, 1916, C. H. Magee, a bookseller and stationer of Salem, Va., filed his petition in voluntary bankruptcy, and adjudication followed the next day. He had been for a year or more the local agent of appellant for the sale on commission of schoolbooks consigned to him under an unrecorded contract by which the legal title of the books remained in the book company. Two days before his petition was filed, and when appellant had reasonable cause to believe that Magee was insolvent, it canceled his agency and repossessed itself of such of its books as he then had on hand, amounting in value to about $450. Upon petition of the trustee in bankruptcy, and after hearing, the referee ordered a return of the books, or their equivalent in money, and this order was confirmed by the District Court. The book company appeals.

The trustee's contention is based upon section 2877 of the Virginia Code, which reads as follows:

"If any person transact business as a trader, with the addition of the words 'Factor,' 'Agent,' 'and Company,' or 'and Co.,' and fail to disclose the

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

name of his principal or partner, by a sign in letters easy to be read, placed conspicuously at the house wherein such business is transacted, * * * or if any person transact such business in his own name, without any such addition, all the property, stock, and choses in action acquired or used in such business shall, as to the creditors of any such person, be liable for the debts of such person. This section shall not apply to a person transacting such business under a license to him as an auctioneer or commission merchant."

There was no compliance with this provision. The sign on Magee's store gave no indication that he was agent for any of the goods offered by him for sale, and he was not licensed to do business as an auctioneer or commission merchant. Moreover, the books received from appellant were intermingled with those procured from other parties and to all appearance constituted part of the bankrupt's stock in trade. In Hoge v. Turner, 96 Va. 624, 632, 32 S. E. 291, 294, it was said:

"The purpose of the Legislature in enacting the statute, as the title to the original act passed March 28, 1839, shows, was to prevent persons carrying on business under false or fictitious names and firms. The object was to prevent fraud, to compel any person transacting business as a trader to disclose the name of the real owner of the business, if any other there be, to prevent any shifting or evasion of ownership and liability for debts in case of controversy, and to preclude the assertion of secret claims of ownership against creditors of him who has conducted the business, possessed the property, and appeared to be its owner."

To the same effect are Edmunds v. Hobbie Piano Co., 97 Va. 588, 34 S. E. 472, and Partlow v. Lickliter, 100 Va. 631, 42 S. E. 671. And this court, in the recent case of American Piano Co. v. Heazel, 240 Fed. 410, 153 C. C. A. 336, although dismissing the petition to superintend and revise, nevertheless took occasion to say:

"In passing, we think * * * it not amiss to say that we have examined this case upon its merits, and that if the same were here by the proper method we would, with reluctance, feel it our duty to affirm the judgment of the court below."

Granting, as appellant contends, that in each of these cases the opposing creditor had or claimed a lien upon the property in dispute, there is nothing in any of the opinions to suggest that they were decided upon that ground. Every implication is to the contrary. Nor does it appear that the courts of Mississippi, which has an almost identical statute, have made any distinction in giving it effect between lien creditors and general creditors. However that may be, the question here considered has not been an open one in this court since its decision in Chesapeake Shoe Co. v. Seldner, 122 Fed. 593, 58 C. C. A. 261. Without repeating the discussion, it is enough to say that it was there held, under this Virginia statute, that the trustee in bankruptcy of a trader doing business in his own name takes title to all the stock in his store, including goods held by him on consignment, to which he did not have title as between himself and the consignor. Among other things, it was said:

"To all intents and purposes, so far as his creditors' rights are concerned, this statute vests in the trader the title to the consigned goods. It precludes the assertion of secret claims of ownership by the consignor. In other words, it avoids the title of the consignor and gives title to the trader."

The only difference between that case and the case at bar is that in the former the consigned property was in the possession of the consignee when bankruptcy proceedings were commenced against him, while in this case the consignor, with reasonable cause to believe that the consignee was insolvent, and presumably for that reason, repossessed itself of the property just before the consignee filed his petition. But we are clearly of opinion that the mere change of possession, under the circumstances here disclosed, cannot serve to sustain the distinction contended for by the appellant. To hold otherwise would be to defeat in large degree the declared purpose of the statute and open the door to its easy evasion. If the bankrupt's failure to comply with this statute operated to vest in him quoad his creditors the title to the books in question, as was decided in Chesapeake Shoe Co. v. Seldner, supra, it seems evident that the consignor could not as against creditors reinvest itself with title by taking possession of the property when the bankruptcy of the consignee was impending and the necessary effect of its act was to give it a preference. In other words, since the statute made these books, notwithstanding the concealed reservation of title, the property of the bankrupt quoad his creditors, the book company had no more right to them as against creditors than it had to any other property belonging to his estate. It results that the transaction under review was a voidable preference, and the trustee is therefore entitled to recover the books or their value. We have examined the various cases cited by appellant, but they all relate to recording acts or other state laws which present a different question.

Accepting, as we are bound to do, the construction which the Virginia Supreme Court of Appeals appears to have given to this trader's statute, and taking into account the applicable provisions of the Bankruptcy Act, we deem it not doubtful that the decree appealed from should be affirmed.

WILLIAMS et al. v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. October 30, 1918.)

No. 3179.

INTOXICATING LIQUORS ⊂=254—INTERSTATE SHIPMENTS—SUIT FOR FORFEITURE—COSTS.

Where a claimant unsuccessfully defends a suit under Criminal Code, § 240 (Comp. St. 1916, § 10410), for forfeiture of liquors shipped without proper labels, the court may, where the facts justify it, adjudge the costs and expenses against him.

In Error to the District Court of the United States for the Southern District of Georgia; Emory Speer, Judge.

Suit by the United States against 530 Packages of Spirituous and Intoxicating Liquor; Wiley Williams and George Davis, claimants. Judgment for the United States, and claimants bring error. Affirmed.

This suit was commenced by a libel in rem for the seizure and forfeiture of some 530 packages of spirituous and intoxicating liquors, described as con-

tained in two certain freight cars located on the Ocilla, Pine Bloom & Valdosta Railroad at Mobley's Siding, in the county of Irwin, state of Georgia, as shipped by one Wiley Williams and one George Davis, in violation of the provisions of section 240 of the Criminal Code of the United States (Act March 4, 1909, c. 321, 35 Stat. 1137 [Comp. St. 1916, § 10410]).

The libel contains four counts, the first two of which charged that the shipment of said liquors in interstate commerce was from the city of Fitzgerald, in the state of Georgia, to the city of Jacksonville, in the state of Florida, and the third and fourth counts charged that the shipment was from Leilaton, in the county of Coffee, in the state of Georgia, to the city of Jacksonville, in the state of Florida.

Upon filing the libel a warrant of seizure was duly issued, and on the following day an order was issued for the removal of the said carloads of liquors from said Mobley's Siding to the city of Macon. Three days after said order of removal, said Wiley Williams and George Davis, the plaintiffs in error, intervened, claiming to be the owners of said property, and alleging that the property libeled was expensive to keep, and that pending the adjudication the delay would work damage and injury to the claimants, and thereupon prayed that the property should be delivered to the claimants, and that the court should appoint the proper persons to appraise said property, and thereupon that claimants should have the privilege of bonding the same. This intervening claim was followed by an amendment denying all the allegations of the libel with regard to the shipment of the property, and especially alleging as follows:

"Interveners further show to the court that on the 27th day of April, 1916, they delivered said two cars of intoxicating liquors to the Ocilla Southern Railroad Company, to be by it and its connecting carriers, transported, one car to Lax, Ga., and one car to Metz Siding, Ga., which shipments were entire intrastate. Thereafter some trouble, confusion, and excitement arose over the fact that said two cars of intoxicating liquors were located at said Lax and said Metz Siding, and various parties living in the vicinity of said rural stations evidenced a desire to take charge of the whole or a portion of said two cars of intoxicating liquors. Thereupon the Ocilla, Pine Bloom & Valdosta Railroad Company, on whose line said two cars were situated, moved said cars to Leilaton, Coffee county, Ga., in order that the same might be protected and preserved. After said two cars of intoxicating liquors had been moved to Leilaton, interveners conferred with Reason Henderson, the president of said Ocilla, Pine Bloom & Valdosta Railroad Company, and informed the said Reason Henderson that if they could legally do so it was their purpose and desire to reship said two cars of intoxicating liquors to the city of Jacksonville, Fla., at the same time advising the said Henderson that before said cars could be shipped to the state of Florida it would be necessary for them to prepare said packages of liquor for interstate shipment, and requested the said Reason Henderson to consult with the counsel for the railroad company, and ascertain from such counsel whether it was legal and lawful to ship two cars of liquors out of the state of Georgia into the state of Florida, provided that the laws with reference to interstate shipments of intoxicating liquors were complied with."

No proceedings to bond the property appear thereafter to have been taken.

The case was brought to trial before a jury, which rendered a general verdict for the United States. Thereupon the court entered a decree of forfeiture of the property and rendered judgment as follows:

"And it is further ordered and decreed that the said 530 packages of spirituous and intoxicating liquors be, and the same are hereby, condemned and forfeited to the United States of America, and that each and every package of said spirituous and intoxicating liquors be, by the marshal of this court, forthwith delivered to the Secretary of the Treasury of the United States, or his authorized agent, taking his receipt therefor. Said liquors to be disposed of as the said Secretary of the Treasury shall direct. And it is further ordered, adjudged, and decreed that the United States of America do have and recover from the said claimants, to wit, Wiley Williams and George Davis, all costs of court, including freight charges incurred in trans-

porting said spirituous and intoxicating liquors from the point or points where seized by the marshal to Macon, Ga., and all expenses for guarding and storing said spirituous and intoxicating liquors while in the possession of the marshal, and all other costs and expenses of every kind and character, not hereinbefore paid by said claimants, incurred by this litigation between said claimants and the United States of America, with right of execution therefor, leave being now reserved to the United States of America to enter thereafter such supplemental judgment as may be necessary for proper fixing the exact amount of recovery; and, in case said costs and expenses, or any part thereof, are not paid by said claimants, and in the event the Secretary of the Treasury shall accept said liquors, such costs or expenses, or any unpaid part thereof, be and the same are hereby adjudged, decreed, and directed to be paid by the United States.

"This the 9th day of March, 1917."

On May 23, 1917, the following supplemental judgment was entered:

"The jury having returned a verdict in favor of the United States in the above case, and a judgment having been entered thereon on the 9th day of March, 1917, with the right reserved therein to take a supplemental judgment for all costs of court as soon as the exact amount of same could be determined, and the exact amount of said costs having been this day ascertained, it is therefore ordered, adjudged, and decreed that the United States do have and recover from the claimants in said cause, to wit, Wiley Williams and George Davis, in the sum of $1,867.53, costs of court, said amount being itemized as follows:

Clerk's costs:	
Attorney's docket fee	$ 20.00
Other costs (clerk's)	44.90
Marshal's costs:	
Guard hire from June 16 to 26, 1916, inclusive, day guard, at $2.50 per day	27.50
Guard hire from June 16, 1916, to March 22, 1917, night guard, at $2.50 per night, 280 nights at $2.50	700.00
Rent of storage room from June 17, 1916, to March 22, 1917, at $1 per day (279)	279.00
Freight on two carloads liquor from Mobley's Siding, Berrien county, to Macon, Ga., upon order of court	569.68
Fees of marshal serving orders, and expenses of travel to serve same, and expenses of deputies guarding said liquor in transit	57.30
Hack fares from marshal's office to place of storage, from June 17, 1916, to March 22, 1917	4.75
Two heavy locks, at $1.25 each	2.50
Carpenter putting locks on, staples, etc.	1.50
Other costs:	
Witness' fees	160.40
Total	$1,867.53

Thereupon said Wiley Williams and George Davis sued out this writ of error, assigning errors as follows:

"(1) Because the court erred in the judgment of March 9, 1917, in condemning the claimants to pay the costs in said action.

"(2) Because the court erred in said judgment of March 9, 1917, in condemning the claimants to pay the costs of seizing, guarding, removing, and storing the liquors therein mentioned, for the reason that in and by said judgment the court decreed the liquors therein mentioned to have been forfeited to the United States as of the date of the original seizure, and all expenses incident to the same accruing subsequent to that date should have been adjudged to have been paid by the United States.

"(3) Because the court erred in said judgment of March 9, 1917, in condemning the claimants to pay the expenses incident to the seizure, removing, storing, and guarding said liquors subsequent to the seizure thereof, for the reason that the court should have adjudged that said liquor be sold and said costs and expenses paid out of the fund realized from said sale.

"(4) Because the court erred in said judgment of May 5, 1917, in condemning the claimants to pay costs of court, amounting to $1,867.53.

"(5) Because the court erred in said judgment of May 5, 1917, in condemning the claimants to pay the items included in said judgment under the head of 'Marshal's Costs,' for the reason, said property having been adjudged to be forfeited to the United States as of the date of the original seizure, the United States should have been condemned to have paid the expenses incident to preserving and keeping said property subsequent to said date, and for the further reason that the court should have, in and by said judgment, directed that the liquors therein mentioned should be sold, and the costs and expenses incident to preserving and keeping the same paid out of the fund realized from said sale."

Alexander Akerman and Charles Akerman, both of Macon, Ga., for plaintiffs in error.

E. M. Donalson, U. S. Atty., of Macon, Ga.

Before PARDEE, WALKER, and BATTS, Circuit Judges.

PARDEE, Circuit Judge (after stating the facts as above). Whether the court erred in adjudging costs and expenses attendant upon the seizure in this case against the intervening claimants depends upon the facts in the case, as shown by the transcript before us, and as this shows no bill of exceptions, nor any agreed statement of facts, and as the verdict of the jury was against the interveners and in favor of the United States on all the issues involved, it follows that the only facts we can consider are those shown by the pleadings. Looking to the pleadings, we find that the plaintiffs in error were the original violators of the law, rendering the seizure proper and necessary, and through their intervention the proceedings were delayed nearly 10 months, thereby largely increasing all the costs and expenses incurred for the preservation of the property pending the final judgment of the court, and we conclude that the plaintiffs in error were properly held responsible for all the costs and expenses incurred from the beginning of the suit. See Clara O. Burns, Adm'x, et al. v. Julius W. Rosenstein et al., 135 U. S. 449, 10 Sup. Ct. 817, 34 L. Ed. 193.

This view of the case is decidedly strengthened by the admission of the interveners in the amendment to their claim to the effect that they originally shipped the liquors for distribution in the state of Georgia as an intrastate shipment, which would have been in violation of the laws of the state of Georgia, wherein said liquors were contraband and liable to seizure and forfeiture See Laws Ga. 1915 (Extra Sess.) p. 88. Taking this view of the case, none of the errors assigned is well taken.

The judgment of the District Court should be affirmed; and it is so ordered.

WILLIAMS v. UNITED STATES.

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

No. 3221.

WITNESSES ⊂=337(5)—EVIDENCE OF FORMER CONVICTION.

A defendant in a criminal case, who elects to take the witness stand, is subject to all the rules and tests applicable to other witnesses, and renders admissible records of former convictions for felony.

In Error to the District Court of the United States for the Southern District of Georgia; Beverly D. Evans, Judge.

Criminal prosecution by the United States against Charles T. Williams. Judgment of conviction, and defendant brings error. Affirmed.

John R. Cooper, of Macon, Ga., for plaintiff in error.

E. M. Donalson, U. S. Atty., of Macon, Ga. (Wallace Miller, Asst. U. S. Atty., of Macon, Ga., on the brief), for the United States.

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

SHEPPARD, District Judge. The plaintiff in error was tried and convicted for the offense denounced by section 3258 of the Revised Statutes (Comp. St. 1916, § 5994). It was the usual indictment of four counts in such cases, and plaintiff in error was convicted on all counts, and assigns as error here the admission in evidence over his objection of the records of two previous convictions of plaintiff in the same court for the same offense. There are two other assignments mentioned in the brief, but not argued, to the effect that the court erred in not permitting the accused to make an uninterrupted statement of his defense to the jury, and the refusal of the court to admit in evidence a letter from one Jule Ingram to Walter Simmons, exculpatory of the latter of any connection with the alleged illicit distillery.

The record shows that during the progress of the trial the defendant elected to take the witness stand in his own behalf, and so became subject to all the rules and tests applicable to any other witness, and was confronted with the record of his previous convictions, the punishment for which may be two years in a penitentiary, and by section 335, Federal Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1152 [Comp. St. 1916, § 10509]), is made a felony. What is said, and the authorities cited in support of our conclusion, in Robert Lee Gordon v. United States, 254 Fed. 53, — C. C. A. —, decided at this term, disposes fully of this assignment, as well as the objection that the accused was not allowed to make a statement to the jury. There was no error in excluding from the jury what purported to be a copy of the "Ingram letter." Its contents were clearly hearsay, and it appears to have been previously excluded on objection of defendant below. It was wholly irrelevant to any issue in the case. The evi-

dence on the whole, if believed by the jury, was sufficient to support the verdict.

We find no error, and the judgment is affirmed. It will be so ordered.

GORDON v. UNITED STATES.

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

No. 3214.

1. CRIMINAL LAW ⟸369(1)—EVIDENCE—OTHER OFFENSES.
   Evidence of other offenses, and independent crimes and convictions, are incompetent to establish the guilt of an accused.
2. CRIMINAL LAW ⟸376—EVIDENCE—BAD CHARACTER.
   Unless the accused has introduced evidence of his good character, the prosecution cannot introduce evidence of his bad character and habits as part of its case.
3. WITNESSES ⟸337(5)—IMPEACHMENT OF ACCUSED—OTHER OFFENSES.
   Where accused took the stand in his own behalf, he could be impeached, like any other witness, by proof of his prior conviction of an offense, which Penal Code, § 335, made a felony; the evidence being restricted to that purpose.

In Error to the District Court of the United States for the Southern District of Georgia; Beverly D. Evans, Judge.

Robert Lee Gordon was convicted of violating Rev. St. § 3258 (Comp. St. 1916, § 5994), by having in his custody and control a distilling apparatus, etc., and he brings error. Affirmed.

Chas. Akerman, of Macon, Ga., for plaintiff in error.

E. M. Donalson, U. S. Atty., of Macon, Ga.

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

SHEPPARD, District Judge. The plaintiff in error, Robert Lee Gordon, was tried and convicted in the Southern district of Georgia on the usual indictment of four counts for a violation of section 3258 of the Revised Statutes (Comp. St. 1916, § 5994), namely, having in his custody and control and set up a distilling apparatus in violation of statute, and with operating, etc., a distillery for which no bond had been given to the United States in conformity to law. During the progress of the trial the defendant volunteered as a witness in his own behalf, and on cross-examination by the United States Attorney was confronted by the record of a previous conviction for the same offense in the same court two years before, to which objection was made, and exception taken to the order of the judge overruling the objection. This exception constitutes the only assignment on this writ of error.

[1, 2] The plaintiff in error complains that the admission of this evidence went to impeach the character of the defendant and was strongly prejudicial to his defense in the trial. That evidence of other independent crimes and convictions to establish the guilt of an

accused are incompetent is well settled. Dyar v. United States, 186 Fed. 614, 108 C. C. A. 478, and cases cited. And it also is true that, unless the accused has introduced evidence of good character, the prosecution cannot introduce evidence of his bad character and habits as part of its case. Thompson v. Bowie, 4 Wall. 463, 18 L. Ed. 423; Williams v. United States, 168 U. S. 382, 18 Sup. Ct. 92, 42 L. Ed. 509.

[3] When, however, the defendant in a criminal trial in a United States court takes the stand as a witness in his own behalf, he does so at his own election, and, by the federal practice, as a witness he becomes subject to all the rules and tests applicable to any other witness, and to test his credibility he may be interrogated as to all matters affecting his credibility. He may be impeached, like any other witness, by proving that he has been convicted of a felony; the punishment provided in the statute for the offense of which the plaintiff had previously been convicted made it a felony. Section 335, Federal Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1152 [Comp. St. 1916, § 10509]). It is well for the judge to instruct the jury as to the limitations of such evidence, that it is not to be considered as proof that the accused is guilty of the offense of which he is charged, but only to affect his credibility as a witness. The record shows that the trial judge safeguarded the rights of the defendant with a proper instruction as to the effect of the previous conviction.

There was no error in the admission in evidence of the record of defendant's previous conviction for the purpose it was offered, circumscribed as it was with an appropriate instruction to the jury. 5 Ency. of Supreme Court Reports, 128; Reagan v. United States, 157 U. S. 301, 15 Sup. Ct. 610, 39 L. Ed. 709; Caminetti v. United States, 242 U. S. 493, 37 Sup. Ct. 192, 61 L. Ed. 442, L. R. A. 1917F, 502, Ann. Cas. 1917B, 1168.

The judgment, therefore, must be affirmed; and it is so ordered.

AMERICAN SURETY CO. OF NEW YORK v. BELLINGHAM NAT. BANK et al.

(Circuit Court of Appeals, Ninth Circuit. December 2, 1918.)

No. 3183.

1. MUNICIPAL CORPORATIONS ⟸347(2)—CONSTRUCTION CONTRACTS—SURETY—PRIOR ASSIGNMENTS.

Under the settled law of Washington, a bank which has advanced money to a contractor, which was expended in paying for labor and materials used in making a city improvement, and has taken an assignment of city warrants therefor, has an equity superior to that of a surety on the contractor's bond.

2. COURTS ⟸365—FEDERAL COURTS—FOLLOWING STATE DECISIONS.

A rule established for years by the highest court of a state, affecting the rights of parties arising out of contracts for municipal improvements and sureties on statutory bonds given by the contractor, if fixed and definite, and uniform in application, should be followed by the federal courts.

Appeal from the District Court of the United States for the Northern Division of the Western District of Washington; Jeremiah Neterer, Judge.

Suit in equity by the American Surety Company of New York against the Bellingham National Bank, the City of Bellingham, and others. Decree for defendants, and complainant appeals. Affirmed.

Hastings & Stedman, of Seattle, Wash., Kellogg & Thompson, of Bellingham, Wash., and Livingston B. Stedman, of Seattle, Wash., for appellant.

Sather & Livesey and George Livesey, all of Bellingham, Wash., for appellees.

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

GILBERT, Circuit Judge. The appellant brought a suit to enjoin the city of Bellingham, Wash., from paying to the Bellingham National Bank certain warrants of the city. The city had made two contracts with Moran Bros. for street improvements, one of date July 29, 1916, for the improvement of Maryland street, the other of date September 22, 1916, for the improvement of Iowa street. On both contracts the appellant became surety on the bonds of the contractors; the first bond being dated July 27, 1916, and the second September 20, 1916. The bank advanced to the contractors money to prosecute both contracts, and took assignments of warrants from them; one assignment on September 11, 1916, for advances on the Maryland street contract, and one on October 20, 1916, for advances on the Iowa street contract. At the time of the completion of the contracts no payment had been made by the city on either contract. The bank had advanced considerable sums on each contract, all of which were used in payment for labor, supplies, and material, in the improvements. Claims in considerable amounts for sums which had not been paid by the contractors were filed against the bonds; all the items thereof being valid claims against the bonds under the law of Washington. The contractors were insolvent. It was the contention of the appellant that its right of lien was superior to that of the bank, and the bank contended that, having paid various claims for labor, material, and supplies actually used in the construction of the improvements, its equity was superior to that of the appellant. The contract price of the improvements was not sufficient to pay all the sums so advanced by the bank and the claims presented against the bonds.

[1] The court below held that the equities were with the bank, distinguished the case from Prairie State Bank v. United States, 164 U. S. 227, 17 Sup. Ct. 142, 41 L. Ed. 412, on the ground that in the latter case the assignment of warrants was prohibited, and distinguished it from Title Guaranty & Surety Co. v. Dutcher (D. C.) 203 Fed. 167, on the ground that in that case no account was kept of the particular work on which the borrowed money was disbursed, and distinguished it from the decision of this court in First Nat. Bank v. City Trust, Safe Deposit & Surety Co., 114 Fed. 529, 52 C. C. A. 313, on

the ground that in that case no equities obtained in favor of the bank, evidently meaning that there was nothing to show that the money loaned by the bank to the contractor in that case was actually devoted to the payment of labor or material for which lienable claims would have arisen against the contractor's bond. Without entering into discussion of the points of difference between the present case and the decisions so cited, we are disposed to hold that the decision here appealed from should be sustained on the ground that in the state of Washington it is now, and has for many years been, the settled law that, where a contractor has assigned to a bank the sums to become due on a city contract as collateral for advances, payments due to the contractor in case of his default are to be applied first to repay such advances. It is sufficient to cite Northwestern Nat. Bank v. Guardian C. & G. Co., 93 Wash. 635, 161 Pac. 473, and Title G. & S. Co. v. First Nat. Bank, 94 Wash. 55, 162 Pac. 23. In the first of those cases the court said:

"We find no merit in the claim that the bonding company has a superior equity in this fund over that of the bank. It has no equity in the fund as against the bank, which paid its money on the strength of assignments of the fund at a time when the contractors had full right to collect and dispose of the fund as they saw fit. Moreover, it is an admitted fact in this case that the money advanced by the bank was actually used by the contractors in the performance of the contract, thus diminishing the bonding company's liability by just the amount advanced. The equities are obviously with the bank."

[2] Such a local rule, affecting rights of parties arising out of municipal contracts for street improvements and sureties on bonds filed in pursuance of statutory provisions, if fixed and definite and uniform in its application, should be followed by a federal court in a case where, as here, no question of general or commercial law or of rights under the federal Constitution or the laws of Congress is involved. In Columbia Digger Co. v. Sparks, 227 Fed. 780, 142 C. C. A. 304, we followed the decision of the Supreme Court of Washington in holding that sureties on a statutory bond of a contractor for a public improvement have the right to have the proceeds of the contract applied in payment for labor and material furnished under said contract in preference to the right of an assignee to receive the same as payee of a pre-existing debt. We said:

"That doctrine has become the settled rule in Washington, and the sureties on the contract in question had the right to rely upon it as the law of that state, and we may assume that they did so when they became sureties upon the contract. A federal court ought not to upset the rule thus established by the Supreme Court of a state for the guidance of its own citizens, unless that rule is against the very decided weight of authority"

—citing Detroit v. Osborne, 135 U. S. 492, 10 Sup. Ct. 1012, 34 L. Ed. 260, in which it was said:

"There should be, in all matters of a local nature, but one law within the state; and that law is not what this court might determine, but what the Supreme Court of the state has determined"

—and citing, also, Equitable Life Assur. Society v. Brown, 213 U. S. 25, 44, 29 Sup. Ct. 404, 410 (53 L. Ed. 682), in which it was said:

"The decisions of the highest court of New York are therefore binding upon this court as to the meaning and effect of the charter of the defendant, and as it is a New York company and the contract is a New York contract, executed and to be carried out therein, its meaning and construction, as held by the highest court of the state, will be of most persuasive influence, even if not of binding force."

See, also, Claiborne County v. Brooks, 111 U. S. 400, 410, 4 Sup. Ct. 489, 28 L. Ed. 470; Snare v. Friedman, 169 Fed. 11, 94 C. C. A. 369, 40 L. R. A. (N. S.) 367; Keystone Wood Co. v. Susquehanna Boom Co., 240 Fed. 296, 153 C. C. A. 222.

The judgment against the appellant for $133.25 on the claim of Morse Hardware Company, having been entered inadvertently, as it is admitted, the decree below should be modified accordingly. As so modified, the decree is affirmed.

UNITED STATES v. MINOR et al.

(Circuit Court of Appeals, Fourth Circuit. October 1, 1918.)

No. 1621.

1. DESCENT AND DISTRIBUTION ⟸138 — LANDS OF DECEASED JUDGMENT DEBTOR—JURISDICTION OF EQUITY.
   The federal District Court has jurisdiction of a bill in equity by the United States to subject to payment of a judgment North Carolina land which had descended to heirs of the judgment debtor; there being no personal assets, and it being necessary to bring in the heirs, etc., for, since Laws 1846–47, c. 1, lands descended to heirs of the judgment debtor cannot be sold on execution, etc., and Revisal N. C. 1905, § 68, conferred jurisdiction on the superior court to grant relief, etc.
2. CREDITORS' SUIT ⟸1—JURISDICTION.
   Courts of equity have jurisdiction to entertain suits in the nature of creditors' bills for the purpose of administering estates, marshaling assets, and adjusting equities.

Appeal from the District Court of the United States for the Western District of North Carolina, at Greensboro; James E. Boyd, Judge.

Bill by the United States against J. B. Minor, administrator of C. O. Ward, deceased, and others. From a decree dismissing the bill (243 Fed. 953), complainant appeals. Reversed.

William C. Hammer, U. S. Atty., of Ashboro, N. C., for appellant.

George S. Bradshaw, of Greensboro, N. C., for appellee.

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

CONNOR, District Judge. This cause was before the court at the May term, 1916. 235 Fed. 101, 148 C. C. A. 595. The facts material to the decision of this appeal are set forth in the opinion of Judge Woods. The court, in that appeal, having held that the cause of action on the judgments recovered by plaintiff, was not barred by the statute of limitation, the district attorney presented to the court a decree directing that the lands described in the bill, which descended to

defendants, heirs at law of the judgment debtor, C. O. Ward, deceased, and conveyed by them to defendant M. J. Wrenn, be sold for the payment of the judgments. The District Judge, for the reasons set out in his opinion, in the record, declined to sign the decree, and dismissed the bill. From this decree, the district attorney appealed. The District Judge, giving full force to the decision of this court, was of the opinion that the collection of the judgments should be enforced by an execution, or writ of fieri facias. Recognizing the fact that the defendants, heirs at law, and the purchasers of the land were entitled to a day in court, before the lands were subjected to sale, he suggests that this could have been accomplished by motion in the original cause, with a citation to them to show cause why the writ should not issue—that the bill in equity could not be entertained.

[1, 2] The learned judge overlooked the fact that by the laws of the state of North Carolina lands descending to the heirs of a judgment debtor cannot be sold under execution issuing on the judgment. The act of the Legislature of 1784 (chapter 1) gave to the judgment creditor of a person deceased, the right to have a writ of scire facias issue to the heirs at law, directing them to show cause why an execution should not issue. Upon the return of the writ, the heirs could, upon proper averment, have an issue tried to ascertain whether there were any personal assets in the hands of the administrator. If this issue was found against the heirs, execution issued against the lands. This statute was repealed by the act of 1846 (Laws 1846–47, c. 1), and provision made for subjecting the lands of the deceased debtor by means of a petition by the administrator, filed in the court of pleas and quarter sessions. Richmond Cedar Works v. Stringfellow (D. C.) 236 Fed. 264. Jurisdiction was thereafter conferred upon the superior court to grant relief. Rev. 1905, c. 1, § 68.

Lands descended cannot be sold under execution. To do so would disturb the statutory system prescribing the method of administration of estates of deceased persons. In this case it may have been more orderly for the administrator to have proceeded under the statute. It has been held by the Supreme Court of this state that, if he fails to do so, the creditor may institute the proceeding. Courts of equity have jurisdiction to entertain suits in the nature of creditors' bills for the purpose of administering estates, marshaling assets, and adjusting equities. Adams' Equity, 257.

In view of the fact that it was necessary to "bring in" the heir and the purchaser, we can see no valid reason why the court of equity is not the proper tribunal for enforcing the remedy which the United States had to collect the judgments. It may, by its decree, adjust any rights which the purchaser may have against the heirs and apportion their liability to him. It is conceded that the administrator has no personal assets, and that there are no other debts outstanding or liens against the land—no other persons than the plaintiff and defendants have any rights or interests to be conserved.

The case is one which illustrates the truth of the maxim that "hard cases are the quicksands of the law." The facts appeal strongly to the consideration of the department upon which the duty of enforcing

claims of the government is imposed. The court can only adjudge the right and enforce the remedy as the law directs.

The decree dismissing the bill must be reversed, to the end that further proceedings be had in accordance with the decision of this court.

Reversed.

UNITED STATES v. ASH SHEEP CO.

(Circuit Court of Appeals, Ninth Circuit. December 2, 1918.)

No. 3229.

INDIANS ⊂=19—UNAUTHORIZED PASTURING OF STOCK ON INDIAN LANDS—"CATTLE."

Rev. St. § 2117 (Comp. St. 1916, § 4107), providing a penalty of $1 a head for grazing "any stock of horses, mules or cattle" on land of any Indian or Indian tribe, applies to sheep.

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

In Error to the District Court of the United States for the District of Montana; Geo. M. Bourquin, Judge.

Action by the United States against the Ash Sheep Company. Judgment for the United States, and defendant brings error. Affirmed.

C. B. Nolan and William Scallon, both of Helena, Mont., for plaintiff in error.

Burton K. Wheeler, U. S. Atty., and James H. Baldwin, Asst. U. S. Atty., both of Butte, Mont., and Homer G. Murphy, Asst. U. S. Atty., of Helena, Mont.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. By writ of error the Ash Sheep Company seeks a reversal of a judgment entered against it for $5,000 in favor of the United States in an action brought in the district of Montana by the United States to recover the penalties provided by section 2117, Rev. St. (Comp. St. 1916, § 4107).

The origin of the case and its history are given in the opinion we expressed in United States v. Ash Sheep Co., 250 Fed. 592, — C. C. A. —. It is therefore only now necessary to recite that, after we reversed the judgment of the lower court and remanded the case for further proceedings, there was a trial to the District Court upon an agreed statement of facts, whereby it was admitted that in July, 1913, the Sheep Company, without the consent of the Crow Tribe of Indians, or of the United States, drove, ranged, and fed 5,000 head of sheep on the lands specified in the complaint; that at that time the land in question had no settlements or entries thereon under the laws of the United States, which provided for settlement and entry being made upon the land; and that in the civil suit brought by the United States to enjoin the Sheep Company from trespassing on the land, the suit being that referred to in the answer of the Sheep Company filed in this action (Ash Sheep Co. v. United States, 250 Fed. 591,

— C. C. A. —), the United States sought to recover as damages the penalties it is herein seeking to recover.

The foregoing statement and the assignments of error disclose that the present case raises the same questions, and only those, which were directly involved in, and were considered and decided by this court upon, the former writ of error; and counsel for the Sheep Company state in their brief that the writ of error herein is prosecuted for the purpose of saving the right to seek a review of our former opinion by the Supreme Court.

As no reason occurs to us for reversing the views we announced in our earlier opinion, we abide by it, and affirm the judgment of the District Court.

Affirmed.

YEATES v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. October 28, 1918.)

No. 3287.

1. CRIMINAL LAW ⊂⊃113—PLACE OF PROSECUTION—ALLEGATION OF INDICTMENT.
   Allegation, in indictment for violation of White Slave Act June 25, 1910 (Comp. St. 1916, §§ 8812–8819), of the place from which transportation was made, fixes jurisdiction.
2. CRIMINAL LAW ⊂⊃29—DIFFERENT OFFENSES IN SAME TRANSACTION—STATE AND FEDERAL.
   There may be a conviction of violation of White Slave Act June 25, 1910 (Comp. St. 1916, §§ 8812–8819), though the offense proved may contain the elements of a graver offense, cognizable by the state laws.
3. CRIMINAL LAW ⊂⊃1156(3)—APPEAL—DENIAL OF NEW TRIAL—NEWLY DISCOVERED EVIDENCE—DISCRETION.
   Disposition of a motion for new trial, based on alleged newly discovered evidence, is within the discretion of the trial judge, reviewable only for manifest abuse.

In Error to the District Court of the United States for the Southern District of Georgia; Beverly D. Evans, Judge.

James S. Yeates was convicted of violation of the White Slave Act, and brings error. Affirmed.

John R. Cooper, of Macon, Ga., for plaintiff in error.

E. M. Donalson, of Macon, Ga., for the United States.

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

BATTS, Circuit Judge. [1] The indictment charges violation of White Slave Act June 25, 1910, c. 395, 36 Stat. 825 (Comp. St. 1916, §§ 8812–8819). The allegation that the transportation was from a place in the Southwestern division of the Southern district of Georgia fixes jurisdiction therein.

[2] The evidence indicates that defendant's unlawful purpose may have been consummated by rape. That the offense proved may con-

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

tain the elements of a graver crime, cognizable by the state laws, does not affect the prosecution.

The Supreme Court has recognized no qualifications to the comprehensive literal terms of the White Slave Act. Questions as to its constitutionality are foreclosed.

[3] The disposition of a motion for a new trial, based upon alleged newly discovered evidence, is within the discretion of the trial judge, subject to review for manifest abuse. There is in this case an absence of anything to indicate that the motion was not disposed of properly.

The judgment is affirmed.

ANDUAGA et al. v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. November 21, 1918.)

No. 3284.

BAIL ⊂=64—CRIMINAL PROSECUTIONS—SUFFICIENCY OF BOND.

A bail bond is not rendered invalid because of a mere verbal inaccuracy, caused by accidental transposition of words, which does not work injury to any person in interest.

In Error to the District Court of the United States for the Western District of Texas, San Antonio Division; Duval West, Judge.

Action by the United States against Enrique Anduaga and A. B. Copeland. Judgment for the United States, and defendants bring error. Affirmed.

Ed. Halton, of San Antonio, Tex., for plaintiffs in error.

Hugh R. Robertson, U. S. Atty., of San Antonio, Tex.

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

BATTS, Circuit Judge. Article 1014, R. S. (Comp. St. 1916, § 1674), provides that a United States commissioner may take bail in any state "agreeably to the usual mode of process against offenders in such state." A provision of Code of Criminal Procedure of Texas 1911, art. 321, is to the effect that—

"A bail bond shall be sufficient if it contains the following requisites: * * *
"3. If the defendant is charged with an offense that is a felony, that it state that he is charged with a felony."

The bond upon which the judgment appealed from was based was in accordance with the law, unless the following is insufficient as a compliance with the quoted subdivision:

"Answer the United States in a complaint filed against him, the said a felony in said court, charging him with."

It is apparent that any deficiency is the result of a mere transposition of words, probably caused by filling blanks in a printed form. The words as used constitute a sufficient recital of the fact that the defendant was charged with a felony. A mere clerical inaccuracy, re-

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

sulting in no harm to any person at interest, ought not to be permitted to defeat the purpose of the law and the intentions of the parties to the bond.

The judgment is affirmed.

MONITOR STOVE & RANGE CO. v. L. J. MUELLER FURNACE CO.

(Circuit Court of Appeals, Seventh Circuit. October 1, 1918. Rehearing Denied November 9, 1918.)

No. 2550.

1. PATENTS ⟸328—CONSTRUCTION—INFRINGEMENT.
The Short patent, No. 933,128, for a hot-air heater, claim 1, which specified the combination with a floor, of a heater having a drum, means for heating said drum, a second drum, etc., and a third drum, etc., *held* not infringed.

2. PATENTS ⟸328—CONSTRUCTION—INFRINGEMENT.
The Doyle and Wollenhaupt patent, No. 1,133,242, for a furnace, claims 1, 2, and 3, which emphasized two concentric circumferential casings surrounding said heater, etc., *held* not infringed.

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

Bill by the Monitor Stove & Range Company against the L. J. Mueller Furnace Company. From a decree dismissing the bill, complainant appeals. Affirmed.

Suit to enjoin infringement of patent No. 933,128, to Robert L. Short, for hot-air heater, and patent No. 1,133,242, to William J. Doyle and J. J. Wollenhaupt, for a furnace. Bill dismissed.

William R. Wood, of New York City, for appellant.

Arthur L. Morsell, of Milwaukee, Wis., for appellee.

Before BAKER, MACK, and EVANS, Circuit Judges.

EVAN A. EVANS, Circuit Judge. [1] Appellant, as assignee of patentees' rights, charged appellee with infringing claim 1 of the Short patent, No. 933,128, and claims 1, 2, and 3 of the Doyle and Wollenhaupt patent, No. 1,133,242. The District Judge found the claims of both patents here involved to be invalid and dismissed the bill.

The Short patent, to quote from the specifications—

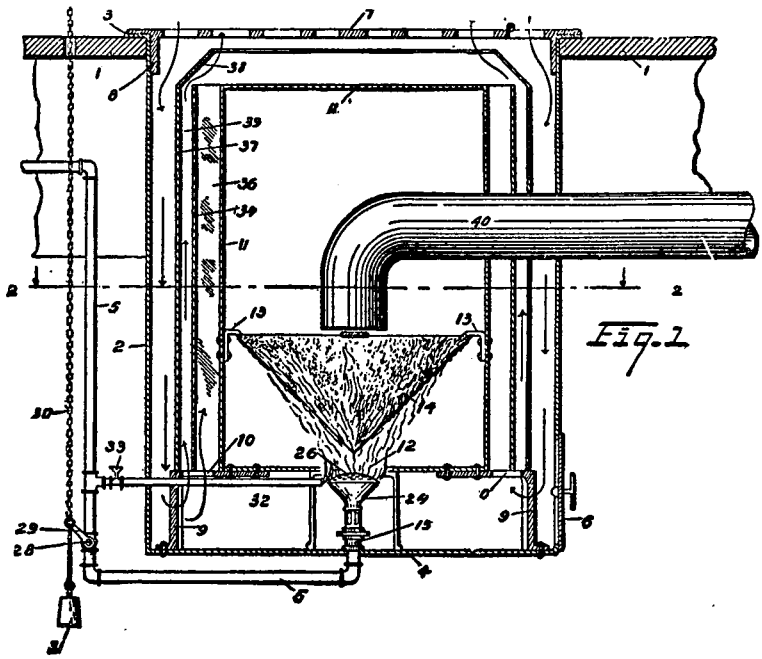
"relates to air-heating systems, and it has particular reference to a heater which is depressed below the floor level; the upper surface of the heater being supported upon the floor and consisting of an open grate structure similar to that employed in the hot-air register. * * * The heater is intended especially for use with gas. It has advantage of economy in the use of fuel, of greater heating capacity, and of use in such positions that the heater occupies practically no space in the rooms where used."

The patentee further states in his specifications:

"In the ordinary hot-air systems where a large furnace is employed, with hot-air pipes leading to registers throughout the building, there is necessarily a great loss of heat incident to the transmission of the hot air from the furnace to the various registers and in the incidental heating of the said con-

ducting pipes. Furthermore, in the use of such furnaces, when but little heat is required, there is always considerable loss due to the employment of a large furnace. In my heater this loss is almost entirely avoided, for the reason that there are no conducting pipes to be heated, and, the heater being located immediately beneath the floor of the room to be heated, there can be no loss due to any of the above-mentioned causes. My system of heating, therefore, has the advantage of locating the heat at the various points needed, the heating devices so located being under the absolute control from the room to be heated, whereby a great convenience in control of the heating devices is secured."

While the foregoing description clearly pictures the structure the patentee had in mind, and the drawing accompanying the specifications, herewith reproduced,



emphasizes the limitations of the invention as disclosed by the specifications, it is claimed by appellant that simply a preferred form of structure is thus set forth in the specifications and the drawing; that in reality the combination covered the triple casing pipeless furnace which has grown much in favor during the past few years. Much testimony was received and appellant favors us with an elaborate argument in support of the advantages of a triple casing pipeless furnace over the double casing type. Appellee, on the other hand, contends that the turning point in this litigation does not involve any such question in the least.

The differences between a pipeless furnace and the furnace with pipes running to the various rooms are quite familiar. In furnaces with pipes carrying the hot air to the different rooms, we have a fur-

nace body proper surrounded with a single casing forming an air space, which air space incloses the radiating surface of the heating body. Cold air is admitted into the bottom of this compartment surrounding the furnace body, and this air receives heat from the radiating surface and passes through the upper part of the compartment to a series of hot-air conduits which lead to the registers of the rooms to be heated.

In the pipeless furnace system, the furnace body is surrounded by a plurality of casings, each spaced from the other. Instead of taking the cold air from the bottom, this style of furnace employs a single large register for the entire house, positioned at a convenient place on the ground floor; the furnace being immediately under and communicating directly with the single register. The inner casing is contracted above the furnace radiator and forms a central opening communicating with the central portion of the single register, while the annular opening forming the spacing between the outer and inner casings communicates with the outer or annular portion of the register. Cold air enters through this outer annular spacing, and passes downward between the two casings to the bottom portion of the furnace, then passes inwardly under the inner casing, which does not extend to the floor and upwardly between the inner casing and the radiating surface of the furnace body, becoming heated thereby, and emerging through the central part of the register to the ground floor of the house.

The triple casing type of pipeless furnace differs from the one just described in that an additional inner casing is provided. Referring to Figure 1, the cold air enters the margin of the register and descends between the outer casing *2* and the middle casing having a constricted upper end *38*. The cold air descends clear to the bottom and then passes inwardly under the bottom edges of this middle casing and of the inner casing *34*, immediately surrounding the radiator *11*. The greater volume of air passes between the radiator *11* and the inner casing *34*, but a portion of the descending cold air passes between the inner casing *34* and the middle casing and is deflected by constricted portion *38* over the upper end of the radiator *11*, thence upwardly and outwardly through the central portion of the radiator.

The advantage of the triple casing lies in the presence of this air chamber, which serves to insulate the outermost column of cold air from the innermost column of hot air.

Appellant urges that Short contributed to the pipeless furnace art, among other things, the idea of a triple casing, thereby making provision for this extra air chamber. Appellee contends that such was not Short's patent disclosure, and, if his discovery be limited to the use of an extra air chamber in a pipeless furnace, it was, in view of the prior art, no invention, and the claim is invalid.

Claim No. 1 reads as follows:

"1. The combination, with a floor, of a heater having a drum, means for heating said drum, a second drum surrounding the first-mentioned drum, and spaced therefrom, a third drum surrounding both drums and constricted at its upper end, and means for causing the cold air to pass downwardly outside the third drum, whereby the heated air passes upwardly between said drum and is directed away from the floor."

Opposing counsel do not agree upon what constitutes the last element in the combination, namely:

"Means for causing the cold air to pass downwardly outside the third drum, whereby the heated air passes upwardly between the said drums and is directed away from the floor."

In giving the proper construction to this claim we cannot overlook the fact that appellant entered a crowded department of the heating art. The file wrapper is likewise instructive and illuminating.

After numerous claims had been rejected, the claim in question was presented, reading as follows:

"A combination with a floor, of a heater having a drum, means for heating said drum, a second drum surrounding the first-mentioned drum and spaced therefrom, a third drum surrounding both drums and constricted at its upper end, and means for supporting said drum from the floor of the room to be heated, and means for causing the cold air to pass downward outside the third drum, whereby the heated air passes upwardly between said drums and is directed away from the floor."

The examiner stated in respect to this claim as thus drawn:

"Claim 1 is found to twice introduce the same matter, namely, means for supporting said drums from the floor of the room to be heated, and means for causing the cold air to pass downwardly outside the third drum, the casing tube being thus twice involved."

Thereupon applicant amended his claim by striking out the words "means for supporting the said drum from the floor of the room to be heated." This amendment was in response to the objection set forth in the letter quoted above. It follows, therefore, that both the Patent Office and the applicant construed the otherwise ambiguous element, "means for causing cold air to pass downwardly outside the third drum, whereby the heated air passes upwardly between the said drum," as synonymous with the element, "means for supporting the said drum from the floor of the room to be heated." No escape from this conclusion is apparent. Likewise, we find no other rational explanation of this last element in the combination as finally allowed. Such a definition is consistent with the asserted claims of the patentee in his specifications heretofore quoted. Wherein did patentee expect to economize in fuel through the employment of a small furnace, if this were not his intention? Again, how did the patentee hope to obtain selected and preferred locations for his heater if his invention did not call for a heater for each room?

Moreover, the prior art was full of patents, an examination of which discloses pipeless furnaces of the general character used by appellee and appellant in their commercial structures, and wherein reference was made to an insulating chamber or medium. For example, in the patent to Evans, No. 496,193, patentee in his specification says:

"In the drawing *a* is the exterior shell of the furnace within which all the internal flues, passages, channels and accessories are contained. *b* is a similar internal casing located within the exterior shell *a*. *This casing* b *may be made double, or in other words, jacketed so as to afford a passage c' for air to pass in order to prevent cold air from impinging upon the hotter interior member of the double casing.*"

In the patent to W. R. Kloeb, No. 765,143, patentee sought protection of an improvement in furnaces. In his specifications he stated:

"This wall, meaning wall *b*, as well as the wall *c* next within, may be of metal covered with asbestos, or other suitable nonconducting and noncombustible material, or a corrugated asbestos board or the like can be employed for this use or in conjunction with a sheet metal interior. * * * Any suitable arrangement may be adopted at this point to maintain the separation of the cold and hot air currents and to sustain the circulation of air herein provided for."

In view of these and other patents, it would be at best but an exercise of mechanical skill to provide a third air chamber to separate the cold-air chamber from the hot-air chamber. In other words, if the sole asserted novelty of Short's discovery consisted of the use of triple casing in place of the double casing so as to more effectually separate the cold-air from the hot-air passages, no invention was disclosed and the claim would be invalid.

If the Patent Office was justified in its allowance of claim 1, it was due to the last element in this claim in combination with the others, which combination produced a heater that possessed the virtues claimed for it by the patentee in his specifications. Such a heater was small, economical of operation, easily operated from the room to be heated. Its operation did not require heating of the entire house but merely a single room.

The particular form of the third drum represented by element 5 might also well have been considered by the Patent Office in giving recognition to this claim.

Clearly, if the last element mentioned in the patent refers to the outer casing *2*, and supports the drum from the floor of the room to be heated, and such is the construction we give to it, then no infringement is shown.

Doyle and Wollenhaupt Patent.

[2] The three claims here in issue are:

"1. A furnace of the character described combining a heater having passages projected therefrom, two concentric circumferential casings surrounding said heater providing two chambers communicating at their base, the outer casing having a rigid heater passage terminal plate circumferentially continuous therewith and the inner casing having an offset portion united to the margins of said plate providing an areaway for said heater passages.

"2. A furnace of the character described combining a heater having passages projected from its various compartments, two concentric casings surrounding said heater, providing two chambers communicating at their base, said casings at their upper portions forming conductor passages for the chambers respectively, one to admit cold air into the outer chamber and the second for discharging the heated air from the inner chamber, the outer casing having a heater face plate circumferentially continuous therewith as a terminal for said heater passages and the inner casing having an offset portion united to the margins of the face plate providing an areaway for said heater passages.

"3. A furnace of the character described combining a heater having passages projected therefrom, a casing surrounding said heater having a rigid passage terminal portion continuous with the circumference of said casing, a second casing within said first casing divisional of two chambers communicative at their base, said second casing having an offset portion connecting with said rigid portion of said first casing providing an areaway for said heater passages."

A prior patent to Strong, No. 1,002,776, is cited both on the construction and the validity of these three claims. In the Strong patent, patentee was endeavoring to provide an improved furnace casing which might be shipped in knocked-down condition and easily and quickly set up. The patent here under consideration was merely an improvement on the Short patent in which the outer casing has a "rigid heater passage terminal plate circumferentially continuous therewith as a terminal for said heater passages and supports the doors thereof." The application for patent was denied by the examiner and the board of appeals, but was finally allowed by the Commissioner of Patents. Adopting the argument of applicant's attorney, distinguishing this patent from the Strong patent, the Commissioner of Patents says:

"Applicants state that in such a furnace it is of prime importance to have the air in the outer or cold chamber considerably colder than the air in the inner or heating chamber. Unless this is true, the heated air in the interior will not rise.

"Applicants therefore have departed from the prior art, represented by Strong by removing what they call their heater face plate *8* outwardly, so that the plate *8* is a continuation circumferentially of the outer casing instead of the inner casing as shown in Strong.

"They contend that they obtained several advantages over this construction, first, by removing the plate further from the heater it will not become so hot and therefore conduct the heat to the inner casing, as would Strong's plate *5*; * * * second, the plate *8* is located outwardly by the offset *27*, so as to correspond circumferentially with the exterior casing, the parts can be much easier assembled as no difficulty would be experienced in getting to the bolts or rivets holding the parts together; and, third, the applicants' plate *8* being continuous with their outer casing *26* obviates the inward depression of the Strong device and locates their device so that they can be fully opened.

"The claims all distinguish from the references very much in the same manner, namely, by including the 'rigid passage terminal circumferentially continuous' with the outer casing, and an inner casing having 'an offset portion united to the margins of said plate' or equivalent limitations.

"In view of the alleged advantages, I cannot see that this change is devoid of patentable novelty, and the claims therefore should be allowed."

Having thus secured their patent upon the emphasis placed on the element:

"Two concentric circumferential casings surrounding said heater providing two chambers communicating at their base, the outer casing having a rigid heater passage terminal plate circumferentially continuous therewith"

—patentee is in no position to assert the rigid heater passage terminal plate need not be circumferentially continuous with the outer casing.

Appellee's structure, not having its terminal plate so located, does not infringe.

Other defenses raised by appellee, including an attack upon the validity of these claims, we need not consider.

The decree is affirmed.

STROMBERG MOTOR DEVICES CO. v. ZENITH CARBURETOR CO.
ZENITH CARBURETOR CO. v. STROMBERG MOTOR DEVICES CO.

(Circuit Court of Appeals, Seventh Circuit. September 14, 1918. Rehearing Denied November 19, 1918.)

Nos. 2234, 2247.

1. PATENTS ⟸168(2)—REJECTION OF CLAIMS—ACQUIESCENCE.
The owner of a patent has no standing to sue upon a canceled claim or seek a construction of an allowed claim which would in effect revive a canceled claim, but the acquiescence of the patentee in the rejection of one claim cannot be given a retroactive effect upon the negotiation leading up to the allowance of the other claims, so as to narrow those claims to less than they were entitled to at the time of their allowance.

2. PATENTS ⟸239—IMPROVEMENT PATENTS—INFRINGEMENT.
Where a later patentee, who obviated another objection to an old device, added to his independent solution a device already patented, but which did not solve the objection solved by the later patentee, such patentee infringed the earlier patent.

3. PATENTS ⟸328—CONSTRUCTION—VALIDITY AND INFRINGEMENT.
The Ahara patent, No. 684,662, claims 1, 2, 4, 5, and 7, for a carburetor for explosive engines which was novel in providing a U-shaped auxiliary well, *held* valid, and infringed by defendant's Exhibits 1 and 10 as well as Exhibit 2.

4. PATENTS ⟸165—PROTECTION TO PATENTEE.
A patentee is entitled to all the benefits of his invention, whether he apprehends and states them or not, and must be given full protection in his claims, whether he has explained the theory of the operation of his device correctly or not, being entitled, against an infringer, to a range of equivalency commensurate with his actual contribution to the art.

5. PATENTS ⟸177—CLAIMS—COMBINATION CLAIMS.
A combination claim must of course be treated as an integer, for its novelty may consist wholly in bringing together old elements.

6. PATENTS ⟸328—CONSTRUCTION—INFRINGEMENT.
The Richard patent No. 791,501, claims 8, 10, and 11, for an explosion engine consisting of a carbureting chamber, a U-shaped receptacle connected with the storage reservoir, etc., *held*, in view of the prior art, not infringed by defendant's carburetors.

7. PATENTS ⟸328—CONSTRUCTION—INFRINGEMENT.
The Sturtevant reissue patent No. 12,611, for a double carburetor for explosive engines, claim 1, *held* not infringed.

8. PATENTS ⟸328—CONSTRUCTION—INFRINGEMENT.
The Anderson patent, No. 1,063,148, claim 1, for a carburetor, a carbureting chamber, a fuel jet, an auxiliary reservoir, etc., *held* not infringed, if conceded valid.

9. PATENTS ⟸157(1)—CONSTRUCTION—ELEMENTS OF COMBINATION.
An element of a combination, described in the same words in each of two claims of a patent, must be taken to refer to the same thing in both claims.

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

Suit by the Stromberg Motor Devices Company against the Zenith Carburetor Company. From a decree in part for complainant (220 Fed. 154), complainant appeals, and defendant cross-appeals. Remanded, with directions. See, also, 254 Fed. 91.

Charles A. Brown, of Chicago, Ill., and William H. Kenyon, of New York City, for Stromberg Motor Devices Co.

Clarence P. Byrnes, of Pittsburgh, Pa., and William M. Swan, of Detroit, Mich., for Zenith Carburetor Co.

Before BAKER, MACK, and EVANS, Circuit Judges.

BAKER, Circuit Judge. Stromberg Company sued Zenith Company for alleged infringement of four patents on carburetors for internal-combustion engines.

Claims 1, 2, 4, 5, and 7 of patent No. 684,662, October 15, 1901, to Ahara, and claims 8, 10, and 11 of patent No. 791,501, June 6, 1905, to Richard, were held valid and infringed by Zenith carburetors identified as Exhibits 1 and 10, but not infringed by Exhibit 2.

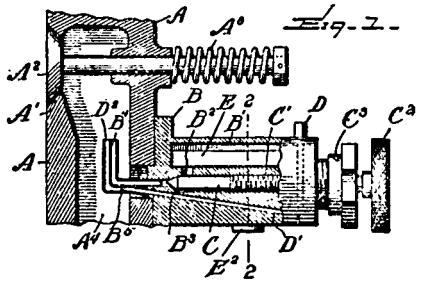
Claim 1 of patent No. 1,063,148, May 27, 1913, to Anderson, and claim 1 of reissue patent No. 12,611, February 19, 1907, to Sturtevant, were held valid, but not infringed by any Zenith device.

Each company assigns error on those parts of the decree that are adverse to its contentions.

I. AHARA.

[1-3] "Feeder for explosive engines," namely, a carburetor, is the subject-matter of the patent. No improvement of explosive engines in kind or degree was contemplated or involved. "This invention," Ahara said, "relates particularly to a structure adapted to vary the amount of fuel mixed with air fed to such an engine"; that is, an explosive engine. He pictured and described in detail the adaptability of his carburetor to vary the amount of fuel to correlate properly with the air conditions, both as to quantity and heat, in a one-cylinder work engine in which the desired uniformity of speed is obtained within fairly close limits by the automatic action of a governor in holding the intake valve shut and the exhaust valve open during one or more of the four-cycle periods of operation. But he also declared that "changes in details of construction to adapt the device to other types of explosive engines are obvious and within ordinary mechanical skill." Of course his saying so does not make it so. But in connection with the general statement of the nature and object of the invention it demonstrates that Ahara's inventive concept covered a carburetor, not an improved one-cylinder work engine, and that he intended to claim, though unnecessarily, all uses to which his carburetor could be put.

In giving the operation of his carburetor when applied to a one cylinder hit-and-miss engine, he illustrated and described three styles of construction; but, as they all operate in the same way, it will suffice if we follow through one type.



"Referring to Fig. 1, the letter A indicates the casing forming a part of an engine, which is provided with an aperture A^1, controlled by a valve A^2 at the inlet-port for the cylinder of an explosive-engine, and communicates with the main air-inlet passage A^4 of the engine. This valve A^2 is ordinarily closed by any desired means—for instance, a spring A^3—and is opened by the suction of the engine-piston in moving away from the valve, so as to draw inward the explosive mixture composed of fuel and air, while in the return movement of the piston the valve is closed and the mixture placed under compression, as is well known in this art. In Fig. 1 I have shown at B a casing comprising the feeding device, which is formed at its upper por-

tion with a fuel-reservoir B^1, having a discharge opening B^2 below the fuel-level therein and valve-controlled port B^3, from which port a feed-tube B^4 extends upward into the space or passage adjacent to the inlet-opening A^1. Any preferred construction of valve may be used in this connection; but I have shown in the present instance a needle-valve C, adjusted by means of a threaded portion C^1, and provided at its outer edge with a handle C^2, while the stem of said valve passes through a packing-sleeve C^3, secured to the casing B in any desired manner. In the form of the invention shown in Fig. 1 there is provided a collecting passage or chamber D, having one end communicating with the atmosphere above the fuel-level of the reservoir, and the other end extending downward to the lower portions of the casing B, and thence upward upon an inclined plane, as shown at D^1, where it communicates with a feed-tube D^2, extending parallel to and in contact with the fuel-tube B^4, which tube is provided with an opening B^5, communicating with the feed-tube D^2. It will thus be seen that when the valve is set to permit the continuous flow of any desired quantity of fuel at each suction-stroke of the engine this amount would pass into the fuel-tube B^4, and be drawn upward with the proper amount of air to effect the explosive mixture for use in the engine, while if the feed of fuel be omitted or cut out the fuel continues to flow into the tube B^4, and not being drawn upward by suction into the cylinder, flows through the aperture B^5 downward into the inclined portion D^1 of the passage D. Sufficient fuel will collect in this passage, depending upon the time interval between the suction-strokes of the engine, so that when the next charge of fuel is drawn into the engine an excess of fuel in proportion to the air is secured sufficient to compensate for the cooling of the cylinder and the air which may be therein, and thus produces an explosive action equal in character with the regular action of the engine.

"The fuel in the reservoir B^1 is maintained at a predetermined level by any desired means."

Claims 1 and 2 are enough to consider in determining all the essential points of dispute:

"1. A feeder for explosive-engines comprising a fuel-reservoir having a feed-outlet below the fuel-level therein to effect a continuous feed, a passage communicating with the atmosphere and with said outlet from said reservoir to receive fuel therefrom, and means adapted to control the communication between said reservoir and said passage, substantially as specified."

"2. A feeder for explosive-engines comprising a casing having a reservoir at its upper portion, a passage below said reservoir communicating with the atmosphere, a fuel-passage extending from below the fuel-level of said reservoir to said first-named passage, and means for regulating the capacity of a normally open port to control the flow of fuel through said fuel-passage, substantially as specified."

Crossley's British patent No. 24,584, December 21, 1893, is the main reliance for overthrowing Ahara. Counsel and experts contend interminably concerning the nature and capacity of the Crossley device, the meaning of certain suggested, but unillustrated, substitutions of parts, and particularly whether the alternative constructions, as each side conceives them to be, would work. We have fully considered all these disputes; but find it unnecessary to state them in detail, because our entire answer is given by considering the Crossley patent, and by placing above the various parts of the provisional and of the complete specification headings that in our judgment indicate the classifications Crossley had in mind.

From the provisional specification:

General Statement.

"Our invention is for the purpose of measuring the quantity of oil required for each working stroke of such oil engines as in governing take a charge or

none in the well-known way. It consists of a chamber into which the oil is delivered of a certain definite capacity, this chamber being the proper size to hold the maximum quantity of oil required for one working stroke, and being emptied by the suction of the engine piston at each charging stroke."

Large Engine.

"There are some conditions under which the quantity of oil per working or charging stroke requires modification to give the best results, as, for instance, an engine working at maximum load, and thus giving working strokes as frequently as possible, requires a definite amount of oil to give the best result. Should, however, the load decrease so as to cause the governor to miss out one or more working strokes in succession, a slight increase in the amount of oil delivered into the engine to form the next working stroke gives a better result than without such increase.

"We obtain this increased amount in the following manner: A pump is arranged to deliver at the necessary intervals the best quantity for each working stroke when working at maximum load; this quantity being delivered into the measuring chamber, and, owing to the special form given to the measure, is drawn into the vaporiser by the piston of the engine during each suction stroke. The total capacity of the measuring chamber, however, is somewhat larger than the volume of this full-power oil charge, so that, when a working stroke has been cut out by the governor, the pump, which still continues delivering its definite quantity, delivers a second charge—or more charges—into the measuring chamber, which, owing to its greater capacity, retains a slightly increased amount for delivery to the engine the next time a working stroke is required, the excess overflowing and returning to the oil receptacle."

Small Engine.

"In a modification of our invention, more especially applicable to smaller engines, in which it may not be necessary to give more than one measured oil charge, the measuring chamber may be made of a suitable size to give the definite amount of oil required, the pump, however, being made to throw a larger volume, and the surplus which thus overflows at each delivery of the pump may be carried to supply a lamp or for any other desired purpose, or may simply pass back to the oil tank."

Non-Return Valve for Both Engines.

"Between the measuring chamber and the vaporiser in most instances it is desirable to place a light non-return valve, which opens during the suction stroke of the engine, allows the oil to be sucked in past it more or less mixed with and followed by a current of air, which thus sweeps the contents of the chamber out, and ensures it being carried through into the vaporiser and thence into the engine."

Preferred Form of Measurer for Both Engines.

"By preference the form given to the measurer is that of a U with very short legs, and the supply from the pump is delivered into the lower part of it from beneath."

Small Engine.

"When the measurer is used for giving one fixed charge only whether the engine be running at light or full load, it may be filled from a vessel placed above it instead of by a pump. A regulated quantity is thus allowed to flow into the U—the surplus passing, as in the case of the pump, either to feed the lamp or to a receptacle below. A bird-cage fountain arrangement may take the place of the overhead vessel so as to dispense with a constant flow to the measurer or any overflow therefrom. A float designed so as to give a constant level may be used instead of the bird-cage fountain."

That ends the provisional specification.

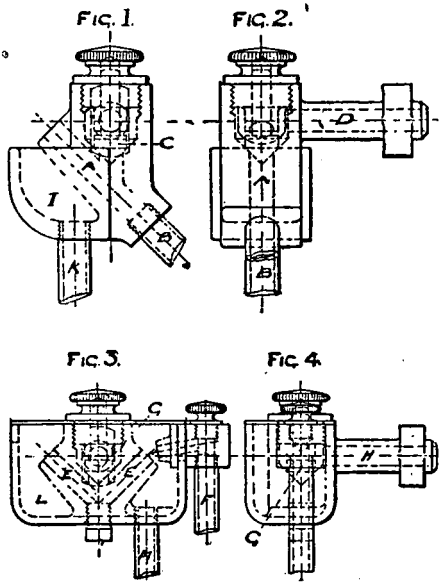
From the complete specification:

General Statement.

Same as in the provisional specification.

Large Engine.

After explaining as before the desirability of an increase of fuel after a nonsuction stroke, Crossley gives the details of construction by reference to drawings, which are part of the complete specification only, as follows:



"To enable our invention to be better understood, we append a sheet of drawings in which Fig. 1 is an end elevation, Fig. 2 is a side elevation, Fig. 3 is an end elevation of a modified form, Fig. 4 is a side elevation of the same.

"In Figs. 1 and 2, 'A' represents the chamber or oil measurer, in this instance consisting of a straight drilled hole, 'B' is the pipe from the oil-pump delivery, and 'C' is the automatic valve hereinafter referred to, 'D' is a passage into the vaporiser. In Figs. 3 and 4, 'E' is the chamber or oil measurer, 'F' is the pipe for the pump delivery, 'G' is the automatic valve, and 'H' is the passage to the vaporiser.

"In connection with the measure shown in Figs. 1 and 2 a pump is arranged to deliver at the necessary intervals the best quantity of oil for each working stroke, when working at maximum load: this quantity being delivered into the measuring chamber 'A,' and, owing to the special form of this chamber, drawn into the vaporiser by the piston of the engine during each vapor charging stroke through the passage 'D' and the automatic valve 'C.' The total capacity of the measuring chamber 'A,' however, is somewhat larger than the volume of this full-power oil charge, so that when a working stroke has been cut out by the governor the pump, which still continues delivering its definite quantity, delivers the second charge—or more charges—into the measuring chamber 'A,' which, owing to its greater capacity, retains a slightly increased amount for delivery to the engine the next time a working stroke is required, the excess overflowing into the cup shaped receiver 'I,' and returning to the oil receptacle through the overflow pipe 'K'."

Small Engine.

Crossley brings forward from the provisional specification the first portion that relates to the small engine, but wholly omits the second portion, which contains the suggestions of substitutions for the pump.

Nonreturn Valve for Both Engines.

"Between the measuring chamber and the vaporiser, in most instances, it is desirable to place the light nonreturn valve 'C,' which opens during the suction stroke of the engine, and allows the oil to be sucked in past it more or less mixed with and followed by a current of air, which thus sweeps the contents of the chamber out through 'H' or 'D,' and insures it being carried through into the vaporiser and thence into the engine."

Preferred Form of Measurer for Both Engines.

"By preference in some instances we form the measuring chamber 'E' as shown in Figs. 3 and 4, the form given being that of a U or V with very short legs. The oil may be delivered into the lower part of it from beneath at the junction of the two short legs."

Large Engine.

"Or, as shown in the drawings, may be delivered into the mouth of one of the legs through 'F.' By thus forming the measurer 'E' the oil flows with a certain amount of momentum into the mouth of one of the legs of the measuring chamber 'E,' this momentum given to the oil causes it to spill over out of the mouth of the other leg, so that though an excess amount of oil may be pumped into the measurer 'E' the oil does not quite fill the measurer 'E,' but the quantity contained in it is sufficient for normal working strokes. If the governor cut out working strokes, a second pump delivery of oil takes place into the measurer 'E.' This measurer, however, being more or less filled with oil, the new charge does not cause so much disturbance in it, and after its delivery the measurer is fuller than it was before, thus giving the slightly increased amount of oil desirable to give a working stroke following an idle stroke or strokes. Working in this manner, there is still a surplus of oil to flow over into the overflow cup 'L,' and pass away by the pipe 'M' to supply a lamp or for any other purpose."

That ends the complete specification.

It is only the large Crossley engine that has any provision of means for increasing the amount of fuel after a nonsuction stroke. Therefore the large Crossley engine is the only structure in this British patent that has any pertinency to the Ahara invention. In the large Crossley engine a pump and a measuring cup capable of holding a little more than one pump-stroke of liquid fuel are the means. None other is described, or even suggested. Referring to Ahara's drawing and description, we find that the means of varying the amount of fuel to correlate with quantity and heat conditions of air in the engine are a constant-level reservoir B^1; a gravity feed leading through the opening B^2, past controllable port B^3, and ending at B^4 within the intake or manifold of the engine with which the carburetor is associated; a valve C to control port B^3; an auxiliary well, namely, the U-shaped tube D D^1 D^2, the upright portion D communicating with the atmosphere above the fuel-level of the reservoir, the lower portion D^1 lying beneath the gravity fuel-feed, and the upright portion D^2 terminating within the intake or manifold of the engine at a point above the fuel-level of the reservoir; and an aperture B^5 permitting the fuel to flow from the gravity feed into the auxiliary well. Upon this disclosure of means Ahara laid his broad claims in suit. Claims 1 and 2, which we have recited, generically cover vital combinations that work in accordance with the Ahara principle. With respect to the other claims in suit, not copied herein, our judgment is the same. Not only is it impossible to derive the Ahara device and claims from the Crossley patent on account of clear differences in means, but Ahara also achieved an improved and enlarged result. In a running engine of the hit-and-miss type periods of nonsuction, and in the multicylindered type, wherein suction is continuous but varied in amount by a manually operated throttle valve, periods of low suction are to be met and provided for. If feeding a running engine with an auxiliary supply of fuel, available immediately after a period of nonsuction or low suction,

be taken as the genus, Crossley's and Ahara's desires for results were akin; but in species their achievements were distant cousins. Crossley's measuring cup was sized to hold the proper supply of oil for one explosion of a hit-and-miss engine running at a predetermined speed, and to hold an additional amount that was relatively slight. One pump-stroke furnished the normal quantity. If by the lessening of the load the predetermined speed of the engine should increase so that the governor would cut out a working stroke, the pump would discharge another pump-stroke of oil into the measuring cup; but the addition to the amount already in the cup would be less than one pump-stroke of oil, because Crossley mentions an excess overflowing the cup and returning to the receptacle with which the pump is connected. Now suppose that the governor, due to a greater fall in load, should cut out a succession of working strokes of the engine. It is obvious that after the first cut-out there would be no increase of fuel to correlate with the increased change of quantity and heat conditions of air in the engine. On the other hand, if the cup were enlarged to satisfy conditions after a succession of cut-outs, it would supply a hostile excess after one cut-out, because the cup is completely emptied by each suction stroke, and any excess of fuel tends to choke the engine. It is apparent, too, that Crossley's carburetor, whose measuring cup is emptied by each suction stroke, would not do very well on a multicylindered, hand-throttle-controlled, automobile engine, wherein the continuous suction must have wide variations in tensity. At best it would provide only that narrow range of speed which would come from holding the throttle to measure the air to correspond with the strictly measured oil, because revolution of the crank-shaft, not suction within the manifold, controls the delivery capacity of the pump. Turn now to Ahara. It is evident that suction at B^4 may be so tense as to limit greatly, if not to stop entirely, the flow into the auxiliary well through the aperture B^5. The result in degree is a matter of proportioning the parts, left to the ordinary judgment and mechanical skill of carburetor makers. If the Ahara carburetor is attached to a hit-and-miss engine, the duration of nonsuction periods is important. If one cut-out occurs, there is time for some fuel to collect in the auxiliary well; if a succession of cut-outs, more time for more fuel. If the nonsuction period is long, as in a dead engine (and this applies to both hit-and-miss and hand-throttle-controlled engines), there is time for the auxiliary well to fill up to the fuel-level of the reservoir. With a running hand-throttle-controlled engine, both the duration and the tensity of low-suction periods are important. Suction may be so high that little fuel or none flows into the auxiliary well. At varying time and tensity degrees of lower suction, correlatively varying amounts of fuel accumulate in the auxiliary well. In starting, suddenly going from no suction to suction, and in picking-up, suddenly going from low suction to high, an excess of fuel in proportion to air is needed; needed on account of the relatively lower temperature in the engine (which is a heat engine) and the lag of the fuel behind the air, due to greater density of fuel than that of air. So in these important operations of starting and of picking-up the Ahara auxiliary well stands ready to meet and satisfy the varying heat and air condi-

tions of the engine. And only in the limited sense that the size of the well and of the openings in connection with it must be proportioned to the demands upon it (as must other parts of the carburetor, and indeed, of the entire engine and automobile) is it true that the Ahara auxiliary well is a "measurer." Crossley was strictly that.

Crossley's and our statement of his patent eliminates his feeder for the small engine, in which there is never an increment of fuel. But in finally dismissing Crossley it may be permissible to note, in connection with the alternative constructions of the feeder for the small engine, (1) that both the large engine and the small will work when the measuring cup is fed by a pump; (2) that in the small engine, wherein the cup is completely filled in advance of each suction stroke, a constant-level reservoir may be substituted for the pump if the fuel-lever in the reservoir is kept at the level of the brim of the cup; (3) that in the large engine, though a constant-level reservoir may be substituted if the fuel-level in the reservoir is kept at the level of a line on the cup that marks one pump-stroke of fuel, we do not perceive how the constant-level can raise itself to supply the increment that distinguishes the operation of the large engine. At least Crossley did not show how; and we are not concerned with the nunc pro tunc products of the creative imagination of counsel and experts.

Only one other prior art reference need be noticed. Banki's patent, No. 595,552, December 14, 1897, was for a gasoline motor. It detailed and claimed improvements in methods of ignition and air control that are irrelevant. One suggestion relating to the carburetor is relied on. A constant-level reservoir feeding a single aspirating jet, typified in Ahara minus the auxiliary well, was used. The tip of the upright nozzle flared like a V. From above, down through the casing of the carburetor, came a screw whose conical point extended within the flaring nozzle. The screw was adjustable to control the amount of gasoline that could be sucked from the nozzle. The suggestion relied on is that the screw "may be provided with a central longitudinal boring through which air may be sucked in during the period of suction, whereby a complete dispersion of the gasoline will result." That is, if the needle of a needle-valve within an aspirating nozzle is hollow, the air coming through the hollow needle will aid in the atomization of the gasoline. No words of Banki's indicate that he ever dreamed of an auxiliary well like Ahara's as part of a carburetor. From Banki's drawings one may read that, when the engine is at rest, the gasoline from the constant-level reservoir would stand near the top of the nozzle; that one-fourth of the conical point of the needle would dip into the gasoline; that the gasoline would rise and stand within the hollow to that extent; and that, when the engine is started, the gasoline in the point of the needle would be sucked out so that the air through the hollow needle might perform its service in aiding atomization. This is claimed to be a clear and definite anticipation of Ahara's auxiliary well. Not only is Ahara's combination of means a stranger to Banki, there being, for example, no passage like Ahara's B^5 leading through the wall of the gravity feed into the hollow needle (the supposed auxiliary well), but the presence of gasoline in the tip of the conical point of the needle was an insignificant accident with Banki

in accomplishing his desired purpose of atomization. To count on the reading of Banki's drawings merely emphasizes the dearth of the prior art. If Zenith Company can construct a usable carburetor of such dimensions that a part of the conical point of the hollow needle of a needle-valve within the aspirating nozzle will serve as an auxiliary well in starting and in picking-up, we feel sure no one will object. What is objected to is the use of Ahara's disclosed mode of operation and claimed combination of means.

Finally stress is laid on the file wrapper as a bar to giving the claims their natural import and the scope they are entitled to as against the prior art. We have carefully considered the entire contents of this voluminous document. It may be summarized thus: Solicitor and examiner had repeated passes at supposed faults of omission, of redundancy, of phraseology, of terminology, in the description and in the claims. Claims were repeatedly rejected on reference to Crossley, Banki, and other patents. After a considerable time the drawings and description took the form they now have in the patent, and eight claims were submitted. Claims 4 to 8, inclusive, became word for word claims 3 to 7, inclusive, of the patent. Claims 2 and 3, after acceptance of an insignificant change in wording suggested by the examiner, became claims 1 and 2 of the patent. But when the eight claims in final form were presented, they were all rejected, the examiner still clinging to the idea that, because Crossley had disclosed means for providing an increment of fuel and Banki and others had shown that constant-level reservoirs, needle-valves, and other elements were old in the carburetor art, no invention was required to produce the mode of operation and the mechanical combinations of the Ahara carburetor. Thereupon an oral debate between solicitor and examiner took place. What occurred is not recorded in the file wrapper. It may possibly be surmised from a reading of the following written argument filed by the solicitor:

"In view of the oral interview with the examiner, it is believed that the objection as to the passage D being an air passage is removed and the term now used will be satisfactory to him. It is noted that in each of the references the air passage cited to anticipate the claim is the main inlet passage for the cylinder, while the present invention is not an explosive engine, and consequently cannot cover in the claims this passage, but a feeder for the engine, which is an attachment independent therefrom, and discharges its charge of fuel into the air or suction inlet of the engine. With this understanding, it is believed that the claims clearly define over the references cited, which do not show the fuel reservoir having an outlet adapted to feed by gravity into the passage communicating with the atmosphere, whereby the amount of fuel which collects increases during the time that the feed is cut out until the fuel in this passage reaches the level of the reservoir. This operation is not present in the prior art, and the British patent to Crossley does not disclose the same, but merely the broad principle of permitting an overflow from the pump when the feed is cut off. In the reference the fuel which flows into the downwardly extending pipe is not adapted to be drawn into the engine at the next succeeding stroke, and the only fuel capable of this action is the small amount between the inlet connection and the end of the pipe from the pump. It is believed, however, that the present amendment places claims in condition for allowance, and an action of that character is urgently requested."

Thereupon the examiner allowed claims 2 to 8, inclusive, but rejected claim 1 on reference to Crossley and Banki. At this point the solicitor was called upon to decide whether he would accept the allowed

claims, and waive claim 1 as submitted, or amend claim 1 in a further attempt to convince the examiner. He amended claim 1 to read as follows:

"1. A feeder for explosive engines comprising a fuel reservoir having a feed outlet below the fuel-level therein to effect a continuous feed, a passage communicating with the atmosphere and extending below said outlet from said reservoir to receive a gravity feed of fuel therefrom, substantially as specified."

And he accompanied the amendment with the following argument:

"Claim 1 was the only claim rejected by the last official action, and it is believed that the amendment thereto which defines the collecting passage extending below the outlet from the reservoir so as to receive the gravity feed of fuel therefrom is a feature novel in the art, and will be deemed allowable by the examiner. In view of the arguments previously submitted and of the last liberal action of the examiner, it is believed that no further argument is necessary as to the manifest advantages secured by the gravity feed over the structures disclosed in the references of record."

But the examiner rejected claim 1 as finally amended. It then became obligatory upon the solicitor to decide whether he would appeal or close the application by taking out the patent with the previously allowed claims as sufficient protection of the disclosed invention. In a document canceling claim 1 and renumbering the allowed claims, the solicitor said:

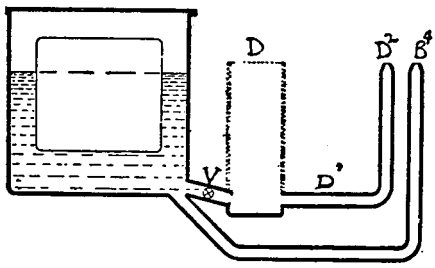
"It is believed that the foregoing amendment, which cancels former claim 1, removes all objection to the case and places the same in condition for allowance. It will be conceded that applicant should not be confined in his present first claim specifically to a valve, as his combination is novel when embodying any means for controlling the food supply to the collecting passage, whereby the automatic gravity feed is successfully accomplished and the fluctuations and expense of a pumping action are entirely avoided."

Beyond question the owner of the Ahara patent has no standing to sue upon canceled claim 1 or to seek a construction of an allowed claim that would have the effect of reviving the canceled claim. But that, in our judgment, is the extent of the estoppel. The solicitor's subsequent election not to appeal from the rejection of claim 1 can be given no retroactive effect upon the negotiations leading up to the allowance of the claims in the patent so as to narrow those claims to less than they were entitled to at the time of their allowance. In those negotiations the solicitor always and consistently declared that claim 1 of the patent, for example, produced a new result, through a new mode of operation, by means of a new mechanical combination, and never for a moment conceded that the inventive concept in that claim amounted to nothing but adding to abandoned claim 1 (not then in existence or abandoned) means for controlling the communication between the reservoir and the auxiliary well. On his side the examiner receded from his original position, and allowed the claims in the patent without stating or demanding any limitation or condition not inherent in the claims themselves, or furnishing any contemporaneous glossary for their interpretation. In electing not to appeal from the rejection of claim 1 the solicitor did not agree that the examiner's action was correct; much less that an infringer should take abandoned claim 1, and not the prior art itself, as the measure of invention involved in the patent.

Zenith Company's carburetors employ a principle that was disclosed in Baverey's patent, No. 907,953, December 29, 1908. If the old single-jet carburetor is adjusted to supply the proper mixture of air and gasoline to an engine running 500 revolutions a minute, the mixture is too rich in gasoline when the engine is up to a substantially higher speed, say 1,500 revolutions a minute; if adjusted to 1,500 revolutions, then the mixture is too lean at 500 revolutions. One Krebs was the first to overcome this difficulty. He provided a supplemental air inlet, governed by a spring-held valve, so that with increasing engine-suction there would be a proportional increase of air. Baverey's method was not to supply an additional air inlet, but to supplement the suction fuel-jet with another jet that could feed a unit of fuel in a unit of time irrespective of the engine-suction or nearly so. Manifestly the tendency of the supplemental jet would be to give leaner mixtures at higher speeds; and, if the two jets were properly correlated, the contrary tendencies would balance, and a uniform mixture would be supplied at all speeds.

This Baverey principle was of course unknown to Ahara, who improved the single suction-jet carburetor by providing his U-shaped auxiliary well for use in starting and in picking-up. But it is elementary that if Baverey, coming later, should add to his independent solution of another objection to the old carburetor the Ahara auxiliary well for starting and picking-up, he would infringe the Ahara patent.

From one of Zenith Company's briefs we reproduce a diagrammatic representation of its carburetor:



B^4 is the suction jet; D^2, the supplemental jet. Air-leg D, of the auxiliary well D D^1 D^2, is indicated by the dotted lines. This was for the purpose of showing, first, that the Baverey principle could be used without the presence of the air-leg D; and, second, that its presence was merely incidental, and therefore not to be counted in determining infringement. If a hand-valve V be used as the means to control the communication between the reservoir and the jet D^2, and if it be turned on at starting, and turned down at low speed and turned off at stopping, the Baverey principle may be employed without having the air-leg D in the carburetor. But the necessity of such frequent manipulation would probably render the carburetor unsalable. And the air-leg is actually employed not merely to do away with the inconveniences that would result from the use of a hand-valve without the air-leg; it is present and is used as an element in the combination of the U-shaped auxiliary well D D^1 D^2 with the reservoir and means for controlling the communication between the reservoir and the auxiliary well. When there is a period of no suction, it is evident that the gasoline will rise in the air-leg D and stand at the level of the constant-level of the reservoir, and be ready to supply the demand for an excess of fuel in starting.

When there is a period of very high suction, the parts may be and are so proportioned that the air-leg is empty. When there is a period of low suction, depending on the time and the degree, there may be and is a filling up of the air-leg with gasoline ready to respond to the sudden demand for an excess of fuel in picking-up. So the Zenith uses the Ahara combination in the Ahara way to produce the Ahara results.

In the actual Zenith carburetors, instead of the supposititious hand-valve, several nuts with different sized bores through them are furnished to be inserted interchangeably at the point V as the means for regulating the flow from the reservoir to the auxiliary well. Both the Baverey patent and the Zenith catalogues properly recognize the interchangeable nuts as the equivalent of Ahara's needle-valve; and they are certainly "means adapted to control the communication." Inasmuch as Zenith has the equivalent of the Ahara control in the Ahara combination, we regard it as irrelevant that Zenith has a separate control of that part of the fuel stream which feeds the suction jet.

Within the air-leg D Zenith Company has placed a secondary U-shaped auxiliary well to improve the starting operation and separate it somewhat from the operation of picking-up. It is unnecessary to detail this part of the mechanism, for with respect to infringement the only distinction between the primary and the secondary auxiliary well is that the latter receives its fuel supply through an opening in its bottom from the primary well instead of directly from the fuel stream as does the primary well. But when the engine is at rest the gasoline rises in the secondary well to the level of the constant-level of the reservoir; and we find in the Ahara claims no limitation that the communication shall be direct and immediate.

Between Exhibits 1 and 10, which the trial court found to be infringements, and Exhibit 2, which was held not to infringe, the only difference is in the amount of "subatmosphere" in the auxiliary well. This expression has been used by witnesses and counsel to indicate that the atmospheric pressure within all the Zenith auxiliary wells and the Ahara well is less than at the ratio of fifteen pounds to the square inch. But Ahara does not mention subatmosphere. In his drawings the opening to the atmosphere seems to be the full circular area of the air-leg D. In the Zenith wells the openings to the atmosphere are more or less constricted. That, however, was Zenith Company's choice of construction, which cannot be recognized as an escape from Ahara.

The decree should be enlarged to include infringement by Exhibit 2; but as the Ahara patent will doubtlessly expire before a final decree can be entered in the District Court, the relief should be limited to an accounting.

II. Richard.

[4-6] This patent is for an "explosion engine." Some of the improvements are in the carburetor art; and to them the claims in suit are addressed.

Claim 11, the broadest, reads as follows:

"11. In an explosion engine, the combination of a storage-reservoir; a carbureting-chamber connected to the engine-cylinder; a mixing-chamber in the upper portion of said carbureting-chamber; a U-shaped receptacle connected

to said storage-reservoir, one of the arms of which opens into said mixing chamber; and suitable air-ports for the other arm of said receptacle and said mixing-chamber."

Claim 10 is the same as claim 11, with the addition of "a valve above said carbureting-chamber"; and claim 8 is the same as claim 10, with the addition of "means for controlling said air-ports."

These claims must be read, first, according to Richard's own lexicography; and second, against the background of the prior art, to determine the nature and scope of the alleged invention, and what, if anything, Zenith owes to Richard.

Richard's figure 3 is this:

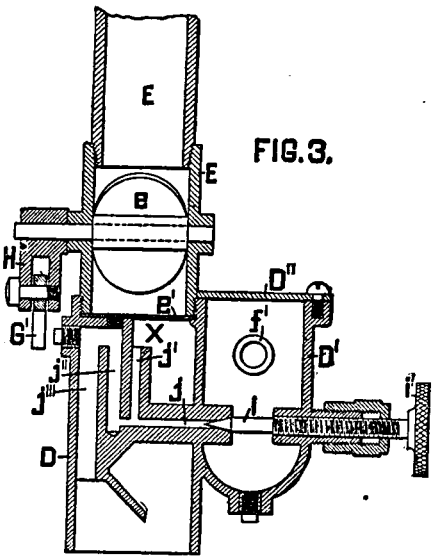


FIG. 3.

In explanation Richard said:

"The atomizer or carburetor proper consists of a main chamber D and a feed-chamber D' therefor. * * * A passage *j* connects the chambers D D'. * * * The liquid hydrocarbon is delivered through the passage *j* into an oil-receptacle within the chamber D. This receptacle is shaped somewhat like a letter U, as it consists of a pair of arms or passages *j' j''*, connected at the bottom and open at the top. The arm or passage *j'* of the oil-receptacle opens into mixing-chamber X. The passage *j''* opens into or is connected to the air-passage *j'''*. Across the top of the chamber X is a screen *e'*. The screen *e'* is retained in position by the valve-casing E, which is threaded into the top of the chamber D. The delivery-pipe E' suitably connects the chamber D to the engine-cylinder. Air is drawn through the atomizing or carbureting chamber by the suction of the engine. A valve *e* is provided for controlling the same. * * * A slanted partition plate or deflector in the bottom of the chamber D is provided to direct a considerable portion of the air passing through the carbureting-chamber into the passage *j'''*.

"In operation air is drawn through the atomizing or vaporizing chamber by the suction of the engine, and a portion of the air passing through the passage *j'''* into the passages *j''* and *j'* becomes saturated with and carries or dashes the liquid hydrocarbon into the mixing-chamber X and against the screen *e'*, where it is met by the in-rushing air, which is thereby suitably mixed therewith and drawn past the valve *e* into the engine-cylinder. The adjustment of the valve *e* regulates the amount of air drawn through the atomizer or carburetor."

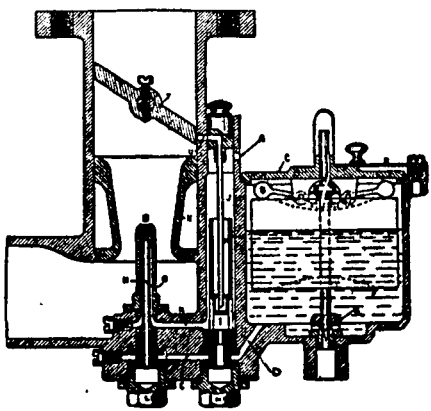
Laying this disclosure upon the claims in suit, we find that the "storage-reservoir" is D'; the "carbureting-chamber" is the entire space within the casing D from the air inlet at the bottom to the top where it is screwed upon the casing E; the "mixing-chamber in the upper portion of the carbureting-chamber" is the walled off space X, within which the jet *j'* terminates; the "U-shaped receptacle" is made up of the jet *j'*, the air-leg *j''*, and the passage at the bottom between them, and is located wholly within the carbureting-chamber D; the

"suitable air-ports" are, first, *j'''* to supply the air-leg *j''*; and, second, the remainder of the intake to supply the mixing chamber X; the "valve above the carbureting-chamber" is the throttle-valve of the engine, and the "means for controlling said air-ports" is the "slanted partition plate or deflector in the bottom of the chamber D."

Richard's idea of the mode of operation seems to be this: If I take the Ahara U-shaped auxiliary well and locate it wholly within the air intake of the engine; if I partition the intake so that the inrushing current of air will be divided into two streams, one to go to the right through the mixing-chamber X and affect the jet *j'* by aspiration, and the other to rush up the passage *j'''*, down the air-leg *j''* and into the jet *j'*; and especially if I increase the rush of the air current into the passage *j'''* by means of a deflecting plate—I obtain not merely aspiration, but I also cause the gasoline to be "carried or dashed into the mixing-chamber X and against the screen *e'*, where it is met by the inrushing air" from the other part of the stream, and thus I produce a better mixture than any known before.

We do not inquire whether Richard was right in his theory. A patentee is entitled to all the benefits of his invention whether he apprehends and states them or not. He must be given full protection in his claims whether he has explained the theory of the operation of his device correctly, erroneously, or not at all. Against an infringer he must be allowed a range of equivalency that is commensurate with his actual contribution to the art. He is not to be limited to particular formation or location of parts, unless the limitations are embodied in the claims themselves or are necessarily imposed by the prior art. We have given Richard's theory only as an aid in framing the definitions of the elements of the claims from Richard's own terminology in connection with the prior art and the alleged infringing structure.

A drawing of the Zenith carburetor is herewith reproduced:



Richard's claims in suit are not limited in terms to the formation and location of parts as detailed in his drawings and description. Taking the terms in their broadest sense, and apart from Richard's dictionary and the prior art, we find in the Zenith carburetors a "storage-reservoir" F; the entire space within the casing from the air intake at the lower-left side of the drawing up to the throttle-valve T may be taken as a "carbureting-chamber"; the space from the bottom of the constricting member X up to the throttle valve T may be called a "mixing-chamber in the upper portion of the carbureting-chamber"; a "U-shaped receptacle" may be found in the air-leg J, the jet H, and the communicat-

ing passage at the bottom between them; a second "U-shaped receptacle" may be found in the air-leg P, the jet U, and the communicating passage at the bottom between them; the air intake at the lower left and the opening A into air-leg J at the upper right are used by Zenith as "suitable air-ports"; the throttle-valve T is present as a "valve above the carbureting-chamber"; and the relative sizes of the air intake of the engine and of the opening A may be considered to be "means for controlling said air-ports."

But on looking to the prior art we find that it was old to recognize the carburetion occurred in the space between the air intake and the throttle-valve. It was established practice, as an aid to efficient aspiration, to constrict the air passage shortly below the tip of the jet and then to taper it up to full diameter below the throttle-valve. Such a construction was called a Venturi tube. But whether a tube of uniform diameter or a Venturi tube was used, the space from below the jet up to the throttle-valve, without being specifically named, was in fact the only "carbureting-chamber" present in the old structure. And the same space, again without being named, was in fact the only "mixing-chamber" present. So without regard to what Richard might say or claim, Zenith Company was free to use an aspirating jet in a Venturi tube. Now the Ahara patent, as we have found, covered his invention of the auxiliary well to whatever extent it could be used with hit-and-miss engines, with throttle-controlled engines, with straight air intakes, with Venturi tubes, and with engines and carburetors not yet devised. Zenith Company, with Ahara's consent, might have applied Ahara's auxiliary well to the old aspirating jet within the old Venturi tube. Whether Zenith Company procured Ahara's consent is of no concern to Richard; that is, Richard cannot be permitted to reach back into the prior art and take any part of Ahara's monopoly of the application of the Ahara auxiliary well to an aspirating jet within a Venturi tube. On the other hand, the Zenith Company in making the application was not at liberty to use any distinct and independent improvements within the Richard patent.

From our examination of the Richard patent, the prior art, and the Zenith carburetors as embodying features that antedated Richard, we find no distinct and independent improvements of Richard's that have been taken by Zenith Company. Richard could not change the nature and function of prior structures by applying to them new word definitions. "Carbureting" and "mixing" may well be taken as synonyms in the general language of the art of aspirating gasoline. In the prior art the single chamber in which aspiration occurs might at will have been denominated either a "carbureting-chamber" or a "mixing-chamber." Applying two names to one structure or to different parts thereof does not make two structures. For a maker of carburetors to infringe Richard he would have to use the walled-off space X, or its equivalent, for a "mixing-chamber" as distinguished from a "carbureting-chamber"—a chamber characterized not only by its physically separate formation and location, but also by its function of "mixing" by means of one branch of the air current within the intake being used to "carry and dash" the gasoline therein, and there to encounter the other branch of the air current. We agree

that "the screen *e'*," which distinguishes claim 6 from claim 11, cannot be read into the claims in suit; but neither can the remaining characterizing structural and functional features of the "mixing-chamber" be read out.

A combination claim must of course be treated as an integer. Its novelty may consist wholly in bringing together old elements. But, as we have already seen, the prior art denies novelty in Richard's combination, if generic definitions be applied to the old elements. Novelty must therefore be predicated upon new characterizing features given to one or more of the old elements. We have found such novelty in Richard's "mixing-chamber" only by putting it in a class different from the old Venturi tube. Similarly the "U-shaped receptacle" cannot be merely Ahara's auxiliary well, which has its air-leg open to the outside atmosphere. Novelty in this feature can be based only on the placing of the entire auxiliary well within the air intake. "Suitable air-ports" must be something different from Ahara's, if the individuality of this element is to characterize Richard's combination as novel. Likewise the "means for controlling said air-ports" must be something distinctive from the relative sizes of the Ahara air intake and of the Ahara opening to the air-leg—it must be the slanted deflector or equivalent means for splitting the air current within the intake into two streams. Of course novelty cannot be found in the storage-reservoir, or the carbureting-chamber, or the throttle-valve of the engine. Infringement would be avoided if Zenith failed to employ any one element of Richard's combination. We find that Zenith has used nothing to which Richard can properly lay claim.

The decree should be modified by striking out the finding that Zenith Exhibits 1 and 10 infringe the Richard patent.

III. STURTEVANT.

[7] A "double carburetor for explosive engines" is the subject-matter.

Sturtevant stated his problem as follows:

> "In the operation of gas-engines which are fed with an explosive mixture of carbureted air some difficulty has been experienced in throttling the engine down to its minimum speed and power without stopping it, this trouble being due to the fact that too fine an adjustment of the throttling devices for controlling the delivery of the explosive mixture to the engine is necessary to be practical, and the control of the engine, therefore, is not at all times absolute or satisfactory."

It is evident that Sturtevant had before his mental vision a throttle-controlled engine provided with the usual single carburetor, namely a device for impregnating with gasoline the air sucked into the engine, consisting of the air intake, the fuel reservoir, and therefrom the fuel tube terminating in the fuel jet within the air intake. He pictured this single carburetor in association with a throttle-valve having the capacity of closing completely the air intake, and thus shutting off the entire supply both of air and of gasoline from the engine. In throttling down an engine so equipped the operator might move the throttle-lever to the closed position, or so near that the minimum of fuel to keep the engine running would not be supplied

and so the engine would stop. To guard against such stoppage the operator might learn, by observation and experiment, the point at which to hold the throttle-lever to provide the required minimum, and then either mark the place on the lever-arc or affix a mechanical stop so that the throttle-valve could not be completely closed. Such was the evil Sturtevant intended to remedy by wholly different means and mode of operation.

Sturtevant explained his means thus:

"Briefly stated, the invention consists in forming the carburetor double—this is to say, having two carbureting-chambers of different fuel capacities, which deliver to the engine-cylinders together under normal running conditions and supply the maximum amount of fuel, but one of which (the main carburetor) may be throttled down or cut out entirely when it is desirable to reduce speed, under which conditions the other or auxiliary carburetor, which is the smaller and which is always open, will supply a minimum amount of fuel sufficient to keep the engine at low speed and prevent its stopping. Furthermore, in starting the engine the smaller carburetor is of the proper capacity to supply the exact charge of fuel to give a proper starting charge at low starting speed and insure the initial starting of the engine, after which the throttled carburetor may be thrown into action and the engine brought up to its full speed."

And this is his mode of operation:

"In operation, assuming that the engine be at rest and the throttle-valve of the main carburetor closed, the engine will be manually turned to give the initial suction or intake stroke to the piston. The suction being through the auxiliary carburetor, fuel in sufficient quantity and of the proper richness will be supplied thereby to start the engine and keep it running at low speed, and the main carburetor can then be thrown into service by opening the throttle-valve and the engine brought to its full speed and power with both carburetors in service and a maximum supply of fuel being delivered to the engine-cylinders. When it is desired to slow down, this may be gradually or quickly done by throttling down the main carburetor until it is entirely cut out, and yet complete stoppage of the engine cannot occur owing to careless throttling down, for the reason that the auxiliary carburetor is still in service and independent of the control of the main carburetor and affords a constant minimum supply of fuel."

Sturtevant's structure is clear. His main carburetor is a complete carburetor in itself. It is associated with a throttle-valve that completely closes its air intake. His auxiliary carburetor is a complete carburetor in itself. To be so, it necessarily has its own separate air intake, its own separate fuel tube, and its own separate fuel jet. It supplies its own separate explosive mixture to the engine independently of any control of the controllable main carburetor. Its air intake is always open, has no association with any throttle. It feeds its explosive mixture, not into the mixing-chamber of the main carburetor at or below the throttle-valve, but through an independent by-pass into the manifold between the throttle-valve and the engine cylinders. Whenever the engine is running, the auxiliary carburetor is in operation and gives the requisite minimum of fuel. Whenever the main carburetor is opened to any degree, the two carburetors co-operate to furnish any desired increment of fuel up to the maximum, which is the sum of the full capacities of the two.

On his disclosure of means and mode of operation Sturtevant started out by claiming "fuel-supplying apparatus for explosive engines, comprising a main carburetor and an auxiliary carburetor."

But the patent office rejected the claim on reference to Schumm's patent, No. 482,201, Sept. 6, 1892, which is for a double carburetor. Thereupon Sturtevant canceled, but eventually was allowed the claim in suit:

"1. Fuel-supplying apparatus for gas-engines, comprising the combination with a main carburetor having a fuel-outlet, and a throttle-valve controlling said fuel-outlet, whereby the amount of fuel supplied from said main carburetor may be varied or completely shut off; of an auxiliary carburetor co-operating with said main carburetor, said auxiliary carburetor having an open fuel-outlet, whereby a desired minimum fuel-supply for the engine is afforded."

It is needless to detail Schumm and other references, for we find in the claim itself all the limitations that Zenith Company deduces from the prior art.

Sturtevant's main carburetor must be associated with a throttle-valve by which "the amount of fuel supplied from said main carburetor may be varied or completely cut off." Looking to the specification of means and the mode of operation to ascertain what Sturtevant had in mind when using the above-quoted limiting clause, we find that he meant a throttle-valve having the capacity of completely closing the intake, thereby completely cutting off the fuel; and that he never contemplated a structure in which the throttle-valve should always be partially open, and in which the fuel-jet should be so large that the minimum of inrushing air would not aspirate the gasoline. Sturtevant's auxiliary carburetor must "co-operate" with his main carburetor. Schumm denies to Sturtevant any monopoly of general co-operation. Therefore what the word in the claim calls for is the specific co-operation that Sturtevant has described. His auxiliary carburetor must be a "carburetor" in the same sense as the main carburetor is a carburetor; that is, a complete carburetor in itself. It must have "an open fuel-outlet whereby a desired minimum fuel-supply for the engine is afforded." That is, it must have means for discharging its own explosive mixture into the engine beyond the control of the throttle-valve and when the engine is running this explosive mixture must always be supplied and be ready to "co-operate" with the mixture from the main carburetor whenever and to whatever degree the closed throttle-valve may be opened. Such, in our judgment, is the scope of the claim.

Turning back to the drawing of the Zenith carburetor, we note that Zenith's alleged auxiliary carburetor consists of the fuel reservoir, the fuel passages leading into the well P, the well P, the fuel jet therefrom terminating at U, and the air intake at the lower left side of the drawing; and that said auxiliary carburetor co-operates with the Zenith main carburetor, which is identified by reference to the fuel-jet S within the Venturi tube.

If the throttle-valve T is closed, there is found in the Zenith structure the equivalent of Sturtevant's main carburetor with its prescribed limitations; but there is no auxiliary carburetor having an opening to discharge its explosive mixture into the engine, for the outlet U is smothered by the throttle-valve.

If the throttle-valve T is permanently held partially open, then, whatever may be said about the presence of Sturtevant's auxiliary

carburetor, no main carburetor is found in its required association with a throttle-valve having the capacity of being completely closed.

Either horn disposes of infringement. But, more vitally, the outlet U is never a discharge for an explosive mixture; it merely feeds raw gasoline. And, still more vitally, when the air current through the main carburetor is pointed to as the means for converting the raw gasoline from the outlet U into an explosive mixture, a demonstration is thereby afforded that Zenith contains no auxiliary "carburetor" at all.

We approve the finding of noninfringement of the Sturtevant patent.

IV. ANDERSON.

[8] Claim 1 is the only claim in issue:

"1. In a carburetor, a carbureting-chamber, a fuel-jet therein, a constant-level supply-chamber feeding said fuel-jet and exposed to atmospheric pressure, an auxiliary reservoir fed from said constant-level supply-chamber, an auxiliary fuel-jet discharging into said carbureting-chamber and fed from said auxiliary reservoir, an atmosphere inlet for said auxiliary reservoir, and means for maintaining a subatmospheric pressure in said auxiliary reservoir during operation of said carburetor."

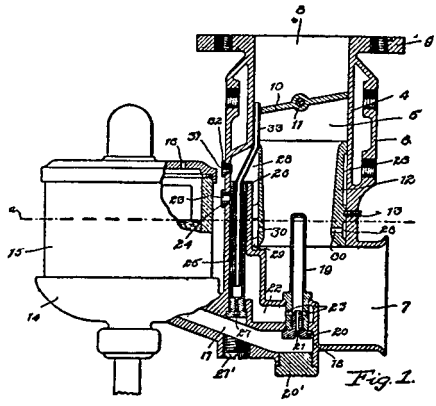


Fig. 1.

From the fuel reservoir 15, through the passage 17, gasoline is fed through the orifice 21 into the main jet within the Venturi tube, and also is fed through the orifice 27 into the auxiliary reservoir 25, and thence into the supplemental jet 33. The auxiliary reservoir 25 is open to the atmosphere through the restricted opening 31, and it is also open to the chamber 28, in which are openings 29 and 30 into the Venturi tube.

This construction, when the engine is running, produces in the auxiliary reservoir 25 a partial vacuum of varying degrees, which is the "subatmospheric pressure" spoken of in the claim. How it is produced, the mode of operation, the working principle, is thus explained by Anderson:

"It is to be noted that the surface of the fuel in the reservoir 25 is exposed to the pressure in the chamber 28, which, in turn, is subject to the pressure and the variations in pressure in the Venturi tube or carbureting-chamber. It is thus clear that, as the suction in the Venturi tube increases, the pressure in the chamber 28 will be lowered, and the rate at which the fuel passes through the restricted opening 27 into the reservoir 25 will vary accordingly. It has been found by experiment, however, that this variation, while highly desirable and productive of the best sort of a mixture, is too marked for practical purposes, unless properly moderated, and I have secured this moderation by means of the restricted passageway 31 to the atmosphere. The passageway is restricted to such an extent that it cannot satisfy the suction created in the chamber 28, and it therefore follows that the pressure on the surface of the fuel in the reservoir 25 is lessened, as the engine speed increases,

so that, as before pointed out, the flow through the passageway 27 is varied accordingly."

Anderson's mode of operation is unmistakable. He creates a partial vacuum in the chamber 28 by means of engine-suction through the openings 29 and 30 into the Venturi tube; the partial vacuum varies in tensity with the varying tensity of the engine-suction; he finds that high suction produces too much "subatmosphere"; and so he "moderates" his "subatmosphere," partially destroys the vacuum tensity, by admitting outside air into chamber 28 through the restricted opening 31.

Whatever of inventive creation was involved in producing the Anderson combination of means to obtain the Anderson result in the Anderson way is entitled to protection not only by specific claims but also by the most generic that could be drawn to fit Anderson's inventive concept. But infringement of the broadest as well as of the narrowest claims can be predicated only on a structure that embodies substantially the Anderson combination of means to obtain substantially the Anderson result in substantially the Anderson way.

As a basis for charging infringement of claim 1 by the starting feed of the Zenith carburetor, Exhibit 2, Stromberg Company identifies the generic terminology of claim 1 with the specific disclosure of means in the following manner:

1. "A carbureting-chamber" is the space from the air-inlet 7 to the explosive-mixture discharge 8.
2. "A fuel-jet therein" is the jet 19.
3. "A constant-level supply-chamber feeding said fuel-jet and exposed to atmospheric pressure" is the constant-level chamber 15.
4. "An auxiliary reservoir fed from said constant-level supply-chamber" is reservoir 25.
5. "An auxiliary fuel-jet discharging into said carbureting-chamber and fed from said auxiliary reservoir" is the jet 33.
6. "An atmosphere inlet for said auxiliary reservoir" is the opening 31.
7. "And means for maintaining a subatmospheric pressure in said auxiliary reservoir during the operation of said carburetor" is the bored nut 32. Several nuts of different sized bores are furnished so that the diameter of the opening 31 may be varied in relation to the openings 29 and 30 into the Venturi tube and the discharge outlet of jet 33. This interchangeability of the bored nut 32 is for the purpose of assisting in the proper initial adjustment of the carburetor to different engines.

Turning back to the drawing of the Zenith carburetor, we find that Zenith has the equivalent, specifically and generically, of Anderson's first element, in the carbureting space from the air intake at the lower left side of the drawing up to the explosive-mixture discharge at the top of the drawing; of his second element, in the double-jet S; of his third element, in the fuel reservoir F; of his fourth element, in the auxiliary reservoir or well P; of his fifth element, in the fuel-jet U; of his sixth element, in the atmosphere inlet A; and of what Stromberg Company has chosen to identify as his seventh element, in the ability and practice of Zenith Company to regulate the size of

the atmosphere inlet for the purpose of aiding in the proper initial adjustment of the carburetor to a given engine.

But Zenith carburetors 1 and 10 and Baverey's patent No. 907,953, December 29, 1908, which was cited against Anderson in the patent office, were in the prior art. Zenith carburetors 1 and 10 contained item for item the elements we have pointed to in the Zenith drawing. So naturally no attempt was made to subordinate them to the Anderson patent. Before Anderson's time Zenith had modified the carburetor as shown in the drawing by closing the top of the well P and admitting air thereto through restricted openings into the well J. And no charge of infringing the Anderson patent could be laid upon that modification. Since Anderson's time the only change in Zenith is found in Exhibit 2. In this, instead of air being admitted to the closed well P through restricted openings into the well J, it is admitted through restricted tubes from the outer air. And on this slight change in construction, and the additional result that is supposed to be obtained thereby, the question of infringement turns.

By means of Ahara's air inlet D and Zenith's restricted air inlet A subatmosphere was created in their respective auxiliary wells. There has always been subatmosphere in the Zenith wells, both P and J. In the structure of the Zenith drawing there may not be much, if any, difference in subatmospheric pressure in the two wells. When Zenith closed the top of the well P and admitted air thereto through restricted openings into the well J, there was undoubtedly a nearer approach to vacuum in the well P than in the well J. And in the Zenith carburetor, Exhibit 2, there is a greater degree of subatmosphere in the inner well than in the outer. But we are unable to determine from the record whether there was any greater or any less degree of subatmosphere in the inner well when air was taken from the outer well than when taken from outside the carburetor. As means of admitting air into the inner well, the restricted openings to the outer well are the equivalents of the restricted openings to the outer air, unless there is a difference in results, for mechanically it is immaterial whether the air is admitted mediately or immediately from the outer air. No infringement can be laid upon Zenith's Exhibit 2, if all that Zenith got was substantially the old result in substantially the old way. But because the proofs do not enable us to find definitely that Zenith obtained merely the old result, we proceed to determine whether Stromberg Company is correct in saying that the seventh element is any means, of the general nature of the nut 32, adapted to regulate the admission of air into the inner well from the outer air.

In support of its right to point to the restricted passages in Zenith's Exhibit 2 from the inner well to the outer air as the equivalent of the seventh element, Stromberg Company asserts that the presence of subatmosphere in the prior Zenith carburetors was incidental, insignificant, detrimental, and contrary to the desired operation; and upon this assertion predicates a claim that Anderson was entitled to monopolize any desirable and intentional use of subatmosphere in carburetors, even though the mechanical elements were found similarly combined in prior structures. It is true that subatmosphere in the Zenith outer

well J, which supplies the supplemental jet H, runs counters to the Baverey principle of supplying the supplemental jet with a unit of fuel in a unit of time and makes it impossible of complete realization. Indeed, the use of any auxiliary well, as we have heretofore seen, is unnecessary to the employment of that feature of the Zenith carburetors. But in every Zenith starting well (the inner well P) subatmosphere has been desirable and in accord with the intended purpose in starting, because in response to subatmosphere the action of the starting jet is augmented and prolonged, and thereby the interval of time that passes before the suction in the Venturi tube is sufficient to lift the gasoline from the main jet is bridged. And if the intent of a maker may be judged by the beneficial results produced by his mechanism, the use of subatmosphere in the prior Zenith starting well was intentional. So there is no basis in fact for the contention that Anderson's patent is to be scanned from the viewpoint that he was the first to devise means for the beneficial and intentional employment of subatmosphere in carburetors.

In our judgment Anderson himself furnishes three demonstrations that Stromberg Company is in error in asserting that Anderson's seventh element in claim 1 refers generically to any means for regulating the admission of outer air to the inner well which have a mode of operation and produce results analogous to the mode of operation and results of Anderson's interchangeable nut 32, which determines the size of the opening 31.

1. In his specification, herein above quoted, Anderson shows that his characteristic subatmosphere is created by the action of the openings 29 and 30 into the Venturi tube in connection with the suction through the Venturi tube; that at high speeds too much subatmosphere is thereby created; and that he destroys the excess by admitting outer air through the opening 31. In other words, if Anderson had not found by experiment, as he says he did, that his means for creating subatmosphere operated excessively at high speeds, he never would have put into his carburetor the opening 31, which is present merely as a moderator of the active means, just as a governor moderates, but does not create, the applied power of an engine. Zenith Company has no carburetor in which the passageway from the outer air to the inner well has any such mode of operation or produces any such result. But Stromberg Company insists that we cannot accept Anderson's definition of his seventh element, because to do so would make that element the same in claim 1 as in claim 2, wherein that element is additionally defined as "comprising a duct for the passage of air only, communicating with said carbureting-chamber and with the auxiliary reservoir above the level of the liquid therein." Taking definitions of terms from Anderson, we believe structures can be imagined which would infringe claim 1 without embodying the quoted limitation in claim 2, and so both claims would be purposeful. But we do not stop to picture supposititious structures, because if we are mistaken in our belief, and if claim 1 must fall unless we accept Stromberg Company's definition and reject Anderson's, then fall it must.

2. On his specification of means and mode of operation, Anderson

submitted claims, several of which were rejected on reference to Baverey. Their general character may be gathered from the following:

"In a carburetor the combination of a suction-controlled fuel feed-jet, a constant-level supply-chamber therefor, an additional jet, and means for supply to said additional jet arranged to deliver varying quantities of fuel according to the pressure produced by the engine."

The objection to this claim is that, if the arrangement for varying the discharge from the additional jet to correlate with the pressure produced by the engine, which is the arrangement for creating subatmosphere, is not confined to Anderson's stated means and method of creating subatmosphere, but is aimed to cover the inlet from the outer air into Zenith's prior auxiliary well, then the claim is void in the light of Baverey's disclosure.

Anderson acquiesced in the rejection. In submitting the present claims, he distinguished from Baverey, as he in fact had already clearly done in his specification of means and mode of operation, by pointing out that his "operation is brought about by maintaining a subatmospheric pressure in the auxiliary reservoir even though the said reservoir is connected with the atmosphere." That is, Anderson's characteristic subatmosphere is obtained, not by means of, but in spite of, the Baverey-Zenith inlet. And thereby Anderson became estopped from contending that the Zenith characteristic subatmosphere was immaterial in the prior art, and that he was entitled to a general dominancy of subatmosphere in carburetors—a contention we have heretofore examined and found to be wanting in merit.

[9] 3. Anderson's claim 4 is word for word the same as claim 1, except that the sixth element, "an atmosphere inlet for said auxiliary reservoir" in claim 1, becomes "a restricted atmosphere inlet for said auxiliary reservoir" in claim 4.

Of course the other elements, including the seventh, must be given exactly the same value and scope in both claims.

Respecting the differentiation of the sixth element, claim 1 calls for an inlet regardless of restriction—for example, Anderson's inlet with the interchangeable nut 32 omitted; while claim 4 demands a restriction of the inlet—for example, such a "restricted inlet" as is provided by the bored and interchangeable nut 32.

Now, if this suit were based on claim 4, it would be apparent at once that the nut 32, or its equivalent in general character, could not be taken as the seventh element after having been properly identified as the sixth element. And though only the opening and not the nut itself as a restricting means is in the sixth element of claim 1, nevertheless the seventh element, being in the same words and based on the same statements of means and mode of operation, must be taken to refer to the same thing in both claims. And inasmuch as the nut 32, or its equivalent in general character, cannot be the seventh element of claim 4, it cannot be the seventh element of claim 1.

Granting validity to Anderson's claim 1, we find that it is not infringed.

The cause is remanded, with the direction to amend the decree conformably to this opinion. Costs in this court are to be equally divided.

STROMBERG MOTOR DEVICES CO. v. ZENITH CARBURETOR CO.

(Circuit Court of Appeals, Seventh Circuit. September 14, 1918.)

No. 2154.

PATENTS ⊂=301(1)—PRELIMINARY INJUNCTION—ISSUANCE.

The denial of a motion for preliminary injunction in an infringement suit presented on affidavits was obviously not an abuse of discretion, where, after hearing on the merits, it was found there was no infringement.

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

Suit by the Stromberg Motor Devices Company against the Zenith Carburetor Company. From an order denying a preliminary injunction, complainant appeals. Affirmed.

Charles A. Brown, of Chicago, Ill., and William H. Kenyon, of New York City, for appellant.

Clarence P. Byrnes, of Pittsburgh, Pa., and William M. Swan, of Detroit, Mich., for appellee.

Before BAKER, MACK, and EVANS, Circuit Judges.

BAKER, Circuit Judge. This is an appeal from an order denying a preliminary injunction upon claims 8, 10, and 11 of the Richard patent, No. 791,501, June 6, 1905.

Shortly after the denial of the motion the District Court heard the case on the merits, and held the claims valid and infringed by two Zenith structures and not infringed by a third.

An appeal was taken from that decree, and was lodged in this court shortly after the present appeal, and by agreement of the parties the two cases were heard at the same time.

Inasmuch as we have found that no Zenith structure infringes the Richard claims (see Stromberg Motor Devices Co. v. Zenith Carburetor Co., 254 Fed. 68, — C. C. A. —, herewith decided), it is quite obvious that the questions of infringement, presented by affidavits, were not so clearly in favor of the Stromberg Company that the District Court abused its discretion in denying the motion for a preliminary injunction.

The order is affirmed.

JONES et al. v. SYKES METAL LATH & ROOFING CO.

(Circuit Court of Appeals, Sixth Circuit. June 4, 1918.)

No. 3032.

1. PATENTS ⊂=51(1)—INVENTION—PRIOR ART—REDUCTION TO PRACTICE.

It is a sufficient reduction to practice of the idea of rolls for cutting expanded metal, relative to anticipation of patented rolls, that they were worked only by hand, being intended as part of a machine which should cut and expand, and the expanding part not being ready; there being no necessary connection between the two parts.

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2. PATENTS ⟸51(1)—PRIOR ART.
A machine in prior use, though not patented or described in printed publication nor known to patentee, was a part of the prior art.

3. PATENTS ⟸53—INVENTION—PRIOR USE—ABANDONMENT.
Relative to anticipation of patented machine, mere change in form of prior commercial machine, it at all times being within the limits of the claim of the patent, would not interrupt continuity of use and constitute abandonment.

4. PATENTS ⟸328—INVENTION—INTEGRAL AND SECTIONAL STRUCTURES—EXPANDED METAL CUTTING ROLLS.
The Curtis patent, No. 671,915, for rolls for cutting expanded metal, claim 2, in substance a square-edged cutting roll notched on one edge only, *held*, in view of prior segmental cutter, not to involve invention, but merely making integrally, and so stronger and simpler, what had been before made in two parts and then put together.

5. PATENTS ⟸328—LIMITED CLAIM—INVENTION—INFRINGEMENT—EXPANDED METAL CUTTING ROLLS.
The Curtis patent, No. 671,915, for rolls for cutting expanded metal, claim 1, *held* limited to preferred form, to involve invention, and to be infringed.

6. PATENTS ⟸165—CLAIMS—LIMITATIONS.
A limitation found in one claim, whereby alone it substantially differs from another, cannot be read into the other.

7. PATENTS ⟸165—CONSTRUCTION OF CLAIM—PATENTEE'S DICTIONARY.
A patentee may supply his own dictionary; so a claim being for roll with notches staggered as specified, and the word "staggered" being found, in the specification, only in the sentence stating the preferred form, the claim will be limited to such form.

8. PATENTS ⟸319(1)—INFRINGEMENT—DAMAGES.
Damages for infringement of patent may be measured by reasonable royalty, if there is no better means of establishing profits or damages.

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

Suit by Breckenridge Jones, trustee, and others against the Sykes Metal Lath & Roofing Company. Bill dismissed, and complainants appeal. Affirmed in part, and in part reversed and remanded.

This is the usual infringement suit based on patent No. 671,915, issued April 9, 1901, to Curtis, appellants' ultimate assignor, for "rolls for cutting expanded metal." The application was filed October 13, 1900. The purpose of the machine was to cut in a metal sheet parallel series of slits so that when a lateral pull was exerted the slitted sheet would expand into an open mesh of approximately diamond-shaped form. The result was not at all new, nor was the mechanism broadly new. It was understood that the continuous longitudinal slit must be interrupted at regular intervals by an uncut portion, called a bond, and that in two adjacent slits these bonds must be so spaced that each bond in one slit would be opposite the center of a severed portion in the other slit. The slits had been made by beveled-edged rotary cutters, and the bonds were caused by making a notch in the rotary cutting edge, just as if a notch is made in the cutting edge of one blade of a pair of shears, whereby the fabric upon which the blades close will be cut on both sides of the notch and remain uncut at that point. A further step in the efficiency of such machines had been made by discarding beveled-edged cutters and using square-edged rolls. Several of these were assembled upon the upper of two horizontal shafts and were thereon properly spaced apart by intermediate smaller discs. Upon the lower shaft were placed corresponding rolls and discs, but each roll upon the lower shaft was opposite an intermediate disc upon the upper, and the two shafts were at such a distance

apart that the lower edge of the cutting rolls upon the upper shaft slightly passed by the upper edge of the similar rolls on the lower shaft and entered slightly into the open spaces surrounding the spacing discs on the lower shaft. As the upper and lower cutting rolls were adjusted laterally just to clear each other, it followed that they would cut a continuous slit in the sheet of metal passed between the rolls—again acting like a pair of shears, save that the motion was rotary. Notches cut across the periphery of these rolls would obviously leave bonds in the material; but, as both edges of the square-faced rolls were cutting edges, such transverse notches would leave the bonds in adjacent slits opposite to each other and the product would not expand. An expansible sheet could be produced with those rolls only by running the sheet through twice, cutting the first slits twice as far apart as was desired, and, on the second run, shifting the sheet longitudinally so as to bring the bonds in the later slits midway between those of the earlier. This was the state of the art, as shown by prior patents and by commercial practice, when Curtis made his improvement. He used the intermeshing square-edged rolls upon upper and lower shaft as just described; but, instead of cutting his notches clear across the periphery of the roll, he notched only one edge, thus producing bonds in only one of the slits cut by the edges of the roll. Then he notched one of the meeting edges which cut the next slit, and arranged these notches so that the bonds would not be opposite each other, but each bond would be opposite the center of the next opening. He could do this in either of two ways: The first way was to notch the right-hand edges of the upper and lower rolls and so each slit would be produced by the rolling engagement of the passing edges of the two rolls, one of which was notched and the other was plain. The other way was to leave the lower rolls entirely plain but notch both edges of the upper roll, arranging the notches upon the opposite edges of the same roll, not across from each other, but in the alternate or staggered position. This would also accomplish the cutting by the meeting of a plain edge and a notched edge. Based upon this construction, he claimed:

1. The slitting-rolls for cutting expanded metal provided with spaced and countering cutting rings having right-angle corners being interrupted at intervals by notches formed in the side faces of the rings, and the notches being relatively staggered, substantially as specified.

2. The slitting-rolls for cutting expanded metal, provided with spaced and countering rings having sharp corners for cutting the metal, such corners being interrupted by notching out the side faces of the rings for a portion of the thickness of the rings, substantially as specified.

The court below held the patent invalid.

Dyrenforth, Lee, Chritton & Wiles and Russell Wiles, all of Chicago, Ill., and Bates & Macklin, of Cleveland, Ohio, for appellants.

Whittemore, Hulbert & Whittemore and James Whittemore, all of Detroit, Mich., for appellee.

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

DENISON, Circuit Judge (after stating the facts as above). Infringement of both claims is alleged; and, if they receive the construction which we think they must have, infringement is conceded.

[1] Several earlier uses are set up in order to anticipate or otherwise invalidate the second and broader claim. We agree with the District Judge that the claim is invalid; but we think this conclusion is most safely based upon the earlier so-called segmental cutter. Curtis made his constructive reduction to practice by filing his application in October, 1900. He claims to have conceived the invention in June of that year; but the evidence of any definite early conception of the invention embodied in these claims is vague, and there was no dis-

closure until in the course of preparing the application. The defendant's predecessor experimented in the summer of 1899 with a machine of this general class, and in December of that year let a contract for the building of a commercial machine. This commercial machine was completed in the spring of 1900 and operated by hand sufficiently to demonstrate its effectiveness. This is proved with all the certainty necessary to establish a claim of anticipation. The rolls were not operated by power at that time, because they were intended to be only a part of the complete machine which should cut and expand, and the expanding part was not ready; but there was no necessary connection between the two parts, and we consider what was done to be a sufficient reduction to practice of the idea involved. It was the same as that later developed by Curtis, with two exceptions: (a) The notches were placed upon the corresponding (say left-hand) edges of each cutting roll, upper and lower, instead of upon both edges of the upper rolls only, as in Curtis' preferred form; (b) instead of cutting notches in the edges of the body of the roll, defendant's predecessor made the roll of less diameter than the adjacent spacing disc, and then built it out with a series of so-called segments until it was of the larger diameter required for the cutting roll. Each segment contained a portion of the cutting edge having one notch (two half notches) therein, and was bolted fast to the body of the roll. When they were all in place, they constitute a continuous roll-cutting edge interrupted by notches. This awkward arrangement was adopted because it was thought the cutting edge must be of harder steel than was advisable for the body of the roll, and because it was thought that separable parts would facilitate sharpening and repairs. It was anticipated that notches would break down and wear out, and in this way one part could be replaced without affecting the rest of the roll. When the entire machine was later completed, it was employed for some time to produce the commercial result. It was finally discarded and replaced by the Curtis construction, because the making in this segmental way and the necessary replacements and repairs proved to be too expensive.

[2, 3] This segmental cutter, although it had never been patented or described in any printed publication and was not known to Curtis, yet was a part of the prior art, with reference to which the character of his variation therefrom must be judged. If some one else had completely invented and used this segmental cutter, and if what Curtis did involved no invention over what had thus been done, certainly Curtis was not entitled to a patent as the first inventor of the thing which he produced. One cannot be an inventor, if there is no invention. See Package Co. v. Johnson Co. (C. C. A. 6) 246 Fed. 598, 601, 159 C. C. A. 568; Lemley v. Dobson (C. C. A. 6) 243 Fed. 391, 395, 156 C. C. A. 171; and see Buser v. Novelty Co. (C. C. A. 6) 151 Fed. 478, 492, et seq., 81 C. C. A. 16. This is not a case where a prior use, exact or suggestive, had been abandoned, and so perhaps should go into oblivion instead of into the prior art; the segmental cutter was in complete and active existence, when Curtis made his conception, and in commercial use when he filed his application. If the segmental cutter is not generally different from Curtis' form, then it follows that

the substance of claim 2—a square-edged cutting roll notched on one edge only—has been in continuous use by defendant and its predecessor ever since a date earlier than Curtis' invention, for change in form within the limits of the claim would not interrupt the continuity of the use.

[4] We find thus presented the controlling question whether Curtis' integral square-edged cutting roll with notches on the edge involved invention as compared with defendant's sectional square-edged roll with notches on the edge. The precise question may be clearer by transposing to the more familiar circular saw. Let it be supposed that saws composed of an integral disc with teeth cut into the edge were common; that defendant had devised a peculiar kind of teeth, and had attached these by removable means to the edge of the disc, thereby producing a saw with these peculiar teeth, each tooth separately removable; and that Curtis then put these same peculiar teeth into the edge of an integral saw by cutting them therein. We are confident that this would not, and that what Curtis did with these cutter rolls did not, involve invention. We have a clear instance of that merely making integrally what had before been made in two parts and then put together, rather than an instance of that uniting into one part which dispenses with a function or gets a new result. See Gould v. Cincinnati Co. (C. C. A. 6) 194 Fed. 680, 685, 115 C. C. A. 74. Curtis' cutter roll was stronger and simpler than defendant's, but only as an integral structure is always stronger and simpler than a sectional one. The defendant had passed through and beyond the Curtis form. Curtis simply dropped off what he thought a useless and troublesome refinement, and adopted the remainder, the substance of defendant's structure. This is especially illustrated by the fact that a sectional view of this segmental cutter and adjacent spacing disc, taken on any selected diameter, cannot be distinguished from a sectional view of the Curtis roll and spacing disc taken on the same diameter, save by the presence of the attaching bolt and the seam between the permanent body and the removable edge.

So far as concerns claim 2, the decree of the court below dismissing the bill must be affirmed.

[5] Claim 1 presents a different problem. We think it must be interpreted as of specific intent, directed to and limited to Curtis' preferred form, whereby he put all his interrupting notches upon the upper rolls, leaving the lower rolls plain, and arranged these notches on the opposite edges of the same roll in staggered relation to each other. Defendant has adopted and used this precise form. It seeks to escape liability by alleging that, if given this specific construction, the claim involves no patentable distinction from claim 2, and is invalid for the same reason, but that it ought not to be so limited, but should be constructed so broadly that it is equivalent to, and is defeated by the same facts which defeat, claim 2.

Putting these notches upon both edges of the same disc, and not opposite each other but staggered, was entirely new and had obvious advantages over the plan of notching one edge of both upper and lower rolls. In the latter case, the ultimate alternate relation of slit

and bond must be secured by a rather nice relative rotary adjustment of upper and lower rolls on their respective shafts and also by regulating the driving means for each shaft so that the notches will leave the bonds at the right spots. Either wear in connecting gears or inaccuracy in replacing rolls after they have been removed for grinding would produce bad results. With the Curtis preferred form, the proper relation of slit and bond in the two adjacent rows was necessarily and automatically preserved. When the rolls were placed on the shaft, originally or after removal, it was immaterial what circumferential position the notches happened to have, so long as the notches in the series of rolls on that one shaft were aligned with each other. It is true these results and these advantages are not testified to by any expert; but they are obvious, and there is no testimony tending to dispute their apparent value. We cannot say that this specific improvement involved no invention.

[6, 7] Since a device which does not bring the bonds and the slits into alternate position will not make a useful product, it is said that the thought expressed by "the notches being relatively staggered" must be read into the second claim as well, and that the notches are "relatively staggered" even in the form of machine which notches only one side of the roll but uses notched rolls on both upper and lower shafts, because these are so adjusted that the notches strike the metal in a staggered relation to each other. Viewed in this way, the claims are equivalent and of a breadth which makes them both invalid. We cannot accept this point of view, for the sufficient reason that a limitation found in one claim and by which alone it substantially differs from another cannot be read into that other, but the expressed distinction must be preserved. There is the further reason that, although by resort to all the possible meanings of the phrase in question, we can conceive that in the upper and lower notched roll construction, the notches are "relatively staggered," yet this was plainly not what Curtis meant when he selected the words; and a patentee is at liberty to supply his own dictionary; the terms of a claim should be taken in the sense given in the lexicon of the specification. Baker, C. J., in Kennicott Co. v. Holt Co. (C. C. A. 7) 230 Fed. 157, 160, 144 C. C. A. 455. He shows, in Fig. 5, one form having the notches alternately arranged on the opposite edges of the same roll, and, in Fig. 6, a form having the notches upon the same edge, and upon one edge only, of upper and lower rolls. He says:

"I prefer to form these notches upon both sides of all the rings as shown in Fig. 5, arranging the notches in staggered fashion. * * * I do not notch the (lower) rings 30 as that is unnecessary if the (upper) rings 20 are notched upon both sides as shown at Fig. 5; but, instead of that construction, the upper rings may be notched upon one side only and the lower rings should, in that case, also be notched upon one side. * * * Either construction works well."

The word "stagger" is not found in any form in the specification, except in the sentence just quoted; and this reference to the authoritative lexicon makes it entirely clear that the first claim was intended to cover this preferred form, and the second claim was intended to be broad enough to cover either form. Defendant's argument upon this

subject, based upon the contents of the file wrapper, is not convincing. As the application was filed, the second claim was in the same form as when issued; but the first claim was still broader and reached generally this arrangement of cutting rings, provided only that they had "notches on their side faces." This would cover notches extending transversely entirely across the periphery and was old, as appeared by the reference cited by the Patent Office. Curtis then amended by substituting claim 1 as issued, and pointed out that there was invention in making notches in the edge only instead of all the way across, because by this change he succeeded in producing bonds which were necessarily opposite each other. The patent then issued.

[8] It results from these considerations that there must be the usual interlocutory decree based on claim 1; but for accounting only—the patent has expired. We appreciate the difficulties attending an accounting, but they are not sufficient to justify the refusal of that remedy, particularly in view of the present rule that damages may be measured by reasonable royalty, if there is no better means of establishing profits or damages.

The judgment is reversed, with costs of this court, and the case remanded for further proceedings.

JONES et al. v. GENERAL FIREPROOFING CO.*

(Circuit Court of Appeals, Sixth Circuit. June 4, 1918.)

No. 3051.

1. PATENTS ⊜328—INVENTION—SHEET METAL EXPANDING MACHINES.
The Curtis patent, No. 670,606, on machines for expanding sheet metal, claim 13, *held* invalid, as not involving invention, but the thought that automatic opening mechanism could be made to operate in a transverse plane; it not being patentable merely to do by automatic machinery what has commonly been done by hand.

2. PATENTS ⊜101—CLAIMS—PART OF DEVICE.
Claims of a patent, intended to reach the operation of half of the device considered by itself, may be valid.

3. PATENTS ⊜328—VALIDITY—SHEET METAL EXPANDING MACHINES.
The Curtis patent, No. 796,402, on machines for expanding sheet metal, claim 3, *held* to be for the diagonal edge over which the sheet should be drawn into another plane as it progressed longitudinally, a new element in the association, and to be valid.

4. PATENTS ⊜165—CONSTRUCTION—LIMITING WORDS.
Limiting words in the claim of a patent, relied on in Patent Office to differentiate it from a prior patent, while to be given their full meaning, if clear and definite, when developing ambiguity should not be read any more broadly than is reasonably necessary to serve such purpose of differentiation.

5. PATENTS ⊜328—INFRINGEMENT—SHEET METAL EXPANDING MACHINES—DRAWING.
The Curtis patent, No. 796,402, on machines for expanding sheet metal, claim 3, *held* infringed by defendant's machine, as "drawing" the sheet; claims 5 and 9 also *held* valid and infringed.

6. PATENTS ⊜328—VALIDITY—SHEET METAL EXPANDING MACHINES.
The Curtis patent, No. 796,402, on machines for expanding sheet metal, claims 1, 8, and 10, *held* invalid, as too broad.

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*For opinion on motion for rehearing and to reopen, see 254 Fed. 970, — C. C. A. —.

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

Suit by Breckenridge Jones, trustee, and others, against the General Fireproofing Company. Bill dismissed, and complainants appeal. Reversed and remanded.

Dyrenforth, Lee, Chritton & Wiles and Russell Wiles, all of Chicago, Ill., and Bates & Macklin, of Cleveland, Ohio, for appellants.

Hoyt, Dustin, Kelley, McKeehan & Andrews, of Cleveland, Ohio (Charles Neave, of New York City, and Fred L. Chappell, of Kalamazoo, Mich., of counsel), for appellee.

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

DENISON, Circuit Judge. [1] For lack of infringement, the court below dismissed the bill of the appellants charging infringement of two patents issued to Curtis, one No. 670,606, of March 26, 1901, and the other No. 796,402, of August 1, 1905, upon machines for expanding sheet metal. Both patents relate to a device which receives as its raw material to be acted upon a slitted sheet of metal prepared as described in our opinion to-day filed in No. 3032, Jones v. Sykes Co., 254 Fed. 91. The final product of the machines of the patents in suit was intended to be used as metal lath. It was not new in itself. It is fully enough described in the opinion of the Supreme Court in Expanded Co. v. Bradford, 214 U. S. 366, 376, 29 Sup. Ct. 652, 53 L. Ed. 1034, as being the product of the methods which the patentee in that case undertook to supersede by his patent there involved. It had also been known that after a sheet was fully cut, as, for example, by the Curtis machine of the patent involved in the Sykes Case, and after the sheet was thus ready for expanding by a pulling or stretching force, such force would be much more effective if exerted at a lateral angle to the plane of the sheet than if exerted in the same plane. This was obvious, since, if the force were exerted in the same plane, the sheet could yield and expand only by a distortion and twisting at and near the bonding points, while, if an equivalent force were exerted at, e. g., a right angle to the plane of the sheet, the necessary yielding and expansion would call only for a bending of the strands without material twisting, and would produce an approximately diamond-shaped mesh (quasi hexagonal) with the strands lying edgewise in the new plane instead of flat in the old. This had been accomplished by taking the finished sheet after it had come from the slitting machine, seizing the opposite edges by suitable holders, and then carrying them apart from each other in a transverse plane. This had been an essentially manual operation, although aided by hand-operated mechanism. Curtis was the first to construct any machine which would receive at one end a ready slitted sheet, carry the same longitudinally along through the machine, and deliver at the other end the transversely expanded product ready for use—all without intermediate handling or attention. The novel characteristic of his machine was to expand transversely and progressively as an incident to the longitudinal feed and travel of this slitted sheet.

In his first machine (670,606), he did this by employing traveling grips which seized the edges of the sheet as it passed longitudinally off the end of the horizontal feed table, and which grips traveled in angling paths forward from, and transversely up and down from, the feed table, thereby gradually expanding the sheet in this transverse plane until the full intended width was reached. His thirteenth claim, the one said to be infringed, reads as follows:

"The machine for opening or expanding sheet metal the slits in which have been previously cut, wherein are combined means for feeding the slitted sheets and means acting to open them by opening the strands between the slits in a direction substantially at right angles to the plane of the sheet, substantially as specified."

The other claims of the patent covered, with various breadth of expression, the specific means which Curtis showed and described, and claim 13 must be considered as reaching any suitable feeding means combined with any suitable opening means which automatically bend the strands at right angles to the plane of the sheet as it leaves the end of the feed table. Thus construed, the claim did not express a patentable invention. The history of the transaction makes this clear. Caldwell had devised a machine which gripped the slitted sheet by its edges as it left the horizontal feed table and opened it in its own plane. Curtis, as a mechanical expert, was asked by the owner of the Caldwell invention to see if he could improve it. He knew that the sheet ought to be opened in a transverse plane, and knew that it was common practice to do this manually, and he modified and adopted the Caldwell mechanism so that the grips moved away from each other up and down instead of sidewise. He was entitled to a patent upon the devices by which he caused this to be done and to a fair measure of equivalency; but we see no invention involved in the mere thought sought to be monopolized by this thirteenth claim, that automatic opening mechanism could be made to operate in the transverse plane. To find invention in such thought would be to say that it is broadly patentable merely to do by automatic machinery what has commonly been done by hand, and the general rule is to the contrary. Marchand v. Emken, 132 U. S. 195, 199, 200, 10 Sup. Ct. 65, 33 L. Ed. 332.

The prosecution, under the second patent in suit, is based upon claims 1, 3, 5, 8, 9, and 10. Claim 3 reads thus:

"In a machine for expanding previously slitted sheets, the combination with a support over which the slitted sheet is moved, of means for continuously feeding the sheet lengthwise along said support and means for drawing it away from the plane of the support as it passes off the same, substantially as specified."

[2] In this patent, Curtis took a completely slitted sheet and conveyed it longitudinally along a feed table. This feed table was broken away on a diagonal line commencing at one of the forward corners and extending back at the desired angle to the other side. The result was that, as the sheet fed forward, first one corner would pass off the supporting means, and then a gradually increasing triangular section would do so, until, eventually, the whole sheet would be passing over and beyond this diagonal edge. Means were then provided for

carrying the free edge of the sheet downwardly at an angle to the plane of the feed table, and, accordingly, the sheet was expanded by pulling it over the diagonal edge. It is true that Curtis showed a double-acting device, so that, in order to apply thereto the foregoing description, his sheet should be thought of as divided into two by a longitudinal center line, the first opening corner of each half sheet being at the central division point between them, and one half being pulled downwardly and the other half pulled upwardly over diagonal edges extending from the two outer corners of the feeding means inward to the center. However, there are claims devoted to this double construction, and the claims in suit clearly have no reference thereto, but are intended to reach the operation of one-half the device considered by itself; and there is no inherent reason why claims drawn on that theory may not be valid.

[3] Our conclusion is that this is a proper case for the application for the principle to which we referred in Davis v. New Departure Co., 217 Fed. 775, 133 C. C. A. 505. From the broad point of view involved in claim 3, the new thing provided by Curtis was the diagonal edge over which the sheet should be drawn into another plane as it progressed longitudinally. This we consider a new element in this association, and it imparts both validity and character to the claim. Curtis did not merely provide a new association of old elements; the thought that the feed table or supporting means could be cut away on a diagonal line so that this diagonal edge would serve as the resisting means over which the sheet might be pulled into expanded form was the novel thought, and the other recited elements of the claim only provide its necessary working environment. There is therefore no occasion to confine the claim to the particular operative mechanism shown and described, but infringement will be found if a defendant has adopted substantially this novel element of the claim, even though it is put into association with other elements of distinctly different form from those shown in the patent, provided that they furnish the necessary field for the novel element to operate and to function as contemplated by the patent, and do not omit, in specie and by equivalent, any specified part.

We do not overlook the fact that this diagonal edge is not, in so many words, specified in claim 3; but we conclude that it is imperatively implied. The claim calls for "a support over which the slitted sheet is moved," and since such a sheet could not be moved lengthwise of the support and drawn away from the plane of the support into expansion as it passes off the same, unless it passes off in a diagonal line, we must conclude that the "support" of the claim is the support thus described. If there were doubt about the necessary presence of this element in claim 3, there could be none as to claim 5.

There is the common controversy whether the patented device has been largely used. If the patent is of the relatively generic scope claimed for it, then it has been embodied in machines which have been extensively adopted; if it is of the precise and limited scope insisted on by defendant, it has had no commercial use. In such a case, to

argue against validity because the specific form has not been marketed is to beg the question.

[4-6] Having determined that the claim is valid and has the scope which we have attributed to it, the question of infringement remains. We conclude that this question depends upon the force to be given to the word "drawing," found in the claim. Defendant's machine does not draw the sheet over the diagonal edge in the same manner nor to the same degree that the Curtis device does. The allusion to the drawing function was relied upon during its progress through the Patent Office, to avoid a reference, and it therefore must have the limiting effect which the circumstance requires; but of course it does not follow that the "drawing" must be of the same kind and extent as shown by Curtis.[1] The file wrapper discloses that Pitkin had an earlier patent upon a device which (for the purpose of construing claim 3) we may assume discloses a longitudinal feed table or support broken away in a diagonal line; but Pitkin fed through this device an unslitted sheet, and above the angling edge he placed a corresponding row of star wheels, which operated to slit, punch, stretch, and expand that line of the metal sheet progressing thereunder. The strand thus cut and punched was forced down and away from the plane of the support, and thereupon another strand was treated in the same manner. The result was that the sheet, as a whole, was carried somewhat away from the plane of the support; but Pitkin did not disclose the idea of drawing or pulling the sheet over this edge and thereby accomplishing the expanding. When Pitkin was cited, Curtis met the rejection by pointing out this drawing function. If words so inserted or relied upon as indicating difference, and which thereby become words of limitation, are clear and definite, they must have their full meaning, even though it later appear that the patentee thereby measurably lessened the monopoly to which he was really entitled; but, if these limiting words develop ambiguity, they should not be read any more broadly than is reasonably necessary to serve that purpose of differentiation for which they were adopted. See Clipper Co. v. E. W. Co. (C. C. A. 6) 237 Fed. 602, 608, 150 C. C. A. 484, and cases cited. When we come to consider defendant's form of turning the sheet over the edge, it is evident that the limitation to "drawing" is ambiguous, and we therefore must inquire whether defendant's operation draws the sheet over the edge in the sense in which Curtis said that he did and that Pitkin did not.

Defendant's machine is very different in appearance from Curtis', and its operation is obscure. It has been necessary to study it in detail and observe the function of each part, but we are finally satisfied that it responds to the terms of the claim. It clearly accomplishes the general result; it feeds in longitudinally a completely slitted sheet and delivers the sheet at the other end fully expanded and in a plane right-angled to the plane of feed. It accomplishes this by turning the sheet over a diagonal edge in the feed table. This turning is done by a series of cams or wedges each of which meets and

[1] We give defendant the benefit of all doubts, by assuming that the effect is the same as if the limiting words had been inserted by amendment.

directs away in a right-angled plane one of the diagonal strands, and, as it does so, it pulls open the space between this strand and the next one and bends the intermediate connectors into the new plane. The result is certainly not the effect of a pushing force, applied from beyond or above the plane of feed, as in Pitkin. It certainly is the result of a pulling strain, applied in the plane of the expanded sheet, as in Curtis. A detailed discussion of the operation involved would serve no good purpose. It is enough to say that, taking Curtis and Pitkin as the prototypes of differentiated classes, we feel confident that defendant's device must be classified with Curtis; and, consequently, infringement must be found.

We see no vital distinction in the fact that Curtis' machine shows a pull transmitted from the further margin through the entire expanded portion, while defendant's bending and turning force comes directly from the next strand, and is exerted strand by strand. Theoretically, Curtis completes his expansion strand by strand; practically, he probably does not. In theory, defendant's cam or abutment has served its full office when it has turned a strand away in the other plane and bent the connectors; in practice, the cams are continued so that they control the whole expanding portion. The essence of Curtis' invention—turning the slitted sheet at an angle as it flows over the diagonal edge of the support—is present just as much if the effective strain comes from the nearest strand as if from one or several further away. There are claims which say or imply that this operating pull is to come from the further margin of the sheet, according to the form shown in the drawing; not so with claim 3.

Claim 5 we think controlled by the same consideration as claim 3, and it also should be held infringed. Claim 1 when compared with other claims cannot well be confined to a device having the diagonal edge which we think the essence of the invention. It seems intended to be broad enough to reach a sheet moving laterally over the edge of the support. Unless it has this construction, it does not seem to add anything to the other claims, and, with this construction, we think it too broad to be valid. Claims 8 and 10 are invalid for the same reasons. In view of our other conclusions, it is not very important whether claim 9 is valid and infringed; but we think it is. The claim was not rejected on Pitkin, does not contain the limitation to "drawing," and infringement is clearer than of claim 3. As to validity, Pitkin comes nearest to anticipating. Since Curtis regards his form as duplex, divided by a longitudinal center line, he must treat Pitkin from the same standpoint; but we cannot regard Pitkin's series of lower cutting laws, diagonally arranged, as the full equivalent of Curtis' diagonal edge over which the previously slitted sheet is turned and opened. We are not here constrained by the estoppel from any action by Curtis in the Patent Office.

The decree below is reversed, and the case remanded for the entry of a new decree in accordance herewith and pursuant to the disclaimer practice pointed out in Westinghouse Co. v. Cooper Co., 245 Fed. 463, 470, 157 C. C. A. 625. Appellants will recover one-half the costs of this court.

CENTRAL RY. SIGNAL CO. et al. v. JACKSON.

(District Court, E. D. Pennsylvania. December 5, 1918.)

No. 1625.

1. PATENTS ⊂=114—SUIT TO OBTAIN PATENT—NATURE OF PROCEEDING—"INDEPENDENT PROCEEDING."
A suit in equity, under Rev. St. § 4915 (Comp. St. 1916, § 9460), to obtain issuance of a patent, although necessarily part of the application for a patent, is an independent proceeding, and not appellate.

2. PATENTS ⊂=114—SUIT TO OBTAIN PATENT—NOTICE TO ADVERSE PARTIES.
In a suit in equity, under Rev. St. § 4915 (Comp. St. 1916, § 9460), to obtain issuance of a patent, the court will not make an order for substituted service on a defendant, but will leave complainant to give such "notice to adverse parties" as he deems sufficient.

In Equity. Suit by the Central Railway Signal Company and Frank Dutcher against George B. Jackson. On motion for order directing substituted service. Denied.

See, also (D. C.) 238 Fed. 625.

William Steell Jackson, of Philadelphia, Pa., for plaintiffs.
Howson & Howson, of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. It appears that a motion made in this case has not formally been disposed of. A statement of the record facts will present the purpose of the motion and effect of its allowance.

It is sufficient for this purpose to state that application was made for a patent, on a claimed invention of the plaintiff Dutcher, to the Commissioner of Patents. A like application was also made by the defendant, and an interference was declared, and an award of priority of invention was given the defendant. This proceeding passed through all the successive stages, original and appellate, and resulted in the final refusal of the Commissioner to issue a patent to the plaintiffs. The present bill in equity was then filed under the provisions of R. S. § 4915 (Comp. St. 1916, § 9460).

The defendant came into this jurisdiction for the sole purpose of testifying in the form of the taking of his deposition in some part of this patent litigation. He was here served with the subpœna, and a copy of the bill in this case, and was to all substantial intents and purposes so served when on the witness stand. This service was on motion set aside in deference to the general principle of comity, and the principle was strictly applied, for the reason that it would not answer to its purposes, unless it was so far recognized that a witness could come into a foreign jurisdiction, relying upon his immunity from service of process. If the immunity was sometimes granted and sometimes denied, the practical result would be the same as if no immunity was accorded. To give practical value to the principle, it must therefore be enforced and never denied, unless the case comes within the recognized exceptions. A practical test of the value of the principle is that the exceptions should be clearly enough defined,

so that counsel would be able to advise in a given case whether immunity from service would be granted or withheld.

Behind many rules of law, however, there is to be discovered a rule of policy as well as a principle of right. In such cases, the policy of the law should be served, but never, unless it is unavoidable, at the cost of a denial of a legal right. There is a legal right, indeed, two legal rights, which are to some extent conflicting, presented in the instant case. One is the right of the plaintiff to make application for letters patent, and to pursue this application through the successive appellate actions to which the plaintiff has resorted. He is given by law the further legal right to make his appeal to a District Court, and to obtain the judgment of that court upon his other legal right to the grant of letters patent. It follows from this that no obstacle should be thrown in the way of his assertion of this right.

There is involved, also, however, the right of a defendant to be protected from any judgment or decree which will affect him, unless the court entering the judgment has jurisdiction both of the general subject-matter, of the particular cause, and of the parties. When properly interpreted, the latter means that he cannot be subjected to the judgment of any court unless he is both amenable to and has been served with the process of that court. Whenever there is a conflict between these two rights, the proper attitude of the court is to take jurisdiction of the case, if there can be found any mode of service of its process which brings a defendant before the court.

Generally speaking, there are three fact conditions, under any one of which process may be served. One is that known as personal service. This is always a good service (generally speaking) unless the defendant is for some reason at the time privileged. This method was tried, and it has been adjudged that the defendant was privileged. Another is the equivalent recognized by statutes or otherwise of personal service, as, for illustration, service by leaving a copy of the process at the dwelling house of the defendant, or other authorized place, with an adult there found.

A question of fact has been raised in this case of whether the defendant was so far a resident of this district as that he could be so served. The validity of such a service could be tested by a return setting forth the fact that service had been so made. No resort has been made to such a test.

There only remains, therefore, the third method of service, which is that now attempted, to wit, a substituted service. A trite illustration of such a form of service is afforded by cases in which service is made by publication or otherwise.

The general fact situation in the present case is this: If the defendant has any so-called home jurisdiction, it is in this district, and it is here, if anywhere, that he is amenable to the service of process. It is urged that, if the court cannot acquire jurisdiction of the defendant, the plaintiff is, as a practical consequence, prevented from asserting the right given him by the act of Congress. This would not justify the court in usurping jurisdiction, but it does call upon us to be scrupulously careful not to refuse to take jurisdiction, if such be authorized under R. S. § 4915. This court may have recourse to the

statutes of the state and to the practice in vogue in the state courts in all "civil causes other than equity," etc., under R. S. § 914 (Comp. St. 1916, § 1537). By R. S. § 917 (Comp. St. 1916, § 1543), the Supreme Court is empowered "to regulate the whole practice" in chancery proceedings, and subordinate to this R. S. § 918 (Comp. St. 1916, § 1544), confers a like power upon the District Courts.

The equity rules promulgated by the Supreme Court, under date of November 4, 1912, by rule 13 (198 Fed. xxii, 115 C. C. A. xxii), provide for service of subpœna only by personal service, or by copy left at the "usual place of abode" of the defendant, etc.

The rules of this court as adopted by the then Circuit Court do not seem to specifically provide for any mode of service, except notices of motions, etc., in pending cases.

[1] It is in consequence in effect urged by counsel on both sides of this question that the validity of service is dependent upon the other question of whether such a bill, as has been filed in this case, is an original proceeding or appellate. It is clear that the proceeding is technically not appellate. The statutes relating to the issue of patents provide for successive appeals, the purpose of which is to secure a review of any rulings made, and, if proper, a reversal of those rulings. Such proceedings are strictly and technically appellate. It is likewise clear that section 4915 strictly and technically gives original and independent jurisdiction to the court to adjudge, it is true, the same claim of right which was made in the other proceedings, and to reach a judgment which is different from, and in that sense a reversal of, the ruling made by the Patent Office, but the ruling thus first made remains and is not technically reversed.

This is the view expressed by the court in Butterworth v. Hoe, 112 U. S. at page 61, 5 Sup. Ct. 25, 28 L. Ed. 656. The view thus expressed is entirely consistent with the comments made upon it in Gandy v. Marble, 122 U. S. at page 439, 7 Sup. Ct. 1290, 30 L. Ed. 1223.

The comment that "the proceeding is in fact and necessarily a part of the application for the patent" is ex vi termini obviously true, because the sole purpose of such a bill is to secure the grant of a patent.

The distinction before pointed out, however, remains that the proceeding, though necessarily part of the application for a patent, is an independent proceeding, and not appellate, in the sense of being an appeal from the ruling first made. In other words, although its purpose is to secure the issue of a patent, the issue of which has been refused, it does not seek that issue through a reversal of the ruling first made, but through an independent finding that the applicant is entitled upon the merits of his application to a patent. In a very practical sense the result is a reversal, but such is not its legal purpose or effect.

The correct view, as presented in Butterworth v. Hoe, is that Congress has provided two modes of procedure through and by which a patent may issue. One is the usual application to the Commissioner of Patents. The other is by bill in equity. It is true that resort cannot be had to the latter until recourse has been first had to the former, but the two proceedings none the less are distinct, separate, and independent, and in all other respects than that indicated are in the

alternative. This results in the conclusion that no aid can be accorded the plaintiffs through the expedient of viewing the present proceeding as an appellate one, and we are driven to the provisions of R. S. § 4915, for such aid as is within the power of this court to afford.

The sections preceding 4915 provide for a mode of procedure which may in its course, as it did in this case, reach the Supreme Court of the District of Columbia. That is the high-water mark of that proceeding. Then comes into effect section 4915, which is operative only after the other proceeding has been concluded.

[2] The remedy prescribed is one by bill in equity, and the court having cognizance thereof may proceed to a finding that the applicant for a patent should have one issued to him, and such finding is authority to the Commissioner of Patents to grant letters patent. It is to be observed that what is to be determined is the right of the applicant. There may be cases in which no one has an interest in the question of the issue of the patent other than the interest of the general public. In such cases, the requirement is that a copy of the bill shall be served upon the Commissioner and all the expenses of the proceeding shall be borne by the applicant. There is in this provision recognition of the fact that there may be an "opposing party," and there is the further requirement that the court shall not proceed to an adjudication until after "notice to adverse parties and other due proceedings had."

The purpose to be served by this requirement of notice is obvious, but the proceeding itself in its main purpose and character is not only analogous to, but it is essentially, a mandamus proceeding, directed to the Commissioner of Patents, in which any party concerned may intervene pro interesse suo.

The point is not directly before us for decision, but it is incidentally involved in disposing of the motion made, as our conclusion with respect to the motion is that we should not make any order for a substituted service, but that the plaintiffs in the bill should follow the injunctions of the statute, to which reference has been made, of the service of a copy of the bill upon the Commissioner, or of notice to adverse parties, or both, and should be left free to do whatever in their judgment is a compliance with the statute, as well as a compliance with the requirements of the chancery practice and equity rules with respect to sufficiency of parties. In illustration of the latter requirement, objection might be made to a bill for defect of parties under rule 44 (198 Fed. xxx, 15 C. C. A. xxx). Such objection could then be disposed of. It would be premature to dispose of it now.

A question might also arise whether the court had cognizance of the case on "notice to adverse parties and due proceedings had" to enable it to adjudge the questions involved. This question, as all other questions in the cause, could be determined when the decree came to be entered, whether it were one pro confesso, or after trial on bill, answer, and proofs. R. S. § 4915, it is to be observed, makes no specific provision for the service of a subpœna or a copy of the bill, except in case of the Commissioner, and except, also, as such service may be implied by the requirement of notice and other due proceed-

ings. All such questions as who are necessary parties to such a bill, and whether notice in fact, however and wherever given, is a compliance with the statute, may be determined at the proper time.

The formal motion before us is formally disposed of by being denied without prejudice.

LUTEN v. WILSON REINFORCED CONCRETE CO. et al.

(District Court, D. Nebraska, Lincoln Division. July 24, 1917.)

No. 19.

1. PATENTS ⊂=328—INFRINGEMENT—REINFORCED CONCRETE CONSTRUCTION.
The Luten patent, No. 999,663, for a tension member with an anchor tip for use in concrete construction, *held* not infringed.
2. PATENTS ⊂=328—INVENTION—REINFORCED CONCRETE BRIDGES.
The Luten patents, No. 818,386, No. 853,202, and No. 853,203, all relating to methods of using reinforcing members in concrete arch bridges, *held* void for lack of invention, in view of the prior art.

In Equity. Suit by Daniel B. Luten against the Wilson Reinforced Concrete Company, in which the State of Nebraska intervenes. Bill dismissed.

Russell T. MacFall, of Indianapolis, Ind., and Frank H. Drury, of Chicago, Ill., for plaintiff.

W. F. Moran, of Nebraska City, Neb., for defendant.

Willis E. Reed, Atty. Gen., Dexter Barrett, Deputy Atty. Gen., and Wallace R. Lane, of Chicago, Ill., for intervener.

MUNGER, District Judge. Suit by Daniel B. Luten, alleging infringement of letters patent issued to him. Of these no evidence was submitted relating to patents numbered 852,970, 852,971, 853,183, and 933,771. The patents relied upon are numbered 818,386, 853,202, 853,203, 999,663, but complainant has abandoned all claims, and has asked to dismiss his bill of complaint, which leave will be granted, as to all other claims except as to claims 1 and 7 of patent numbered 818,386, claim 16 of patent numbered 853,202, claims 9, 12, 14, 16, and 18 of patent numbered 853,203, and claim 6 of patent numbered 999,663.

In a general way these patents relate to methods of using reinforcing members in connection with concrete, especially in the construction of arches of bridges.

[1] The claim in patent No. 999,663 is for the use in combination with hardened plastic material, of a tension member with an anchor tip of a spiral of increasing curvature tangential to the tension member and imbedded in the plastic material. Complainant charged that a bridge built by some of the defendants infringed upon this patent. The plans called for the use of a hook at the end of the metallic tension members, but the evidence shows that these plans were not followed, and that the tension members had no curvature at or near the

ends, and reliance was placed upon friction as a bond. As there was no infringement of the patent, no further discussion of it is necessary.

[2] The claim in patent 853,202 reads as follows:

"16. A concrete bridge having a concrete spandrel extended back of the abutments with upright rods or bars imbedded near the ends of the spandrel."

The evidence shows that this form of structure was anticipated by a number of patents and publications, especially by the Von Emperger patent of June 1, 1897, and by the Monier construction.

The claims in controversy in patent 853,203 relate chiefly to the placing of reinforcing and tension members in the arch or floor of the bridge transverse to the axis in connection with other members imbedded in the spandrels. The Monier method of construction completely anticipates any claims of complainant's patent that the defendants' bridge can be said to follow. The defendants' expert is clear upon this point, and the figure and drawings of the Monier patent and the graphic delineation of its use published in the Engineering News of 1893 leave no doubt. The use of a reading glass as a magnifier makes certain the form of construction used in that published article. Other patents, publications, and uses of similar construction show a state of the art such that Luten has no claim to invention for any of these claims that the defendants' bridge has followed.

The remaining patent, No. 818,386, involves two claims. Claim 1 reads as follows:

"An arch having imbedded therein a plurality of tension members passing alternately across the rib, said members being low at the crown and high at the haunches, and each of said members passing across the rib at different longitudinal points from the others, substantially as described."

Claim 7 is as follows:

"An arch having imbedded therein rods, bars or other tension members in two or more series, following one face of the arch rib, thence across and following the other face of the rib, the points of crossing for the different series being angularly or laterally displaced with respect to each other, substantially as described."

These claims attempt to cover the positioning of members where stresses will occasion fractures. The principles that govern the location of the danger points from live loads were old when Luten entered this field. Writers and inventors had indicated the methods of correcting these dangers by the use of tension members substantially as Luten's patent attempts to apply the correction.

In view of the state of the art, Luten cannot be said to have supplied more than ordinary mechanical or engineering skill in giving functions to tension members when applied to the problem of arches upon which is to be imposed a live load.

For these reasons, a decree may be prepared, dismissing complainant's bill.

UNITED STATES v. HIRSCH.

(District Court, E. D. New York. November 11, 1918.)

ARMY AND NAVY ⊂⊃36—OFFENSES BY PERSONS IN MILITARY SERVICE—JURISDICTION OF CIVIL COURTS.

Articles of War enacted August 29, 1916 (Comp. St. 1916, § 2308a), do not deprive the civil courts, either in time of peace or war, of the concurrent jurisdiction previously vested in them over crimes against either federal or state law, committed within the United States, by persons subject to military law.

Criminal prosecution by the United States against Harry Jean Hirsch and 17 others. On plea to the jurisdiction by defendant Hirsch. Overruled.

Melville J. France, U. S. Atty., of Brooklyn, and H. Harvey Harwood, Asst. U. S. Atty., of New York City.

Stephen C. Baldwin, of New York City, for defendant.

CHATFIELD, District Judge. Under a plea denying jurisdiction to the court, motion is made by Harry J. Hirsch, one of the defendants (18 in number) in the above-entitled action, to dismiss the indictment as against him, and for an order directing his release, and that all charges relating to the matters set forth in the indictment be left exclusively, so far as he is concerned, to the military forces of the United States for hearing before a military court, under the present Articles of War.

The indictment charges a conspiracy to defraud the United States, between July 15, 1916, and September 19, 1918, and the commission of overt acts, attributed to each of the defendants, between August, 1916, and August, 1918.

The defendant making the motion is a colonel of the Regular Army detailed to the Quartermaster's Corps. His present application is based upon the language of the Articles of War, adopted by the act of Congress of August 29, 1916, and contained in the Army Appropriation Bill of that date (39 Statutes at Large, chapter 418, at page 650 [Comp. St. 1916, § 2308a]).

This new codification "shall at all times and in all places govern the armies of the United States," and took the place of old section 1342 of the Revised Statutes, which was repealed, in so far as inconsistent with the new law. But it especially provides that all offenses committed prior to August 29, 1916, shall be governed by the law as it stood before that date; that is, by old section 1342 of the Revised Statutes.

It would therefore follow that some of the acts of conspiracy alleged in the indictment might prove to have occurred before August 29, 1916, and would be considered under the provisions of former section 1342, while the new articles would be in force as to matters occurring after that date.

But if the indictment will lie against the defendant Hirsch, under the new section 1342, its validity would not be affected by the amend-

ment of 1916, for it might include any act within three years prior to the filing of the indictment. On the other hand, if the defendant Hirsch's contention is correct, further consideration would be required, in order to determine whether any part of the alleged conspiracy, or the commission of overt acts, antedated August 29, 1916.

Passing to a consideration of the point really presented, we find that under the previous Articles of War concurrent jurisdiction was given to the civil courts and to courts-martial to deal with any offender who happened to be at the time within the court's jurisdiction. Under this law both courts-martial and civil courts necessarily respected the jurisdiction which was being exercised by the other, and the court first apprehending the defendant was thus able to proceed with a trial, without reference to the concurrent jurisdiction of the other. In the same way double jeopardy was avoided. Each statute was therefore valid, and constitutional rights were entirely preserved.

This construction was upheld in the cases of Dynes v. Hoover, 61 U. S. 65, 15 L. Ed. 838, Coleman v. Tennessee, 97 U. S. 509, 24 L. Ed. 1118, Grafton v. United States, 206 U. S. 333, 27 Sup. Ct. 749, 51 L. Ed. 1084, 11 Ann. Cas. 640, and Franklin v. United States, 216 U. S. 559, 30 Sup. Ct. 434, 54 L. Ed. 615.

The new Articles of War embodied many paragraphs worded in exactly the same way as those previously in force, but new sections have been added, and some sections have been so changed as to require construction by the courts with reference to the matters considered in the cases above cited.

The general paragraph conferring jurisdiction read:

"The armies of the United States shall be governed by the following rules and articles."

To this has been added the words "at all times and in all places." This change was evidently inserted to cover the needs of the army when on foreign soil (as, for instance, in Mexico), and to avoid the possible contention that the "armies of the United States" included only the forces of the United States within its borders. But the defendant here claims that the intent of the provision is to exclude, even within the United States, the exercise of any jurisdiction, other than that of the Articles of War, over the members of the army.

Article 12 is new, and gives general courts-martial "power to try any person subject to military law for any crime or offense made punishable" by the Articles of War. The defendant argues that this excludes the exercise of jurisdiction by any civil court.

A new section (article 15) states that the jurisdiction conferred upon courts-martial "shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction" over offenses triable by those bodies. The point is made by the defendant that the words "civil tribunals" are not specifically included, and it is argued that their former concurrent jurisdiction is thereby inferentially repealed.

The new articles show recognition of the existence and procedure of civil criminal courts by the wording of the authority to subpœna wit-

nesses before courts-martial and by the authority to punish those who disobey subpœnas, through a proceeding "in the District Court of the United States," and add the words "jurisdiction being hereby conferred upon such courts for such purpose" (articles 22 and 23). This last provision was evidently made necessary from the fact that the District Courts of the United States did not have, prior to this legislation, jurisdiction to punish for contempt committed before a court-martial or in defiance of its subpœna. But the defendant argues that these words show a limitation of the jurisdiction of the District Court to the express powers therein conferred.

The other sections of the new Articles of War present no phase of the present subject different from the former articles until we reach section 74, under the general subdivision of "Arrest—Confinement." Article 74 (which takes the place of the former article 59) provides that:

"When any person subject to military law * * * is accused of a crime or offense committed within the geographical limits of the states of the Union and the District of Columbia, and punishable by the laws of the land, the commanding officer is required, except in time of war, upon application duly made, to use his utmost endeavor to deliver over such accused person to the civil authorities, or to aid the officers of justice in apprehending and securing him, in order that he may be brought to trial. Any commanding officer who upon such application refuses or willfully neglects, except in time of war, to deliver over such accused person to the civil authorities or to aid the officers of justice in apprehending and securing him, shall be dismissed from the service or suffer such other punishment as a court-martial may direct."

The words "except in time of war" are old, but are of course significant at the present moment, for the case at bar arises when the United States is at war, and the evident purpose of the section is to provide that an army officer is not to be delivered over or hunted out and run down by the army upon the demand of the civil authorities, if his services in time of war are required in the army.

The new words, "the geographical limits of the states of the Union and the District of Columbia," evidently specify the territory between the Atlantic and Pacific Ocean and between the Canadian boundary and the Mexican line, and they thus include the civil authorities of the United States; but the section is not limited to crimes or offenses committed against a state or its inhabitants or the District of Columbia, or under state laws, as opposed to laws of the United States.

The penalty of dismissal from the service applies as before to a refusal or neglect to aid the the civil authorities "except in time of war." This bears out the contention of the government that the law does not and cannot mean to prohibit all delivery of accused military persons during war time. On the contrary, it is evidently intended to give the military officers discretion in war time as to whether a person should be delivered, but to make such delivery compulsory when the nation is not at war.

When we reach articles 83, 84, 87, 92, 93, and 94, we find definitions of military offenses similar to those defined as crimes in the civil Penal Code.

Article 92 provides the penalty of death for murder or rape "as a court-martial may direct; but no person shall be tried by court-martial for murder or rape committed within the geographical limits of the states of the Union and the District of Columbia in time of peace." This adds to the language of old section 58 the words quoted above, but the provision conferring jurisdiction is no broader than the words of the old statute, "shall be punishable by court-martial."

Article 93 provides in similar words with reference to the other crimes formerly covered by section 58.

Article 94 is as follows:

"*Frauds against the Government.*—Any person subject to military law who makes or causes to be made any claim against the United States, or any officer thereof, knowing such claim to be false or fraudulent; or

"Who presents or causes to be presented to any person in the civil or military service thereof, for approval or payment, any claim against the United States or any officer thereof, knowing such claim to be false or fraudulent; or

"Who enters into any agreement or conspiracy to defraud the United States by obtaining, or aiding others to obtain, the allowance or payment of any false or fraudulent claim;" etc.

The remaining articles present no particular variation from the questions stated above. Article 96 and article 104 are general sections to cover matters not before expressly defined, and by a separate section of the Appropriation Law of August 29, 1916, the provisions of the Articles of War are in some respects not to take effect until March 1, 1917. Article 92, which includes definition of the offense similar to that in the present indictment, was, however, to take effect at once.

The question of martial law during the occupation of a military force is not involved in this application. Under such conditions the Articles of War may become the sole law of the place, and the civil law or territorial laws would be suspended. Even in a foreign country, the new Articles of War would be the code under which the army would be governed. Coleman v. Tennessee, supra, 97 U. S. at pages 516 and 517, 24 L. Ed. 1118.

But the question involved in the present motion is simply whether the new Articles of War have repealed by act of Congress the concurrent jurisdiction previously vesting under the Constitution in civil courts for the trial of crimes committed by an officer or member of the army, and, if not, whether the new language produces that effect in time of war, even though the army does not act under the Articles of War, to exert its own, and in such case superior, jurisdiction to deal with the charge by retaining physical control of the accused, and by proceeding to hear and dispose of the case before relinquishing him for civil arrest (article 74).

But in these respects the new Articles of War show no intent on the part of Congress to limit jurisdiction over crimes to courts-martial even in time of war. The language of the sections is in each case evidently intended to confer jurisdiction on the army; but it does not, except in express instances, restrict such other jurisdiction as may already exist. Nor does the language support the proposition that the changes were intended by inference to effect a different result.

The defendant has drawn a wrong conclusion from the words extending concurrent military jurisdiction over certain matters, which previously had been debatable, and has sought to show a similar extension in the nature of the jurisdiction conferred. But the words which actually create the jurisdiction (as opposed to those defining its application to specific matters) are the same in the new law as in the old.

The defendant has likewise incorrectly interpreted the words defining the territory within which the Articles of War shall be in force, by assuming that these words are made a limit to, and a part of, the definition of what kind of jurisdiction shall be exercised therein. His error in interpretation of the words "within the geographical limits of the states of the Union and the District of Columbia" has been already pointed out, and further illustrates the idea on his part that these words affect the nature of the jurisdiction, itself, which is conferred within those limits.

But there is nothing in the entire Code as amended which supports the idea that the law in its present form confers sole jurisdiction upon the military authorities in any different way, or of any different nature, than that which was conferred by the law previously in force and interpreted by the cases above cited.

In the present case the defendant has in effect been delivered over to the civil authorities, even in time of war, by the mere fact that, without interference from his superior officers, he has been subjected to arrest, and has been, and is being, allowed to appear to answer the charge. The jurisdiction of the civil court is therefore complete, and will continue so far as is proper and necessary, giving due regard to the needs of the country as expressed through its military officers. His limits of confinement have been enlarged on bail, but the rights of this court to proceed when he is before it, in the usual meaning of those words, have been in no way repealed by the passage of the present Articles of War.

The defendant will therefore be required to plead generally to the indictment, and his special plea to jurisdiction will be overruled.

ALTMAN v. NEW HAVEN UNION CO.

(District Court, D. Connecticut. November 2, 1918.)

No. 1427.

1. COPYRIGHTS ⇐83—SUIT FOR INFRINGEMENT—EVIDENCE.
   In a suit for infringement of copyright, a receipt given by complainant on settlement with another infringer, from whom defendant obtained the photograph which it copied, *held* not admissible as a defense, although competent as bearing upon the equities between the parties; the rule being no different in copyright cases than in other actions.
2. COPYRIGHTS ⇐9—SUBJECTS OF COPYRIGHT—PHOTOGRAPH.
   A photograph of a high school class, made under an arrangement by which the photographer was to receive for his work only the proceeds of such copies as he might sell, *held* copyrightable by him.

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3. COPYRIGHTS ⟸77—INFRINGEMENT—JOINT INFRINGERS.
One who obtained and published a copy of a photograph, which was an infringement of a copyright, but without knowledge of the fact, was not a joint, but an independent, infringer.

4. COPYRIGHTS ⟸52—SUIT FOR INFRINGEMENT—DEFENSES.
That defendant innocently published a copy of a photograph, and had no knowledge that it was copyrighted, is not a defense to a suit for infringement of the copyright.

In Equity. Suit by Charles Albert Altman against the New Haven Union Company. Decree for complainant.

Arthur W. Chambers, of New Haven, Conn., for plaintiff.
Philip Pond, of New Haven, Conn., for defendant.

THOMAS, District Judge. This is a bill alleging infringement of a copyrighted photograph, containing the usual prayer for an injunction and damages, and the action is based upon the provisions of the Copyright Law of March 14, 1909, c. 320, 35 Stat. 1075, as amended by Act Aug. 24, 1912, c. 356, 37 Stat. 488, Act March 2, 1913, c. 97, 37 Stat. 724, and Act March 28, 1914, c. 47, 38 Stat. 311 (Comp. St. 1916, § 9517 et seq.).

The answer is in effect a general denial, and sets up certain facts which show the circumstances under which the picture was printed, all of which amount to a confession and avoidance of the claims of the plaintiff, that the photograph was not copyrightable, and that the plaintiff was paid in full by reason of the receipt given for $300 in settlement of a suit in this court entitled Altman v. New Haven Printing Co. et al.

The relevant facts upon which this decision must be based are found to be as follows:

The graduating class of the New Haven High School of 1914, acting through a committee duly appointed, arranged with The New Haven Printing Company to print its Class Book, which was to contain, among other things, a group photograph of the class.

In order to secure this photograph, a committee of the class was appointed to make the necessary arrangements, to the end that a proper photograph could be secured, which could also be sold separately to such of the individual members of the class as desired to secure a copy.

After conferring with various photographers, arrangements were finally made with the plaintiff, whereby he was to take the picture of the class on the front steps of the High School building, and for which he was to receive $1.50 for each photograph sold to such members of the class as desired to purchase a copy at that price. The plaintiff was under no other contract as to price than as stated; i. e., no arrangement or contract was made whereby he was to receive any pay for his services as a photographer. At the appointed time the class, some 500 in number, assembled on the front steps of the High School. The plaintiff is, and has been for some years past, one of the leading photographers of the city, and has had a wide and varied experience

in taking all kinds of indoor and outdoor photographs, and thoroughly understands the art. He grouped the members of the class, arranged their positions, and did all of the work necessary to secure a proper negative, from which an acceptable photograph could be made, and which resulted in a pleasing, satisfactory, and, so far as such a production may be, an artistic photograph, at least sufficiently so as to bring it within the realm of those things which may be copyrighted in accordance with the provisions of the Copyright Law of 1909, as amended.

As soon as the photograph was developed, steps were immediately taken by the plaintiff to protect his rights in the same by applying to the Copyright Office in Washington, and pursuant to the steps so taken, and in conformity with law, on May 23, 1914, plaintiff received his certificate of registration under the seal of the Copyright Office. The negative from which the photographs were printed was marked by the plaintiff in conformity with the provisions of law, so that all photographs made from the negative were properly and legally marked.

In due time the proper members of the class committee submitted the photograph to the New Haven Printing Company for entry in the Class Book. The photograph was too large, and it was decided that it was necessary to cut the picture down; hence the members of the committee having charge of the matter cut the top and bottom of the photograph off. In doing so, all of the background and foreground were taken away, leaving only the members of the class, with a scant margin around the four sides of the picture. In cutting off the top or background of the picture, all of the High School building shown in the original disappeared; and in cutting away the front or foreground, all of the street and some of the sidewalk disappeared, and with them the copyright marks: "© Altman, New Haven, Conn. N. H. H. S. 1914."

In this reduced condition the photograph was taken by the class committee to the Stoddard Engraving Company, which made a copper cut from which the New Haven Printing Company printed the pictures. But it was finally decided that, instead of including the picture as part of the book, it should be printed separately and distributed with the book to each member of the class purchasing the book, and some 350 or more were thus printed by the New Haven Printing Company and distributed to the members of the class. This reduced the sale of photographs the plaintiff expected to make, because by purchasing the Class Book each member thereby secured a copper-plate photo identical with the original photo, except for the trimming and cutting off as above described. In fact, the sales by the plaintiff of his original photograph were so few as to make them negligible.

The defendant is, and has been for many years past, the publisher of one of the large newspapers of the state, printing a daily and Sunday edition of many thousand copies, and has a wide and extensive circulation in the city of New Haven and vicinity, and is always active in advancing the civic interests of the city, and takes a lively interest in all that pertains to the educational welfare of the community. Through one of its reporters, duly assigned by the manager of the

paper for such purpose, it secured one of the photographs of the class, made from the Stoddard Engraving Company's plate and printed by the New Haven Printing Company, for the purpose of using the same by way of embellishment to a "story" or news item in its issue of Sunday, May 31, 1914, concerning the graduating class of the New Haven High School, which was then soon to graduate. From such photograph, in its own photo-engraving rooms, a proper cut was made, and the picture printed in the Sunday issue of May 31, 1914. This was done without knowledge that the original photograph was copyrighted, and without knowledge, so far as the evidence shows, that the picture then in its possession and printed in its newspaper was even a copy of a copyrighted photograph. The evidence is conclusive that the acts of the defendant in printing the picture were entirely innocent, and that its violation of the plaintiff's rights, if any, was technical in the highest degree.

[1] On August 25, 1915, the plaintiff brought suit in this court against the New Haven Printing Company, the members comprising it, and the Stoddard Engraving Company for violation of his copyright for the acts above set forth, which suit was on the 13th of October, 1914, settled, and a release given, as appears from the following receipt, which was offered in evidence at the trial of this case, and tentatively received, subject to final ruling at this time:

"Whereas, the Stoddard Engraving Company, a Connecticut corporation, doing business in New Haven, Connecticut, and Edward G. Fenton and Frederick A. Krooner, individually and doing business under the name and style of Fenton & Krooner and New Haven Printing Company, have infringed the copyright of Charles A. Altman, for a photograph entitled 'New Haven High School 1914 Graduating Class'; and

"Whereas, suit has been instituted by said Charles A. Altman against said Edward G. Fenton and Frederick A. Krooner, individually and under the name and style of Fenton & Krooner and New Haven Printing Company, and the same is now pending in the District Court of the United States, District of Connecticut; and

"Whereas, the said Stoddard Engraving Company and said Edward G. Fenton and Frederick A. Krooner, individually and as Fenton & Krooner and as New Haven Printing Company, agree to discontinue said infringement:

"Now, therefore, in consideration of the sum of three hundred dollars ($300) in hand paid, the receipt of which is hereby acknowledged, I do hereby relinquish any and all claims I have against the said Stoddard Engraving Company, said Edward G. Fenton and Frederick A. Krooner, individually and under the name and style of Fenton & Krooner and New Haven Printing Company, arising out of said infringement.

"Dated at New Haven, this 13th day of October, 1914.

"Charles A. Altman,
"By George E. Hall, His Attorney."

Not until April 12, 1915, and nearly a year after the infringement complained of, did the plaintiff bring this suit against this defendant. While this fact has no bearing upon the decision to be reached, it has some bearing upon the inferences to be drawn as affecting the equities of the case, taken in connection with other facts bearing upon this feature of it.

Before discussing the law applicable to facts, it is necessary to now rule upon the question of the admissibility of the receipt above quoted,

which was offered as a bar to a recovery in this action, having been pleaded as a defense in the answer. The fact that it was pleaded in the answer does not of itself make it admissible. It would not be contended by counsel, I apprehend, that if A. was suing B. in a state court for violation of a personal right, that a receipt in full in an action between A. and C. for the violation of a personal right, even of the same kind and character, offered as a bar to a recovery, would be admissible. Is there any rule of evidence peculiar to copyrights which would change the ruling in other cases?

In Beifeld v. Dodge Pub. Co. (C. C.) 198 Fed. 658, Judge Ward, in a suit for infringement of a copyright on a painting sold to plaintiff and copyrighted in his name, excluded correspondence between the artist and a third party, as to the publication of a sketch of the picture from which defendant's copies were printed, because relating to transactions between third persons.

The rules of evidence in copyright cases are the same as in other cases (16 Cyc. 382, 821), and I am unable to find any authority to the contrary, and so the receipt, for the purpose for which it was offered—i. e., to defeat the action—is excluded, but it may be admitted as bearing upon the equities between the parties.

Having thus disposed of the receipt, let us now discuss the defense set forth that the photograph was not copyrightable.

[2] Prior to 1865 it was held that a photograph was not a "print, cut or engraving," within the meaning of the earlier law, and was not therefore a proper subject of copyright. Congress, however, in 1865, extended copyright protection to negatives and photographs by expressly including them among the articles for which copyright was provided. Act March 3, 1865, c. 126, 13 Stat. 540. This express designation of photographs has been continued in all subsequent statutes. Act July 8, 1870, c. 230, § 86, 16 Stat. 212 (R. S. § 4952); Act March 3, 1891, c. 565, 26 Stat. 1107; Act Jan. 7, 1904, c. 2, 33 Stat. 4; Act March 3, 1905, c. 1432, 33 Stat. 1000. Although it was questioned whether a photographer is an author, and a photograph a writing, within the constitutional provision under which copyrights may be granted, the constitutionality of the act was sustained. Thornton v. Schreiber, 124 U. S. 612, 8 Sup. Ct. 618, 31 L. Ed. 577; Burrow-Giles Lith. Co. v. Sarony, 111 U. S. 53, 4 Sup. Ct. 279, 28 L. Ed. 349; Harper v. Kalem Co., 169 Fed. 61, 94 C. C. A. 429.

Accordingly, since the act of 1865, photographs have been, and now are, copyrightable as such, and photographers have frequently been protected in the enjoyment of a copyright in their photographic productions. Thornton v. Schreiber, supra. The basis and justification of such copyrights is the undeniable fact that a photograph may embody original work and artistic skill, and be in fact an artistic production, the result of original intellectual conception on the part of its author. Pagano v. Chas. Beseler Co. (D. C.) 234 Fed. 963; Gross v. Seligman, 212 Fed. 930, 129 C. C. A. 450; Bamforth v. Douglass Post Card Co. (C. C.) 158 Fed. 355. The fact that the photographer arranged the light, the grouping, the posing, and other details of a photograph, so as to produce an artistic and pleasing picture, is sufficient to sustain

a copyright for such photograph. Burrow-Giles Lith. Co. v. Sarony, supra; Pagano v. Beseler Co., supra.

Under the facts found and the law, which is clear and explicit, the photograph here under discussion was clearly copyrightable.

The material allegations of the bill have been satisfactorily established by competent evidence to show, that under the decisions of the cases cited, the plaintiff had a valid copyright, and was the lawful owner of the copyright secured upon the photograph taken of the group entitled "N. H. H. S. 1914."

Further facts set forth in the answer by way of defense suggest that the defendant claims that the property right in this photograph belonged to the high school class. This would be true, provided the committee of the high school and the plaintiff had entered into a contract whereby the high school committee was to pay the photographer a fixed price for his services. In such an event the defense pleaded would avail the defendant, but from the evidence no such situation is disclosed. On the contrary, the proof is conclusive that the plaintiff was to take the group picture and charge each individual who saw fit to make a purchase of him $1.50 per photograph. Hence there is nothing consistent in these facts with the contention that the property right in the photograph belonged to the high school class or to the committee representing it.

Where the photographer takes the portrait for the sitter under employment by the latter, it is the implied agreement that the property in the portrait is in the sitter, and neither the photographer nor a stranger has a right to print or make copies without permission from the sitter. Moore v. Rugg, 44 Minn. 28, 46 N. W. 141, 9 L. R. A. 58, 20 Am. St. Rep. 539. Where, however, the photograph is taken at the expense of the photographer and for his benefit, the sitter loses control of the disposition of the pictures, and the property right is in the photographer. Press Pub. Co. v. Falk (C. C.) 59 Fed. 324. So here, no other conclusion is possible, under the evidence, save the one here reached, that the plaintiff was the lawful owner of the right in the photograph, bound only to sell each photograph at a price not to exceed $1.50 to each member of the class desiring to purchase one. By no possible stretch of the evidence could it be said that the class had or owned the right in the photograph.

[3] As to the next defense set forth in the answer, but little need be said in view of the testimony. It is alleged that the defendant was a joint offender with the Stoddard Engraving Company and Fenton & Krooner, individually and doing business under the name and style of the New Haven Printing Company. The doctrine of contributory infringer is not in the least applicable, in view of the testimony and finding of facts. In order that the defendant might successfully avail itself of this defense, it would have to appear from the evidence that, at the time of the transactions between the Stoddard Engraving Company and the New Haven Printing Company, the defendant had knowledge of the arrangements and participated in them, sanctioned the violation of the plaintiff's rights, and that its violation of the plaintiff's rights was part of that transaction. Harper v. Shoppell (C.

C.) 28 Fed. 615. Of course, it is manifest that such was not the case; but, on the contrary, the defendant was in ignorance of that transaction, and had no knowledge of it.

[4] And as a last defense the defendant pleads, and the court finds as a fact, that its infringement was entirely innocent. Under the law, is that a defense? The law is decisive and clear on this point, and rules against the defense, for it has been repeatedly held that ignorance of a copyright, or honest intention, affords no defense to an action for infringement.

In Morrison v. Pettibone (C. C.) 87 Fed. 330, at page 332, the court said:

"The authorities are clear that the question of knowledge or intent does not enter into consideration upon the issue of infringement."

In Stern v. Jerome H. Remick & Co. (C. C.) 175 Fed. 282, Judge Hand said:

"It is not necessary that the defendant should have intended to violate the copyright of the plaintiff. He had means of knowledge from the copyright office that the song had been in fact copyrighted; and he, like any one else, took his chances when he published the song without any inquiry."

Judge Hollister, in Meccano v. Wagner (D. C.) 234 Fed. 912, at page 921, said:

"Intention is held to be immaterial, if infringement otherwise appears."

The author's property is absolute when perfected by copyright, and the intent or purpose of an invasion is nowhere made an excuse for it.

The defenses pleaded being of no avail, in view of the law and evidence, the plaintiff is entitled to a judgment, and section 25 of the statute provides in this connection:

"That if any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable:

"(a) To an injunction restraining such infringement;

"(b) To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, * * * but in case of a newspaper reproduction of a copyrighted photograph such damages shall not exceed the sum of two hundred dollars nor be less than the sum of fifty dollars." Comp. St. 1916, § 9546.

In deciding the amount to be awarded, the court should take into consideration all the facts and circumstances of the case. Here we have an innocent infringement, for which suit was not brought for nearly a year, and after a substantial settlement for the real damage done the plaintiff, which was the negligible sale of the original photograph, and while the court would not be permitted by law to speculate as to the profit the plaintiff would have enjoyed, had he been so successful as to sell one copy to each member of the class, it is a fair conclusion that the printing in the Sunday edition of the New Haven Union of the class picture did not cost the plaintiff the loss of a single sale of the original photograph, especially when one carefully examines a copy of the newspaper containing the picture. But Congress has seen fit to fix the minimum recovery at $50, below which this court cannot assess the damages, on the theory, presumably, that proof of the actual dam-

age would be very difficult, if not impossible, but that always some damage would result from such an infringement, which would not and could not be less than $50. The law of the case is with the plaintiff, the equities with the defendant, and the equities justify the court in giving every consideration possible to the defendant in deciding upon the amount the plaintiff may recover.

The plaintiff is entitled to an injunction, and it may issue; but, in view of the highly technical character of the infringement, and for the reasons above expressed, I am constrained to order that the plaintiff may recover judgment for $50, without costs.

Ordered accordingly.

UNITED STATES v. STILSON et al.

(District Court, E. D. Pennsylvania. November 26, 1918.)

No. 114.

1. CRIMINAL LAW ⟸921—NEW TRIAL—GROUNDS.
   The admission in evidence in a criminal case of admissions of defendant, though erroneous, is not ground for new trial, where the fact admitted was not really in controversy, and was independently proven.
2. CONSPIRACY ⟸40—CRIMINAL CONSPIRACY—PERSONS CHARGEABLE.
   Where offenses are being committed, of such character that they are necessarily the result of concert of action all who participated in the things which are done resulting in such offenses may, if the inference fairly arises out of everything which has been done, be found guilty of conspiracy to commit the offenses.
3. CRIMINAL LAW ⟸915—NEW TRIAL—INDICTMENT—CONSPIRACY.
   In view of Rev. St. § 1025 (Comp. St. 1916, § 1691), providing that no indictment shall be deemed insufficient by reason of defects in matter of form which do not tend to the prejudice of defendant, an indictment *held* not fatally defective, on motion for new trial, because it charged in separate counts a conspiracy to commit acts which constituted offenses under different statutes.
4. CRIMINAL LAW ⟸814(1)—TRIAL—INSTRUCTIONS.
   Every charge to a jury ought to reflect the real issue arising out of the evidence, and also as presented in the arguments addressed to the jury.

Criminal prosecution by the United States against Joseph V. Stilson, Joseph Sukys, K. Vidikas, and J. V. Stalioraitis. On motion in arrest of judgment and for new trial. Denied.

Francis Fisher Kane, Owen J. Roberts, and Samuel Rosenbaum, all of Philadelphia, Pa., for the United States.

Henry John Nelson and Henry John Gibbons, both of Philadelphia, Pa., for defendants.

DICKINSON, District Judge. The spirit of frank and candid discussion of the legal merits of the case and defense which have been manifested throughout by counsel, not only justifies, but calls for, full consideration of all the points which counsel deem worthy of discussion. We shall therefore follow the line of thought presented by the

arguments, although discussing the points involved in a somewhat different order.

1. First, with respect to the second point (reason 5) discussed by counsel. The defendants asked for a severance at the trial. Following the denial of this motion, a demand was made for the allowance of peremptory challenges to the limit which would have been allowed in the aggregate, had the defendants been separately tried. Perhaps the only comment for which this reason for a new trial calls is afforded by that made by counsel in moving for the severance, and demanding on behalf of each defendant the full number of challenges given by the act of Congress to all of the defendants jointly. The comment in effect was that it was made with the knowledge that the unbroken practice in the trial of cases in the courts of the United States was in line with the denial of the motion and of the claimed right of challenge. This was accompanied with an expression of the expectation of counsel that the trial judge would feel constrained to follow these precedents. This expectation was realized. As the trial judge did not feel at liberty to depart from the established practice, and as the same view is still entertained, no discussion of the principles of law involved seems to be called for, inasmuch as it is deemed unnecessary to vindicate a practice authoritatively established. Any relief to which the defendants may feel themselves entitled must be accorded by an appellate court.

2. Again, with respect to the question of the constitutional freedom of the press being involved, which is discussed by counsel as point 6 (reason 9). This may be passed with a very apt quotation from the brief of counsel. It is there recognized that, so far as a trial court is concerned, the question has been settled, but it is raised because (and here comes in the quotation) "hope springs eternal in the human breast," and the hope is expressed that the line of cases which admittedly rule the question against the defendants may be overruled. This court, however, is, of course, not asked to overrule them.

3. The point discussed as point 3 (reason 6) calls for nearly the same comment. A search warrant had been regularly issued, under the authority of which papers and things had been seized. These were subsequently offered in evidence. One of the defendants made certain statements at the time of the visit of the officers of the United States in serving the warrant.

It is not denied (in fact, is almost categorically conceded) that the weight of authority at least (to quote the briefs submitted) justifies the admission of the evidence which was admitted. Several additional observations may be made. The papers which were seized were so seized, not only by authority of a warrant for the purpose regularly issued, but they were not the papers of the defendants, but of the publishing corporation. Again, the papers consisted in the main of the files of the Kova publication, and the seizure was of little practical importance, beyond the facility thereby afforded the authorities to examine the publications as they chronologically appeared, and saved them the time and trouble of collecting them elsewhere.

[1] A like observation may be made as to the admissions made by the defendants. They were admissible because clearly voluntary. The

presence or absence of this finding is admittedly the test of admissibility, and the finding is not in question. Here, again, the point is robbed of all practical value because of the circumstance that the fact admitted was not in real controversy and was independently proven. Sparf v. United States, 156 U. S. 51, 15 Sup. Ct. 273, 39 L. Ed. 343; Bram v. United States, 168 U. S. 532, 18 Sup. Ct. 183, 42 L. Ed. 568.

4. This brings us to a consideration of those reasons for a new trial which present the substantial defense interposed. The defense is that there was no evidence to justify a finding that the defendants were engaged in a conspiracy to have committed the acts which admittedly are offenses condemned by the Espionage Law. Without going into details, there was the publication of the paper known as Kova, which not only contained articles which in themselves were violations of the law, but which in their whole tone and spirit, and in the tone and spirit of the publication itself, evidenced a defiance of the law and a purpose to oppose the operation of the law. In addition to this, there were other publications, in the form of pamphlets or circulars, which in every line breathed sedition.

The connection of one of the defendants with the commission of these acts was directly and clearly shown. The authorship of some of the articles and circulars was traced to him with satisfying directness. He was shown further to have been a party to the publication and circulation of others. This evidence went to the overt acts averments.

[2] The distinction between the crime of conspiracy and the commission of the offenses which are the object of the conspiracy is clear enough, and sight of this should not, of course, be lost. When, however, offenses against the law are being committed, and are of such a character that they are necessarily the fruit of concert of action, all who participate in the things which are done, resulting in the act which is of this common product character, may, if the inference fairly arises out of everything which has been done, be found guilty of a conspiracy to do what has been done. It is, of course, true that the connection may have been such as to justify no more than a suspicion of participation in the conspiracy, and may evidence nothing more than knowledge that the offenses were being committed, or of an intention on the part of others to commit them. Neither evidence which would warrant such a suspicion nor a finding of the fact of such knowledge would in itself afford a sound basis for a finding of the guilt of conspiracy; but if, in addition to the knowledge, there is evidence of a participation in or connection with the acts which are committed, and this participation or connection was an intentional act, it may support a finding of guilt.

The point is made that so far, at least, as the defendant Sukys is concerned, there was nothing upon which to base a finding that he was a participant in anything in the nature of a conspiracy, beyond the fact that he had to do with the mechanical work of getting out the paper, and the doctrine which was announced in United States v. Newton (D. C.) 52 Fed. 275, is invoked as applicable to his case. When anything which is the common product of several persons is done, that there are gradations or differences of degree in the guilt of those involved may be clear enough. It is also true that the participation of some of those involved may be so casual or so perfunctory, or be of

such an irresponsible character as that they cannot be said in any real sense to be parties to a conspiracy to do the thing which has been done. Such a finding, however, is essentially a fact finding, and is to be determined by the triers of fact.

Bringing the discussion of the principle involved from its statement in the abstract to its application to this concrete case, the evidence against the defendant Sukys was such that the trial judge would not have been justified in withdrawing the case against him from the consideration of the jury, but required the submission of it as it was submitted under what we still think to have been adequate instructions to the jury to enable them to pass upon the question of his guilty participation in what was done, and in consequence his connection with the conspiracy, which the jury found to exist. After a verdict of guilty, the same reasons which controlled the trial judge in submitting the question forbid an interference with the verdict. There remains, of course, the duty of giving all the considerations which affect this particular defendant their due weight in imposing sentence.

[3] 5. In the supplemental paper book which has been submitted the point is made that the indictment under which the defendants were tried is bad for duplicity. The proposition of law that it is bad pleading to incorporate in one count two offenses, made such by different statutes, and calling for different measures of punishment, is a proposition the soundness of which must be admitted. Ammerman v. United States, 216 Fed. 326, 132 C. C. A. 470. This admission, however, does not carry with it the further admission that the principle is applicable to this indictment.

The first count presents the fact of the United States being in a state of war, and that during the time of the existence of this state the defendants entered into a conspiracy to have committed certain acts which at such time were offenses against the law. One of them was the offense of causing insubordination. Another was to obstruct enlistments, and it further charges that in pursuance or furtherance of this unlawful conspiracy the defendants committed certain overt acts, and indicates the conspiracy charge to be that which is defined, and the punishment of which is provided for, in section 4 of the Act of June 15, 1917, c. 30, 40 Stat. 219.

The second count differs from the first, in that it charges that the object of the conspiracy was to bring about the offense of inducing men in the military service to desert; the offense being that defined, and the punishment of which is provided for, in the fifth section of the Act of May 18, 1917, c. 15, 40 Stat. 80.

It is true that we have two acts of Congress declaring and defining the offense of conspiracy. One is that which was re-enacted in the 1909 Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1088 [Comp. St. 1916, § 10165 et seq.]). The other is that which is to be found in section 4 of the Act of June 15, 1917. A conspiracy to have committed any of the acts which are offenses against the law in the Act of June 15, 1917, would have been, within the limitations imposed, an offense against the law under the Criminal Code provision of 1909. The two enactments are substantially the same in their provisions, section 4 of the 1917 act being a re-enactment of the act of 1909, except that its

provisions are limited to the acts declared by that act to be offenses, while the act of 1909 applies to any act which is an offense against the law. It would not, we assume, be asserted that an indictment charging a conspiracy to have committed any of the offenses defined in the Act of June 15, 1917, would not have been good under section 4 of that act. It would not, we assume again, be asserted that an indictment for a conspiracy to have committed the offenses defined in the other sections of the act would not have been a good indictment under the provisions of the Criminal Code of 1909, if there had been no section 4 in the act of 1917.

The offense which the defendants are charged to have conspired to have committed by the second count of the indictment is an offense defined by the Act of May 18, 1917, and is, we think, properly charged as an offense against the 1909 enactment. In the sense intended by counsel, the charge of conspiracy in count 1 is in legal intendment a different offense from the conspiracy charge in count 2. Had the two offenses been charged in one count of the indictment, the count would have been bad for duplicity, and on demurrer would have been so held. It does not follow, however, that an indictment charging the two offenses in separate counts would be open to the same criticism. The question might, of course, be raised by demurrer, and in a sense may be now raised. In view of the provisions, however, of section 1025 of the Revised Statutes (Comp. St. 1916, § 1691), counsel exercised, we think, good judgment in not so raising it. In every real case there is a substantial question of law or fact presented for discussion. Sometimes issues of law and fact are both raised. Sometimes good tactics as well as strategy on the part of counsel calls upon them to bring the stress to bear on one issue and sometimes on the other. When, however, the real issue is one of fact, it is usually the part of wisdom in counsel to meet it as such, and not to obscure the substantial issue through and by raising questions of procedure. There are times, of course, in which the opposite tactics may be wise, but they are exceptional.

Obeying the injunction of section 1025, we must now apply to this indictment the test there prescribed. Applying this test, we are unable to find that there was anything in the form of this indictment which tended "to the prejudice of the defendants." This conclusion is uninfluenced by any of the cases to the effect that the door is closed against the objection now urged, because not made before plea and trial. It is put upon the broad ground that the form of the charge played no part in the trial of the case, and because of this did not injuriously affect the defendants. If counsel, upon a back view of the events of the trial, had changed their minds, and now think anything could have been gained by raising an objection, which they before thought would not have been to the advantage of the defendants to have raised, and were able to show that the defendants had been prejudiced by anything in the form of the indictment, the time of making the objection would not influence us. We are, however, strongly of opinion that counsel exercised good judgment in what they did, and that the defendants were not prejudiced thereby. The case was tried

on its fact merits, and in a very gratifying atmosphere of fairness and of candor throughout.

The argument addressed to us is in effect that the objection now under discussion would not have pertained to the case, if the second count had been abandoned or withdrawn. A verdict upon an indictment containing only the first count would thus admittedly have been good, and this count will support the verdict in the eyes both of the law and of substantial justice.

6. The position that there must be evidence of a conspiracy before overt acts of some of the conspirators can be shown is well taken. We think, however, this principle was recognized and applied in the trial of the case.

It would give undue length to this already over-long opinion to discuss the evidence, in order either to point out what evidence there was of conspiracy, or to discuss the other point of what evidence there was to connect Sukys with it; nor do we see occasion to discuss the objections which have been urged to the charge of the court, beyond making one or two observations. This brings us to the final point in support of the reasons for a new trial which voice objections to what the trial judge said to the jury.

7. As to the connection of Sukys with the newspaper publication, he had written himself down as the individual who was responsible for that publication. This act, as any other act, was open, of course, to explanation, and it cannot be denied that the explanation given might well go far in the direction of reducing the degree of his criminality. In the face of this, however, and the other evidence in the case, no trial judge could have been supported in a refusal to submit the evidence for the consideration of the jury. The consideration which it should receive has already been intimated as one having an important bearing upon whatever sentence should be imposed upon the defendants. The trial judge did not feel called upon to advert to this feature of the defense in the charge, because it had been fully, clearly, and with marked ability discussed by counsel.

[4] With respect to the charge of the court, this observation is to be made: Every charge to the jury, which is a real charge, and not merely a colorless statement of the law and of the issues of fact involved, ought to reflect the real issue arising out of the evidence, and also as presented in the arguments addressed to the jury. It can never be rightly interpreted unless it is read in the atmosphere of the trial. If the parties, in presenting their cause, strip it of all formalities and technical distinctions, and get right down to the marrow of the case, and to a discussion of the substantial questions involved, it is not only helpful to the jury, but inevitable, that the charge should reflect the same spirit. There can never be applied to a charge under such circumstances the canons of criticism to which a treatise on the law of the case could properly be subjected. The attempt was made in the charge to direct the attention of the jury to the distinction between something which had been made an offense against the law and a conspiracy to have that offense committed. It was therefore impressed upon the jury that it was necessary for them to find, not merely a conspiracy, but a conspiracy to have a crime committed; and this carried with it

the further necessity of making clear the essentials of the crime to commit which the defendants were charged with having conspired. We do not see that this was confusing to the jury, and, on the contrary, think it was helpful to them.

The rule for a new trial is discharged, and the United States may move for judgment on the verdict and sentence.

EARN LINE S. S. CO. v. SUTHERLAND S. S. CO., Limited.

(District Court, S. D. New York. November 12, 1918.)

1. CONSTITUTIONAL LAW ⊜72—ENCROACHMENT ON EXECUTIVE—ACTS OF FOREIGN SOVEREIGNTY—LEGALITY.
   A domestic court cannot, without trenching on the prerogative of its own executive, hold invalid the act of a foreign sovereign; so the action of the British Admiralty in requisitioning a British steamer under charter must be deemed legal, in an action in the United States by the charterers against the owner.
2. SHIPPING ⊜58(3)—CHARTER PARTY—REQUISITION OF VESSEL—EVIDENCE.
   In an action for breach of a time charter party by the charterers against the owner of a British vessel, requisitioned by the British Admiralty, *held*, that the requisition was legal and in invitum.
3. SHIPPING ⊜51—CHARTER PARTY—REQUISITION OF VESSEL.
   The requisitioning by the British Admiralty of a British vessel, under time charter excepting restraints of princes, etc., *held* to excuse the owner, a British subject, for refusal in Cuba of cargo which the charterer had directed transported, etc.
4. SHIPPING ⊜38—CHARTER PARTY—REQUISITION OF VESSEL.
   Where a time charter of a British vessel contained the usual breakdown clause, and excepted the restraints of princes, etc., and the vessel was requisitioned by the British Admiralty at a rate lower than the going rate, and there appeared no likelihood the vessel would be released before expiration of the charter, *held*, that the owner was warranted in treating the charter at an end, and in refusing to receive further hire and allow the charterer to collect sums paid by the Admiralty.

In Admiralty. Libel by the Earn Line Steamship Company against the Sutherland Steamship Company, Limited. Libelant given leave to move to amend, and libel ordered dismissed, if no motion is made.

This case arises on a libel in personam in the admiralty by the charterers against the owners of the steamship Claveresk for breach of a time charter party entered into in New York on February 8, 1913, under which the Claveresk was let for "about five years from the time of delivery" within the following limits: United States, West Indies, Central America, Caribbean Sea, Gulf of Mexico, South America not south of Bahia Blanca, Europe, and Africa not east of Port Said. Delivery and redelivery were to be made United Kingdom or continent between Bordeaux and Hamburg, and the hire was £1,320 per month. Clause No. 17 read as follows: "Should the vessel be lost, freight paid in advance and not earned (reckoning from the date of her loss) shall be returned to the charterers. The act of God, enemies, fire, restraint of princes, rulers, and people, and all dangers and accidents of the seas, rivers, machinery, boilers, and steam navigation, and errors of navigation throughout this charter party always mutually excepted." The ship was not to carry "molasses or wet sugar," and there was the usual "breakdown" clause.

The Claveresk entered upon the charter on April 17, 1913, and was used in carrying coal south and ore north between Cuba and the United States

under a subcontract between the libelant and an iron company. On January 26, 1917, when the charter had a little over a year to run, the owners, who were situated at Newcastle-on-Tyne, in England, received a telegram as follows: "Your steamer Claveresk required for government service after completion discharge in West Indies. Formal requisition follows. Please inform date steamer expected available for government service. Transports L Room 108a." This telegram was sent by a subordinate in the office of the Director of Transports, itself a department of the Lords Commissioners of the Admiralty, to which the respondents answered on the same day by telegram as follows: "Telegram received requisitioning Claveresk. This steamer arrived Baltimore January seventeen expect would discharge ore load coals and sail again about twenty-third. Therefore expect now on passage to Felton, Cuba, where due about thirtieth. Ought to be discharged there one day and ready your service end this month. Can you arrange for government agent in Cuba give captain orders? You will doubtless remember when you requisitioned Claveresk in May, 1915, time charterers intercepted our telegrams and prevented captain receiving orders until ship loaded when you released her."

On January 27th one Cyril Hurcomb, for the Director of Transports, sent a letter to the respondents in confirmation of the Director's telegram. This letter inclosed a requisitioning letter and two copies of a pro forma charter party to be executed by the Lords Commissioners of the Admiralty. It stated that it was not proposed at the time to enter into a formal charter, but that hire would be paid in accordance with the agreement attached. It further stated that the ship would be required to load a full cargo of sugar and that the master should apply to A. H. Lamburn Company, Havana, for instructions. The requisitioning letter, which was inclosed, stated that it had been found necessary by the Lords Commissioners of the Admiralty to requisition the steamer under royal proclamation and under the conditions of the pro forma charter party inclosed. It further stated that the rates of hire as fixed for requisitioned ships had been generally accepted by shipowners, and that payments on this basis would be made as soon as possible.

On January 29th respondents wired their captain as follows: "Steamer requisitioned national service by British government apply to Lemborn [sic?] Havana for orders. Telegraph us acknowledging this message. Refuse load iron ore." The master answered on February 1st: "Instructions received. Wiring Laborn [sic?] Havana." On February 2d, Culliford & Clark, shipping agents, wrote the respondents that they had received the following cable from New York: "Notify owners that hire has been paid. If steamer definitely requisitioned, collect hire from admiralty account Earn Line." To which the respondent answered on the same day that, owing to the action of the government, they had been "frustrated" in completing the time charter and that no hire would be received thereafter on their account. This information was conveyed to the libelant in New York by the respondent's agent on February 17, 1917, at the time of refusing a half month's hire. The steamer was discharged at Felton, Cuba, on February 10, 1917, and has since that time been under requisition by the British Admiralty.

On August 3, 1914, the King of Great Britain issued a proclamation authorizing the Lords Commissioners of the Admiralty to requisition any British ship or vessel within the British Isles or the water adjacent thereto. On November 10, 1915, he issued a second proclamation that any British ship registered in the United Kingdom might be requisitioned for the carriage of food stuffs, and that such requisition should take effect on notice thereof served as therein provided. The notice was to be deemed sufficient and effective if addressed to the corporation owner in proper cases, and might be signed by any person authorized for such purpose by the president of the Board of Trade. On March 16, 1916, Parliament passed an amendment to the Defense of the Realm Act declaring that, when the fulfillment by any person of a contract is interfered with by the necessity of such person's complying with any requirement of the Admiralty, such necessity should be a good defense, and no action should be taken against such person for nonfulfillment of his

contract. An analogous amendment was also passed on July 10, 1917, the details of which it is not necessary to set out.

The testimony was taken in London by deposition of Sir Henry Erle Richards, for the libelant, and Charles Robertson Dunlop, Esq., for the respondent, upon the validity of this proclamation and of the requisition made in accordance with it. Mr. Dunlop was of opinion that the prerogative of the Crown authorized it to seize British property anywhere for the defense of the realm, and that this prerogative was limited in no sense by the terms of any proclamation which the King might utter. Sir Henry Erle Richards was of opinion that the prerogative extended only to the seizure of such property within the realm as was necessary for its defense, and that, regardless of the terms of the proclamation itself, the King could not under his prerogative seize property outside the realm. He also thought that the prerogative extended only to the actual seizure of property, and did not include a notice operating in personam upon the individual.

Mr. Dunlop was also of opinion that, the notice of requisition being legal, the owners were bound to obey it, and if they disobeyed would be liable to punishment by fine and imprisonment as for a misdemeanor, without specific statutory authority; also that the Crown could compel the owners to obey by a writ of mandamus issuing from the King's Bench Division of the High Court. He believed that the right itself could also be enforced directly by the Crown's seizing the ship on the high seas, or indirectly in a foreign port if the British representatives at such port had power to refuse clearance papers to the master. On these questions Sir Henry Erle Richards expressed no opinion.

Upon the trial of the cause Mr. Frederic R. Coudert and Lieut. Col. Howard Thayer Kingsbury prayed leave to intervene as amici curiæ, on the ground that they had been retained by the British Embassy at Washington to suggest upon the record that the Claveresk had been requisitioned by the government of Great Britain for government service upon the prerogative of the British Crown, on January 27, 1917, at which time the steamer was at sea; that the period of requisition was indefinite, and became operative on February 10, 1917, that she had remained continuously thereafter in the service of the British government under the orders of the Lords Commissioners of the Admiralty, and that such requisition was a governmental act of the government of Great Britain. This suggestion was evidenced by a certificate under the Embassy's seal, signed by Colville Barclay, British Chargé d'Affaires, in the absence of the British Ambassador. The suggestion was entered upon the record and the certificate received in evidence over the objection of the libelant.

Two points were raised: First, whether the requisition of January 27th was a valid excuse within the "restraints of princes" clause, and whether it justified the respondent in finally withdrawing the Claveresk from her charter on February 17, 1917; and, second, in case this point went against the libelant, whether in this proceeding it might have a decree for the difference between the hire received from the admiralty for the duration of the charter and the charter hire under the charter party.

Upon the second point the respondent raised the question of pleading and of jurisdiction. The libel was drawn for a breach of the charter party by repudiation, and contained no allegations concerning hire received by the owners from the Admiralty. The respondent asserted that under the pleading there could be no such award, and that in any event the action was at most for money had and received which was not properly cognizable in a court of admiralty. To meet this objection the libelant, upon the hearing, was allowed to file a replication setting up as new allegations that hire was due under the pro forma charter party between the Admiralty and the owners, and that the hire was greater than the hire reserved in the charter.

Charles S. Haight and Wharton Poor, both of New York City, for libelant.

J. Parker Kirlin and John M. Woolsey, both of New York City, for respondent.

Frederic R. Coudert and Lieut. Col. Howard Thayer Kingsbury, both of New York City, amici curiæ.

LEARNED HAND, District Judge (after stating the facts as above). [1] The first question in this case is whether the respondents are guilty of a breach of the charter party for refusing to carry ore on February 10, 1917, at Felton, Cuba, a few days before this libel was filed. That question I quite distinguish from their right to repudiate the charter party altogether on February 17, 1917, a point I am reserving for the moment. The libelants object, first, that the action of the British Admiralty was not authorized by the prerogative of the Crown, and could not be an excuse, at least until followed by some threat of compulsion. The act of another sovereign within its own territory is of necessity legal. Underhill v. Hernandez, 168 U. S. 250, 18 Sup. Ct. 83, 42 L. Ed. 456; American Banana Co. v. United Fruit Co., 213 U. S. 347, 29 Sup. Ct. 511, 53 L. Ed. 826, 16 Ann. Cas. 1047; Oetjen v. Central Leather Co., 246 U. S. 297, 38 Sup. Ct. 309, 62 L. Ed. 726; Ricaud v. American Metal Co., 246 U. S. 304, 38 Sup. Ct. 312, 62 L. Ed. 733; Hewitt v. Speyer, 250 Fed. 367, — C. C. A. —. It is quite true that the act of any public official of a foreign state may in fact be illegal by the municipal law of that state, but no domestic court may admit such a possibility without trenching upon the prerogative of its own executive. The presupposition upon which states must deal with each other is that each is responsible for, and so bound by, the acts of its own functionaries. The Invincible, Fed. Cas. No. 7,054. A court may not, therefore, make any assumption contrary to the fundamental presupposition upon which its executive will act. Hence I should not entertain this issue, whether or no the Embassy's certificate were in evidence.

The libelants urge that in Brunner v. Webster, 5 Com. Cas. 167, the court went into the question of the authority of a foreign official under his own law; but I cannot agree. In that case, while the ship was at Beyrut, the owners inquired of a Roumanian official, one Dr. Obregea, whether a cargo of rice might be discharged at Galatz, a place at which he had jurisdiction. Dr. Obregea answered that he should prevent the discharge, and the owners treated it as a restraint of princes. Kennedy, J., held that in his judgment Dr. Obregea's opinion would have been found erroneous, had the ship proceeded, and held that there was no restraint. The point is a narrow one, but it is still quite true that the official had not undertaken to stop the discharge; he had only indicated his purpose to do so, and Kennedy, J., was not undertaking to pass upon the validity of an official act, but to express his doubts as to what would in the sequel have been the definitive action of the Roumanian government, had the owners proceeded to Galatz.

[2] Nor am I impressed with the suggestion that the formal requisition followed the original telegram only because of the respondents' complaisance in its telegraphic answer. It appears to me somewhat naïve to suppose, under such circumstances as then existed, that the British Admiralty made requisitions dependent upon the consent of the shipowner. That the respondents were eager enough to have their

ship taken is clear enough, as well as is their desire to get rid of a charter then become onerous, and to substitute the Admiralty hire; but that this attitude had any effect upon the result seems to me a thin supposition.

[3] I must therefore assume that the requisition was legal and that it was in invitum. Did it excuse the owner? I think it did. I distinguish between the legality of the requisition which was sent and received in Great Britain and of the respondents' refusal to load in Cuba. The breach was committed in the territory of another state, and its legality was dependent wholly on the law of the place where it occurred, of, if one will, upon the law of New York, where the charter party was made, I do not care which. It was a wrong, not by virtue of British, but of Cuban, law, and no supposed law of the flag has anything whatever to do with it, in my judgment. No command of a foreign sovereign to its subject can legalize a wrong committed elsewhere. The refusal was excused only in case the owner was within the terms of the exception. Mr. Haight says that no coercion was exercised, or even threatened, which is quite true; but I think it is not enough. The ship might have been seized on the high seas by British cruisers—the only testimony is that it would—or it might have been detained by the British consul at Felton. That possibility was alone thought enough in The Athanasios, 228 Fed. 558.

But I do not rely upon restraints directed against the ship itself, for the case was between sovereign and subject, not between the owner and a foreign power. In the former case, at least now in England, a legal command of the sovereign is enough, though it operates only in personam. Brit. & Foreign Mar. Ins. Co. v. Sanday, [1916] 1 A. C. 650; Furness Withy & Co. v. Rederiaktiegelabet Banco, [1817] 2 K. B. 373. There is no case in the United States, so far as I know; but I accept the rule there laid down. It appears to me quite unreasonable to suppose that the parties should have supposed the owner to be released when his ship was restrained by a foreign power, but not when he was himself within the sanctions possible to his own sovereign. Nor do I think it necessary to show to what sanctions he would have in fact been subject. Force is implied in the very nature of law, and the requisition was a command having the force of law. The restraint was in existence, unlike that in Watts, Watts & Co. v. Mitsui, [1917] A. C. 227. It was the "direct" cause of the breach, unlike Becker, Gray & Co. v. London Assur. Co., [1918] A. C. 101. If the actual incidence of power was still somewhat contingent, that is no objection in this country, if reasonable prudence justified compliance, and not defiance. The Styria, 186 U. S. 1, 22 Sup. Ct. 731, 46 L. Ed. 1027; The Kronprinzessin Cecilie, 244 U. S. 12, 37 Sup. Ct. 490, 61 L. Ed. 960. I cannot agree that the owners were called upon to undertake the risks of disobeying a valid command of their sovereign, in order to see whether the command would be pressed with penalties. This was the assumption throughout in Tamplin, etc., Co. v. Anglo-Mexican, etc., Co., [1916] 2 A. C. 227.

So it follows, as I view it, that the refusal to load at Felton was excused, and if the case rested there nothing more need be said; but

it does not. While the respondents might safely have continued to refuse all orders while the ship remainded on requisition, they would have been obliged to receive the hire and allow the libelants to collect the Admiralty hire; but this they did not do. On the contrary, they repudiated the charter party altogether and that was quite another thing.

[4] This repudiation the respondents justify upon the ground that the adventure has been "frustrated," in the language of the English cases. Whether one looks at it in that way, or as a question arising under the "restraint of princes" clause, makes in my judgment no difference. Certainly under the clause the owner was excused from observing the charterer's orders, because he could not; but if the charterer gave no orders of his own, and was content to adopt the directions of the Admiralty, how did the clause operate to relieve the owner from going on until the ship was used for purposes not covered by the charter party? This had as yet not happened; a voyage from Cuba to England was within the charter limits, and the cargo was not, so far as appears, either "molasses or wet sugar," which were excluded. While the charterer paid the hire, and the ship was not used for such other purposes, I can see no excuse under the clause for refusing to allow the charterer to adopt the Admiralty orders. Nor is there any difference, if one regards the question upon the basis of "frustration." The owner's adventure remained what it had been.

Now, the case is different with the charterer, whose rights must be considered, I believe, although the reason is not at once apparent. The requisition did not, of course, prevent his continued payment of the hire, or his performance of any of the other covenants in the charter party, not even the payment for coals, port charges, and dunnage, if demanded. Yet the restraint of princes clause the parties inserted as a mutual exception. As such it must be given some effect, if it can, and I can think of nothing so natural as to say that it excused the covenant to pay hire when the charterer could not have stipulated use of the ship. I recognize the force of Lord Parker's judgment in Tamplin, etc., Co. v. Anglo-Mexican, etc., Co., [1916] 2 A. C. 397, based upon the "breakdown" clause; but, as I view this charter, we have not the case of implying a condition which the parties have not expressed, but of giving effect to all the language which they used. The purpose evidenced by that clause is to put the vessel off hire when the charterer has no use of her. It is altogether consonant with that purpose to interpret the restraint of princes clause as effecting the same result, and the embarrassment felt by Lord Parker appears to me largely overcome when the parties have provided express language which must be taken as supplementary to the conditions specified in the "breakdown" clause.

However, as I have already implied, that excuse depends upon the failure of the consideration of the covenant to pay hire, not upon the impossibility of performance of the covenant, and when the ship is requisitioned on full hire there appears to me to be no failure at all. It is true that the charterer loses the use of the ship, but by hypothesis he gets the full equivalent in money. Presumably he could fix other

equal tonnage with the substituted hire, but it makes no difference whether he can or not. The venture is commercial, and may be settled in money. The changed situation is changed only in form; the charterer has the risk, and the advantage of any variation in the rates, and the owner his original assurance of the stipulated hire, which is precisely what each party agreed to accept. Moreover, if the charterer alone be allowed to disaffirm, he will do so only when the rates have fallen, and not if they rise. Such a right is obviously unfair, and could not have been the purpose of the parties. It deprives the owner of the security of a fixed hire, and relieves the charterer of the risk of a fall in rates. If, therefore, the charterer have such a right, so must the owner, which means that the contract is at an end, though, if continued, it would for the balance of the term leave the parties in substance in exactly that position which they accepted at the outset. Hence, if the Admiralty hire in the case at bar be fixed at the market rates for tonnage, I think that the charterer had no right to disaffirm upon requisition, and the owner no reciprocal right. That question the record does not answer.

If, on the other hand, the requisition be not at going rates, but at a substantially lower amount, as was, indeed, conceded arguendo, the situation appears to me quite different. I think it should fall as much within the clause as though the ship had been made a prize. Now it is quite true, and the case at bar is an instance of it, that notwithstanding that fact the actual Admiralty hire may be greater than the charter hire. The proper time at which to look is not, however, after the event, and when the rates have changed. The chief purpose of the charter, as I have said, is to impose upon one the risk of change, and to secure the other against it. But if the parties had been faced with the possibility that during the term the ship would have been seized at a large discount from the then going hire, obviously, if both were fair, they would have treated it as like a seizure without hire at all. The charterer's right and risk in the variation in rates would be "loaded," in the language of an actuary, with a heavy discount. He would not, if I may use the phrase, be getting a fair run for his money. Such an event the clause seems to me to cover as much as the capture of the ship or the like. And if the charterer have such a right, then so must the owner in similar case, and for the same reasons as when the requisition is at full rates. He may not be deprived of his assurance of a fixed hire when the venture turns out to be a loss, and deprived of the gain when it results in a profit.

There is, it is true, some artificiality in speaking of the right of the charterer to repudiate as a protection when the charter party was made before the war; but I suppose we must agree that the rule should apply generally both to charters made before the war and after it had affected rates. We necessarily look at the putative situation presented to the parties when the contract is made somewhat abstractly, not in the full concreteness of what afterwards occurred. If we did not, there could never be a bargain at all. Therefore, as I view it, if the requisition be permanent, the right of either party to disaffirm turns upon the Admiralty rate.

The English cases, and they are the only ones which deal with the question, do not, I must own, consider the matter quite in this way, though the result is the same as that which I have reached. The question always is of an implied condition which the parties have not expressed, an approach not really different in practice, though it is somewhat different in theory, at least if the exception be mutual. The absence of any consideration of the amount of the Admiralty hire I apprehend is due to the fact that the hire is never in fact a full equivalent. It would, indeed, be hardly excusable to consider the question so generally as I have, were it not that the difference in judicial opinion in England had left the law not wholly settled in theory. The rule is nevertheless quite the same as that which, as it seems to me, theoretical considerations would suggest.

The cases all take their origin from Tamplin, etc., Co. v. Anglo-Mexican, etc., Co., [1916] 2 A. C. 397, in which the owner had repudiated the charter party upon requisition of the ship. In both the courts below he had been unsuccessful, upon the ground that his concern was only with his hire, and that he could not complain if the charterer chose to accept the changed status, so long as he paid regularly. In the House of Lords the decision was affirmed by a vote of three to two, but for quite different reasons. Lord Parker of Waddington thought that the whole doctrine of an implied condition contradicted the express provisions of the charter party, and that the requisition did not affect the charterer's obligations or his rights to the Admiralty hire. Lord Haldane and Lord Atkinson thought that any requisition interrupted so vitally the basis on which the parties had contracted that the charter party was at an end. Lord Loreburn agreed with them in principle, but thought that the rule applied only when it was apparent that the requisition would outlast the charter party and that there was no such evidence. The case has been accepted as ruling, that, when the requisition to the mind of a reasonable man would seem likely to outlast the charter party, it terminated the contract, and that it applies as well to time as to voyage charters.

The charterer repudiated, and was sued by the owner, in Countess of Warwick S. S. Co. v. Le Nickel Soc. An., 34 T. L. R. 27, Admiral Shipping Co. v. Widner, Hopkins & Co., [1917] 1 K. B. 222, and Lloyd Royal Belge, etc., v. Stathatos, 33 T. L. R. 390 (as to the counterclaim); while the owner repudiated, and was sued by the charterer, in Chinese Eng. & Mining Co. v. Sale, [1917] 2 K. B. 599, and Heilgers v. Cambrian, etc., Co., 33 T. L. R. 348. Throughout, the only question discussed has been the probable duration of the requisition at the time when it was made; Tamplin, etc., Co. v. Anglo-Mexican, etc., Co., supra, being interpreted as leaving open only that issue.

There remains the question of the probable duration of the requisition. Even if the English rule be adopted, it appears to me that the probabilities were all strongly that the requisition would outlast the remainder of the term. I take it that the whole circumstances must be considered, and not merely the unexpired part of the term. If so, the evidence is strongly with the respondents. All the shipping men called were of opinion that there was small chance of any release at

the time, and the well-known facts bear them out. In February, 1917, Germany had already declared her unrestricted U-boat campaign and it was in force. The seriousness of the situation to Great Britain is a matter of such common knowledge that I may refer to it. The following months of that year were among the most critical of the war, and the crisis turned wholly upon the destruction of shipping. The avowed purpose was to prevent the victualing of the United Kingdom, and there was no reason to question the relentless determination with which it was announced. While the success of the project was, of course, uncertain, the large diminution of Britain's mercantile marine was to all intents a certainty, as well as the continued necessity of a national mobilization of all bottoms. Of course, no one could say how long the war would last; but the necessity of continuing that mobilization would not terminate with the war, for the shortage would in every probability be felt for long thereafter. The likelihood that a vessel then requisitioned should be released within 14 months appears to me, therefore, very slight.

If, on the other hand, the time at which the contract must be repudiated is at an interval after requisition, the result is the same. Every month after February, 1917, until April, 1918, only made the need of ships more pressing, and the event in fact justified the respondents' assumption.

I should myself incline to think that any requisition ought prima facie to terminate the charter party. As I have said, I do not regard the conditions of the "breakdown" clause as necessarily exclusive. It does not seem to me, with deference, a very practicable rule to speculate upon whether the charter party will outlast the requisition by any period at all. Suppose it does outlast it by a few months. The charterer may have been deprived of the use of the ship without adequate return for perhaps all but a short time. It seems unfair to hold him to the hire. I recognize the difficulties where the charter may have years to run; but when, as here, the question is of months, it seems to me that a requisition which is presumably intended for a substantial time should terminate the contract. This question it is not, however, necessary for me to decide.

Hence it follows that the libel should be dismissed, unless the libelants can show that the Admiralty hire was intended to be a full equivalent for the going rates. It is not necessary, therefore, to consider the questions of jurisdiction and of pleading which the case raises until it appears that they wish to raise that question. Within ten days after the filing of this opinion I will entertain a motion to amend the libel, alleging that fact; but, if none is made, the libel will be dismissed. The replication in no event appears to me valid.

UNITED STATES v. SCHAFER et al.

(District Court, E. D. Pennsylvania. December 9, 1918.)

No. 89.

1. WAR ⟸4—ESPIONAGE ACT—MAKING FALSE REPORTS.
An indictment against newspaper publishers, under Espionage Act, for making false reports, etc., by altering original news dispatches before publication, is supported by evidence showing that, while defendants received no dispatches from news agencies, they took dispatches from other papers and so altered them as to give aid to the enemy.
2. WAR ⟸4—ESPIONAGE ACT—MAKING FALSE REPORTS.
It is not a defense to a prosecution for making false statements to promote the success of the enemy in time of war in a newspaper published by defendants that the statements were not made from motives of personal disloyalty, but to further the purposes of an organization of which the paper was the organ.
3. CRIMINAL LAW ⟸862—JURY—APPLICATION OF PERSONAL KNOWLEDGE.
The jury in criminal case may properly take cognizance of facts which are matters of general information.

Criminal prosecution by the United States against Peter Schafer, Paul Vogel, Louis Werner, Martin Darkow, and Herman Lemke. On motions in arrest of judgment and for new trial. Discharged.

See, also, 248 Fed. 290.

Samuel Rosenbaum, Asst. U. S. Atty., Francis Fisher Kane, U. S. Atty., and Owen J. Roberts, Sp. Asst. U. S. Atty., all of Philadelphia, Pa.

Wm. A. Gray, of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. The reasons for a new trial in this case number 49 in all. Some of them are necessarily what may be characterized as formal. Many of the others indicate in their statement whether they are well or ill taken, and call for no discussion. This leaves for discussion three questions, two of which bear upon the course of the trial as affecting all of the defendants, and one as affecting two or possibly three of them.

[1] One of the questions presented may be thus stated: It goes to the proposition of charging a defendant with one offense and convicting him of a different offense, and one with which he has not been charged in accordance with legal forms. As a basis for the reason for a new trial advanced, the assertion is made with respect to certain counts in the indictment (those which may be called "false news" counts) that the theory upon which the indictment was framed is that a news dispatch emanated from a certain source and place, as, for illustration, an associated press dispatch from Berne or Amsterdam, and that the defendants altered this dispatch so as to change its meaning. The falsity is thus charged to have consisted in this alteration.

Another basis for the reasons for a new trial advanced is the further assertion that there was no proof of either the sending, receipt, or alteration of any such dispatches, and the inference is drawn that there

could be no lawful conviction of guilt of that charge in the absence of evidence to support it.

With respect to the evidence which was introduced, the further assertion is made that it was confined to what might support a charge that the defendants had published a false report, but was wholly barren of anything which would support the charge as made.

The basis for these assertions is the fact that the newspaper office from which the publication issued received no dispatches of any kind. The paper frequently contained what purported to be dispatches from the different news centers of the world, and they were so published as to present the appearance of being news which had come to the office by cable or otherwise. Their real origin was this: Newspapers printed in English and other languages came to the office. Those who had to do with the publication of the newspaper of the defendants made free use of the contents of other papers. In newspaper parlance, they "lifted" the news from other papers.

The real gravamen of the offense of which they were guilty, in so far as they were guilty, without regard to any of its purely legal aspects, was that they changed the news which they had thus "lifted" so as to give it a tone which would afford comfort and encouragement to the enemies of the United States, or would be injurious to our cause. It will thus be seen that in no aspect did the act which was committed differ in substance from the act which was charged. Whether it did so differ in the strictly legal view depends wholly upon what the indictment means by the phrase "original dispatch."

The thought entertained by the learned counsel for the defendants, and sought to be impressed upon the trial judge, and now reexpressed, is that the indictment charged a specific offense and charged it in the narrow sense of being the act of falsifying a dispatch which had emanated from a news collecting agency, and that the dispatch so changed was one which in fact had been received by the defendants.

The logical outcome of this thought is that the only evidence which would support such a charge would be the testimony of some one connected with such a news agency that such a dispatch had been sent to the defendants, followed by evidence of its contents, and further evidence that the dispatch had been published in a falsified form.

The trial judge refused to put this narrow construction upon the charge as laid in the indictment, but read it as expressive of a charge of the substantial offense of disseminating false statements which tended and were put out with intent to promote the success of the enemies of the United States.

The charge thus made would emphatically embrace the act of taking a news dispatch from another paper and so changing it as to make it serve a disloyal purpose. The dispatch so changed would be an "original dispatch" within the meaning of the indictment.

To give emphasis to the distinction sought to be expressed, we are of opinion although there is nothing in this case to require us to go so far, that the charge in substance would have been supported by proof that the defendants had wholly faked a dispatch, so that it had

no other origin than an emanation from the brain of the person who faked it.

The question as now presented is wholly an appellate question, and we take the view, as above expressed, because we deem it to be in line with the command of Rev. St. § 1025 (Comp. St. 1916, § 1691). As we view it, the motive for that command is a very practical one. A very short experience in the trial of causes, criminal or civil, brings out with cameo-like clearness two methods of trial. When one method is resorted to, procedure questions are given such prominence that the substantial questions of fact or of substantive law are wholly or almost lost to view. When the other method is employed counsel and parties by an agreement, tacit or expressed, join in presenting the substantial issues which arise in the case, and as the phrase is, agree to try the case on its merits without regard to form.

The injunction of Rev. St. § 1025, was laid upon the courts with the contrast between these two systems of trial practice in the mind of Congress, and the command is that no indictment shall be held to be insufficient or effect be refused to a verdict if the indictment and trial be such as that a trial may be had and the trial is had in accordance with the second method described. This, as we understand it, is what Congress means in saying that the test of every question of this character which is raised is whether or not there has crept into the indictment or the trial anything which has worked to the prejudice of the defendants. There is a class of distinctions with which highly trained and bright intellects love to deal which may fitly be characterized as metaphysical. As an intellectual exercise, discussion of them is always pleasurable and may have a high didactic value, but the practical affairs of life cannot be made to await the end of the discussion.

We adhere to the view entertained by the trial judge that the indictment charged and the evidence supports the offense defined by the Espionage Law relating to the making of false reports, etc.

The second of the points remaining for discussion in the cause arises out of that part of the charge which dealt with the distinction between treason and the acts condemned by the Espionage Law (Act June 15, 1917, c. 30, 40 Stat. 217) as criminal. As has often been observed, a charge to a jury should always be read in the atmosphere of the trial in which it was delivered. One of the functions of the charge is to enable a jury to comprehend the issues of a cause as presented to them by the evidence and the arguments of counsel. The cause which they have in their minds as the one to be determined by them is the cause as thus presented, and it would only work confusion if the trial judge did not shape the charge accordingly. There was evidently, as the charge itself indicates, some occurrence of the trial which prompted the comment of which complaint is now made. A part of that complaint is that the comment was irrelevant and tended to prejudice the defendants.

There is nothing which we have been able to find in the record which either suggests or revives a recollection of what the happening was. In the absence of any such recollection, it must be left to

surmise. As counsel for the defendants now read the charge, and perhaps as they heard it, they have received the impression that the charge magnified the crime laid in the indictment. Such was not its purpose, nor do we think its practical effect. The jury was made up of high-minded and intelligent men. This does not mean that they would not be swayed by the emotions which we all feel when what we call our love of country is hurt; but it does mean that they would distinguish between acts which have been made criminal and publications or speeches which affect us unpleasantly. Aside from the particular happening, whatever it was, which provoked this part of the charge, the comments complained of had evidently a double purpose. One was that it would not follow that, because mere words might not be overt acts of treason, mere words could not constitute a crime. The other is that, no matter how objectionable they might be to the hearer or the reader, because coming within the category of what was disloyal, or what would be in the common acceptation treasonable, they would not be a crime, in the legal sense, of which any one could be convicted, unless the objectionable acts had been declared to be a crime by some act of Congress. This thought is, we think, clearly expressed in the main charge, and is certainly clearly presented in what was added to the main charge upon exception taken by defendants.

The point now made is properly enough vigorously pressed by counsel, and we have given it very careful consideration. The result is we are unable to see in this any reason for interference with the verdict.

[2] The benefit of the third point is limited to the defendants Lemke, Schafer, and Vogel. Its application to Lemke is not conceded. Some countenance is lent to it by the act of the district attorney in not asking the jury for the conviction of Schafer and Vogel, except upon the conspiracy count. The connection of these two men with the publication was such as, we assume, to admittedly affect the degree of guilt, and because of this is a consideration in the imposition of sentence. What may in a sense be called their formal responsibility for the publication furnishes in itself evidence to be submitted to a jury. Their real connection with it was at least this: That while their main motive in being parties to the publication of the newspaper was to promote the interests of the organization with which they were connected, there were justifying grounds for the finding that in order to promote this interest they were not only willing, but deemed it helpful, that the newspaper as the organ of their organization should assume an attitude which the jury has found to be a disloyal one. The truth many be that their motive was not a disloyal one, in the sense that they wished to promote the success of the enemies of the United States; but the evidence again justified the finding that their intent was an unlawful one, because they could not cater to those whose support they sought, unless they did have the newspaper do all which it could do toward promoting the success of that government with the people of which we were at war. Indeed, in disclaiming disloyal motives, there was a plain, if not a frank, admission of this intent, and of the selfish reason behind it.

We do not find this reason for a new trial to be any ground for interference with the verdict.

[3] Perhaps one other thing calls for some comment. There was an attempt made to express in the charge to the jury the thought that with respect to all matters which are matters of general information the jury had the right to call upon this fund of general knowledge which was in their keeping. This must be so, because there is no practical method of having such a state of facts enter into the make-up of a judgment other than by drawing upon this fund. The kind of knowledge which is based upon what are classified as historical facts supplies us with an illustration of the distinction intended. The quoted parts of the charge dealing with this thought were not very happily, or at least very clearly, expressed. What was in mind was that the jury would want to know how they were to deal with certain questions which were essentially questions of fact, and yet in respect to which there was, strictly speaking, no evidence.

One of these was the question of the existence of a state of war. This was in no important sense a question, but with respect to how a state of war could be found to be a fact, the method employed afforded an illustration of how these other questions of fact with which the jury had to deal, which were matters of general knowledge, could be met. Many instances of so-called propaganda in this and other countries may be used as illustrations. What is put out is known to be false, because so pronounced by the information which is common to all. The question, however, is what will justify a finding of falsity? Upon what can the finding be based? The answer is that, if the statements made are of matters which are the subject of general information and are part of our common knowledge, their truth or falsity may be thus tested. The line between what may be thus tested and a specific fact, which must be proven, is a line which cannot otherwise be defined than by the statement that we may judge of anything which is within, and the subject of common knowledge, although we may have no other light leading us to a judgment than that afforded by such common knowledge as we have.

The complaint made is that the instruction given was so general as to be misleading, and was fraught with danger (to use an extravagant illustration) that the jury might accept it as a warrant, in cases which had aroused a popular interest and in that sense were matters of common knowledge, to convict defendants who were thus commonly thought to be guilty.

We have carefully re-read the charge with the thought thus indicated in mind, and when read in the light of the events of the trial and of the arguments addressed to the jury, we cannot think the jury failed to grasp the distinction made between those things of which judicial notice could be taken and facts which must be affirmatively and even formally established by evidence.

The motions in arrest of judgment and for a new trial are discharged.

UNITED STATES RAILROAD ADMINISTRATION, W. G. McAdoo, Director General of Railroads (Atlantic Coast Line Railroad), v. BURCH, Sheriff.

(District Court, E. D. South Carolina. November 30, 1918.)

No. 206.

1. RAILROADS ⟸5½, New, vol. 6A Key-No. Series—TAKING POSSESSION OF RAILROADS—COURTS.

   The extent of the power conferred by Act Aug. 29, 1916 (Comp. St. 1916, § 1974a), authorizing the President, through the Secretary of War, to take possession of railroads in time of war, etc., and the determination of the property to be taken possession of, are questions for the court.

2. RAILROADS ⟸5½, New, vol. 6A Key-No. Series—TAKING POSSESSION OF RAILROADS—EFFECT.

   Under Act Aug. 29, 1916 (Comp. St. 1916, § 1974a), authorizing the President in time of war to take possession of railroads, etc., and the presidential proclamation of December 26, 1917, and despite Act March 21, 1918, the Director General of Railroads was not authorized to take possession of land belonging to a railroad company which was not used in its business as a carrier; hence sale of such land under execution against the railroad company will not be enjoined on suit of the Director General, the company making no objection.

3. COURTS ⟸508(3)—FEDERAL COURTS—JURISDICTION.

   The federal courts, by virtue of their general equity powers, have jurisdiction to enjoin the enforcement of a judgment in the state courts upon the usual principles under which a court of equity will enjoin enforcement of a judgment.

4. RAILROADS ⟸5½, New, vol. 6A Key-No. Series—FEDERAL COURTS—JURISDICTION.

   A suit by the Director General of Railroads to enjoin sale of land owned by a railroad under execution issued on a judgment of a state court, on the theory that, having taken possession of the same, it was exempt from process under act of March 21, 1918, is a suit of a civil nature arising under the laws of the United States, etc., of which the federal District Court has jurisdiction, for it must be deemed that Act March 21, 1918, modified Jud. Code, § 265 (Comp. St. 1916, § 1242).

In Equity. Bill by the United States Railroad Administration, W. G. McAdoo, Director General of Railroads (Atlantic Coast Line Railroad), against Thomas S. Burch, as Sheriff of Florence County. On order to show cause why defendant should not be restrained and enjoined, etc. Preliminary injunction refused, etc.

Rutledge & Hyde, of Charleston, S. C., for complainants.
Logan & Grace, of Columbia, S. C., for defendant.

SMITH, District Judge. This matter came on to be heard under the order of this court made November 26, 1918, requiring the defendant to show cause on the 2d day of December, 1918, at 9 o'clock a. m., why he should not be restrained and enjoined from further proceeding to advertise or sell the property of the Atlantic Coast Line Railroad Company, described in Exhibit A, annexed to the bill of complaint herein. By consent of counsel the hearing was had this day, in lieu of being had on the day named in the said order, to wit, 2d day of December, 1918.

The defendant duly appeared and filed his return to the order to show cause, and counsel on both sides have been heard; the hearing being had upon the bill of complaint and the exhibits and the return to the rule to show cause and exhibits.

The allegation of the complainant is that he is in actual physical possession of the property (sought to be sold by the defendant) under the terms of the statutes passed by the Congress of the United States, to wit, the act approved August 29, 1916, entitled "An act making appropriations for the support of the army for the fiscal year ending June thirtieth, nine hundred and seventeen, and for other purposes" (U. S. Stat. at Large, vol. 39, p. 645, c. 418), and of the proclamation of the President of the United States made the 26th of December, 1917, in pursuance thereof, and also of the act approved March 21, 1918, entitled "An act to provide for the operation of transportation systems while under federal control, for the just compensation of their owners and for other purposes."

So far as the papers now before the court are concerned, to wit, the bill of complaint and exhibits, and the return and exhibits, the facts appear to be that a final judgment has been recovered in the state court of South Carolina, in a cause of Travis Barnes, by his Guardian ad Litem, John J. Barnes, v. Atlantic Coast Line Railroad Co. This final judgment was recovered on the 18th day of March, 1918, and, upon an appeal therefrom by the defendant Atlantic Coast Line Railroad Company, the judgment was, by the Supreme Court of South Carolina, in August, 1918, affirmed (96 S. E. 530), and the remittitur affirming the same was forthwith duly filed in the court of common pleas for Charleston county.

Under the provisions of the state law of South Carolina, this final judgment was transcripted to the county of Florence, and, upon execution issued thereon in the county of Florence, a levy has been made upon certain real estate of the defendant the Atlantic Coast Line Railroad, in the county of Florence, and the same has been advertised for sale to satisfy the execution. To enjoin the sale under the execution, the bill of complaint in this cause has been filed.

It further appears that the action in the state court was begun on September 21, 1915, for a cause of action accruing on the 13th of February, 1915, and long anterior to the enactment by Congress of the statutes above referred to.

It also appears that the property levied on and advertised for sale consists of several pieces of land in the city and county of Florence, S. C. These tracts of land are mostly lots in the city of Florence and land adjacent thereto; and according to the statement of the tax agent of the defendant the Atlantic Coast Line Railroad, made in February, 1918, when the same were returned for taxation, this property so levied on was returned as real estate belonging to the Atlantic Coast Line Railroad, not necessary to the daily running of the road in Florence, S. C., and, as a conclusion of fact based upon the only reasonable inference that can be made from the papers before the court, these lots of land would not appear in any wise to be property or land essential or necessary to the performance of the transportation duties and operations of the defendant Atlantic Coast Line Railroad.

The question, therefore, is whether or not the complainant William G. McAdoo, as Director General of Railroads, is legally in possession of this property so as to be entitled to the protection of that clause of the

act approved March 21, 1918, which provides that no process, mesne or final, shall be levied against any property under such federal control.

[1, 2] The first question to be determined under the statutes is as to what property the President was entitled, through the Secretary of War, to take possession of and legally to hold, so as to be entitled to the benefit of such exemption from the levy of final process. Under the terms of the act of the 29th August, 1916, it is declared as follows:

"The President, in time of war, is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with emergency as may be needful or desirable." Comp. St. 1916, § 1974a.

An inspection of the whole statute, as well as of this clause, shows that the purpose and intent of the statute was to provide for the speedy and expeditious transportation of troops, war material, and equipment; and for that purpose to give possession of the systems of transportation to the government, through the Secretary of War, with power to use such systems for such transportation to the exclusion, as far as may be necessary, of all other traffic, either in passengers or freight, thereon. That is the purpose of the statute, and it is evident that the purpose of the statute giving such enlarged powers, to be exercised during the emergency of war, was not for the purpose of taking possession of any property which might be owned by the different corporations operating and owning systems of transportation, and which property was wholly independent of transportation uses, and neither incidental nor necessary for them, but was simply to allow the government to get control of everything necessary or appropriate for transportation purposes.

Under this statute, the President could authorize the Secretary of War only to take possession of such property as he himself is authorized to take possession of under the statute. The extent of his powers, and the definition of what property he was authorized to take possession of under the statute, would be necessarily a judicial question. All acts done and all property taken possession of within the adjudicated extent of the powers allowed might be a ministerial question; but as to the extent of those powers, and whether the powers were given, must always, under the Constitution of the United States, remain a judicial question, and one to be decided by the courts of the land.

Under the terms of this statute, the President issued a proclamation on the 26th of December, 1917, referring to the statute, and declaring that, through the Secretary of War, he took possession and assumed control at 12 o'clock noon on the 28th day of December, 1917, of each and every system of transportation, and the appurtenances thereof, located wholly or in part within the boundaries of the continental United States, and consisting of railroads, and owned or controlled systems of coastwise and inland transportation, engaged in general transportation, whether operated by steam or by electric power, including also terminals, terminal companies, and terminal associations, sleeping

and parlor car lines, elevators, warehouses, telegraph and telephone lines, and all other equipment and appurtenances, commonly used upon or operated as a part of such rail or combined rail and water systems of transportation, to the end that such systems of transportation be utilized for the transportation and transfer of troops, war material, and equipment, to the exclusion, so far as may be necessary, of all other traffic thereon.

The proclamation further proceeds that the possession, control, operation, and utilization of such transportation systems shall be exercised by and through William G. McAdoo, who was by the proclamation appointed and designated Director General of Railroads.

The language of this proclamation, assuming that the entire language is warranted by the powers extended to the President under the terms of the statute, and which powers he could not in any proclamation lawfully exceed, would not itself appear to include the property in question in these proceedings, unless it should be supposed to be included under the general designation of all other equipment and appurtenances, commonly used upon or operated as a part of such rail or combined rail and water systems of transportation. The outlying lots of land held by a railroad company as an investment, or which it may have purchased at some time and still continued to hold, would not appear to be included within any of the language of this proclamation. The position of counsel for the complainant is that the statute and the proclamation must be considered to include all property of a railroad. If this contention were correct, it would cover all moneys of the railroad in its possession, when possession was taken under the proclamation of the President. It would also cover all personal property, including stocks in industrial corporations, if any such were owned by the railroad at that time.

A fair construction of the statutes, and of the proclamation itself, however, would not appear to warrant any such inference that their provisions include such property. The language appears to be clearly limited to transportation systems, and to property which was used for transportation purposes, including therein all property fairly incidental or necessary for use in effecting such purposes. Separated, disconnected, unutilized tracts of land would not appear to come within this definition.

The later statute of March 21, 1918, would not appear to affect this conclusion. There is nothing in it which extends the powers of the President as to the character of the property he could take possession of under the previous statute. By section 9 it is provided that the provisions of the act of August 29, 1916, shall remain in force and effect except as expressly modified and restricted by the late act; and the President, in addition to the powers conferred by that statute, is given such other and further powers necessary or proper to give effect to the powers therein and theretofore conferred; that is to say, the President has only the powers in two acts conferred, and he is given such further powers as are necessary or appropriate to give effect to those powers. That is all.

If the purpose, intent, and meaning of the original statute was to give him power to take possession of only transportation facilities, there is nothing in the later act to extend the powers given him so as to give him the right to take possession of disconnected property and property unnecessary for the purposes of transportation.

The proclamation of the President expressly provides that regular dividends theretofore declared, and maturing interest upon bonds, debentures, and other obligations, may be paid in due course; the said regular dividends and interest may be continued to be paid until and unless the said Director General shall from time to time otherwise, by general or special order, determine; and the later statute of 21st March, 1918, expressly provides a method by which the carrier might be paid a rental for the use of its transportation facilities, and the proceeds of such rental might be by the carrier devoted to the payment of its own obligations.

The present case presents the case of a creditor holding a final judgment, which should normally be paid forthwith, and with the right to the creditor, if the same be not paid, to enforce payment out of any property of the judgment debtor liable to judgment execution. To hold that the railroad company is by these statutes put in a position where it is not bound to pay any of its debts until the possession of its property is restored to it, although it may receive the rentals in the meantime, might mean that, while the railroad company would still continue to be in possession of the rents and profits and other results flowing from the property, its creditors, who are entitled to payment therefrom, might be greatly injured by their inability to collect payment for an indefinite period.

The case before the court, however, does not depend upon any inability or unfortunate position that the railroad is placed in, because its property has been taken possession of by the government, or at least so much of its property as is necessary for use for transportation purposes. Were the railroad company to file a bill in equity, stating that all of its property had been taken possession of by the government by virtue of these acts, and that it had no property or funds which could be applied to the payment of this debt, and that a creditor ought not to be allowed by the compulsory process of judgment and execution to sell away the property of the railroad company, and deprive it of its legal title, when through the action of the government it was powerless to make payment, it might present a question calling for the interposition of an injunction from a court of equity until the railroad company should be in a position to use its funds to meet the claims of its creditors.

In other words, if the railroad company were in position to claim that the effect of these statutes was a compulsory statutory moratorium, it might be in a position, in view of the great injury and injustice worked to it by permitting a creditor to assert his legal rights under execution—it might be in a position to have an injunction. That is not the case, however. The Atlantic Coast Line Railroad Company is not before the court. The Atlantic Coast Line Railroad Company asks no injunction. The injunction is sought on behalf of the Director

General appointed by the President's proclamation, upon the single ground that he is legally in possession of this property, and that, being in possession of this property, then under the terms of section 10 of the act of the 21st March, 1918, no final process could be levied upon it. The only question thus for the court is whether or not, under the terms of the statutes of the United States, the complainant in this case is legally in possession of the property, so as to entitle him to the benefit of the exemption given by the act from the levy of final process. It does not appear to the court that the property is property of which, under the terms of the statute, the President was authorized to take possession. If the President was not authorized to take possession, then he could not authorize the Secretary of War or the Director General to take possession, and any possession taken by them would be unlawful and would in no wise divest the rights of other parties.

The complainant being thus not in legal possession of this property, and the property being, in the opinion of this court, not property of which he could legally take possession, under the terms of the statutes, it is not property which, under the terms of those statutes, is exempt from the levy of final process; and it follows from that, that the injunction should be refused.

If it in any wise appeared to the court that the Atlantic Coast Line Railroad Company was itself bona fide seeking relief because it had been actually divested of the possession of the property by the act of the government, and that it had in consequence been deprived of the power and means to pay its creditors, the case would be otherwise.

But from the facts the court must infer that the railroad company is amply able to meet its debts, and, if such be the case, then the effect of an injunction now would be to permit the railroad company, if it desired, to use the position of the Director General of Railroads as a screen to shield it from the just claims of its creditors.

[3, 4] The defendant in his return to the rule has raised the question that this court has no jurisdiction of the cause, and cannot enjoin a sale under execution under a judgment in a state court. Inasmuch as this question is a question arising in a case which asks for the enforcement of a right claimed to exist and be given under the terms of an act of Congress, it is evidently an action of a civil nature in equity, brought by an officer of the United States authorized to sue, and arising under the laws of the United States, where it appears upon the face of the bill of complaint that the right claimed by the plaintiff and sought to be enforced arises by virtue of and under a statute of the United States.

The question whether or not final process can be levied against this property is one that arises under the very terms of the act of March 21, 1918; nor is the position that this court has no jurisdiction to stay the execution of a judgment recovered in the state court well taken. It has been laid down that the United States courts, by virtue of their general equity powers, have jurisdiction to enjoin the enforcement of a judgment in the state court upon the usual principles under which courts of equity will enjoin the enforcement of a judgment. Simon v. Southern Ry. Co., 236 U. S. 115, 35 Sup. Ct. 255, 59 L. Ed. 492;

Union Ry. Co. v. Illinois Cent. R. Co., 207 Fed. 745, 125 C. C. A. 283; Schultz v. Highland Gold Mines Co. (C. C.) 158 Fed. 337; Linton v. Safe Deposit & Title Guaranty Co. (C. C.) 147 Fed. 824.

Further, the special statutory exemption from process, created by the act of 21st March, 1918, must be construed, in connection with the provision of section 265 of the Judicial Code of the United States (formerly section 720, U. S. R. S.; Comp. St. 1916, § 1242), as modifying the language of that section, and creating another exception, under which the attempted enforcement of the mesne and final process from a state court may be restrained in proper cases.

It would appear, therefore, that the court has jurisdiction of the proceedings, although, upon consideration of the facts of the case, it does not appear to be a case in which a preliminary injunction should be issued; and the motion for a preliminary injunction is accordingly refused, and the injunction contained in the order of this court, dated November 26, 1918, is hereby vacated.

BROWN v. CRAWFORD et al.

CRAWFORD et al. v. KASTE et al.

(District Court, D. Oregon. November 25, 1918.)

Nos. 7426, 8015.

1. COURTS ⊕=497—JURISDICTION—COMITY.
Where a court of competent jurisdiction has, by appropriate proceedings, taken property into its possession through its officers, the property is thereby withdrawn from the jurisdiction of all other courts, though of concurrent jurisdiction, and they have no power to render judgment disturbing the possession of the property while in custody of the court which seized it.

2. COURTS ⊕=493(3)—JURISDICTION—COMITY.
Where the controversy is not the same—that is, where the issues in one suit are different from those in another, etc.—there can be no infringement of jurisdiction, as between the courts, in obtaining cognizance of the cases, though the court first obtaining posssession of the res is entitled to retain the same for purpose of disposition, etc.

3. COURTS ⊕=493(3)—JURISDICTION—COMITY.
Though a state court had taken possession of the property of an insolvent corporation which was subject to mortgages, by appointing a receiver, *held* that the federal court had jurisdiction of a suit to foreclose the mortgages, the two tribunals being concurrent, and the foreclosure proceedings not necessarily disturbing the state court's possession of the property.

4. BANKRUPTCY ⊕=20(2)—TRUSTEE—AUTHORITY OF.
Where the state court appointed a receiver to take possession of the property of an insolvent corporation, *held*, bankruptcy proceedings having subsequently been begun, that the trustee in bankruptcy is entitled to possession of the property in preference to the receiver.

5. BANKRUPTCY ⊕=20(2)—TRUSTEE—RIGHTFUL POSSESSION.
Where a receiver had been appointed by the state court to take possession of the property of an insolvent corporation, and one who had acquired the equity of redemption of land which the corporation had mortgaged agreed that, if a receiver was appointed, such equity would

be subordinated to the protection of the unsecured creditors, *held* that the subsequently appointed trustee in bankruptcy, who represents the unsecured creditors, might execute the trust.

6. BANKRUPTCY ⊂⊃288(1)—TRUSTEE—TAKING POSSESSION OF PROPERTY IN HANDS OF A RECEIVER APPOINTED BY STATE COURT.

Where trustee in bankruptcy, under order of referee, took possession of property of the bankrupt in the hands of a receiver appointed by the state court, *held* that possession was taken by summary process, which is not in accordance with the comity existing between state and national courts.

In Equity. Suit by William W. Crawford, trustee, and another, against John W. Kaste, consolidated with a suit by Russell H. Brown, as trustee in bankruptcy of the Monarch Lumber Company, a bankrupt, against William W. Crawford, trustee, and others. Decree of foreclosure, with directions.

See, also, 252 Fed. 248.

Ralph A. Coan, of Portland, Or., for Brown.

O. A. Neal, of Portland, Or. (Wirt Minor, of Portland, Or., of counsel), for Crawford and Assets Realization Co.

Carey & Kerr and C. A. Sheppard, all of Portland, Or., for David Inv. Co.

Martin L. Pipes, of Portland, Or., and Dey, Hampson & Nelson, of Portland, Or., for Kaste.

Platt & Platt and Hugh Montgomery, all of Portland, Or., for Brayton & Lawbaugh.

Maurice W. Seitz, of Portland, Or., for Moody.

WOLVERTON, District Judge. This is a suit to foreclose a mortgage and to subject the property covered thereby to the payment of the mortgage obligations. Previously to this a suit was instituted by Russell H. Brown, trustee in bankruptcy of the estate of Monarch Lumber Company of Oregon, against the Assets Realization Company and William W. Crawford, for an accounting touching the property supposed to have been covered by the mortgage. A cross-bill was filed by the David Investment Company, claiming that as guarantor it had paid certain installments of interest on the mortgage obligations, and seeking subrogation for a recovery of the sums paid. The mortgage was set up in all its features. Brayton & Lawbaugh, and Moody, the successor to Bjelik, controverted the legality of the execution of the mortgage, charging that it was usurious, and that recovery thereon should be reduced to less than the face value of the obligations. After hearing; a decision was rendered sustaining the mortgage and settling the account as prayed for by the trustee in bankruptcy. Later, by leave of court, the defendants Assets Realization Company and William W. Crawford, trustee, filed a cross-bill setting up the mortgage and praying foreclosure, and the issues on the pleadings have been subsequently completed. These two causes were consolidated for trial. The former case has been largely lost sight of on the present hearing, and the trial has proceeded in the main upon the direct foreclosure proceeding as above entitled.

The defendants Brayton & Lawbaugh and J. D. Moody set up their judgments, which it is claimed are liens against the mortgaged property, and again insist that the mortgage is usurious.

The David Investment Company by its answer again claims that it is entitled to subrogation for interest paid on the principal obligations.

The defendant Kaste answers that he is the owner of the legal title covered by the mortgage; that in a certain cause pending in the circuit court of the state of Oregon for Multnomah county, entitled Brayton & Lawbaugh v. The Monarch Lumber Company et al., upon condition that the state court appoint a receiver of the mill property covered by the mortgage, he subordinated his title for the benefit of the general creditors, he to retain the legal title when they were paid; that a receiver was accordingly appointed, who, through a writ of assistance, was put into possession of the property, and is now entitled to such possession, although the same was wrongfully taken from him by Russell H. Brown as receiver in bankruptcy, but who now retains the same as trustee; that by reason thereof this court is without jurisdiction of the subject-matter to entertain cognizance of the foreclosure suit.

Russell H. Brown, trustee, for answer relies upon his right of possession of the property, with a view to administering it for the benefit of the general creditors.

[1-3] The question of prime importance is one of jurisdiction. It is insistently urged that the federal court is without jurisdiction to entertain the present suit to foreclose the Monarch Lumber Company mortgage. The basis of the proposition is that the state court is entitled to the possession of the res, and, being so entitled, no suit or action will lie in any other court, whether federal or state, with respect thereto.

Let it be conceded for the present that the state court, by the rules of comity, is entitled to such possession; or we may go further, and let it be admitted that such court has the actual possession, and is holding it in accordance with such rules of comity. I am persuaded that in either aspect the position of counsel is unsound. Reference will later be made to the state of the record. The Supreme Court, in a comparatively recent case, has laid down the broad rule applicable in the following language:

"The rule is well recognized that the pendency of an action in the state court is no bar to proceedings concerning the same matter in the federal court having jurisdiction, for both the state and federal courts have certain concurrent jurisdiction over such controversies, and when they arise between citizens of different states the federal jurisdiction may be invoked, and the cause carried to judgment, notwithstanding a state court may also have taken jurisdiction of the same case." McClellan v. Carland, 217 U. S. 268, 282, 30 Sup. Ct. 501, 505 (54 L. Ed. 762).

And in an earlier case, Gordon v. Gilfoil, 99 U. S. 168, 178 (25 L. Ed. 383), the court observes:

"It has been frequently held that the pendency of a suit in a state court is no ground even for a plea in abatement to a suit upon the same matter in a federal court."

The proposition is very well illustrated by the case of Mercantile Trust Co. v. Lamoille Val. R. Co., 17 Fed. Cas. 25, No. 9432. The plaintiff in that case, being the owner and holder of certain railroad mortgage bonds, instituted a suit, in behalf of itself and other like owners and holders, to foreclose the mortgage and for removal of trustees who were seeking to foreclose an alleged preference mortgage upon the same property in the state court, one of whom had been appointed receiver in that court, and was at the time in possession of such property. The court stated the question for its decision not to be whether it would grant relief that would disturb the state court, for "surely," it was declared, "it will not do that," but whether it would hear and determine any question or grant any relief concerning the right to the property, and not extending to possession, while the state court had possession. The question is the direct one involved here. Answering it, the court says:

"There is nothing, either in the letter or the spirit of the statute, that prohibits a party having a question of right, or a claim to relief, that can be determined without meddling with the possession of any court, from having the question determined or the relief granted by any court of competent jurisdiction for the purpose. Neither is there anything in the nature of things which should prevent."

After referring to the case of Watson v. Jones, 13 Wall. 679, 20 L. Ed. 666, the court goes on to say:

"In this case, as in that, some of the relief which the bill might cover would interfere with the possession of the state court, and some of it would not. The execution of an order of sale, under the provisions of the mortgage, or of an order for the delivery of possession, under other provisions, would have that direct effect, and, perhaps, the general prayer for relief would cover either; but, as before mentioned, it is clear that the plaintiff cannot have such relief. None can be had except that which will not interfere with the present possession. A decree of foreclosure would not. It would only cut off the equity of redemption of the plaintiff's bonds, which the mortgagors now have, and would not affect the possession at all, but only the right. * * *

"The objection on account of the receivership cannot prevail to prevent proceeding in this cause, so far as it can go without interfering with the receivership; and a decree of foreclosure can be had, if the plaintiff is otherwise entitled to one, without involving such interference."

The principle relied upon by counsel as inimical to the jurisdiction of this court of the subject-matter is one well settled and not to be controverted; but it is wholly without application here. It is, as stated in Wabash Railroad Co. v. Adelbert College, 208 U. S. 38, 54, 28 Sup. Ct. 182, 187 (52 L. Ed. 379), that:

"When a court of competent jurisdiction has, by appropriate proceedings, taken property into its possession through its officers, the property is thereby withdrawn from the jurisdiction of all other courts. The latter courts, though of concurrent jurisdiction, are without power to render any judgment which invades or disturbs the possession of the property while it is in the custody of the court which has seized it."

The principle is applied in Palmer v. Texas, 212 U. S. 118, 125, 29 Sup. Ct. 230, 232 (53 L. Ed. 435), the court saying:

"If the state court had acquired jurisdiction over the property by the proceedings for the appointment of its receiver, and had not lost the same by the subsequent proceedings, then, upon well-settled principles, often recognized

and enforced in this court, there should be no interference with the action of the state courts while thus exercising its authorized jurisdiction."

Counsel confuses jurisdiction over the subject-matter for entertaining a cause respecting it and jurisdiction of the res by possession with power of disposal within the purview of the cause brought upon the record. Eliminating the idea of possession, the state and the federal court, though exercising concurrent jurisdiction, may proceed at one and the same time, though the parties be the same and the subject-matter and the cause the same; but, of course, only one relief can be had in the end. Comity, indeed, forbids any unseemly conflict between such courts for possession of the res involved, but does not prevent a pursuit of the same right in both courts where such conflict does not arise. While possession gives jurisdiction over the res, it does not control jurisdiction as to the subject-matter. Another court will respect possession, but it is at liberty to entertain another cause concerning the same subject-matter, so long as it does not oust the court first acquiring possession of the res, or interfere with its disposal of the same in the manner appropriate to the cause there entertained. The distinction is not new, and is well recognized. Logan v. Greenlaw (C. C.) 12 Fed 10; In re Hall & Stilson Co. (C. C.) 73 Fed. 527.

Another application of the principle is that, where the controversy is not the same—that is, where the issues in one suit are different from those involved in another, and the subject-matter is not identical—there can be no infringement of jurisdiction as between the courts maintaining cognizance of the cases. But in such cases the first acquisition of the possession of the res dominates the right to retain the same for the purpose of disposition appropriate to the cause pending. Knudsen v. First Trust & Savings Bank, 245 Fed. 81, 85, 157 C. C. A. 377, and cases cited.

The controversy here is by no means the same as that presented in the state court. The issues are not the same, nor is the subject-matter identical or of like nature. So it is clear that the pendency of the cause in the state court stands in no way as an impediment to this court's entertaining jurisdiction of the present cause, and the objection that this court is without jurisdiction of the subject-matter cannot be maintained. The state Supreme Court voiced its realization of the propriety of the institution of a separate suit when it said, in the Brayton & Lawbaugh Case, that "the appointment of the receiver should in no wise interfere with the foreclosure of the notes and mortgage"; which statement it deemed opportune to accompany with the admonition that, "whenever the holder of the notes desires to sue, permission to do so should be promptly granted." 87 Or. 365, 391, 169 Pac. 528, 536.

[4] The immediate question is whether this court should exercise jurisdiction to retain possession of the res for application to the purposes of the suit. It is admitted that the real property subject to the mortgage is now in the possession of the trustee in bankruptcy, who is a party defendant here, but it is contended that the state court receiver is rightfully entitled to the possession. Let us inquire about that.

On November 18, 1914, Brayton & Lawbaugh instituted a suit in the circuit court of the state of Oregon for Multnomah county against

the Monarch Lumber Company of Oregon, Monarch Lumber Company of Maine, Assets Realization Company, Ira M. Cobe, and William W. Crawford, individually and as trustee. Plaintiff claimed to be the owner of a judgment rendered against the Monarch Lumber Company of Oregon on December 8, 1913, with a lien on the premises covered by the present mortgage, acquired by attachment dating from August 13, 1913. The purpose of the suit was to set aside certain conveyances of the real property and a bill of sale for the personal property; also to reduce the amount of the mortgage and to subject the property to the payment of its judgment. The insolvency of the Monarch Lumber Company of Oregon was specifically alleged. This complaint was, on December 14, 1914, amended by adding E. W. Spencer, W. T. Patton, John Bjelik, and A. C. Springer as parties defendant. As amended, it contained the same general allegations as to the insolvency of the Monarch Lumber Company, and demanded the same general relief. On February 4, 1915, a second amended complaint was filed adding as party defendant T. M. Hurlburt, sheriff of Multnomah county, but with like allegations as to insolvency of the Monarch Lumber Company of Oregon, and like prayer for relief. Still later, on November 13, 1915, a third amended complaint was filed. This purports to be in behalf of the plaintiff and other creditors of the Monarch Lumber Company of Oregon similarly situated, and contains the same general allegations of insolvency, but prays an accounting and general relief.

On January 3, 1917, W. T. Patton, appearing by his attorney, J. W. Kaste, filed a motion for the appointment of a receiver, assigning as a reason therefor, among others, that the Monarch Lumber Company is an insolvent corporation, has ceased to do business for the past three years, is defunct, and has no officer now within the state, and has forfeited its corporate rights. In pursuance of this motion, Felix W. Isherwood was appointed receiver of "all and singular the property, real, personal, and mixed, heretofore owned and operated by the Monarch Lumber Company."

When it came to the final disposition of the case, the court, among other things, found as its conclusion of law:

"That said receiver herein appointed should by the decree of this court be continued until the further order of this court, with the duty and powers in him vested to administer upon said estate of said defunct corporation, to wind up its affairs, and to settle the claims, and to dispose of its property for that purpose, under the orders and directions of this court."

When the case got to the Supreme Court, that court based its approval of the appointment of the receiver upon the ground that the Monarch Lumber Company was an insolvent concern. Brayton & Lawbaugh v. Monarch Lumber Co., 87 Or. 365, 169 Pac. 528, 536, 170 Pac. 717.

So that, in consideration of this record, it can scarcely be further controverted that Isherwood was appointed receiver of an insolvent corporation, with a view to winding out its affairs and disposing of its property subject to the orders of the court. In such a case there can be not doubt, as the court decided in the matter of the Monarch Lumber Company, a bankrupt, that the trustee in bankruptcy had the lawful right to the possession of the property of the Monarch Lumber

Company in preference to the receiver in the state court. Such is the settled law upon the subject.

[5] The next phase of the case relates to the ownership of the property, namely, the real estate which is covered by the mortgage, at the time of the appointment of the trustee in bankruptcy. It is settled by the judgment of the Supreme Court that Patton was the owner of the equity of redemption of the real property at the time of the appointment of the receiver. Shortly after the receiver had been appointed in the state court, to wit, on February 2, 1917, Patton deeded the premises to Kaste, and Kaste is now the owner of Patton's interest therein. The consideration for the transfer was $800. Of this $705 was paid from contributions made by one or more of the general creditors, and the balance by Kaste himself. Kaste was unwilling to purchase the title without the assistance of the general creditors, and the arrangement was accordingly made whereby the general creditors should participate in the proceeds to be derived from the property before the receiver was appointed. This resulted in a proposition by Kaste, he at the time representing Patton, made in open court, to the effect that, if the court would appoint a receiver in that cause, Patton would subordinate his title in and to tract "A" for the benefit and protection of the unsecured creditors of the said Monarch Lumber Company; and the appointment was accordingly made by the court. Kaste has explained that it was his intent and purpose to retain the legal title after the unsecured creditors had been satisfied, and such is the effect of the transaction in appointing the receiver. Tract "B" was not subjected to the condition, and Patton continued to hold the title thereto unaffected by any subordination to the claims of the unsecured creditors.

The testimony here further shows that on January 29, 1917, Isherwood was, through the aid of a writ of assistance issued out of the circuit court, put into the possession of the property, both tract "A" and tract "B." After he had been in possession for the space of an hour, possibly longer, Russell H. Brown, the receiver in bankruptcy of the Monarch Lumber Company, appeared and demanded possession, producing his authority from the referee in bankruptcy for so doing. Isherwood, unwilling to resist an officer of the court, yielded to the demand, but did so under protest, and Brown assumed possession. Brown subsequently was appointed trustee, and now holds the property as such.

The question arises what interest the trustee in bankruptcy has in tract "A," and whether he is entitled to administer it for the benefit of the unsecured creditors. I am persuaded that he has a direct interest, as trustee of the property, by reason of the fact that it was subordinated both by the act of Patton and by the order of the court for the benefit of the unsecured creditors of the Monarch Lumber Company of Oregon, and with their co-operation and assent. The trustee represents the creditors of that concern by operation of law, and as such is competent to administer the property for their benefit. While it is true that the title to the property passed from the Monarch Lumber Company, the subordination restored it for the benefit of these creditors, whereby they were accorded a lien for the protection of their

claims. The trustee representing the creditors, there would seem to be no good reason why he may not execute the trust, and subject the property to the payment of such claims. The residue, of course, would go to Kaste.

[6] But, however, this may be, the possession was taken from the state receiver by summary process. This, I am convinced, is not in accord with the suggestion of comity existing between state and national courts, and, if persisted in, would lead to unseemly conflict between such courts respecting the possession of property. In re Watts and Sachs, 190 U. S. 1, 23 Sup. Ct. 718, 47 L. Ed. 933; In re Lengert Wagon Co. (D. C.) 110 Fed. 927, 928; Carling v. Seymour Lumber Co., 113 Fed. 483, 51 C. C. A. 1; In re Rathman, 183 Fed. 913, 106 C. C. A. 253.

The question respecting usury attending the execution of the Monarch Lumber Company of Oregon mortgage was settled in the suit for an accounting, and need not be further attended to or discussed here.

So, also, at the former trial it was determined that the plaintiffs were entitled to recoup for premiums paid for fire protection, and for taxes, expenses of watchmen, and necessary repairs to prevent dissipation of the property, the sum of $50,000. That amount, as nearly as could be ascertained, covered the whole of such expense and outlay up to the time of that trial. At least, I am unable to say that a larger sum is subject to recoupment under sections 6, 7, 10, and 12 of article 2 of the mortgage, so as to entitle the plaintiffs to a lien within these provisions; but I hold that they are entitled to such lien covering that sum.

Further expenditures were incurred by Lester W. David subsequent to the former trial, and while it is claimed he was in possession of the property, to the amount of $12,780.84, which it is sought to have declared a lien under the mortgage for like reasons as the above sum of $50.000 was so adjusted. David, however, entered into a contract with the trustee in bankruptcy to keep up the property and maintain it in as good condition as he found it at the time, and to pay the insurance. This contract and undertaking on the part of David are fatal to the contention. The said sum of $12,780.84 is therefore not subject to such adjustment.

As conclusions of mixed fact and law, and without further analysis, I make the following findings:

The plaintiffs are entitled to recover the principal of the 12 notes..	$300,000 00
The interest from September 1, 1913, to this date, at 7% per annum, the David Investment Company having paid the first two years' interest	109,900 00
Also money that the mortgagee was compelled to pay to keep down the taxes and insurance, and to preserve the property so that insurance could be had, and prevent dissipation	50,000 00
Amount found to be reasonable as attorneys' fees for foreclosing the mortgage	15,000 00
Total	$474,900 00
The David Investment Company is entitled to recover the amount it was compelled to pay on interest installments as guarantor....	$37,500 00
And interest on such payments from date made at 7% per annum..	16,182 25
Total	$53,682 25

Plaintiffs are entitled to a foreclosure of the mortgage, and the David Investment Company is entitled to subrogation for the amount of interest it was compelled to pay, and the accumulated interest thereon, as above indicated.

The property incumbered by the mortgage should be sold to satisfy these demands of plaintiffs and the David Investment Company, together with the costs of this suit, which are awarded to plaintiffs.

Whatever money or property may remain after the satisfaction of these demands should be applied in satisfaction:

First, of the judgment of J. D. Moody, including interest thereon from June 30, 1913, the date of its rendition, at 6 per cent. per annum.

Second, of the judgment of Brayton & Lawbaugh, including interest thereon from December 8, 1913, the date of its rendition, at 6 per cent. per annum. The lien of this judgment was acquired by attachment levied August 13, 1913, which gives the lien over the Patton judgment, and subordinates Kaste's title thereto. These judgment holders have not asked that they participate in the foreclosure, but it is only fair that they should participate in the funds arising from the mortgaged property according to their priorities.

Third, the general or unsecured creditors of the Monarch Lumber Company of Oregon are entitled to the payment of their claims out of any surplus that may yet remain of the proceeds of tract "A."

Fourth, John W. Kaste is entitled to any balance that shall remain, either of money or property, after all these demands are satisfied.

All the defendants, including Kaste, should be foreclosed of whatever right, title, or interest they or either of them have or hold in the property.

The property, however, should be at once returned to Felix W. Isherwood, the receiver in the state court, and order of sale under the decree of foreclosure should be stayed pending action in that court.

The trustee in bankruptcy is entitled to a like accounting as was awarded him upon the former trial.

The decree of foreclosure should remain open for such further provision to be made at the foot thereof as may hereafter seem meet and proper.

Let a decree be drawn and entered in conformity with this opinion and these findings.

THE ROSERIC.

(District Court, D. New Jersey. November 22, 1918.)

1. INTERNATIONAL LAW ⇐10—ACTS OF SOVEREIGNTY OF FOREIGN NATION—RECOGNITION BY UNITED STATES COURTS.

An admiralty court of the United States will not exercise its jurisdiction in rem over a vessel under requisition by the British government, and used by it for purposes of the war in which such government and the United States are cobelligerents against a common enemy, so long as the vessel remains in such service, and the fact that its officers and crew are still in the employment of the owner is immaterial.

2. ADMIRALTY ⇐43—ARREST—IMMUNITY—VESSELS IN PUBLIC SERVICE.

A vessel engaged exclusively in public service is as exempt from delay caused by arrest as from final condemnation.

3. ADMIRALTY ⟸43—JURISDICTION—PROCESS—EXEMPTION—SHIPS IN PUBLIC SERVICE.
Unarmed vessel employed by a sovereign in public service is as exempt from judicial process to enforce private claims as one of his battleships.

4. COURTS ⟸1—JURISDICTION—SOVEREIGN.
No jurisdiction will be exercised over a sovereign, whether local or foreign, or over instrumentalities employed by it in the public service, by any proceedings in invitum, regardless of the form or character of the process.

5. ADMIRALTY ⟸43—SHIP IN PUBLIC SERVICE—REQUISITIONED SHIP.
Where ship and its equipment was requisitioned into public service, and the officers and crew continued to operate ship, the ship and its officers and crew for the time being became the sovereign's instrumentalities, and the ship was as much in possession of the sovereign as if he had taken it over by a regular charter or manned it for his navy.

6. PROCESS ⟸115—IMMUNITY FROM PROCESS—PUBLIC SERVICE.
The immunity of the sovereign's instrumentalities devoted to public service from process of its own courts is not based upon the idea that it may be safely accorded, but on account of its dignity and independence, and because it is necessary for the well-being of the nation that it shall not be hampered or interfered with in the use of such instrumentalities.

7. INTERNATIONAL LAW ⟸10—IMMUNITY FROM PROCESS—SHIPS IN SERVICE OF FOREIGN COUNTRY.
The immunity from process granted to ship in public service of country by courts of another country is based upon the idea that sovereigns are of equal dignity and independence, and that out of regard for the right of a sovereign to be unhampered in use of such instrumentalities, and to maintain amicable relation between sovereigns, it is tacitly agreed that one sovereign should decline to exercise some of its prerogatives when it would necessarily place another sovereign in a subordinate position.

8. PROCESS ⟸115—EXEMPTION—INSTRUMENTALITIES IN PUBLIC SERVICE.
It is not the ownership or exclusive possession of the instrumentality by the sovereign, but its appropriation and devotion to public service, that exempts it from judicial process.

9. ADMIRALTY ⟸72—IMMUNITY OF VESSEL IN SERVICE OF FOREIGN GOVERNMENT—PRESENTATION OF CLAIM.
While a claim of immunity of a vessel in the service of a foreign government from arrest under process from a court of the United States may properly be presented by the Department of Justice, the court may, in its discretion, act on suggestion of the Embassy of the foreign government.

In Admiralty. Suit by the McAllister Lighterage Line, Incorporated, against the British steamship Roseric. On suggestion that writ of arrest be quashed, or suit stayed. Suit stayed.

Vredenburgh, Wall & Carey, of Jersey City, N. J., and Burlingham, Veeder, Masten & Fearey, of New York City, for libelant.

Frederick R. Coudert and Howard Thayer Kingsbury, both of New York City, as amici curiæ, for British Embassy.

John M. Woolsey, of New York City, appearing specially for the Roseric.

RELLSTAB, District Judge. [1] The libel alleges that on April 16, 1918, the steamship Roseric negligently collided with libelant's barge McAllister Bros. No. 63, in New York Harbor, to its damage. After seizure by the marshal, within the territorial jurisdiction of this court, the steamship was released by the order of libelant upon an undertaking by the owners to bond her, in case the court should hold that she

was not immune from process, on grounds to be urged on behalf of the British Ambassador. Thereupon counsel for the British Embassy, appearing by leave of court as amici curiæ, filed a suggestion in the following terms:

"(1) The said Roseric is in the service of the British government as an admiralty transport by virtue of a requisition from the Lords Commissioners of the Admiralty and is engaged in the business of the British government and under its direction and control.

"(2) Any interruption of the voyage of said vessel by arrest or other process will interfere with the government business upon which said vessel is engaged, and thereby with the efficient prosecution of the present war.

"(3) This court should not exercise jurisdiction over a vessel in the service of a cobelligerent foreign government.

"(4) The British courts have refused to exercise jurisdiction over vessels in government service, whether of the British government or of allied governments, and by comity the courts of the United States should, in like manner, decline to exercise jurisdiction over vessels in the service of the British government.

"(5) The questions involved in this cause are of great importance to the British government, by reason of the large number of vessels in the service of the British government which enter ports of the United States, and of the important relation borne by the government service performed by these vessels to the efficient prosecution of the present war.

"And, upon such suggestion, for leave to represent to this honorable court as such amici curiæ that the said writ of arrest should be quashed and dissolved in so far as it runs against the said steamship Roseric, and that all proceedings to arrest or detain the said steamship Roseric under said writ, or otherwise, should be stayed so long as said steamship Roseric remains in the service of the British government as aforesaid."

From this suggestion and the deposition of the ship's master, which was not offered in evidence, but produced for the information of the court, it appears that, while the steamship is owned by a British subject and its navigation in charge of the owner's officers and crew, who receive their compensation from such owner, it, as well as the officers and crew, is under the complete control of the British government, and is engaged in its business as an admiralty transport, carrying such cargo, and going to and from such ports, as that government directs. For the time being it is appropriated by the British government for its public use, and was when the collision occurred and the arrest was made.

On the face of the libel, the libelant, an American citizen, has an inchoate lien on the ship, and this court prima facie jurisdiction to perfect it. If the arrest is set aside and the writ quashed, the libelant has no present remedy but in the British courts. If the proceedings to arrest the ship are stayed for as long as it remains in the service of the British government, the libelant's rights will be seriously prejudiced, and in the end it may find itself remediless.

[2] On the other hand, if the right to arrest this ship, so requisitioned, is sustained, the sovereign rights of the British government, at a time when it is engaged in a war, will be subordinated to those of a private claimant. Furthermore, the right to seize one ship so requisitioned means the right to seize any number of ships similarly conditioned, with the result that during the continuance of the war, not only that government, but the United States and other sovereignties, cobelligerents in

prosecuting such war against the common enemy, will be seriously hampered in their joint struggle to maintain their sovereign rights. It is of no moment that in this case, by arrangement between the proctors of the libelant and the ship's owner, no prejudicial detention of the ship resulted. The right to arrest involves the right to detain; detention includes the probability of loss to the users of the vessel; and exemption from delay of a vessel engaged exclusively in the public service of a nation is as much the privilege of sovereignty as the vessel's exemption from final condemnation. For present purposes the steamship must be regarded as still subject to or threatened with process of arrest. The Florence H. (D. C.) 248 Fed. 1012.

Libelant asserts that, "if this court drops or stays its jurisdiction, that must be done for reasons which our courts have declared to be not well founded," and that to grant such immunity would go "far beyond the principles which have been laid down by our courts as determining whether a ship shall be immune from process."

In The Exchange, 11 U. S. (7 Cranch) 116, 3 L. Ed. 287, a pioneer in this field of judicial inquiry, it was held that—

"A public vessel of war of a foreign sovereign at peace with the United States, coming into our ports, and demeaning herself in a friendly manner, is exempt from the jurisdiction of the country."

In that case libelant, an American citizen, asserted title to a vessel found within the waters of the United States and in the possession of the French government, which had converted it into a war vessel. Chief Justice Marshall, speaking for the court, after premising that all sovereignties possess equal rights and equal independence, declared that, as a result of mutual intercourse, impelled by a common interest, they "have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers," and that such jurisdiction "would not seem to contemplate foreign sovereigns, nor their sovereign rights, as its objects."

After dealing with the admitted exemptions of the person of a sovereign, his ambassadors, and the passage of his armies under certain circumstances, from interference by the sovereign of the territory into which they had been permitted to enter, the learned Chief Justice said:

"That all exemptions from territorial jurisdiction must be derived from the consent of the sovereign of the territory; that this consent may be implied or expressed; and that, when implied, its extent must be regulated by the nature of the case, and the views under which the parties, requiring and conceding it, must be supposed to act." 7 Cranch, 143, 3 L. Ed. 287.

After pointing out the difference in the status of a private individual and a merchant ship, on the one hand, and a public armed ship, on the other hand, of one nation coming into the territory of another, with reference to amenability to the latter's jurisdiction, and that the foreign sovereign could have no motive for the former's exemption from such jurisdiction, he, referring to the foreign sovereign's attitude to the public armed ship, said:

"She constitutes a part of the military force of her nation; acts under the immediate and direct command of the sovereign; is employed by him in na-

tional objects. He has many and powerful motives for preventing those objects from being defeated by the interference of a foreign state. Such interference cannot take place, without affecting his power and his dignity. The implied license, therefore, under which such vessel enters a friendly port, may reasonably be construed, and, it seems to the court, ought to be construed, as containing an exemption from the jurisdiction of the sovereign, within whose territory she claims the rites of hospitality." 7 Cranch, 143, 3 L. Ed. 287.

The Exchange is a strong case, but it has always been accepted as law both here and abroad. There the allegation was that libelants had been wrongfully dispossessed of their vessel by the representatives of a foreign sovereign. The inconvenience or possible injustice that may happen to the libelant in the instant case, if the Roseric is held immune from arrest, is incomparable with that apparently sustained by the libelant in the cited case.

The immunity there accorded was not due to a lack of judicial power. The power was assumed, but its exercise was waived out of a due regard for the dignity and independence of a sister sovereignty, with whom this nation was at peace. The implication is that to insist upon jurisdiction in such instances likely would be considered by the foreign sovereign as a reflection upon its dignity and an interference with its independence, and would tend to strain and possibly disrupt amicable relationships.

[3] Though in The Exchange an armed ship of war was the subject before the court, there is nothing in the reasoning resulting in its exemption from judicial process that limited the immunity of that character of vessels. The privilege was based on the idea that the sovereign's property devoted to state purposes is free and exempt from all judicial process to enforce private claims. Such idea is as cogently applicable to an unarmed vessel employed by the sovereign in the public service as it is to one of his battleships. The exemption declared in that case was considered in The Santissima Trinidad, 20 U. S. (7 Wheat.) 283, 353, 5 L. Ed. 454, and Mr. Justice Story, who sat in The Exchange, in stating the grounds thereof, referred to them as applicable to foreign public ships.

In Briggs et al. v. Lightboats, 93 Mass. (11 Allen) 157, Justice Gray, in answering the contention that these lightboats, though owned by the United States, were not intended for military service, and therefore were subject to judicial process, stated the ground of exemption as follows:

"The immunity from such interference arises, not because they are instruments of war, but because they are instruments of sovereignty, and does not depend on the extent or manner of their actual use at any particular moment, but on the purpose to which they are devoted." Page 165.

In granting immunity to property devoted by a sovereign to public use, neither its ownership nor the particular public use made of it is treated as important in the British courts.

In The Parlement Belge, L. R. 5 P. D. 197, immunity was accorded to an unarmed vessel belonging to a foreign sovereign in the hands of officers commissioned by him and employed in carrying mails, though

it also carried merchandise and passengers for hire. In that case Brett, L. J., after reviewing the American and other cases, said:

"That as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign state to respect the independence of every other sovereign state, each and every one declines to exercise, by means of any of its courts, any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any state which is destined to its public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and therefore, but for the common agreement, subject to its jurisdiction." Page 217.

In The Broadmayne, L. R. (C. A. 1916) 64, the immunity was extended to a ship owned by private parties, while under requisition by the British Admiralty, in an action for salvage. This exemption was granted in spite of the urgings of plaintiff's counsel (being similar to those pressed here):

"That the effect of requisitioning a ship is not to change the ownership, and the ship requisitioned remains the property of the owners, notwithstanding the requisitioning, and that when the use of the ship by the crown ceases the ship is restored to her owners." Page 70.

Swinfen Eady, L. J., in reply to such insistence, said:

"That is so, but it does not prevent a ship, so long as she remains under requisition, being in the service of the crown, and as such exempt from process of arrest." Page 70.

In The Messicano, 32 T. L. R. 519, a vessel requisitioned by the Italian government from private owners, and carrying war material for that government, was held to have the same privilege from arrest in a collision case as a ship requisitioned by the British government.

In The Errisos, reported in Lloyd's List, October 24, 1917, pages 5–8, a vessel owned by Greek subjects, and which, by arrangement between the Greek and British governments, had been requisitioned for the use of the British and Italian governments, and was carrying coal for the latter, was held free from arrest or detention "so long as the ship shall remain in the service of either the Italian or the British government for public or state purposes."

[4] These cases, in my judgment, must be accepted as declaring the judicial policy to exercise no jurisdiction over a sovereign, whether local or foreign, or over instrumentalities employed by it in the public service, by any proceedings in invitum, regardless of the form or character of the process. The libelant, however, insists that The Johnson Lighterage Co. No. 24 (D. C.) 231 Fed. 365, and The Attualita (C. C. A. 4) 238 Fed. 909, 152 C. C. A. 43, announce a different rule and control the instant case. The Johnson Lighterage Co. Case (decided by this court) was a proceeding to recover for salvage services. Both cargo and vessel were seized. On an order to show cause why such cargo (munitions of war) should not be released from seizure and turned over to the Russian government, who was the owner thereof, it was held that, as the possession of the cargo at the time of its seizure was not in that government, but in the charterer of the vessel, under a contract for transportation, it was within the exception declared in The

Davis, 77 U. S. (10 Wall.) 15, 19 L. Ed. 875, and subject to arrest. The lack of actual possession of the property by the government at the time of seizure is the basis of the exception established by the Davis Case, and distinguishes both it and the Lighterage Case from the case at bar.

The contention of libelant that, as the ship's officers and crew operated the Roseric, she was within the exception established by these cases, is not tenable. The British government, in the exercise of its sovereign powers, took the Roseric and devoted it to its own purposes. That no change in the officers and crew took place, and that they continued in the employment of the ship's owner, is unimportant. The ship, its owner, officers, and crew, were under the compulsion of sovereignty.

While the fact that the operation of the ship was by the owner's officers and crew may be important on the question of the owner's present, and the ship's ultimate, liability for the negligence charged in the libel, it is immaterial upon the question of the right of a private individual to enforce such liability by seizing the ship while it remains appropriated to the sovereign's public use. Whether the government should operate the ship by the owner's officers and crew or others was for the sovereign's exclusive determination.

[5] The effect of its requisition was to put the ship and its equipment into the public service. The officers and crew, as well as the ship, for the time being became the sovereign's instrumentalities, and whatever possession of the ship they obtained by reason of this employment was the sovereign's possession while the requisition was in force.

In legal effect a ship so subjected to vis major is no less in the possession of the sovereign than if he had taken it over by a regular charter or had manned it by his navy. In The Davis, with reference to the goods there in question, the court found:

> That the United States was not in the position of a charterer of the vessel, but that "the case was the usual one of a common carrier contracting to deliver goods on his own responsibility," and that "the possession of the master of the vessel was not the possession of the United States. He was in no sense an officer of the government. He was acting for himself, under a contract which placed the property in his possession and exclusive control for the voyage." 10 Wall. 21, 22, 19 L. Ed. 875.

The Attualita (C. C. A. 4) 238 Fed. 909, 152 C. C. A. 43, is more in point. In that case, notwithstanding the ship had been requisitioned by the Italian government and was engaged in its public service, it was held subject to arrest in a proceeding in rem to recover damages for an alleged tort. That case was decided before this country became a cobelligerent with the Italian government in the war against Germany. In all other respects the facts of that case are seemingly identical with those of the case at bar. The District Court had held that the ship was immune from arrest, basing its decision on the ground of international comity. The Circuit Court of Appeals, observing that to allow the immunity would require it to go beyond any of the decided cases, said:

> "There are many reasons which suggest the inexpediency and the impolicy of creating a class of vessels for which no one is in any way responsible." 238 Fed. 911, 152 C. C. A. 45.

And, after referring to the immunity granted to the diplomatic representatives and the vessels or other property in the possession and control of a sovereignty, it said that such immunity—

"can be safely accorded, because the limited numbers and the ordinarily responsible character of the diplomats or agents in charge of the property in question and the dignity and honor of the sovereignty in whose services they are, make abuse of such immunity rare." 238 Fed. 911, 152 C. C. A. 45.

That the seizure of the vessel interfered with sovereignty's rights and deprived it of the use of the ship, unless and until it or the owner thereof submitted to the court's jurisdiction (by bonding, etc.), was not referred to.

So far as the suggested irresponsibility of any one for a tort committed in the operation of a vessel so requisitioned is concerned, it should not be overlooked that the owner could be made personally liable for the negligence of his servants in operating the ship, even though the ship should be exempt; and so far as the ship itself is concerned the immunity need not be extended beyond the period of the sovereign's requisition; for, as soon as the sovereign restores the ship to the owner, the reason for its immunity is gone.

[6] It seems to me, and I state my judgment with deference, that the decision in that case unduly subordinates the rights of sovereignty to those of the individual. The immunity of the sovereign's instrumentalities devoted to public service from the process of its own courts, as I understand the previous cases, is not based upon the idea that it may be "safely accorded," but on account of its dignity and independence, and because it is necessary, for the well-being of the nation that it serves, that it shall not be hampered or interfered with in the use of such instrumentalities.

[7] In the case of the courts of one sovereignty waiving jurisdiction over another sovereignty's instrumentalities, the thought of safety to private litigants, to my mind, is at least equally irrelevant. The immunity in such cases, as already noted, is based upon the idea that sovereigns are of equal dignity and independence, and that out of regard for such rights, and to maintain and further amicable relations among them, it is, by tacit agreement, recognized as needful, in certain particulars, that one sovereign should decline to exercise some of its prerogatives when to exercise them would necessarily place another sovereign in a subordinate position.

In line with this thought, the following language of Judge Thompson in The Luigi (D. C.) 230 Fed. 495, is pertinent:

"It is far more important for the courts of the United States to recognize the international rule of comity that an independent sovereign cannot be personally sued, because such a suit would be inconsistent with the independence and equality among the nations of the state which he represents, than it is to take cognizance of private rights, if by so doing that rule is violated." Page 496.

[8] If these ideas dominate the question whether immunity should be granted to a foreign sovereign's property devoted to the public service, it logically follows that it is not the ownership or exclusive possession of the instrumentality by the sovereign, but its appropriation

and devotion to such service, that exempts it from judicial process. That in such use the owner of the instrumentality, through its servants, is permitted to remain in physical possession thereof, and, in consequence, may become personally liable for its agents' torts, is of no moment, where, as in this case, the ship and its entire equipment is under the absolute dominion of the sovereign.

The Florence H. (D. C.) 248 Fed. 1012, is said by analogy to support the libelant's contention in this behalf. The denial of immunity in that case was based solely upon the ground that by congressional action (Act Sept. 7, 1916, c. 451, § 9, 39 Stat. 730 [Comp. St. 1916, § 8146e]) the Florence H., though owned by the United States and devoted to national purposes, because of her employment as a merchant vessel, was made subject to all laws, regulations, and liabilities governing merchant vessels. The ground of the decision negatives the pertinency of the citation.

Thus far I have considered this question as if no relations other than those arising from a state of peace and amity existed between this nation and the one suggesting the immunity. If, then, the consent of one sovereignty to waive jurisdiction over the public instrumentalities of another is implied, when the two live in amity, and in part because their mutual well-being is promoted thereby, as announced in The Exchange, upon what theory is this immunity to be withdrawn from a sovereignty with whom this nation is actively engaged in prosecuting a war against a common enemy? The mutual benefit that accrues from such exemption in time of peace is at best but little in comparison with that which actually accrues in time of such a war.

The extraordinary conditions that environ the present suggestion of immunity, if they did not bring the instant case within the principle here deduced from the cases, would justify the announcing of one that did. However, as indicated, no such judicial declaration is needed. The Roseric is well within such principle, and, unless the British Embassy's *suggestion* is to be disregarded for the reasons now to be considered, must be held immune.

Libelant further contends that the suggestion of the British government is not conclusive, and, if so intended, is not properly before the court, because not presented by the United States attorney. As to the conclusiveness of the suggestion: In The Exchange, supra, the libelant answered the suggestion interposed on behalf of the French government and sought to put it in issue. The Supreme Court, however, accepted the facts as declared in the suggestion. In The Parlement Belge, supra, the court, to a like contention, by Brett, L. J., said:

"The ship has been by the sovereign of Belgium, by the usual means, declared to be in his possession as sovereign, and to be a public vessel of the state. It seems very difficult to say that any court can inquire by contentious testimony whether that declaration is or is not correct. To submit to such an inquiry before the court is to submit to its jurisdiction. It has been held that, if the ship be declared by the sovereign authority by the usual means to be a ship of war, that declaration cannot be inquired into. That was expressly decided under very trying circumstances in the case of The Exchange. Whether the ship is a public ship, used for national purposes, seems to come within the same rule." Pages 219, 220.

In the instant case none of the allegations of the suggestion have been put in issue. It is therefore, so far as this case is concerned, sufficient to say that, if the suggestion has been properly presented, it is conclusive as to all its material statements of fact. To the same effect, see The Luigi, 230 Fed. 495, 496, supra.

[9] As to the source from which the suggestion came: What is to prevent one sovereignty from appearing in the courts of another sovereignty? Or, stated more to the point, why should the court of one sovereignty refrain from receiving a suggestion as to its lack of jurisdiction, because it comes solely from the representative of a foreign sovereignty? It is not merely a proper, but a commendable, practice for such suggestions to come through the Attorney General or one of his representatives; but is it to be disregarded unless it does so come? No case has been cited that holds as matter of law that such a suggestion will not be received from a foreign sovereign's official representative. True, in The Luigi, supra, upon an oral suggestion made in open court—seemingly as amicus curiæ for a foreign government—Judge Thompson said he "was of the opinion that, inasmuch as the suggestion raised a question of international comity, it should come through official channels of the United States government."

In The Florence H., supra, Judge Learned Hand declined to receive the suggestion made on behalf of a foreign sovereign that to assume further jurisdiction might result in diplomatic embarrassment, unless such suggestion came through the diplomatic channels of this government. But I do not understand that either Judge Thompson or Judge Hand denied the power of the court to receive the suggestion through any other channels.

There may be good reasons in a given case why a suggestion from a foreign sovereignty should not be entertained, save through the executive branch of the government, of which the court is a part. To my mind, the sources from which such suggestion will be received is a matter of judicial discretion. Each case must be governed by its own circumstances, and The Luigi and The Florence H. I take to be instances where, in the exercise of judicial discretion, it was thought best not to receive the suggestions made on behalf of foreign governments, unless they came through the executive department of our government, and not as determinations that no such suggestions would be received from any other source.

In the instant case there are no considerations influencing the judicial discretion to refuse to act upon the suggestion made directly to the court by the British Embassy. On the contrary, from what has already been said concerning our national interests as a cobelligerent with the British government in the war pending at the time of the Roseric's seizure, they lead so obviously to an opposite determination that, in the absence of an intimation from the executive branch of this government that the public interests would be disserved by receiving such suggestion, its rejection would not be justified.

The only remaining question is whether, in following the British Embassy's suggestion, the writ of arrest should be quashed, or merely that the suit be stayed. While full immunity is to be accorded the British

government in the use of the Roseric while she is under its requisition, no good reason calls for the dismissal of the suit, a result which would follow the quashing of the writ.

A decree may be entered, staying all proceedings to arrest or detain the Roseric so long as she continues in the service of the British government.

In re MASON CO.

(District Court, D. Connecticut. November 20, 1918.)

No. 3714.

1. INSURANCE ⟸79—TERMINATION OF AGENCY—NOTICE.
   Insurance agency contract construed as requiring 30 days' notice of cancellation only when without cause, and to give right to cancel at once for cause.

2. INSURANCE ⟸80—AGENCY—NATURE OF CONTRACT—OWNERSHIP OF PREMIUM.
   Contract whereby in terms insurance company appointed a general agent, and required bond for payment of all moneys that became due from agent to company, *held* one of principal and agent, and not of seller and buyer, so that title in premiums, except agent's commission, is in insurer, though clause providing for agent's each month, on the 20th, reporting business up to the 15th, and within 60 days thereafter remitting all premiums thereby shown due the company, provides all credits extended for payment of premiums shall be at sole risk of agent.

In Bankruptcy. In the matter of the Mason Company, bankrupt. On petition of the Massachusetts Bonding & Insurance Company to review order of the referee denying its claim to premiums on insurance policies collected by the trustee. Order modified.

Ralph H. Clarke, of New Haven, Conn., for petitioner.
Albert H. Barclay, of New Haven, Conn., for trustee.

THOMAS, District Judge. This matter is now before the court on a petition for review of the referee's order denying the petition of the Massachusetts Bonding & Insurance Company, claiming as its property $1,311.09, the same being the amount of certain premiums on insurance policies written by said company through its general agents, the Mason Company, now bankrupt, which premiums, pursuant to an order of the referee, have been collected by the trustee and are held by him subject to the order of court.

The petitioner and the Mason Company entered into a contract in writing, which the petitioner alleges was a contract binding the Mason Company, the general agent, to sell policies of insurance written by the petitioner within certain prescribed limits in Connecticut and for certain commissions detailed in said contract. The petitioner claims that this is a contract between principal and agent; the trustee claims that it is a contract between vendor and vendee. Before passing upon this question, which is the main feature in the case, let us dispose of the subordinate issues.

Among other things the contract provided:

"That for any violation of, or failure to comply with, the conditions or provisions hereof, the general agent or the company shall have the right to cancel this agreement, and shall not be liable to the other for any loss, injury, or damage that may result therefrom. That this agreement will become effective from the 15th day of August, 1913, and will continue in force thereafter, subject to cancellation upon 30 days' notice from either party to the other, in writing. Depositing said notice in the United States mail, registered, shall be deemed a sufficient service thereof."

On the 3d day of March, 1915, the petitioner wrote the Mason Company the following letter:

"The Mason Company, 185 Church Street, New Haven—Dear Sirs: Confirming the writer's conversation with you of the 1st inst., you are hereby advised that, for reasons well known to your company, your appointment as agents of the Massachusetts Bonding & Insurance Company is revoked from the close of business March 1, 1915, and that from and after that date you have no authority to act as agent of said company in any capacity, nor to collect any premiums on policies or bonds issued by said company.

"Kindly acknowledge receipt of this communication at your early convenience, and oblige,

"Very truly yours, C. W. Fletcher, Assistant Secretary."

The Mason Company was adjudicated a bankrupt on the 20th day of March, 1915, and on March 31, 1915, Franklin L. Homan was appointed trustee.

[1] Some controversy arises in the minds of counsel respecting the right of the home office to cancel the contract under the terms of it, but this feature of the case need present no difficulty whatever. As I read the terms of the contract, either party had the right to cancel the contract at once for cause; but, if either party desired to cancel the contract without cause, each was bound to give the other 30 days' notice. The Mason Company at the time this letter was written was much indebted to the home office, at least to the extent of $4,000, because suit for this amount was brought in the state court upon a note for premiums *other* than those now claimed by the petitioner, which note was dated on the 3d day of June, 1914, and was payable on or before December 31, 1914. This failure to pay according to the terms of the contract laid the basis for the home office to cancel the contract at once. So it was acting well within the terms of the contract and lawfully when it sent the above-quoted letter on the 3d of March, 1915.

[2] In passing upon the controlling feature of this case, it now becomes important to decide whether or not the contract was a contract of agency between principal and agent, or a contract between vendor and vendee, and the correct interpretation of the contract will determine the issues involved between the parties in this proceeding. Without quoting the entire contract, and for the purpose of ascertaining, if possible, the intent of the parties at the time of the execution of the contract, it will be necessary to refer to certain portions of it. In the preamble it is provided that, in consideration of the covenants hereinafter specified, the Massachusetts Bonding & Insurance Company (hereinafter called the company) hereby appoints the Mason Company (hereinafter called the general agents), its vice

president, secretary, and treasurer, as its general agents, etc. Later on the contract says: "The General Agents Agree"—which is a heading, and then follows the various things the general agents agree to do and not to do, and among others they agree to "keep an accurate record on the company's registers, books, or cards, which may be provided, of all business transacted, and forward to the home office a daily report of such business, together with applications for all policies, where an application is required." And further it is provided:

"That they will furnish the company, at its expense, a satisfactory surety bond in the sum of $3,000 specifically providing for the payment of all moneys that may become due from the general agents to the company."

Then, under the heading of what "The Company Agrees" to do, the contract provides:

"That it will furnish the general agents and all subagents with licenses, etc.; that it will furnish the general agents and all subagents with printed forms, stationery, etc."

And then, under the heading of what "It is Mutually Understood and Agreed," it is provided that the territory of the said general agency is defined as follows:

"That the territory of the said general agency is indeterminate, but in a general way will comprise that section of the state lying south of a line from Norwich, on the east, running through Middletown, Waterbury, and Danbury to the New York state line, on the west, the general agents expressly agreeing that they will not compete with, or interfere in any way with, agencies already established, in any of the cities mentioned, or within the territory assigned, without the full knowledge and consent, in writing, of the company."

And under the cancellation clause reference therein is made to what the *general agents* and *the company* shall have the right to do.

The fourth paragraph of the original contract was amended to read as follows:

"It is Hereby Mutually Understood and Agreed:

"That the fourth paragraph on the first page of said contract under the caption 'The General Agents Agree,' is amended to read as follows:

"That all credits extended for the payment of premiums shall be at the sole risk of the general agents, and that not later than the 20th day of each month they will forward to the home office a full and accurate report in the form required by the company of all business transacted for or on its behalf for the period ending on the 15th day of the month for which such report is made, and will remit the full amount of all premiums shown by such report to be due the company within sixty days after the date on which such report is due at the home office of the company; that is to say, the general agents will forward on the 20th day of January a report of business transacted from the 15th day of the preceding December to the 15th day of January, and on March 20th will remit the premiums shown to be due the company by said report. Reports and remittances for succeeding months to be made upon the same basis."

Here again reference is made to the *general agents,* so that it must be apparent that the intent of the parties, at the time the contract was executed, so far as the reading of the same is concerned, conveys, without question, the idea that the parties contemplated a contract of agency, and such must be the ultimate conclusion here found, un-

less some rule of law intervenes to prevent the court from reaching such conclusion.

The trustee maintains that this is not a contract of agency in any sense of the word, but "it was clearly a contract between these parties of vendor and purchaser," and in his brief says that the contract "by its terms expressly eliminated any trust or fiduciary relationship that might, in the ordinary course of the conduct of such business, exist between the parties. The agreement created a relation of debtor and creditor." It is therefore apparent that, so far as the trustee is concerned, he relies upon the terms of the contract in order to find a correct interpretation of the contract itself, insisting that under the fourth clause of the contract, as amended, in view of the fact that it is provided that the credits extended for the payment of premiums shall be at the sole risk of the general agents, and that not later than the 20th day of each month they will forward to the home office a full and accurate report, in the form required by the company, of all business transacted for or on its behalf, for the period ending on the 15th day of the month for which such report is made, and will remit the full amount of all premiums shown by such report to be due the company within 60 days after the date when such report is due at the home office—that is to say, the general agents will forward on the 20th day of January a report of business transacted from the 15th day of the preceding December to the 15th day of January, and on March 20th will remit the premiums shown to be due the company by such report—that such provisions establish a contract between a vendor and vendee, and not a contract between a principal and agent.

In this conclusion I cannot concur, and, while no dispute can be had with the law cited in support of the facts as applied to the various cases relied upon, nevertheless the plain import of the question in this contract as to the intentions of the parties, as clearly expressed by it, forecloses the conclusion relied upon by the trustee in support of his claim. In my view of the situation, as disclosed by the record and careful reading of the contract, the outstanding premiums unpaid were clearly the property of the petitioner, who had appointed the Mason Company as general agents to sell its policies of insurance and collect its premiums for it, subject only to the right of the agents to comply with the regulations set forth in the contract, and to deduct certain commissions for services thus rendered as general agents. Further support for this conclusion is found in the provisions of the contract concerning the bond to be given by the general agents to the company, providing for the payment of all moneys that become due from the general agents to the company. If the money collected or to be collected for premiums was in the contemplation of the parties to be the property of the Mason Company, no bond would have been necessary; but it clearly appears that it was understood that the money collected for premiums was the property of the home office, and it was to secure the payment of it that the bond was given.

It is further argued by the trustee that creditors of the Mason Company could, in a suit to recover on their claims, have attached by garnishee process the uncollected premiums in the hands of the

various subagents of the Mason Company and even of individual policy holders, and urges this fact for the further reason of showing that the premiums were the property of the Mason Company, and now should be held by the trustee for the benefit of the estate. In this statement I cannot concur. Assuming that no bankruptcy proceedings had intervened, in such circumstances as the trustee outlines, would not the Mason Company have contended, and contended successfully, in those suits brought by the various creditors against it, that it had a contract whereby it had been appointed a general agent to collect these premiums, and that the money represented by it is not its property to the extent that it had a right to collect it and appropriate it to its own use, but rather that the money represented by premiums was the property of the home office, subject only to a deduction for commissions allowed by the terms of the contract, and that only to the extent of such commissions did they have an interest in the premiums? To that extent, and to that extent only, in my view of such an assumed situation, would an attaching creditor secure any part of the fund. In other words, upon proper proceedings it would be bound to appear that the only moneys which were legally attached under such circumstances, and which belonged to the Mason Company, would be the commissions due it under the terms of the contract, and the balance of the money thus attached would have to be released in favor of the Massachusetts Bonding & Insurance Company.

The trustee relies upon Ætna Powder Co. v. Hildebrand, 137 Ind. 462, 37 N. E. 136, 45 Am. St. Rep. 194, and says in his brief exactly the same situation as in this case existed before the court, in which conclusion, after carefully reading the case, I cannot concur, for there the contract was an entirely different contract than the one here under consideration. But the trustee goes on further to say that in that case it was held that, where by the terms of a contract goods are consigned by one person to another to sell as agent upon a commission, the conclusion was reached by the court that this was a contract between the vendor and vendee. With that proposition there can be no quarrel, but that is not the case here, because goods here were not consigned by the home office, and, as I view it, the terms of the contract here under consideration make no such provision, and such was not the intention of the parties, even though the fourth paragraph of the contract provided that the credits extended should be at the risk of the general agents.

While it is true, as counsel have stated in the briefs, it has been difficult to find cases where this exact situation has arisen, I think it must be due, doubtless, to the fact that the propositions involved seem so clear and of such a fundamental character as to require the citation of no authority to support the contention; but my attention is directed to Jefferson Fire Ins. Co. v. Bierce & Sage (C. C.) 183 Fed. 588. This was a suit by an insurance company against its general agent for an accounting of premiums. The insurance company undertook to terminate the agency by the appointment of a receiver, and the question was whether the agency had been lawfully terminated,

and in the course of the opinion written by Judge Denison, of the Sixth Circuit, now of the Circuit Court of Appeals, he said at page 592:

"As to the uncollected accounts, it is not equitable that complainant should insist upon the defendant's guaranty, found in the contract, and at the same time deprive defendant of the power to collect, as was done by procuring the appointment of a receiver. The resort to these proceedings operated as a waiver of the guaranty. The accounts belong to the complainant."

This dictum is in line with the conclusion here reached.

If Lebanon Mutual Insurance Co. v. Hoover, 113 Pa. 591, 8 Atl. 163, 57 Am. Rep. 511, cited by the trustee, is at all pertinent to the question here to be decided, it in no way alters the conclusion here reached. Note carefully what Judge Sterrett, in writing the opinion of the court, says:

"They [the jury] found the established course of dealing between the three parties concerned [the assured, the agent, the company] was that Tredick, the agent, was treated as debtor to the company for premiums on all policies or renewal certificates procured through him, whether he received such premiums from the parties in whose favor they were issued or not, and that he was not expected to account and pay to the company until a statement was rendered during the next succeeding month; that as between Tredick [the agent] and the assured the latter were not expected to pay in advance, but upon demand made by him a month or more after the insurance was effected. * * * The true answer to the narrow technical defense, interposed in this case, is not that there was an actual waiver of the condition in question, but that there was a mutual understanding between the parties that instead of a strictly cash payment of premiums at the time of effecting insurance, a short credit would be given by the company to its agent and by him to the assured."

So here, if we adopt the reasoning of the Hoover Case, the conclusion is that, even though the contract here does provide that "all credits extended for the payment of premiums *shall be at the sole risk of the general agents,*" that provision simply made the Mason Company the "debtor" of the insurance company for all premiums collected or uncollected, and in no way could such a clause be construed so as to make the Mason Company the owner of the fund, which would have to be the case if the trustee is entitled to it. The contract was a "mutual understanding between the parties that, instead of a strictly cash payment of premiums at the time of effecting the insurance, a short credit would be given by the company to its agent and by him to the assured," and that by such a provision the express terms of the contract could not be altered to make it a contract of vendor and purchaser, even though the Mason Company became a "debtor." The language of the contract in the Hoover Case was not held to be a contract of vendor and purchaser, as urged by the trustee, but, on the contrary, a contract of agency pure and simple.

Nor is the Ætna Powder Co. Case, referred to and relied upon, at variance with the conclusion here reached, because the facts there are not the facts here. The contract there was different from the contract here. The wording of the contract itself clearly showed the intention of the parties, even as it does here, and even though the appellant there contended that the contract was one of principal

and agent, the court held that the language of the contract showed otherwise. The contract there provided that the Powder Company agreed to "consign" to Hildebrand & Fugate, to sell as agents, at a price to be fixed by the Powder Company below which the goods so "consigned" should not be sold, authorizing Hildebrand & Fugate to sell the goods "so consigned" at the established prices; and all through the contract the wording of it shows clearly that it was a contract of consignment and necessarily governed by the well-known legal principles respecting contracts of consignment, and not by the legal principles affecting contracts of sale by principal and agent.

In the course of the opinion Judge McCabe said:

"The only difference, therefore, between counsel on both sides as to this point, is that appellant's counsel contend that a different relation between the parties than that provided in the contract may arise or be created by the act of one of the parties thereto without any new contract, or the modification of the old by mutual agreement of both. Such a doctrine is at variance with the plainest and most familiar elementary principles of the law of contracts. It is manifest that the contract fixes the relations between the parties thereto at every stage of the transactions provided for therein."

So here by the very terms of the contract the parties were bound by the rules applicable to principal and agent, and not by those to vendor and vendee, and, thus concluding, I find that the fund was the property of the insurance company and the only property right the Mason Company had in it, and which the trustee now takes, is the property right in the commissions provided for in the contract, which vary slightly, as will be seen by reference to it, according to the character and kind of policy issued, but which amount may be easily computed by the trustee, for the purpose of determining what part of this fund he is entitled to hold for the benefit of the estate and what part shall be paid over to the petitioner.

It is further urged in support of the claim of the trustee that the insurance company by its own acts has created the relation of debtor and creditor, thus creating the relation of vendor and purchaser, by bringing its suit on the $4,000 note, which represents premiums collected by the Mason Company other than those here claimed; and it is also urged in this connection that, as the contract provided "that all credits extended for the payment of premiums shall be at the sole risk of the general agents," the fund here in dispute, by the acts of the parties and the terms of the contract, became the property of the Mason Company, and, now that bankruptcy has ensued, ipso facto, the property of the trustee. In my opinion such a statement refutes such a claim and answers the inquiry here presented, because the suit brought shows conclusively that the insurance company was endeavoring to collect what it considered was its property, and that it never treated the fund as the property of the Mason Company, to which it has always maintained that it had title, and the clear intendment of the clause of the contract above quoted simply shows that the "mutual understanding between the parties" was, to use the language of the court in the Hoover Case, supra, that, "instead of a strictly cash payment of premiums at the time of effecting insurance, a

short credit would be given by the company to its agent and by it to the assured," and if the Mason Company saw fit to extend credit to customers on the insurance company's money, it, the Mason Company, must assume the risk as to whether the customers it saw fit to do business with were financially responsible, in view of the fact that by the very nature of the transactions the insurance company could not and would not undertake to decide the question of financial responsibility of the Mason Company's customers.

In other words, assuming that the contract had not made any provision for the extension of credit, and provided that the business should be strictly cash from assured to the Mason Company—from the Mason Company to the home office—could it be claimed with any seriousness that the cash premiums collected by the Mason Company were its property, to which it held title? The very statement compels a negative answer. So it seems very clear to me that, as the contract simply provided a means for the very same transaction on a credit basis, the legal effect of the transaction was in no way changed and so the title to the premiums was in the insurance company, less what, under the contract, the Mason Company was entitled to deduct as a commission, and to this commission, and that only, the Mason Company had title, and this sum, and this only, is what passes to the trustee for the benefit of the estate.

Therefore the order of the referee is modified, and an order may be entered providing for the payment of such an amount to the trustee as is represented by the commissions provided for in the contract, and the balance shall be paid by the trustee to the Massachusetts Bonding & Insurance Company, the petitioner herein, all in accordance with this opinion.

Ordered accordingly.

In re ROSENWASSER BROS., Inc.

(District Court, E. D. New York. October 31, 1918.)

1. SEARCHES AND SEIZURES ⟸3—SEARCH WARRANTS—AUTHORITY TO ISSUE.
   The action of a commissioner in issuing a search warrant under authority given by Act June 15, 1917, c. 30, tit. 11, may be reviewed by the court on motion.
2. SEARCHES AND SEIZURES ⟸3—SEARCH WARRANTS—PROBABLE CAUSE.
   Probable cause for the issuance of a search warrant must be shown by the facts alleged, and is to be determined therefrom by the magistrate, and not by the opinion of the affiant, although the facts may be averred on information, if the source of the information is stated.
3. SEARCHES AND SEIZURES ⟸3—SEARCH WARRANTS—SEIZURE OF CORPORATE RECORDS.
   Corporation records, which would be evidence against individuals charged with crime, may be taken under a search warrant; and it is no objection that they might also be evidence against the corporation.
4. SEARCHES AND SEIZURES ⟸3—SEARCH WARRANTS—PROBABLE CAUSE.
   Not only the affidavit made for the issuance of a search warrant, but also the complaint and affidavit charging the crime, may be considered in determining probable cause for issuance of the search warrant.

5. SEARCHES AND SEIZURES ⊂⊃3—SEARCH WARRANTS—GROUNDS FOR ISSUANCE.

Issuance of a search warrant by a commissioner *held* justified by the showing of probable cause.

6. SEARCHES AND SEIZURES ⊂⊃3—SEARCH WARRANTS—SUFFICIENCY OF AFFIDAVIT.

An affidavit for a search warrant need not set forth the entire details for exactly passing upon the materiality of every document which the search warrant might properly produce, but general allegations showing materiality are sufficient.

In the matter of the application of Rosenwasser Bros., Incorporated, for vacation of search warrant. Denied.

Fitzgerald, Stapleton & Mahon, of New York City (Luke D. Stapleton, of New York City, of counsel), for petitioner.

Melville J. France, U. S. Atty., of Brooklyn, and H. Harvey Harwood, Asst. U. S. Atty., of New York City, for the United States.

CHATFIELD, District Judge. Motion has been made to this court to vacate and set aside a search warrant, and to direct the return of property taken under this search warrant from the factory of Rosenwasser Bros., Incorporated, one of the defendants in the case.

The record shows that complaint was presented to a United States commissioner against Rosenwasser Bros., Incorporated, with relation to a charge of conspiracy which it was alleged had been formed and carried out by the corporation with certain of its employés and certain inspectors and officers of the United States, who were concerned with government contracts in the process of fulfillment by the corporation.

[1] This search warrant was issued under the provisions of Act June 15, 1917, c. 30, tit. 11, §§ 1–3, 40 Stat. 228, and the particular ground upon which the search warrant was issued is that of section 2, par. 2:

"When the property was used as the means of committing a felony."

Section 3 provides:

"A search warrant cannot be issued but upon probable cause, supported by affidavit, naming or describing the person and particularly describing the property and the place to be searched."

For the purpose of this motion it may be assumed that the other sections of this statute have been substantially complied with, that the property seized has been inventoried, that the return of such papers as are not material to the criminal charge has been secured through the act of the commissioner, and that the books and papers necessary to the ordinary conduct of the defendant company's business have been made available to them.

The only question presented is whether probable cause as to the commission of a crime was shown in such a manner as to meet the requirements of the provisions of articles 4 and 5 of the Constitution, forbidding unlawful searches and seizures and securing protection against compulsory incrimination.

A motion such as the present could be made as the law stood before the enactment of the present statute. United States v. Wilson, (C. C.) 163 Fed. 338; United States v. McHie (D. C.) 194 Fed. 894; Weeks v. United States, 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177.

The situation has not been changed in this respect by the statute of June 15, 1917. The various sections giving the commissioner the power under the warrant to determine whether probable cause actually exists, and to pass upon the materiality of the articles seized, do not restrict the right of the court to consider whether the record shows a basis for the entire proceeding. If there was no probable cause for the issuance of the original search warrant, the court can still set aside the entire action. In re Veeder (C. C. A. 7th Circuit) 252 Fed. 414, — C. C. A. —; United States v. Friedberg (D. C.) 233 Fed. 313.

[2] Probable cause must be shown from the facts alleged. It is not sufficient to aver nothing beyond the belief of an individual that such facts could be set forth. The conclusion from the averments of facts must be that of the magistrate, and not the opinion of the affiant. United States v. Tureaud (C. C.) 20 Fed. 621; United States v. Baumert (D. C.) 179 Fed. 735, and cases therein cited.

But the averments of facts need not be by an eyewitness. Allegations on information can be stated, if the facts so referred to and the source of the information are stated. The expression of belief in those facts is customary and required, but does not of itself constitute an allegation which will take the place of the statement of the alleged facts themselves. Beavers v. Henkel, 194 U. S. 73, 24 Sup. Ct. 605, 48 L. Ed. 882.

But the evidence need not be given in detail, nor need the allegations be made by all the parties who will be called to prove them at the hearing. A direct affidavit that facts exist from which probable cause is inferable is sufficient. So is a statement that information as to the facts has been obtained from named sources, if the facts are recited. Beavers v. Henkel, supra, 194 U. S. at page 86, 24 Sup. Ct. 605, 48 L. Ed. 882.

[3] In the case at bar a search warrant and a warrant of arrest were issued and executed together. The corporation could not be arrested in corpore. But some of the individual defendants were arrested at the time of executing the search warrant, and notice was then given that the corporation was a party defendant. No question arises as to the right to take corporation records, which would be evidence against the individuals. Wilson v. United States, 221 U. S. 361, 31 Sup. Ct. 538, 55 L. Ed. 771, Ann. Cas. 1912D, 558; Dreier v. United States, 221 U. S. 394, 31 Sup. Ct. 550, 55 L. Ed. 784. Nor can the individuals or the corporation object that the papers taken from them might be evidence against the corporation. Hale v. Henkel, 201 U. S. 43, 26 Sup. Ct. 370, 50 L. Ed. 652; Wheeler v. United States, 226 U. S. 478, 33 Sup. Ct. 158, 57 L. Ed. 309.

[4] If the corporation can be charged with conspiracy, it must still produce its books on the service of lawful process. Hale v. Henkel, supra. But it can object to being unlawfully searched, or compelled

to produce evidence against itself, by methods outside of the law. Individual defendants have the same right. Each claim of right must be considered by itself. The affidavit upon which the search warrant was asked was not the only paper before the commissioner. He had the complaint and affidavit upon which the warrant of arrest was sought. Both of these could be, and in fact were, used in determining probable cause. These papers together make out a showing of probable cause as to the existence and place of keeping of the papers sought and as to the commission of the crime charged.

[5] But the commissioner in the search warrant does not specifically recite the affidavits so used, nor does he state that he finds probable cause for the charge of conspiracy. His language is merely in the form of a conclusion, as follows:

"Whereas, complaint on oath and in writing has this day been made before me * * * by Franklin Ford, alleging that he has reason to believe and that he does believe that certain property was used as a means of committing a felony, to wit, a conspiracy to defraud the United States, a violation of section 37, C. C. of the United States," and that "the said above property is and is concealed in the quartermaster's subdepot located at Jackson avenue and Queen street, Long Island City."

But this includes the allegation that the property was used in the commission of a "conspiracy," and necessarily includes the finding of the elements of a conspiracy charge.

If the commissioner had stated that he was acting upon two complaints, one showing grounds for the issuance of the search warrant, and one showing probable cause for believing that a felony had been committed, by means of the papers and records sought, the only question would be the sufficiency of the showing made by both complaints.

Viewed in this light, the warrant of search was issued on verified statements sufficient to comply with the statute. When viewed from the allegations of the single paper, generally referred to as the complaint for the search warrant (the affidavit as to the whereabouts and existence of the papers sought), the lack of a showing of probable cause of the commission of a crime would be apparent. But under the circumstances of the issuance of both warrants in this case, the action of the commissioner was justified in law, and the government is not estopped from relying upon the entire record, by the failure of the commissioner to clearly state that his conclusions are not drawn from one complaint or one affidavit alone.

A warrant of arrest need not be as explicit or full as an indictment in setting forth the entire charge, and so a search warrant need not cover all the requisite preliminaries in its recitals, if the crime is definitely shown, and if the conclusion of the commissioner that probable cause exists is so stated that the papers upon which it is based can be identified as having been before him at the time, and if the names of the affiants are set forth (section 6):

"If the * * * commissioner is thereupon satisfied of the existence of the grounds of the application or that there is probable cause to believe their existence, he must issue a search warrant, * * * stating the particular grounds or probable cause for its issue and the names of the persons whose affidavits have been taken."

These affidavits need not be served, but the warrant must be (section 12), and the originals are of course a part of the record, which must be preserved and should be filed with his return (section 17).

In this case the defendants have been misled by the use of the word "complaint," as if but one affidavit were referred to, when in fact there were three made by the same party. But no wrong has been inflicted thereby, and the general statement of the commissioner is broad enough to cover the defendants' rights, although not so worded as to make plain, upon the face of the warrant, the exact way in which the requirements of section 6 were met.

The court in the Veeder Case, supra, found that an allegation of belief as to the materiality of the papers sought was insufficient from which to find probable cause, when the list included papers of which the affiant had obtained merely a glance and which were not specifically described. The court comments upon the impossibility of determining whether a list of office books, copy of the smoke and wide tire ordinances, and Mr. Veeder's office keys were means used in the commission of the crime of controlling the price of beef by certain packers.

In the present case the affidavit is worded in much the same manner, and the Veeder decision does not seem to have been made use of to avoid the presentation of a similar objection.

[6] But it cannot be held that an affidavit for the purpose of showing probable cause must set forth the entire details for exactly passing upon the materiality of every document which the search warrant might properly produce. General allegations showing materiality to the issue would seem to be sufficiently specific, and such books and papers as have been used in the business routine are not to be thrown out as irrelevant and immaterial in the sense in which those faults were found by the court in the Veeder Case. It cannot be held that no discretion in searching (or even no search) for objects which may ultimately prove immaterial can be allowed, and that the affidavits must cover every such possibility. The language of the statute providing for the return of articles of this category indicates the proper limitations which the court found were exceeded in the Veeder Case. The papers searched for under the present warrant appear from the affidavits to be in substance material, and the warrant is not therefore fatally defective in this regard.

On the entire record the motion will be denied.

BRIGHT et al. v. VIRGINIA & GOLD HILL WATER CO.

(District Court, D. Nevada. October 17, 1918.)

1. CORPORATIONS ⇐397—AGENT OF CORPORATION.
   One is an agent, whether he is acting for a natural person or a corporation; the fact the principal is artificial not interfering with the status of the agent.
2. WITNESSES ⇐144(13)—COMPETENCY—TRANSACTION WITH PERSON SINCE DECEASED.
   Under Rev. Laws Nev. § 5419, declaring no person shall be allowed to testify when the other party to the transaction is dead, one party to an

arrangement with a corporation cannot testify thereto after death of the corporate representative, for such representative was the other party to the transaction.

At Law. Action by Rose Bright and others against the Virginia & Gold Hill Water Company. On objection to testimony. Testimony excluded.

H. V. Morehouse, of Reno, Nev., for plaintiffs.
Cheney, Downer, Price & Hawkins, of Reno, Nev., for defendant.

FARRINGTON, District Judge (orally). It appears that in 1880, Mrs. Raffetto, her husband, and brother were living on the ranch under discussion. Mrs. Raffetto says she owned an interest in the property. I have not examined the record, but counsel have stated, and the statement has not been questioned, that this property, or a portion of it, was deeded to her in January, 1881, and that this transaction, in regard to which her testimony is offered, occurred something like 37 years ago. I assume that Mrs. Raffetto was interested in the property at the time, and therefore interested in the water. Mrs. Raffetto says the water in a ditch owned by the Water Company escaped and ran over the Raffetto ranch, doing a large amount of injury, and that Mr. Overton, the superintendent of the company, visited the premises, and there was some sort of an arrangement, conversation, or transaction among these four persons—Mrs. Raffetto, her husband, and her brother, on the one side, and Mr. Overton, on the other. Mr. Overton is dead. Defendant objects to the testimony of Mrs. Raffetto as to what occurred on that occasion, on the ground that, inasmuch as death has closed the lips of Mr. Overton, Mrs. Raffetto's lips also are closed.

There was a time when interested parties were not permitted to testify in law cases; their lips were closed, because they were interested. That was the common-law rule for 200 years. During that period a man accused of crime in England was not permitted to testify in his own behalf in a criminal trial. This law was altogether too drastic; hence Lord Denman's Act, and similar legislation in England, followed by like statutes in America, which permit interested parties to testify, save in certain cases. The difference in the statutes is the difference in the exception. At one time there was a federal statute regulating the matter, but that statute has been repealed, and now the national courts must conform to and follow the state legislation. It is not a question as to what is just or unjust; it is simply a question as to what the law is.

It is easy to see how the law as it is written can operate unjustly in certain cases. For instance, you and I enter into a contract; I die, and the law says you cannot yourself testify as to the terms of the contract. It does not say you cannot prove your contract; it simply says you cannot testify; it closes your mouth, because death has closed mine. It may thus operate to prevent you from establishing your claim.

[1, 2] The statute of Nevada reads as follows:

"No person shall be allowed to testify when the other party to the transaction is dead." 2 Rev. Laws Nev. § 5419.

Unquestionably the Legislature intended by that language to shut out testimony in certain cases, and it is for the court now to determine whether the statute applies to the case in hand. The statute was not always in its present form. Originally it read thus:

"All persons without exception, including parties to or those interested in the suit, except where the adverse party is dead, or where the opposite party shall be the administrator, executor or legal representative of a deceased person, may be witnesses." St. 1861, c. 103, § 340, as amended by St. 1864, c. 58.

Any person could be a witness, except where the adverse party was dead, or where the opposite party was an administrator or an executor. The Legislature evidently was not satisfied, so a few years later it adopted a statute reading as follows:

"No person shall be allowed to testify * * * when the other party to the transaction, or opposite party in the action, or the party for whose immediate benefit the action or proceeding is prosecuted or defended, is the representative of a deceased person." 1 Comp. Laws 1873, § 1440.

In this statute the controlling factor is the opposite party. If he is the representative of a deceased person, the testimony will be excluded; if he is not the representative of a deceased person, the testimony will be admitted.

While this statute was in force, the case entitled Vesey v. Benton, 13 Nev. 284, was decided. The controversy arose in this county—I presume the Benton referred to is "Doc" Benton. H. M. Vesey entered into a contract with Benton, whereby Benton was to furnish board for a number of men; in making the contract E. A. Vesey acted as agent for his brother, H. M. Vesey, who soon after died. The deceased brother was the principal in the contract; the living brother, as agent, had arranged the contract with Benton. E. A. Vesey, the agent who arranged the contract, having been appointed administrator of his brother's estate, brought an action against Benton on the contract. As the representative of a deceased person, he was allowed to testify, but Benton's testimony was excluded; he could not testify, because the opposite party to the contract was dead, and the party opposite to him in the suit was the representative of a deceased person. It was a peculiar situation. Under the plain letter of the statute, one of the men actually engaged in making the contract was permitted to testify, while the testimony of the other was excluded. The case was appealed, and the Supreme Court, speaking through Judge Hawley, criticized the statute severely, but said it was the law, and there was no escape from it; if the law was wrong, the fault was the fault of the Legislature; the court was bound to follow the statute as it was written.

Reading again the present statute, "No person shall be allowed to testify when the other party to the transaction is dead," the first question is: Was Mrs. Raffetto a party to the transaction? And the next question is: Was Mr. Overton a party to the transaction?

The Legislature undoubtedly used the term "other party to the transaction" advisedly. If it had intended "when the other party to the contract," or "the other party to the suit" is a deceased person, it certainly would have said so. The word "transaction" is more comprehensive than the word "contract." It must be given a broader interpre-

tation than would be given if the statute said "when the other party to the contract" is dead.

In this case there was a transaction, and Mrs. Raffetto was a party to it. If I understand her testimony, she was interested in the ranch at the time, owned a part of it, and therefore was interested in the water; she took an actual part in the conversation with Mr. Overton, and in arranging the contract regarding which she is asked to testify.

As to Mr. Overton, Mrs. Raffetto says he was superintendent of the company. Objection was made that this could not be so proven. If Mr. Overton was not the agent of the company, not its superintendent, it is difficult to see how he could bind the corporation; he must have had some authority to do so. He must have been a representative of the corporation; otherwise, there was no contract which could bind the company. If he was the agent of the company, then is he the other party to the transaction?

In the case to which I referred a few moments ago, Vesey v. Benton, the arrangement between Benton and the surviving brother, the agent for the dead principal, is characterized as a transaction. The court says, "The other party to the transaction is E. A. Vesey;" that is, the agent who negotiated the contract.

In Crane & Co. v. Gloster, 13 Nev. 279, Judge Beatty says:

"Under the old law, if A., by his agent, contracted with B., and his agent died, in an action on the contract after the death of the agent, B. could not have testified, because of the death of the 'other party to the transaction.'"

A man is an agent, whether he is acting for a person or for a corporation. The fact that the principal for whom he acts may be an artificial rather than a natural person does not affect his status as an agent. If, as agent, he arranges a contract for his principal, he is one of the parties to the transaction, within the meaning of the statute.

In Carroll v. United Railways of St. Louis, 157 Mo. App. 247, 137 S. W. 303, cited by defendant, there is an interpretation of a similar, but less comprehensive, statute. Doubtless, if the Supreme Court of Missouri, when passing on the question, had been obliged to apply the Nevada statute to the facts, it would have come to precisely the same conclusion it did in that case. There the statute read:

"When one of the parties to the contract, or to the cause of action, is dead, the other party to the cause of action, or to the contract, cannot testify."

In that case the transaction did not occur between the original parties to the contract. On one side was a woman who had been injured, and on the other a corporation through whose negligence the injury was supposed to have occurred. The transaction was the fact that the lawyer for the plaintiff, the injured woman, tendered certain moneys to the attorney for the company; the attorney for the company died, and the court said the lawyer for the plaintiff could not testify as to that matter; death had closed the mouth of one party to the transaction, and the law would close the mouth of the other. The word "transaction" does not occur in the Missouri statute; the term used is "parties to the contract, or to the cause of action."

Counsel puts much reliance on the decision in Burgess v. Helm, 24

Nev. 242, 51 Pac. 1025. Burgess claimed to have entered into a contract with Mrs. William McDonald for services; Mrs. McDonald died, and Mr. Helm became her administrator. Burgess brought a suit against the estate. He sought to establish the contract between himself and Mrs. McDonald, not by his own testimony, but by the testimony of third parties as to conversations with Mrs. McDonald after the contract was supposed to have been entered into, in which she made admissions as to its terms. The administrator objected to the testimony, because the third parties who were testifying to these conversations were parties to the transaction—that is, to the conversations—and Mrs. McDonald, the other party, was dead; but the court said "No," the transaction was the contract between Burgess and Mrs. McDonald, therefore Burgess could not testify, but the testimony of his witnesses was admissible.

If the rule had been construed as broadly as Mr. Helm contended for in that case, it would practically, as counsel for plaintiffs in this case suggests, make it impossible to prove a claim against a dead man. I think the decision in the Burgess Case was correct, but it does not fit this case; therefore I am constrained to sustain the objection made to the testimony of Mrs. Raffetto.

The controlling factor in this conclusion is the language of the statute itself:

"No person shall be allowed to testify when the other party to the transaction is dead."

If the Legislature had intended "the other party to the contract," it would have said so; if it had intended "the other party to the suit," it would have said so. In view of the many changes made in the act since its first adoption, we cannot assume that the last amendment was made otherwise than deliberately and advisedly.

LANCASTER et al. v. POLICE JURY, PARISH OF AVOYELLES, STATE OF LOUISIANA, et al.

(District Court, W. D. Louisiana. December 7, 1917.)

1. APPEARANCE ⇐25—EFFECT—IRREGULARITIES—ANCILLARY BILL.
   Where all parties were properly served and appeared, it is immaterial to the jurisdiction of the court that suit was by ancillary bill.
2. STATUTES ⇐63—INVALIDITY—EFFECT.
   Where a statute providing for elections for special road taxes was invalid, those objecting to the tax were not restricted to the time allowed by statute to attack the same.
3. HIGHWAYS ⇐148—ROAD TAXES—INJUNCTION—ADEQUATE REMEDY AT LAW.
   As there is no right in Louisiana to recover a state tax paid under protest, a suit to enjoin the collection of special road taxes cannot be dismissed on the ground of an adequate remedy at law, for the remedy at law must be as practical and efficient as the remedy in equity.
4. CONSTITUTIONAL LAW ⇐290(3)—DUE PROCESS—NOTICE OF TAX ELECTION.
   Act La. No. 256 of 1910, amended by Act No. 218 of 1912, together with Act No. 183 of 1914, and Act No. 199 of 1916, all relating to the

formation of road districts and elections for special taxes therein, though not providing for notice before creation of the taxing district, are not invalid, as violative of the Fourteenth Amendment, as denying due process, as the acts provide for notice of subsequent proceedings.

5. COURTS ⟸366(6)—FEDERAL COURTS—PRECEDENTS.
Decision of the Supreme Court of Louisiana, holding valid Act No. 199 of 1916, relating to special road districts, etc., is binding on the federal courts.

6. HIGHWAYS ⟸122—ROAD TAXES—CONSTITUTION.
Const. La. art. 291, amendment of 1912, which was incorporated in Const. La. 1913 as article 292, *held* to amend articles 232 and 281, so as to allow police juries to create a road district composed of parts of two or more wards, and submit to it a proposition for special taxes.

7. HIGHWAYS ⟸135—ROAD DISTRICTS—SPECIAL TAXES.
Const. La. art. 281, granting parishes, school districts, road districts, etc., the right, when duly authorized by election, to assess special taxes, provided such taxes for all purposes set forth shall not exceed 10 mills, etc., allows a road district, though overlapping property incorporated into school districts, to levy taxes up to the maximum allowed, etc.

8. HIGHWAYS ⟸122—STATUTE—CONSTRUCTION.
In view of the public benefit to be derived from good roads, the road laws of Louisiana relative to taxation should be construed, if possible, so as to harmonize inconsistencies.

9. HIGHWAYS ⟸90—ROAD DISTRICTS.
Under Act La. No. 256 of 1910, amended by Act No. 218 of 1912, together with Act No. 183 of 1914 and Act No. 199 of 1916, *held*, that police juries are authorized to create road districts, that a district can be changed for convenience, etc., that after the act of 1916, and prior to organization of board of supervisors, the police jury could act, and its acts might be ratified by the board when organized, etc.

10. HIGHWAYS ⟸138—ROAD DISTRICTS—TAXES.
Special road taxes, levied by the police jury in accordance with an election held in a duly created Louisiana road district, *held* valid.

11. HIGHWAYS ⟸138—ROAD DISTRICTS—TAXES.
Where a second Louisiana road district was created, embracing all the territory of another, in which an election providing special taxes had carried, levy of tax in accordance with the election was invalid.

12. HIGHWAYS ⟸148—ROAD DISTRICTS—TAXES.
Tax levied on property in a road district *held* valid, and not subject to attack; any action on ground of irregularity in calling the election being barred by prescription of 60 days prescribed by Act La. No. 256 of 1910.

13. HIGHWAYS ⟸138—ROAD DISTRICTS—TAXES.
Special road tax assessed by the assessor *held* invalid; police jury having created another district, embracing old district, after election.

14. HIGHWAYS ⟸138—ROAD DISTRICTS—SPECIAL TAXES.
A special road tax for a Louisiana road district, to be valid, must be assessed by the police jury, instead of the board of supervisors.

In Equity. Ancillary bill by J. L. Lancaster and another, receivers of the Texas & Pacific Railway Company against the Police Jury, Parish of Avoyelles, and others, filed in the receivership proceedings of B. F. Bush, receiver of the St. Louis, Iron Mountain & Southern Railway Company, against the Texas & Pacific Railway Company. Decree in part for complainants in the ancillary bill, and bill in other respects dismissed.

This is an application for an injunction to prevent the levy and collection of certain road taxes. Article 232 of the Constitution of Louisiana of 1898 vests authority in any parish, municipal corporation (Orleans excepted), ward, or school district to levy a special tax for the purpose of erecting public buildings, schoolhouses, bridges, etc., and other works of permanent public improvement, on the approval of a majority in number and value of the property taxpayers of the subdivision voting at an election. The amount of this special tax and the number of years it is to run is fixed by the election.

Article 281, § 1, of the said Constitution, amendment of 1912 (Act No. 132 of 1912), authorizes the same subdivisions, and in addition road and subroad districts, to incur debts and issue negotiable bonds therefor, not exceeding 10 per cent. of the assessed value of the property in such subdivision, and to impose and collect taxes, not exceeding 10 mills in any one year, for the purpose of paying such bonds and interest, after an election, the same as provided for by article 232. This article provides for 30 days' publication of notice of the election.

In line with these two articles of the Constitution, the Louisiana Legislature adopted Act No. 256 of 1910, amended by Act No. 218 of 1912, which provides that parishes, wards, and road districts are political subdivisions of the state, and may levy special taxes, not exceeding the limits fixed by the Constitution, incur debt, and issue negotiable bonds therefor, not exceeding 10 per cent. of the assessed value of the property in the subdivision. The act vests the police jury with authority to call elections and levy the taxes, and goes into elaborate details as to the method of calling and holding elections and for the levying of the taxes and the issuing of the bonds. This act provides for the publication of the various steps taken, and specially provides (section 17) "that, for a period of sixty days from the date of the promulgation of the result of any such election, any person in interest shall have the right to contest the legality of such election for any cause, after which time no one shall have any cause of action to contest the regularity, formality, or legality of said election for any cause whatever."

Article 291 of said Constitution, amendment of 1912 (Act No. 236 of 1912), authorizes the police juries of the state (the governing bodies of the parishes) to form their respective parishes into road districts, and, in addition to certain specified taxes, to impose other taxes for the construction and maintenance of public roads and bridges, and to incur debt and issue bonds therefor, "in the manner and to the extent authorized under the provisions of articles 232 and 281 of the Constitution and the statutes adopted to carry them into effect." These articles are now incorporated in the Constitution of 1913. Article 291 is consolidated with old article 292, and bears the number 292. Articles 232 and 281 retain their same numbers.

Following the adoption of these laws the Louisiana Legislature enacted Act No. 183 of 1914, which authorizes the various police juries to divide their parishes into road districts on their own initiative, and requires them to do so on the petition of not less than 25 per cent of the property owners, resident and nonresident, in the proposed district, and authorizes them to divide a road district into subdistricts on the petition of 50 per cent. of the said property owners. The act constitutes the police juries the governing body of the road districts, and gives them the right to call elections and levy taxes according to the provisions of Act No. 256 of 1910.

Thereafter, by Act No. 199 of 1916, which became effective July 31, 1916, the Legislature amended certain sections of Act No. 183 of 1914, to create a new governing body for road districts, called a board of supervisors, consisting of the police juror or jurors and the member or members of the school board representing the ward or wards of which the district is made up, and one other member, to be appointed by the police jury, and creating it a public corporation, and generally vesting it with the same power as to public roads formerly in the police jury. This act, however, has no repealing clause. No part of Act No. 256 of 1910 is amended or repealed, and sections 1, 7, 9, and 10 of Act No. 183 of 1914 are not amended. By these sections the police jury still creates the road district, provides the specifications for constructing the road, and levies the tax, and the sher-

iff collects the tax. Act No. 183 of 1914 and Act No. 199 of 1916 have been repealed by Act No. 30, Ex. Sess. 1917, but that is immaterial to this case.

The receivers of the Texas & Pacific Railway Company have filed an ancillary bill, in the receivership proceedings, against the sheriff, ex officio the tax collector, the assessor, and the police jury of Avoyelles parish, La., and against the boards of supervisors of four road districts of said parish, to wit, Nos. 11, 14, 16, and 17, by their proper designations. The pleadings are voluminous, but, briefly stated, the bill sets up the various acts of the police jury and of the said boards of supervisors relative to the levying of the taxes complained of, charges the illegality of the articles of the Constitution and legislative enactments of Louisiana enumerated above, as violative of the Fourteenth Amendment of the Constitution of the United States, as not affording due process of law, because they fail to provide for notice to plaintiffs before levy and collection of the taxes complained of, charges specially the invalidity of Act No. 199, supra, as in violation of the Constitution of Louisiana, and alleges various irregularities in the proceedings to impose the taxes, entitling plaintiffs to an injunction in any event. The prayer is that article 292 of the Constitution of Louisiana, Act No. 183 of 1914, and Act No. 199 of 1916 be declared null and void, that defendants be perpetually restrained from levying, for the year 1916 and subsequent years, any taxes under said laws and the proceedings complained of, for an injunction against the sheriff to prevent the seizure and sale of plaintiff's property to satisfy said taxes, and for an injunction pendente lite to the same effect. Various objections, to be later referred to in the opinion, and answers asserting the validity of the said laws and legality of the proceedings under them, have been filed by the defendants.

The application for a preliminary injunction was heard by three judges under the provisions of section 266, Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1162 [Comp. St. 1916, § 1243]). Owing to unavoidable delays in completing the records on that hearing, no decision has been rendered by the special tribunal. The case was then referred to a master to find the facts, and is now before me on the merits, on the record and the master's report.

Substantially three questions are presented: First, whether the laws above noted afford due process of law in the levying of the taxes; second, whether the said legislative acts are valid, when measured by the Constitution of Louisiana; and, third, whether the provisions of the Louisiana law have been sufficiently observed to validate the taxes levied and bonds issued. Four other suits of a similar character were argued and submitted at the same time, and will be largely controlled by the decision in this case.

Thomas J. Freeman and Howe, Fenner, Spencer & Cocke, all of New Orleans, La., and Wise, Randolph, Rendall & Freyer, of Shreveport, La., for plaintiffs in rule.

G. L. Porterie, of Marksville, La., and H. L. Favrot and Lewis R. Graham, both of New Orleans, La., for defendants in rule.

FOSTER, District Judge (after stating the facts as above). The defendants, in the form of pleas and demurrers, long since abolished by the equity rules, raise various preliminary objections, to wit, multifariousness, misjoinder, the prescription of 60 days created by the Louisiana statutes, want of jurisdiction ratione materia and ratione personæ, and that the plaintiffs have an adequate remedy at law. None of the objections are pleaded in the answers or by motion to dismiss, and all of them might be overruled without further comment. Nevertheless, though inartificially presented, in order to decide the issues squarely, the objections noted have been considered.

[1, 2] A federal question is seriously raised. The amount involved

exceeds $3,000. All the parties defendant are domiciled in the Western district of Louisiana. The assessor and the sheriff, respectively, assess and collect all the taxes. The police jury and the board of supervisors are parties in interest. It is immaterial that the suit is by ancillary bill, as all parties are properly served and have appeared. If the laws complained of are void, the prescription of 60 days falls with them. The first five objections are clearly without merit.

[3] The last-mentioned objection has been pressed in argument, however, and it is proper to say it is not well taken, for the following reasons: It is well settled that the remedy at law, to oust the jurisdiction in equity, must be as practical and efficient to the ends of justice and its prompt administration as the remedy in equity. Tyler v. Savage, 143 U. S. 95, 12 Sup. Ct. 340, 36 L. Ed. 82. It is conceded by defendants in their brief that in Louisiana, as distinguished from other states, there is no right to recover a state tax paid under protest; but a distinction is sought to be made with regard to a tax imposed by a municipal corporation or a political subdivision. A number of cases have been cited, but, except as to one, to be later noted, they tend to uphold the jurisdiction in equity, as all of them would have been equitable actions in the federal courts. The erroneous impression of defendants is created by the confusion of legal and equitable remedies in Louisiana in one system under the civil law. The case mainly relied on by defendants is Constant v. East Carroll Parish, 105 La. 286, 29 South. 728. In that case the question of the right to sue to recover back the amount of the tax was not raised. Clearly, it could be waived. On the other hand, in the later case of Sims v. Village of Mer Rouge, 141 La. 91, 74 South. 706, the question was sharply presented by an exception of no cause of action, which was sustained by the Supreme Court. The objections will be overruled.

[4] On the merits, the first point made by plaintiffs is that the laws relative to taxation for road purposes, enumerated above, do not provide for adequate notice to property owners before the taxing subdivision is created, and that the opportunity is not presented to protest, and to show that no benefit will be derived by them, this especially affecting nonresidents and corporations, who have no voice in the election; that, therefore, these laws are violative of the Fourteenth Amendment of the Constitution of the United States. This contention is without merit. It is true no notice is given before the creation of the taxing district and the calling of the election, but after that there is ample notice of every step in the proceedings, and an opportunity is afforded to test the validity of the proceedings in court. It is not essential to due process of law that the person taxed should have notice of every step in the proceedings, and notice by publication may be sufficient. McMillen v. Anderson, 95 U. S. 37, 24 L. Ed. 335; Davidson v. New Orleans, 96 U. S. 97, 24 L. Ed. 616.

[5] Of the local questions presented, the first is that no other governing bodies than police juries and municipal corporations have authority under the Constitution to submit a proposition with reference to special road taxes, and hence Act 199 of 1916, vesting the power in boards of supervisors, is void. The Supreme Court of Louisiana has

answered this in the negative. Lebeau v. Police Jury, 140 La. 172, 72 South. 914; Bolinger v. Police Jury of Bossier Parish, 141 La. 596, 75 South. 423. These decisions I am bound to follow.

[6] The next proposition to be considered is plaintiffs' contention that the police jury could not create a road district composed of parts of two or more wards and submit to it a proposition to levy a tax, incur debt, and issue bonds, because by article 232 of the Louisiana Constitution such a proposition can only be submitted to a parish, municipality, ward, or school district, and in creating road districts by virtue of article 292 the police jury must do so comformably to article 232. It is clear, however, from a reading of the articles, that articles 232 and 281 were only intended to be controlling as to the amount and method of levying the tax, and not as restricting the police jury in any way in the formation of road districts. Furthermore, the Supreme Court of Louisiana has held, construing article 292, that it must be considered as amending articles 232 and 281 in so far as their provisions conflict. City of Lafayette v. Bank of Lafayette, 137 La. 96, 68 South. 238. I have no hesitancy in following this decision.

[7] Further, it appears that some of the road districts overlap territorially the same property incorporated into school districts. The total special taxes assessed for school and road purposes exceed 10 mills on the dollar, and the total amount of bonds issued exceed 10 per centum of the assessed valuation of the property contained in the road district. It is contended by plaintiffs that this exceeds the limitations imposed by the Constitution of Louisiana. Article 281 of the said Constitution, after granting the right to parishes, school districts, road districts, etc., when duly authorized by an election, to issue bonds and assess special taxes, says: Provided the special taxes "for all purposes as above set forth" shall not exceed 10 mills on the property in such subdivision, and the total amount of bonds "for all purposes" shall never exceed 10 per centum of the assessed value of the property in such subdivision. It is contended the words "for all purposes" means for school and road purposes together. I think, however, the words should be held to mean for all purposes for which the particular subdivision was created. For instance, road districts are authorized to construct and maintain roads, provide a sinking fund, and pay the interest and principal of bonds. These various matters make applicable the limitation. This is the interpretation put on similar provisions of the Constitution of 1879 by the Supreme Court of Louisiana. Washington State Bank v. Baillio, 47 La. Ann. 1471, 17 South. 880.

[8, 9] Proceeding with the local questions, it is argued by plaintiffs that, if Act No. 199 of 1916 is void, anything done by the board of supervisors created by that law is the action of unauthorized individuals, and no valid tax can be predicated upon it, and, conversely, if said act is valid, anything done by the police jury after the said act became effective is void, for the same reasons. Without doubt the Legislature, by adopting Act No. 199 of 1916, very much complicated the none too clear road laws of Louisiana; but, considering the great benefit to be derived by the nation, the state, and the general public by the building of good roads, it is the duty of the court to bring order out

of chaos, if possible. Construing the road laws of Louisiana, the Supreme Court of Louisiana, in the case of Crow v. Board of Supervisors, etc., 141 La. 1017, 76 South. 182, held: That police juries are authorized to create road districts; that a road district, once formed, may be changed for the convenience or advantage of the public; that, when a district is included in the territory of another, it ceases to exist; that the special taxes voted must be levied by the police jury; that after Act No. 199 of 1916 became effective, and prior to the organization of the board of supervisors the police jury might take the steps necessary to call elections, promulgate the returns, and issue the bonds; that the board of supervisors, when organized, is not required to do over what has been done by the police jury; that the board of supervisors may ratify and adopt the acts of the police jury; that the prescription of 60 days applies to an election called by the police jury after Act No. 199 of 1916 became effective.

It may be argued that part of the opinion in the Crow Case, supra, is obiter; but the findings above set out accord with my own views, for I know of no good reason why the board of supervisors could not adopt the valid acts of the police jury and continue the proceedings. Furthermore, considering the state of the law, giving both the right to call elections, neither the police jury nor the board of supervisors could be considered unauthorized individuals, and that an election is called by one when possibly it should have been called by the other would be at most an irregularity.

The master has found the facts as to each road district. Taking them up in the order of the bill, the facts material to a decision are as follows:

Tenth Ward Road District No. 11, Parish of Avoyelles.

[10] This road district was created by the police jury on August 4, 1915. An election was called to levy a 6-mill tax, resulted favorably, and the result was duly promulgated by the police jury on September 8, 1915. On August 2, 1916, the police jury adopted an ordinance calling an election to submit a proposition to issue bonds in the aggregate of $100,000. On September 13, 1916, the result was promulgated, declaring the election carried in favor of the proposition. On November 4, 1916, the board of supervisors met and organized, and directed the issuance of the said bonds. On November 8, 1916, the police jury levied the tax. On April 23, 1917, the board of supervisors ratified and adopted as its own all proceedings previously had by the police jury. It is conceded the various steps were published according to law. This applies to the other districts.

Applying the law set out above, it is evident the taxes assessed on the property in this road district are valid.

Burns Road District No. 12, Parish of Avoyelles.

[11] On April 5, 1916, the police jury created this district by ordinance and called an election. On June 7, 1916, the election was declared carried, and the result promulgated. No tax was ever levied by the police jury, and on August 3, 1916, the police jury created another

road district, embracing all the territory of road district No. 12. Taxes were assessed, however, and the sheriff is endeavoring to collect them.

It is evident the tax assessed in this road district is invalid.

Avoyelles Road District No. 13.

[12] On August 3, 1916, the police jury created this road district by ordinance, appointed a board of supervisors, and called an election to incur debt and issue bonds therefor, aggregating $75,000. On September 13, 1916, the police jury issued its proclamation declaring the proposition carried. On November 8, 1916, the police jury levied the tax of 6 mills for the purpose of paying the principal and interest of the bonds. On December 30, 1916, the board of supervisors adopted an ordinance providing for the issuance of the bonds.

Conceding there was an irregularity in calling the election, under the authority of the Crow Case, supra, any action on that ground was barred by the prescription of 60 days. As this suit was not instituted until May 24, 1917, the prescription applies.

The tax levied on the property in this road district is valid.

Avoyelles Road District No. 14.

[13] On September 19, 1916, this road district was created by the police jury. On September 19, 1916, the board of supervisors called an election submitting a proposition to issue bonds aggregating $30,000. On November 2, 1916, the board of supervisors promulgated the result, declaring the proposition carried, and apparently leaving it to the assessor to assess sufficient tax to pay the bonds and interest. No tax was levied by the police jury, and on November 8, 1916, the police jury created another road district, Avoyelles road district No. 16, and included all the territory of road district 14 in it. On February 7, 1917, the police jury, by ordinance creating a second road district, road district No. 16 of Avoyelles parish, repealed, annulled, and rescinded the ordinance creating this road district. Nevertheless the assessor assessed the taxes.

It is evident the tax is invalid.

Avoyelles Road District No. 16.

On November 8, 1916, the police jury created this road district and appointed a board of supervisors. Nothing else was done until February 7, 1917, the police jury created another road district, designated as road district No. 16 of Avoyelles parish, which included the same territory, and by the same ordinance repealed, annulled, and rescinded the ordinance creating the district.

It does not appear by the master's findings any tax was assessed; therefore no action of the court is necessary.

Road District No. 16 of Avoyelles.

[14] This road district was created February 7, 1917, and all the proceedings seem to be regular, except that the tax was ordered assessed by the board of supervisors, instead of the police jury.

A valid levy is essential to the validity of any tax. The taxes assessed in this road district are invalid.

Avoyelles Road District No. 17.

It appears that the police jury adopted two ordinances creating road districts designated Avoyelles road district No. 17, but, beyond appointing the boards of supervisors, nothing has been done; therefore no action of the court is necessary in the premises.

Considering the above facts, and applying the law as I find it, there will be a decree in favor of plaintiffs, enjoining and restraining the defendants from assessing and collecting, or attempting to assess and collect, any taxes on plaintiffs' property in road district No. 12, created August 5, 1916, road district No. 14, created September 19, 1916, and road district No. 16, created Feb. 7, 1917, but without prejudice to any valid proceedings to complete the organization, and to levy. assess, and collect the taxes in road districts No. 16 and No. 17 now existing. In all other respects the bill will be dismissed; costs to be divided.

LANCASTER et al. v. POLICE JURY, PARISH OF SABINE, STATE OF LOUISIANA, et al.

(District Court, W. D. Louisiana. December 7, 1917.)

1. HIGHWAYS ⇐138—ROAD TAXES—ASSESSMENT.
   Where the ordinance calling an election for a special road tax did not comply with Act La. No. 256 of 1910, § 3, the tax is invalid, for in proceedings of that character the authorities calling and holding the election must proceed with meticulous care.
2. HIGHWAYS ⇐138—SPECIAL ROAD TAXES—ASSESSMENT.
   Where a special road tax for a Louisiana road district was not assessed by the police jury, there was no valid levy.
3. HIGHWAYS ⇐90—ROAD DISTRICTS—CREATION.
   Under Act La. No. 183 of 1914, § 1, providing that the police jury of the parish shall create a road district on petition of not less than 25 per cent. of the property owners, etc., *held*, in no event, whether the section is mandatory or not, could the police jury create a road district on the petition of 25 per cent. of the resident property owners, where there were nonresident owners.
4. MUNICIPAL CORPORATIONS ⇐406(2)—TAXING DISTRICTS—DELEGATION OF POWER.
   It is well settled the Legislature may create taxing districts for the purpose of local improvements, such as roads, and also may delegate that authority to municipal corporations, or boards, or commissions.
5. MUNICIPAL CORPORATIONS ⇐495—IMPROVEMENTS—ASSESSMENTS—BENEFITS.
   When taxing districts are created for the purpose of local improvements, the question of benefit is one of fact for the taxing authorities, subject to the rule that the delegated body may not act arbitrarily, and impose a tax in disregard of the benefit to be derived.
6. HIGHWAYS ⇐148—TAXING DISTRICTS—BENEFITS—EQUITY JURISDICTION.
   A court of equity has jurisdiction to determine the question whether land included in a Louisiana road district will be benefited by the building of the road for which special taxes were levied, if the police jury acted arbitrarily, and taxed property that would not be benefited at all.
7. HIGHWAYS ⇐136—TAXES—ROAD DISTRICTS.
   The inclusion of complainants' property in a Louisiana road district, and imposition of special taxes thereon, *held* arbitrary, as such property

would receive no benefits; hence, as their bill was filed within the 60-day prescription fixed by Act La. No. 256 of 1910, complainants were entitled to relief.

In Equity. Ancillary bill by J. L. Lancaster and another, receivers of the Texas & Pacific Railway Company, against the Police Jury, Parish of Sabine, State of Louisiana, and others, filed in the receivership proceedings of B. H. Bush, receiver of the St. Louis, Iron Mountain & Southern Railway Company against the Texas & Pacific Railway Company. Decree for complainants in ancillary bill.

Thomas J. Freeman and Howe, Fenner, Spencer & Cocke, all of New Orleans, La., and Wise, Randolph, Rendall & Freyer, of Shreveport, La., for plaintiffs in rule.

Lewis R. Graham, of New Orleans, La., for defendants in rule.

FOSTER, District Judge. In this matter the issues are similar to those in the case of Lancaster and Wight, receivers, v. Police Jury of Avoyelles, 254 Fed. 179, recently decided, and the questions at law are largely controlled by that decision.

[1] The election was called by the police jury, and a proposition submitted to issue $30,000 of bonds, said bonds to be paid in such amount and in such places and at such times as the governing authority might determine, and also to authorize a tax of 6 mills annually for not more than 25 years to liquidate the bonds. Subsequently the board of supervisors of the road district declared the election carried, promulgated the result, and assessed the tax. It is evident that the ordinance calling the election does not comply with the law. Section 3, Act 256 of 1910. In proceedings of this character the authorities calling and holding the election must proceed with meticulous care. Williams v. Police Jury, 129 La. 267, 55 South. 878; Elkins v. Board of School Directors, 138 La. 207, 70 South. 99; Capps v. Board of School Directors, 138 La. 348, 70 South. 322. As this suit was filed within the 60 days provided by law, the court must consider irregularities of this kind.

[2] Furthermore the tax was not assessed by the police jury, and therefore there is no valid levy. Crow v. Board of Supervisors, 141 La. 1017, 76 South. 182.

[3] It is further shown that road district No. 6, the only district herein complained of, was created by the police jury in accordance with a petition of more than 25 per cent. of property owners residing in the proposed district.

Section 1 of Act 183 of 1914 provides:

"That the police juries of the various parishes of this state, the parish of Orleans excepted, are empowered and authorized upon their own initiative to divide their parishes into one or more road districts, * * * but the police jury of any parish shall create a road district in said parish on petition of not less than twenty-five per cent. of property owners, resident and nonresident."

It is contended by plaintiff that the police jury must create a road district when requested by more than 25 per cent. of the property owners exactly as outlined in the petition, and that as nonresidents and corporations are not entitled to any voice in the proceedings, nor any ne-

tice of the filing of the petition, or of the creation of the road district, Act 183 of 1914, under the provisions of which the proceedings are had, deprives them of their property without due process of law. So far as I am advised, the Supreme Court of Louisiana has not construed this feature of the act. If it is to be construed so as to require the police jury to create a road district exactly as petitioned for, there is much in plaintiff's contention; but "shall" is sometimes construed as "may," and the act is susceptible of the construction that the police jury is vested with discretion in establishing the boundaries of the road district, even on a petition of property owners. If it were not so, there would be no delegation of authority to a body authorized to inquire as to the necessity of the improvement and the benefit to the property taxed. But the act requires the police jury to create a road district on the petition of 25 per cent. of the property taxpayers, resident and nonresident. Considering that nonresidents have no voice in the election a fair construction of the act would be to require the petition to be signed by more than 25 per cent. of the taxpayers in both number and amount of assessed value, the same as is required to carry the election, if it is mandatory on the police jury. In no event, however, could the police jury create a road district on the petition of 25 per cent. of the resident taxpayers, as was done here, where it is clearly shown there are nonresident taxpayers.

[4-7] In addition to the other allegations, the bill sets up that the road district was so laid out as to include all the railroad lines of the Texas & Pacific Railroad Company, not because any part of them would derive benefit, but for the sole purpose of including valuable property for the benefit of others, and so reduce the cost of the improvement to them; that the principal road proposed to be built would be adjacent to and parallel to the railroad, and the roads in the district will be of no benefit to the plaintiff, but, on the contrary, will be a detriment. The master found these facts to be as contended by plaintiff on the admission of defendant. No exception was taken to the master's findings.

The total assessed valuation of the property in the district is $371,309. At the election 84 votes, representing an assessed valuation of $42,273, were cast in favor of the proposition, and 12 votes, representing $4,210, were cast against it. It is fair to assume that all those entitled to vote did so, and therefore the burden will fall heaviest on these having no voice in the proceedings.

It is well settled that the Legislature may create taxing districts for the purpose of local improvements, such as roads, and also may delegate that authority to municipal corporations, or boards, or commissions. When this is done, the question of benefit to the land taxed is one of fact, to be finally determined by the taxing authorities, but subject, however, to the exception that the delegated body may not act arbitrarily, and impose a tax in utter disregard to the benefit to be derived by the property taxed. Myles Salt Co. v. Iberia & St. Mary Drainage District, 239 U. S. 478, 36 Sup. Ct. 204, 60 L. Ed. 392, and authorities cited. At the election in road district No. 6 less than 12 per cent. of the assessed valuation of the land in the district voted; plaintiffs had no voice in the proceedings to create the district, were

not entitled to notice before it was created, and had no vote in the election. There were entitled to their day in court, however, within 60 days thereafter during which time the bill was filed, to contest the validity of the election for any cause. Section 17, Act 256 of 1910. Furthermore, a court of equity had jurisdiction to determine the question as to whether or not the land will be benefited by the building of the road, if the police jury has acted arbitrarily and imposed a tax on property that will not be at all benefited.

In this case the bill was filed in time; plaintiffs have not waived their rights, and are not estopped. From the facts found by the master, I am constrained to hold that the police jury, in creating road district No. 6, acted arbitrarily and without due regard to plaintiffs' rights; that plaintiffs' property will derive no benefit whatever from the building of the proposed roads, and should not have been included in the road district.

Considering the above views, there will be a decree in favor of the plaintiff as prayed for; defendants to pay all costs.

HOPKINS v. LANCASTER, State Treasurer, et al.

(District Court, N. D. Alabama, N. D. at Montgomery. July 30, 1918.)

No. 228.

1. COURTS ⟸366(7)—FEDERAL COURTS—DECISIONS OF STATE COURT.
On suit by statutory receiver of an Illinois insurance company, the federal court is bound by the decision of the Illinois Supreme Court as to the interpretation of the receiver's statutory powers.

2. INSURANCE ⟸50—STATUTORY RECEIVERS—POWERS.
A statutory receiver of an Illinois insurance company is, under the laws of that state, invested with the title to all the assets of the company, wherever situated.

3. RECEIVERS ⟸210—STATUTORY RECEIVERS—RIGHT TO SUE.
A statutory receiver, invested with title to the assets of a dissolved corporation, may sue in the courts of a state foreign to the state of his appointment.

4. RECEIVERS ⟸210—POWER OF INTERVENER TO QUESTION RIGHT OF COMPLAINANT TO SUE.
An intervener, in a suit by the statutory receiver of a foreign insurance company against the treasurer of a state, can only raise the question whether he is a creditor entitled to share in the distribution of funds deposited with the treasurer, etc.

5. PARTIES ⟸47—RIGHT OF INTERVENER—CLAIMS.
A stranger cannot intervene for the purpose of defeating the entire suit, nor for the purpose of litigating with the complainant his right or title to any relief; and if it is desired to set up a new and independent claim, it must be done by an original bill in the nature of a cross-bill.

6. CONTRACTS ⟸212(2)—PERFORMANCE—TIME.
Where no definite time for performance is fixed by the contract, the law implies a reasonable time.

7. LIENS ⟸7—EQUITABLE TIME—CREATION.
Where a foreign insurance company agreed to pay interveners a fixed sum in the event they secured legislation which would enable the company to withdraw securities deposited with the state treasurer, etc.,

held, that interveners secured no equitable lien by implication or otherwise on such securities.

8. LIENS ⟸7—EQUITABLE LIENS—CREATION.

An equitable lien may arise by express agreement or implication, as where a party innocently and under mistake of title makes improvements permanently beneficial to another's property.

In Equity. Suit by James S. Hopkins, as receiver of the Illinois Surety Company, against W. L. Lancaster, as Treasurer of the State of Alabama, and others, in which Meyer & Goldman intervened. Decree for complainant.

A. J. Hopkins, of Chicago, Ill., and M. M. Ullman, of Birmingham, Ala., for plaintiff.

E. S. Thigpen, Asst. Atty. Gen., of Montgomery, Ala., for defendant.

Steiner, Crum & Weil, of Montgomery, Ala., for interveners.

HENRY D. CLAYTON, District Judge. The original bill in this cause was filed on March 13, 1918, by Hopkins, as receiver of the Illinois Surety Company, against W. L. Lancaster, as treasurer of the state of Alabama, and others. The bill shows that Hopkins is the statutory receiver of an insolvent insurance company, which was dissolved upon a bill filed in the superior court of Cook county, Ill., in conformity with the statutes of the state of Illinois; said bill having been filed to that end by a majority in number and interest of the stockholders of said company on April 19, 1916, and a decree of dissolution having been entered in said cause by the court after the appearance and answer of the Illinois Surety Company.

[1-3] This court is bound by the decisions of the highest court of the state of Illinois as to the interpretation of the powers of such receiver. As construed by the Supreme Court of Illinois, a receiver appointed in the manner shown in the bill in this cause is invested with the title to all the assets of the dissolved corporation wherever situated. Republic Life Ins. Co. v. Swigert, 135 Ill. 150, 173, 174, 25 N. E. 680, 687, 12 L. R. A. 328. A statutory receiver, invested with title to the assets of a dissolved corporation, may sue in the courts of a state foreign to the state of his appointment. Such a receiver is not a mere chancery receiver, but he derives his powers from the statute, and not from the manner of his appointment or the decree of the court. Great West. Mining Co. v. Harris, 198 U. S. 561, 574, 25 Sup. Ct. 770, 774, 49 L. Ed. 1163. In that case the Supreme Court, speaking of Booth v. Clark, 17 How. 322, 15 L. Ed. 164, said:

"In that case it was held that a receiver is an officer of the court which appoints him, and, in the absence of some conveyance or statute vesting the property of the debtor in him, he cannot sue in courts of a foreign jurisdiction, upon the order of the court which appointed him, to recover the property of the debtor."

But here there is a statute providing for the dissolution of an insolvent corporation, and that statute, as construed by the highest court of the state in which the receiver is appointed, vested the title to the

assets of the dissolved corporation in the receiver. The law seems to be well settled that such receiver may sue as of right in the courts of a foreign jurisdiction, and such courts will in respect to such questions of title accept the construction put upon it by the highest court of the state. Bernheimer v. Converse, 206 U. S. 516, 534, 27 Sup. Ct. 755, 51 L. Ed. 1163; Converse v. Hamilton, 224 U. S. 243, 32 Sup. Ct. 415, 56 L. Ed. 749, Ann. Cas. 1913D, 1292.

Upon the hearing heretofore had in this court upon the answer filed by the defendant Lancaster, the state treasurer, a decree was entered in which the court found the allegations of the bill to be true, assumed jurisdiction of the cause, and ordered the state treasurer to turn over to the clerk of this court the securities, which are now in the possession of the court; the state treasurer having complied with the order so made.

[4, 5] The interveners, Meyer & Goldman, are in no position to question the right of the petitioner to sue. In the case of Ex parte Gray, 157 Ala. 358, 364, 47 South. 286, 288 (131 Am. St. Rep. 62), the Supreme Court said:

"Our own court has recognized the right of intervention, but held that a stranger could not intervene for the purpose of defeating the entire suit, nor for the purpose of litigating with the complainant his right or title to any relief. * * *" Renfro Bros. v. Goetter, Weil & Co., 78 Ala. 311, 313–315; Curtis v. Curtis, 180 Ala. 64, 60 South. 167, 168; Wightman v. Yaryan Co., 217 Ill. 371, 380, 75 N. E. 502, 108 Am. St. Rep. 258, 3 Ann. Cas. 1089; Cincinnati Equipment Co. v. Degnan, 184 Fed. 834, 841, 107 C. C. A. 158.

Mr. Justice Lurton in Horn v. Pere Marquette R. R. Co. (C. C.) 151 Fed. 626, 634, said:

"A most absurd result would ensue if, when the corporation has submitted to the jurisdiction of the court, either as a court of equity or to the local jurisdiction, a creditor could come in, or, when brought in, might reopen the matter of jurisdiction over the debtor corporation. If such an objection is not waived once for all, so as to close the question as to stockholders and creditors, what number of creditors would conclude the rest?" In re Metropolitan Railway Receivership, 208 U. S. 90, 28 Sup. Ct. 219, 52 L. Ed. 403.

It seems to me that the interveners, Meyer & Goldman, are entitled to raise only one question, and that is whether or not they are of the class of creditors who are entitled to share in the distribution of the fund in the hands of the court. It is shown that the funds now in the hands of the court were deposited by the Illinois Surety Company with the treasurer of the state of Alabama in trust for the benefit of the holders of certain obligations thereafter to be issued by the Illinois Surety Company. The statute of Alabama, under which the deposit was made, as construed by the Supreme Court, confines those entitled to share in this fund to judgment creditors who have recovered judgments against the Illinois Surety Company upon an official bond or a judicial bond; that is to say, upon the bond of some public official of the state of Alabama, or a bond given by a party in a judicial proceeding in Alabama. It is shown by the petition of intervention that Meyer & Goldman are not judgment creditors, nor are they the holders of a judicial bond or an official bond. They are not, there-

fore, entitled to subject the fund now in the hands of the court to the payment of any claim asserted in the petition of intervention.

But it is contended that this court, having acquired jurisdiction of this cause, and having in its possession certain funds belonging to the Illinois Surety Company, or its successors in interest, will not return these funds to a foreign jurisdiction, and compel citizens of Alabama holding a lien thereon to litigate with the receiver in a foreign state. If Meyer & Goldman were creditors of the class entitled to subject the fund to the payment of their claims, this court would certainly render such decree as would be necessary to protect their lien before permitting the receiver to take the assets located in the state of Alabama out of the jurisdiction of this court; but, since they are not of that class, it is still contended that as interveners they may assert and foreclose an equitable lien upon these securities. As said by the Supreme Court of Alabama in Curtis v. Curtis, 180 Ala. 64, 69, 60 South. 167, 168:

"Our own court has recognized the right of intervention, but held that a stranger could not intervene for the purpose of defeating the entire suit, nor for the purpose of litigating with the complainant his right or title to any relief; also that, if it is desired to set up a new and independent claim, it must be done by an original bill in the nature of a cross-bill. Renfro Bros. v. Goetter, Weil & Co., 78 Ala. 311, 313-315." Ex parte Gray, 157 Ala. 358, 47 South. 286, 288, 131 Am. St. Rep. 62.

[6-8] The court has carefully read the correspondence passing between these parties, the interveners and the plaintiff, and this correspondence is the only contract out of which the claim, upon which the intervention is based, arises. The court finds from this correspondence that the Illinois Surety Company employed Meyer & Goldman to procure the delivery of the bonds in question to the Illinois Surety Company, and agreed to pay Meyer & Goldman, in the event they were successful, the sum of $1,000. This appears from the letter of the plaintiff's president, written December 30, 1914, where he said:

"I have been to considerable trouble and expense myself in making two trips to Alabama, and our company thinks that the fee you suggest is a little high; but I have decided that I will pay $1.000 to you as your fee, if you are successful in getting the bonds restored to the Illinois Surety Company without any strings. What I mean by that is that I do not want to be required to give another surety bond and pay annual premiums to the company for getting our bonds from the state treasurer. I think they should be delivered to us, and if you can procure that by legislation, or by satisfying the present official who has charge of these bonds that under the law we are entitled to the return of the bonds, and they are returned to us, I will give you a fee of $1,000. If you are not successful, I don't think we should pay you anything; and, if these terms are satisfactory to you, you can proceed with the matter."

No definite time having been fixed by the contract for its performance, the law would grant a reasonable time. It further appears from the correspondence that the Illinois Surety Company paid to Meyer & Goldman $500 for their expenses in attending the Legislature in securing the passage of the act designed to enable the company to withdraw these securities. The act of the Legislature was passed; but still the company failed to secure the return of the bonds. It is true

that on July 6, 1915, one of the interveners wrote to the president of the company that he had succeeded in passing the bill through the Legislature, and felt that he had fairly earned the fee of $1,000; but immediately thereafter, on July 10, 1915, the president of the company wrote to Meyer & Goldman that he had no objection to the fee of $1,000 if Meyer & Goldman secured the return of the bonds, and in this letter agreed to pay the expenses, not to exceed $500, and concluded his letter by saying:

"If this is satisfactory to you, you can proceed at once to Montgomery and take up this work of securing the legislation as outlined in your letter to me of July 6th."

On August 7th, intervener Goldman advised by letter that the bill had been signed, and asked for a check for $1,000 and a check for $250, balance of expense money. On August 9th, the president of the surety company acknowledged receipt of this letter and stated:

"The $1,000 I will send you as soon as the Illinois Surety Company receives its bonds, now in the hands of the treasurer of your state, as per my letter to you of December 30, 1914."

Accepting this as satisfactory, it appears from the correspondence that on September 27, 1915, Goldman went to Montgomery for the purpose of attempting to secure the return of the bonds and calling upon the insurance company for further directions as to how to proceed. The company replied to this letter under date of October 5, 1915, and from that date forward until the Illinois Surety Company was dissolved in April, 1916, more than six months later, there does not appear to have been any efforts made by Meyer & Goldman to secure the return of these bonds. A reasonable time certainly elapsed before the receiver was appointed.

The court is of the opinion, and so holds, that the interveners are not entitled to any equitable lien upon the funds. An equitable lien may arise by express agreement or by implication. There is clearly no agreement for a lien in this case, because there is no intention expressed to appropriate as security for the debt the bonds on which the lien is claimed. 25 Cyc. 665, 666. An equitable lien may arise by implication, and such a lien arises where a party innocently and in good faith, but under a mistake as to the condition of the title, renders services, makes improvements, or incurs obligations that are permanently beneficial to another's property. 25 Cyc. 667.

There is no room in this case under the evidence to find that an equitable lien arose by implication. The case of Barnes v. Alexander, 232 U. S. 117, 34 Sup. Ct. 276, 58 L. Ed. 530, and the case of McGowan v. Parish, 237 U. S. 285, 35 Sup. Ct. 543, 59 L. Ed. 955, are not in conflict with the opinion here expressed, because in those cases there was an expressed intention to give to the creditor an interest in the property itself as security for the debt.

NORFOLK BANK FOR SAVINGS & TRUSTS v. WHIPPLE.

(District Court, E. D. South Carolina, at Charleston. September 27, 1918.)

No. 177.

1. COURTS ⟸372(4)—FEDERAL COURTS—FOLLOWING STATE DECISIONS.
In cases involving construction of contracts affecting interests in real estate, even where, when the rights of the parties accrued, there was no settled law of decision in the state establishing a rule of property binding on federal courts, such courts should, unless strongly convinced of their error, follow the state decisions.

2. LOGS AND LOGGING ⟸3(11)—CONSTRUCTION—CONDITION SUBSEQUENT—CONVEYANCE OF STANDING TIMBER.
A deed to standing timber, giving the grantee 10 years from the time of commencing to cut within which to cut and remove the timber, vests in the grantee a present estate in the timber trees, with the right to begin cutting within a reasonable time from the date of the deed.

3. DEEDS ⟸145—CONSTRUCTION—COVENANT OR CONDITION.
If the language in a deed is of doubtful import, the court will construe it as a covenant, for breach of which damages may be recovered, rather than a condition working a forfeiture of the estate.

4. LOGS AND LOGGING ⟸3(14)—CONSTRUCTION—CONVEYANCE OF STANDING TIMBER.
Failure of the grantee of standing timber to begin cutting the same within 14 years *held* to terminate his estate therein, where under his deed he was required to begin cutting within a reasonable time.

In Equity. Suit by the Norfolk Bank for Savings & Trusts against C. S. Whipple. Motion for injunction denied, and bill dismissed.

Bryan A. Hagood, of Charleston, S. C., and Edward P. Buford, of Lawrenceville, Va., for complainant.

L. D. Lide, of Marion, S. C., Townsend & Rogers, of Bennettsville, S. C., and W. C. Miller, of Charleston, S. C., for defendant.

CONNOR, District Judge. The bill, answer, exhibits, and testimony disclose the following case:

On January 30, 1899, H. R. Peele, being the owner of a tract of land with the timber standing and growing thereon, containing 777 acres, in consideration of the sum of $400 conveyed the timber of the dimensions named in the deed to the Cape Fear Lumber Company. The deed contains the following clause:

"The said Cape Fear Lumber Company to have ten (10) years from time they commence to cut the timber to cut and remove the same, and [if] at the end of that time they have not removed said timber, then to pay six per cent. upon the purchase price, they can have ten years longer to remove the same."

Thereafter, in August, 1904, and before the said lumber company had cut or removed any timber from said land, it conveyed to the Marion County Lumber Company all of its right, title, and interest in and to the timber, with the right to cut and remove the same, conveyed by Peele. Thereafter, on December 27, 1910, and before either of said companies had cut or removed any part of the timber, Peele con-

veyed the land upon which the timber was standing, in consideration of $4,600, to Ansel A. Gray, who, at the time of filing the bill herein, was the owner thereof. On March 5, 1905, the Marion Lumber Company executed a deed in trust to complainant, Norfolk Bank for Savings & Trusts, conveying, among other timber rights and contracts, the timber conveyed by Peele to the Cape Fear Lumber Company, and by said company to the Marion County Lumber Company, for the purpose of securing a bond issue. On April 3, 1913, said Marion County Lumber Company executed a second deed in trust, conveying the same property, to secure an additional bond issue. There was, at the time of filing the bill, bonds secured by said deeds outstanding to the amount of $50,000.

On the 6th day of February, 1913, Ansel A. Gray instituted in the court of common pleas of Marlboro county a suit against the Marion County Lumber Company, for the purpose of removing the cloud from the title to the standing timber, alleging that, by its failure to cut and remove the timber on the land purchased by him from H. R. Peele within a reasonable time, the title had reverted to plaintiff, etc. The bill was dismissed by the circuit judge. Upon appeal to the Supreme Court the judgment was reversed, and it was adjudged that by the failure to commence to cut the timber in a reasonable time "the right to cut was ended." Gray v. Marion County Lumber Co., 102 S. C. 289, 86 S. E. 640. This decision was rendered October 15, 1915. On the 13th day of October, 1913, said Ansel A. Gray and defendant, C. S. Whipple, entered into a contract whereby Gray agreed to sell and Whipple agreed to buy the timber on the tract of land purchased from Peele, provided that in the suit brought by Gray against the Marion County Lumber Company it was adjudged that the title to the timber was in Gray. If the suit resulted adversely to Gray, the contract was to "terminate." Whipple agreed to pay $3,000 cash and execute his notes secured by mortgage on the timber for $6,000. He was to have ten years from the date of the deed to cut and remove the timber.

On November 1, 1915, upon the decision of the case by the Supreme Court, Gray executed to Whipple, pursuant to the terms of the contract, a deed for the timber, upon receipt of $6,000 cash and his notes for $3,000. Whipple began to cut the timber, whereupon complainant brought this suit. The jurisdiction of this court is based upon diversity of citizenship. All of the deeds and contracts referred to were duly recorded in Marlboro county. Defendant shows, in addition to the foregoing facts relating to the title to the timber, that the deed in trust to the complainant, trustee, includes several other lots of timber and timber contracts, the value of which is not shown; that there is outstanding $40,000 of the bonds secured by the first trust deed, and $20,000 of those secured by the second deed; that the Marion County Lumber Company has surrendered its charter and conveyed its property to the Marion County Lumber Corporation, a Virginia corporation, which has assumed the payment of the debts of the lumber company; that the officers of complainant had knowledge of the pendency of the suit by Gray against the Marion County Lumber Company, and of other suits pending in the courts of South Car-

olina, involving the title to the timber covered by the deeds in trust, and failed to intervene therein. It appears that Gray did not have actual notice of the deeds in trust to complainant when he purchased from Peele. This is immaterial, because the deeds were recorded. He had notice of, and purchased subject to, the deed from Peele to the Cape Fear Lumber Company.

It is not seriously contended that complainant, in respect to the first deed in trust, is bound by the decree in the case of Gray v. Marion County Lumber Company. Its deed was on record, and, if plaintiff had so desired, he could, by substituted service, have brought it into the record. As to the second deed, executed after the suit was instituted, it would seem that it occupies the attitude of a purchaser pendente lite and is bound by the decree.

[1] Counsel for complainant challenge the decision of the Supreme Court of South Carolina, in the case of Gray v. Lumber Company, in respect to the extent to which it is binding upon this court, and its value as a correct adjudication of the rights of the parties claiming under the deed from Peele to the Cape Fear Lumber Company. It is conceded that the title of complainant is dependent upon the construction of that deed and the course pursued by the successors in title to the land and the timber. Counsel insist that, conceding the well-settled rule by which this court is required to follow the decision of the state courts, upon which property rights, or rules of property, are based, the remedies afforded and modes of procedure pursued in the federal courts, sitting as courts of equity, are not determined by local laws and rules of decisions, but by general principles, rules, and usages of equity having uniform operation in those courts wherever sitting. Guffey v. Smith, 237 U. S. 101, 35 Sup. Ct. 526, 59 L. Ed. 856. I do not understand that the decision in that case drew into question or limited the well-settled rule laid down in Burgess v. Seligman, 107 U. S. 20 (33), 2 Sup. Ct. 10, 27 L. Ed. 359, and Kuhn v. Fairmont Coal Co., 215 U. S. 349, 30 Sup. Ct. 140, 54 L. Ed. 228, and followed in numerous other cases.

It is uniformly held that state Codes of Procedure, abolishing the distinction between actions at law and suits in equity, with the results which follow therefrom, do not limit or affect either the jurisdiction or modes of procedure of federal courts in equity causes. The primary question to be settled in this case is whether the Supreme Court of South Carolina has, by a current of decisions, so construed deeds containing substantially the same language and provisions as to make a rule of property in that state. The latest discussion of the subject and classification of the cases coming within the rule laid down in Burgess v. Seligman is found in the opinion of Mr. Justice Harlan in Kuhn v. Fairmont Coal Co., supra. The cases are cited in the opinion in Highland Park Mfg. Co. v. Steele, 232 Fed. 10, 146 C. C. A. 202.

The questions ably discussed by the learned counsel for complainant are: Should the court, in obedience to the decisions of the Supreme Court, adopt as binding upon its judgment the decision of the Supreme Court of South Carolina in Gray v. Marion County Lum-

ber Co., not as res judicata, but as prescribing a rule of property, which the court should apply in this case? Gray v. Marion County Lumber Co., is decided upon the authority of Minshew v. Lumber Co., 98 S. C. 8, 81 S. E. 1027 (1914), in which a writ of error was dismissed for want of jurisdiction. See 235 U. S. 685, 35 Sup. Ct. 202, 59 L. Ed. 424. While the deed construed in that case is not in the exact language used in this, the court said:

"This case cannot be distinguished in any essential particular, either of law or fact, from the particular case."

After disposing of exceptions directed to the admissibility and effect to be given to parol evidence, Mr. Justice Watts says:

"Under contracts of this character, the purchaser has only the right to have a reasonable time to get the fruits of his purchase. He has no right to enjoy, by indefinite extension, what would practically amount to a perpetuity and deprive the owner of the enjoyment of his property."

The learned justice says:

"It has been decided by this court in Flagler v. Lumber Company, 89 S. C. 328, 71 S. E. 849 (1911), McClary v. Lumber Company, 90 S. C. 153, 72 S. E. 145 (1912), and Atlantic Coast Realty Company v. Litchfield, 90 S. C. 363, 73 S. E. 182 [728], that the grantee must begin the removal of the timber within a reasonable time, and it follows, as a natural, logical, and irresistible sequence that, upon the failure to commence the removal within a reasonable time, the estate or interest granted is terminated and the interest granted reverts to the grantor or his privies."

An examination of the cases cited discloses that in each of them the grant of the timber is followed by a limitation upon the time within which the grantee may cut and remove the timber, fixed by reference to the time at which it "begins cutting and removing," followed by a clause extending the time limit upon the payment of interest on the purchase price. We thus see that, from 1911 until the decision of the Gray Case (1915), the court has uniformly held that deeds conveying standing timber, coupled with the language found in the deed from Peele to the Cape Fear Lumber Company, conveyed to the grantee a determinable or qualified fee to the timber which determined upon the expiration of the period fixed by reference to the time the grantee began to cut and remove the timber. It will be observed that, in the cases cited, the construction of the language was essential to a decision of the case. In each case it was strenuously insisted that the timber was conveyed in fee, and that, by the failure to cut and remove within the time limit, the title did not revest in the grantor. It is in evidence in this case that learned counsel so advised the complainant. Such has been, at all times, in South Carolina and other states, the contention of counsel representing the timber companies.

In Rogers v. Marion County Lumber Corporation (S. C.) 93 S. E. 1055, the court in a per curiam opinion treats the question as closed —the law settled. The decisions of the Supreme Court of South Carolina place the question clearly within the rule of stare decisis. Complainant insists that the law was not so settled at the date upon

which its right accrued. In Kuhn v. Fairmont Coal Co., supra, it is said:

"Where, before the rights of the parties accrued, certain rules relating to real estate have been so established * * * as to become rules of property and action in the state, those rules are accepted * * * as authoritative declarations of the law of the state."

This limitation, in respect to the time at which the "rights of the parties accrued," as related to the time when the "rule of property" was "established," invites recurrence to the dates of the deeds and the South Carolina decisions. The deed from Peele to the Cape Fear Lumber Company bears date January 30, 1899. Accepting the South Carolina rule as to the reasonable time within which the grantee, or its assigns, should begin to cut at approximately 12 years, the right of complainant to demand the extension of time accrued in 1911. Gray did not bring his action against the Marion County Lumber Company until February 6, 1913. While defendant entered into an executory contract with Gray for the purchase of the timber, he did not acquire such title as Gray had, and pay the purchase price, until November 1, 1915, subsequent to the decision by the Supreme Court holding that complainant's title to the timber had determined at the date when the suit was brought, January 27, 1913.

In the Flagler Case, decided in 1911, it is said that the question presented, the construction of a timber deed containing language from which the court found that the parties intended to place a time limit to the right to cut and remove the timber, had not theretofore been before the court. It was there distinctly held that when such intention was expressed in the deed, or could be reasonably inferred, the grantee did not take an absolute fee, but that he was bound to commence the removal of the timber within a reasonable time. Judge Rucker, after reviewing the cases relied upon by defendant to sustain its contention, and decided cases in other courts, thus states the conclusion:

"Suffice it to say that we are of opinion that, both by the inherent reason of the thing, as well as by authority, the true rule is that, wherever it is apparent in a contract that the parties had in view some time for the commencement of the removal of the timber, which intent was not embodied in the * * * contract, the law will presume, and will enforce, that such commencement of the removal of the timber shall be within a reasonable time from the date of the contract."

The court reversed the decree of the trial court dismissing the bill, and remanded the case, with direction to the court to take testimony and ascertain what would be a reasonable time. The language of the extension clause in the deed before the court was, in all essential respects, the same as in this. The grantee was given 10 years from the time when it began cutting and removing, with the right to an extension upon payment of interest. The deed bore date June 10, 1899. Every subsequent decision has been consistent with that made in the Flagler Case. It will be observed that the court did not hold that the time elapsing between the date of the deed and the decision was unreasonable. It left the question open for determination of the trial court, upon testimony, as a question of fact.

Conceding, for the present, that at the time the right of complainant to tender the interest and demand the additional time accrued the decisions of the South Carolina court had not established a rule of property applicable to complainant's deed, and that the decisions thereafter made are not to be "accepted as authoritative declarations of the law," the question is presented whether the case falls within the other classifications made by Judge Harlan, in which he says:

"It is not only the right, but the duty, of the federal court to exercise its own judgment, as when the case depends upon the principles of general jurisprudence. * * * For the sake of comity, and to avoid confusion, the federal courts should always lean to an agreement with the state court, if the question is balanced with doubt."

It is suggested that, while the timber deed conveyed real property situate in South Carolina, and in so far as the kind and quality of estate is conveyed the decisions of the court of that state are rules of property, the question presented here involves the construction of a superadded contract prescribing the terms upon which a valuable right may be enjoyed, which should be construed by this court upon principles of general jurisprudence—the intention of the parties. The distinction is stated in Kuhn v. Fairmont Coal Co., supra, and a number of illustrative cases commented upon. The learned justice says:

"There are adjudged cases involving the meaning of written contracts having more or less connection with land that were not regarded as involving a rule in the law of real estate, but as only presenting questions of general law, touching which the federal courts have always exercised their own judgment, and in respect to which they are not bound to accept the views of the state courts."

The opinion, and the dissenting opinion of Mr. Justice Holmes, contain an interesting and exhaustive discussion of the question in the light of the decided cases. Certainly, for the reasons strongly stated by Judge Dayton in Kuhn v. Fairmont Coal Co. (C. C.) 152 Fed. 1013, the federal courts should, unless strongly convinced of their error, follow the decisions of the state courts upon the questions presented, and upon the decisions of which the rights of the parties depend.

[2] In his opinion the learned District Judge has made a full and valuable collection of illustrative cases. This view of the case opens up for examination the very interesting questions presented and argued with marked ability by counsel for complainant. They challenge the decision of Gray v. Lumber Co., supra, and the cases upon which it is based. To state the contention in the language of the brief:

"A present estate in the timber vested in the Cape Fear Lumber Company, immediately on the execution of the deed from H. R. Peele, which has passed by mesne conveyances to the plaintiff, by virtue of the deed in trust."

This may be conceded. The best considered authorities so hold. From this proposition it is argued that such estate is not one which is determinable by operation of law for failure of the grantee, or its assigns, to commence the cutting and removal of the timber within a reasonable, or any other, time.

An examination of the opinions of courts, dealing with timber deeds, containing limitations upon the time for cutting and removing, discloses a purpose to give to them a construction, effectuating what the court finds to have been the intention of the parties, and to conserve the rights of both parties resort to analogies, sometimes resulting in confusion. The early cases in states wherein the cutting of timber was conducted by corporations operating large mills, buying standing trees from the owners of the land, either with or without a provision fixing the time within which they were to be cut and removed, disclose different views and variant constructions. By some it is held that no title vests in the trees until they are cut, and that therefore only such as are cut and removed within the time fixed pass to the grantee. Strasson v. Montgomery, 32 Wis. 52. It is said:

"Such deed does not immediately pass the title to the trees, and is not a sale, or a contract for a sale or interest in land, but an executory contract for a sale of chattels, to take effect when the trees are cut and severed from the land, with a license to enter and cut during the time fixed." Fletcher v. Livingston, 153 Mass. 388, 26 N. E. 1001.

By other courts it is held that, upon failure to cut within the time limited by the deed, the title to the standing trees, or such of them as remained uncut, does not revert to the owner of the land, but remains in the grantee of the trees; that the failure to cut within the time limit did not work a forfeiture of the estate; that the license to enter and cut expired at the end of the time fixed. This construction left the owner of the trees in the position of having title to timber trees standing and growing on the lands of the grantor, with no right to enter and cut them. It was said that in such cases, by entering upon the land, the owner of the trees committed an actionable trespass; the damage recoverable was the injury to the soil, in making the entry—not the value of the trees cut and removed.

The conclusion to which other courts came was that the title to the timber vested in the grantee, with the condition annexed that if it was not cut and removed within the period fixed by the deed, or, if no time was fixed, within a reasonable time, the title to the timber not cut and removed reverted to the owner of the land or his grantee. The Supreme Court of Michigan, in Williams v. Flood, 63 Mich. 493, 30 N. W. 96, said:

"It is not very important to discuss the exact nature of plaintiff's rights under the written contract. Whatever they were, they included an absolute sale of all the timber described, subject only to such qualifications of the right of removal as the contract mentions. At most, this condition would only operate by way of forfeiture. The timber had all been paid for, and all belonged to plaintiff, unless lost by that forfeiture for nonremoval."

In Bunch v. Elizabeth City Lumber Co., 134 N. C. 121, 46 S. E. 24, the question in respect to the construction of a timber deed, with a clause limiting the time for cutting computed from the time the grantee began to cut, was first presented to the Supreme Court of North Carolina. It was argued on petition for rehearing, by eminent and learned counsel. Mr. Justice Walker reviewed the authorities, reaching the conclusion that the deed vested a present title to the timber in

the grantee; that the right to cut and remove was limited to a reasonable time; that, upon the failure to begin to cut within such time, the title reverted to the grantor. This decision was rendered in 1903. He says:

"It is well settled on principle and by authority that the legal effect of the instrument is that the vendor thereby conveyed to the vendee all of the trees and timber on the premises which the vendee should remove therefrom within the prescribed time, and that such as remained thereon after that time should belong to the vendor or to his grantee of the premises."

In Midyette v. Grubbs, 145 N. C. 85, 58 S. E. 795, 13 L. R. A. (N. S.) 278 (1907), Mr. Justice Hoke reviews the decided cases and says:

"It may now be taken as settled that growing trees are a part of the realty, and a contract to sell and convey them, * * * must be reduced to writing. These authorities also clearly establish that, on the expiration of the time stated in such a contract within which the timber may be removed, all right in the vendee shall cease and determine, and the estate in so much of the standing timber as has not by that time been severed shall revert to the vendor; and both positions are upheld in numerous and well-considered cases in other jurisdictions."

See Hawkins v. Lumber Co., 139 N. C. 162, 51 S. E. 852; Lumber Co. v. Corey, 140 N. C. 467, 53 S. E. 300; Hornthal v. Howcott, 154 N. C. 228, 70 S. E. 171; Jenkins v. Lumber Co., 154 N. C. 357, 70 S. E. 633.

In a very able and well-considered opinion by Judge Keith, in Wright-Young v. Camp. Mfg. Co., 110 Va. 678, 66 S. E. 843 (1910), after a thorough examination of the decided cases, the court adopted the opinion of those courts which held that the deed conveyed an estate in the timber, subject to be divested, and revert to the grantor, upon failure to cut and remove within the time fixed in the deed, or a reasonable time. He thus concludes the discussion:

"Looking to the whole deed, and all of its provisions must be considered in order to arrive at its proper construction, we are of opinion that it was not the intention of the parties to give an absolute and unconditional title to the timber, but only such as was cut and removed within the time limited by the deed, and such extensions thereof as the grantee was entitled to demand upon a fair construction of the deed, or as might be agreed upon between the parties."

In that case the deed was executed January 24, 1895, with a limit of five years to cut and remove the timber, and the right to demand an extension "as long as the grantee might desire," upon payment of interest on the purchase price. At the end of five years the grantee paid the interest, and continued to do so for four years, when the grantor refused to accept further interest and sold to another person, who began to cut the timber. The lumber company brought suit to enjoin the cutting. Although the contract gave the grantee the right to demand an extension of time "as long as it might desire," such right was construed to mean "a reasonable time." Quoting with approval the language used in McIntyre v. Barnard, 1 Sandf. Ch. (N. Y.) 52, the learned president said:

"It is only by this construction that we can give full scope to the whole intention expressed by the instrument; and at the same time we relieve it

from the irrational consequences to which the defendant's construction inevitably leads."

The effect which would follow from the contention that these deeds impose permanent burdens upon timber lands, and prevent the owner from bringing them under cultivation or other use to which they are adapted, does violence to the intention of the parties, and imposes such burdens upon the lands of the grantors as greatly to diminish, if not destroy, its value.

The court, in that case, noting that nine years had elapsed since the execution of the deed, gave the lumber company one year within which to cut, from the filing of the decree. This case was cited with approval by the same learned judge in Brown v. Surry Lumber Co., 113 Va. 503, 75 S. E. 84. There were, in that case, facts which differentiated it from the Wright-Young Case, but the court adhered to the construction of the deed announced in the first case. Quigley Furniture Co. v. Rhea, 114 Va. 271, 76 S. E. 330.

In Smith v. Ramsey, 116 Va. 530, 82 S. E. 189, Judge Buchanan refers to the great "diversity of judicial decision" in the construction of timber contracts, not only in different jurisdictions, "but the decisions of the same court have not always been uniform." He discusses the "vexed question," citing the Wright-Young and the Rhea Cases, supra. He concludes:

"Those decisions would seem, therefore, to settle, if decisions can settle a question, that the provisions in such contracts for the cutting and removal of the timber within a fixed period are not covenants, but conditions."

In Adkins v. Huff, 58 W. Va. 646, 52 S. E. 773, 3 L. R. A. (N. S.) 649, 6 Ann. Cas. 246, Huff conveyed to Adkins a tract of land, reserving and excepting the timber, giving 34 months from the date of the deed to cut and remove the timber. Eliminating conditions which came into the situation after the date of the deed, the grantor not having cut and removed the timber within the period fixed, the grantee, claiming that the title to the timber became absolute in him, began to cut. The grantor, claiming under the reservation, applied to the court for an injunction, which was granted. Upon appeal the decree was reversed and the bill dismissed. Judge Poffenbarger said:

"The authorities are practically uniform in holding that an instrument granting standing timber, and containing a clause requiring or permitting it to be removed within a specified time from the date of the grant, gives no absolute and unconditional title to the property. Some courts hold the right of the grantee to be a license, others a lease, and others a defeasible title to the timber. By the great weight of authority it is determined that no right or title exists in the grantee after the expiration of the time specified in the deed or contract."

In support of this conclusion a large number of cases from the courts of Vermont, Michigan, New York, Minnesota, Massachusetts, Wisconsin, Ohio, and Maine are cited. Holding that the same construction should be given a reservation as a conveyance of timber with a time fixed for cutting, the court enjoined the grantor claiming under the reservation from cutting after the expiration of the time limit. The judge said obiter that if no time for cutting was fixed,

and the deed contained apt words to convey a fee, the title was "absolute and unconditional," citing cases from Alabama and Michigan.

In Keystone Lumber & Mining Co. v. Brooks, 65 W. Va. 512, 64 S. E. 614, Judge Brannon cites Adkins v. Huff, supra, but appears to reject the conclusion reached. He does not overrule it, but, with all deference to the learned judge, I am unable to reconcile much that he writes, or his conclusion, with the decision in that case. It may be that the two decisions may be reconciled by noting the construction placed on the language of the two deeds. The inference which I draw from the opinion is that the learned judge leaned to the view that the language used in timber deeds fixing a time within which the timber was to be removed is to be construed as a covenant on the part of the grantee, and not a limitation or condition subsequent. The argument of counsel for complainant in this case finds much support in Judge Brannon's opinion.

It is held by Judge Rose in Cullen v. Armstrong (D. C.) 209 Fed. 704, that according to the decision of the Maryland court a contract for the sale of standing timber, or, as he describes it, a "timber leave," is personal property; it is bought and sold as goods, wares, and merchandise.

I have, at probably unnecessary length, reviewed the decisions in the state courts in this circuit, because of my very high regard for the learning of the justices, and a careful consideration which they have given to the construction of these timber deeds, and for the additional reason that I deem it important that the decisions of the state and federal courts in this circuit shall be uniform.

If the time at which the rights of the lumber companies, purchasing timber and operating large mills in these states, be fixed at the date of the deeds, between the years 1895 and 1905, approximately, rather than at the dates at which the right to demand extension of time for cutting and removing—1905 to 1915, approximately—it will be found that in neither of the states had there been such a number of cases decided as to constitute authoritative declarations of the law controlling the federal courts. If the date of the deeds be adopted as the time when the right of the parties accrued, the question presented in this and other cases coming before the District Courts in this district must be treated as open to the independent judgment of the federal court, observing the principle announced in Kuhn v. Fairmont Coal Co., supra.

[3] In the very carefully prepared brief of counsel for complainant it is contended that the courts of South Carolina, and therefore Virginia and North Carolina, have fallen into error in holding that the clause fixing the time within which the timber shall be cut and removed is a condition subsequent, and that failure to comply with such provision works a forfeiture of the estate in the timber; that such language should be construed to be a personal covenant on the part of the purchaser to cut and remove the timber within the time prescribed. It is well settled that, if language is of doubtful import, the court will construe it to be a covenant, for breach of which damages may be recovered, rather than a condition working a forfeiture

of the estate. King v. N. W. R. R. Co., 99 Va. 625, 39 S. E. 701; Bangert v. Roper Lumber Co., 169 N. C. 628, 86 S. E. 517. In the last-cited case, in which there were two dissents, the court held that, under the terms of the deed, payment was not required in advance. The further contention is made that, if the provision be construed as attaching to the estate a condition subsequent, the failure to comply with its terms does not work a forfeiture until action is taken by the party entitled to take advantage of the breach, as by re-entry, notice, or otherwise—that failure to do so operates as a waiver of the breach; that a court of equity will not lend its aid to enforce a forfeiture of a condition subsequent. Authorities are cited sustaining these positions.

Language is used by some of the courts indicating that they treated the clause limiting the time for cutting the timber as creating a condition subsequent. It would seem, however, that the better interpretation of the opinions leads to the conclusion that they likened the deeds, and the estate conveyed to a base or qualified fee. Bunch v. Lumber Co., supra. This estate is defined by Blackstone as:

"Such a one as has a qualification subjoined thereto and which must be determined whenever the qualification annexed to it is at an end." 2 Com. 147 (*109).

In the note to Jones' Blackstone, the case of Wiggins Ferry Co. v. Ohio & M. Ry. Co., 94 Ill. 83, is cited. It is said of this character of estate:

"It is true the estate here may not endure forever; it may be determined by the failure to use and employ the rights and easements granted in the manner prescribed in the grant; but if they shall be so used and employed the grant is forever. And this seems to meet Blackstone's definition of a qualified or base fee."

It is also said that the estate created by the conveyance is not properly an estate on condition, either precedent or subsequent, but a base or qualified fee. Kilpatrick v. Graves, 51 Miss. 432.

Chancellor Kent defines a qualified base or determinable fee as:

"An interest which may continue forever, but the estate is liable to be determined without the aid of a conveyance, by some act or event circumscribing its continuance or extent." Com. IV, *9.

Mr. Justice Walker states the proposition clearly, saying:

"In no event should we give a construction to the instrument which will confer any greater right or estate than is commensurate with the object and purpose of the parties, as expressed in it." Jenkins v. Lumber Co., supra.

It is manifest that these "timber contracts" are sui generis, and in the effort to construe them by analogy to deeds, or instruments conveying land, difficulties are encountered. The courts which adopt the view of the South Carolina court, that an estate vests in the grantee upon the delivery of the deed, with a limitation upon the time for cutting and removing, hold that upon the expiration of such time the title "determines," "reverts," or use equivalent terms, excluding the idea that the clause fixing the time creates a condition subsequent.

I have given to the well-considered argument of counsel careful consideration. They are confronted, however, with the fact that the Supreme Court of South Carolina, in accord with the large majority of other state courts, especially in this judicial circuit, has, by an unbroken line of decisions, held that the title to the timber of the Cape Fear Lumber Company, and its assignee, determined upon the failure to cut and remove within a reasonable time, and that such time had elapsed before Gray brought his suit against the Marion County Lumber Company, or it made a tender of the interest and gave notice of the additional time required. This court is asked to disregard the decision of the South Carolina court, and hold that complainant is the owner of the timber under the deeds in trust executed by the Marion County Lumber Company, and that defendant, purchasing from the owner of the land subsequent to the decision of the Gray Case, be enjoined from cutting. To so hold would do violence to the wise and salutary rule prescribed by the Supreme Court of the United States in Kuhn v. Fairmont Coal Co., supra, that—

"To avoid confusion, the federal court should always lean to an agreement with the state court, if the question is balanced with doubt."

The wisdom of this rule followed by the federal courts is illustrated by the situation presented in this case, and other timber contracts, or deeds, of the same character. It appears from the state reports that parties and corporations holding deeds for timber on extensive tracts of land, in the South Atlantic states, containing clauses limiting the time for cutting, differing in some respects, but substantially similar, have strongly pressed upon the state courts the contention made here. The opinions of the judges in the cases cited, and many others, disclose a careful, anxious effort to give to the deeds a fair, reasonable construction. As said by Judge Keith, "looking to the whole deed, and all of its provisions," and "avoiding irrational consequences," they have reached the conclusion that—

"It was not the intention of the parties to give an absolute and unconditional title to the timber, but only such as was cut * * * within the time limited by the deed, and such extensions thereof as the grantee was entitled to demand upon a fair construction of the deed, or as might be agreed upon between the parties."

While I am not inadvertent to the fact that other courts have held to the contrary, I concur in this construction.

It is urged that in Crown Orchard Co. v. Dennis, 229 Fed. 652, 144 C. C. A. 62, the Court of Appeals of this circuit rejected the construction placed upon the timber deeds by the South Carolina court in the Flagler and Minshew Cases, and adopted, as its independent judgment, the rule laid down in the Prettyman Case, 97 S. C. 247, 81 S. E. 484, resulting in the conclusion that, when the extension clause gave such additional time as the grantee "might desire," the doctrine of reasonable time could not be applied; that the right to cut and remove was unlimited. It will be noted that in the Prettyman Case the circuit judge of the state court, in his decree, said that when such time was granted as the grantee "might desire," in "unambiguous and express terms," the "reasonable time" rule did not apply; that "when

the parties speak for themselves the court cannot imply." The learned judge fixed the additional time to cut at 10 years, because "that was the time demanded by the grantee." He says: "The plaintiff had thus, by its notice, fixed the duration of the extension." A reasonable construction of the language of the circuit judge justifies the argument that he was of the opinion that the language of the deed excluded the application of the "reasonable time" rule. The Chief Justice in a per curiam opinion says that, "for the reasons therein set forth, the judgment is affirmed." Judge Watts, in his dissenting opinion, suggests that, by adopting the decree "as the judgment of this court," it was committed "to a decision and a policy that will be far-reaching in its effect and prejudge other cases of similar character." This case was strongly pressed upon the federal court in the argument of the Crown Orchard Case. Judge Knapp says:

"It is not necessary for us to affirm that the Prettyman Case established a rule of property in South Carolina which we are bound to apply. We follow it upon the question in dispute, not merely out of deference to the court which decided it, but because the decision commends itself to our judgment as just and correct."

From this language it is argued in this, and other, cases that this court is bound, as by an authoritative declaration of the law, to hold that the Cape Fear Lumber Company and complainant, its assignee, is entitled to an unlimited and unlimitable time to cut and remove the timber. The language quoted, without limitation, is capable of that construction. It may be suggested that, in saying that the judgment in the Prettyman Case was "for the reasons given" affirmed, the Chief Justice was referring to the fact that the period of 10 years was fixed because, as stated by the circuit judge, that was the time fixed by the plaintiff, thus limiting the scope of the per curiam opinion of the court. However this may be, it is manifest that the learned judge in his opinion in the Crown Orchard Case did not intend to hold that the deed conferred an unlimited time to cut. He says that the exercise of the right conferred by the deed "must be an honest and justifiable desire, not a pretended or fantastic desire. In short, we take the phrase to mean such additional time as may be reasonably desired by the party having the right to an extension." The court remanded the case, with direction to the court below to fix the time, etc.

Referring to the Prettyman Case, supra, it is worthy of note that the decision was rendered on April 23, 1917, and the decision in the Minshew Case on April 27, 1917. Judge Watts, who wrote in the Minshew Case, makes no reference to the decision in the other case, although he reviews all of the other decisions of the court relating to the construction of timber deeds. There were differentiating facts in the cases. As we have seen, the Minshew Case is cited as the authoritative declaration of the law in the Gray Case.

I have given to the language used by the court in the Crown Orchard Case careful consideration, and said this much to exclude the suggestion that I did not regard it as controlling authority in like cases. I shall indulge the hope that my decree in this may be reviewed, so that, without regard to the conclusion reached, the District Judges in this

circuit, and the parties who have large interests involved in such contracts, may be advised what construction the federal courts will place upon these deeds.

[4] I conclude that the deed from Peele to the Cape Fear Lumber Company vested in the grantee a present estate in the timber trees, with the right to begin cutting and removing them within a reasonable time computed from the date of the deed; that, upon failure to begin cutting within such time, the title to, and estate in, the timber determined and reverted to the owner of the land or his grantee, Gray; that, by the failure to begin cutting the timber within the time elapsing between the date of the deed and the institution of the suit by Gray against the Marion County Lumber Company—14 years—the right, title, and estate to the timber vested in the lumber company, and such rights as vested in complainant by virtue of the deeds in trust determined and reverted to Gray, the owner of the land; that by the deed from Gray to defendant he became the owner of the timber, with the right to cut and remove it, according to the terms and provisions of the deed under which he claims.

This construction of the deed disposes of several interesting questions discussed by counsel, upon the theory that defendant's title was dependent upon a forfeiture wrought by breach of a condition subsequent. It also renders unnecessary the discussion of questions presented by defendant.

The motion for an injunction is denied, and the bill dismissed, at the cost of complainant.

AMMON & PERSON v. NARRAGANSETT DAIRY CO., Limited.

(District Court, D. Rhode Island. December 12, 1918.)

No. 74.

TRADE-MARKS AND TRADE-NAMES ⇐98—SUIT FOR INFRINGEMENT—RECOVERY OF DAMAGES AND PROFITS.

The right to an injunction against the future use of a single word forming part of complainants' trade-mark, and which it afterward used alone, does not carry the right to an accounting, covering time when such word alone was only used by defendant in good faith, and on packages clearly identified as its own.

In Equity. Suit by Ammon & Person against the Narragansett Dairy Company, Limited. On complainants' motion for entry of decree.

See, also, 252 Fed. 276.

Edwards & Angell, of Providence, R. I., for plaintiffs.

Wilson, Gardner & Churchill, of Providence, R. I., for defendant.

BROWN, District Judge. Though the opinion already filed (252 Fed. 276) holds that the plaintiffs are entitled to an injunction, and that the defendant's cross-bill must be dismissed, yet it appears that the former Narragansett Dairy Company had used as a trade-mark

applied to goods the word "Queen" alone for about three years prior to any use of the word alone by the plaintiffs as a trade-mark applied to goods. This use by that company or by the defendant had been very substantial and continuous in New England and elsewhere from 1909 to September 29, 1915, the date of plaintiffs' notice to defendant; such use being without fraudulent intent to imitate plaintiffs' goods, and so far as appears without actual deception of purchasers. This has a most important bearing on plaintiffs' right to an accounting of profits and assessment of damages.

The goods of both these manufacturers were sold as their own product to persons who ordered of them as manufacturers. While plaintiffs' cartons for one-pound packages, bearing the word "Queen," first used in 1912, bore no marks indicating that Ammon & Person, the plaintiffs, who were wholesalers and not manufacturers, were connected in any way with the goods, the cartons of the two corporations were so conspicuously marked with their names as manufacturers that it is impossible to believe that any purchaser of these either at wholesale or retail, could have supposed he was getting goods of the plaintiffs. Were it not for the earlier use of plaintiffs' trade-mark, "Queen of the West," and evidence showing that this had been abbreviated to the trade-name "Queen," not used as a trade-mark before 1912, the plaintiffs would be entitled to no relief.

By reason of differences in the facts, Hanover Milling Co. v. Metcalf, 240 U. S. 403, 36 Sup. Ct. 357, 60 L. Ed. 713, seems insufficient to support defendant's cross-bill. Yet that case is important for the recognition that it gives to the rights of one who, in good faith and without notice, has built up a trade in a special territory, and to the principle that the earlier adopter may not monopolize marks where his trade has never reached, and where the mark signifies, not his goods, but those of another.

The plaintiffs' contention that the word "Queen" alone had become so associated with plaintiffs' goods, that it meant to the public plaintiffs' goods, and that therefore defendant's profits are presumably due to that meaning, finds little support in the evidence. The contention is based rather upon a theoretical presumption than upon any substantial testimony.

To apply in this case a presumption that purchasers who ordered goods from the defendant's factory, or who purchased goods packed in defendant's cartons (which could not be mistaken for plaintiffs'), did so because of any knowledge of plaintiffs' reputation or connection with the goods, would be highly unreasonable. Presumptions are never allowed against ascertained and established facts; when these appear, presumptions disappear. Lincoln v. French, 105 U. S. 617, 26 L. Ed. 1189.

Hamilton-Brown Shoe Co. v. Wolf Bros. Co., 240 U. S. 251, 36 Sup. Ct. 269, 60 L. Ed. 629, has slight application to the facts of the present case. In that case of fraudulent imitation the court applied the principle applicable in cases of tortious confusion of goods. 240 U. S. 262, 36 Sup. Ct. 269, 60 L. Ed. 629. It is to be noted that the exclusion from an accounting of sales, where the infringing mark was accom-

panied by matter clearly indicating that the goods were of the defendant's manufacture, was affirmed. 240 U. S. 255, 260, 36 Sup. Ct. 269, 60 L. Ed. 629. See, also, Wolf Bros. Co. v. Hamilton-Brown Shoe Co., 206 Fed. 611, 619, 124 C. C. A. 409. The rule applicable in cases of confusion of goods extends no further than necessity requires. See cases cited in Bouvier's Law Dict. (Rawle's 3d Ed.) vol. 1, pp. 605, 606.

In Westinghouse Co. v. Wagner Mfg. Co., 225 U. S. 604, 618, 619, 32 Sup. Ct. 691, 696 (56 L. Ed. 1222), it was said:

"The inseparable profit must be given to the patentee or infringer. The loss had to fall on the innocent or the guilty. In such an alternative the law places the loss on the wrongdoer."

But only in such alternative is the rule applicable. Whether such alternative exists is a matter of fact, and not of law. It would be altogether too sweeping a proposition to say that, irrespective of particular circumstances, a court should hold that a sale of goods bearing a trade-mark was due to such trade-mark; for it is familiar knowledge that in the sales of many goods bearing trade-marks the trade-mark is a negligible factor, and this would seem especially true of many ordinary articles of consumption. Whether or not things which are mixed can be separated cannot be determined as a matter of law. On the contrary, in many cases it may be quite obvious that marks affixed to goods could have played but an insignificant part in the sale. As was said (225 U. S. on page 620, 32 Sup. Ct. 696 [56 L. Ed. 1222]) in the opinion last cited:

"The rule, however, is not intended to penalize the infringer, nor to give the patentee profits to which he is clearly not entitled. So that where, by general evidence, expert testimony, or otherwise, it is shown that his patent is of relatively small value, it will often be possible to prove that, at the utmost, it could not have contributed to more than a given amount of the profits. Lupton v. White, 15 Vesey, Jr., 432–440. In such cases, except possibly against one who had concealed or destroyed evidence or been guilty of gross wrong, the plaintiff's recovery cannot exceed the amount thus proved, even though it be impossible otherwise more precisely to apportion the profits."

The burden is upon the plaintiffs to prove the existence of profits attributable to their trade-mark and to demonstrate that they are impossible of accurate or approximate apportionment. 225 U. S. 622, 32 Sup. Ct. 691, 56 L. Ed. 1222.

The plaintiffs in this case are met by the fact that their trade-mark "Queen of The West" and the trade-mark "Queen" are not the same, but the resemblance is partial. That the word "Queen" alone, when applied as a trade-mark, did not mean to the public generally the goods of the plaintiff, but did mean for a period of about three years before the use of the trade-mark "Queen" the goods of manufacturers who sold the goods as their own product, and who had associated their own name with the word "Queen" so conspicuously as to exclude any reasonable presumption that the purchaser of cartons so marked, or the purchaser from salesmen representing the manufacturers, or who ordered their goods from the factory, could have been mistaken.

Under this state of things, it is evident that to call upon the defendant to produce a specific account of the goods sold upon orders sent to its factory, or taken by salesmen from purchasers who knew they

were getting the defendant's goods, would be inequitable, and that the expense and burden of such an accounting would be wholly disproportionate to any possible advantage that could result to the plaintiffs. The plaintiffs must establish their right to the assistance of a court of equity, not through the abstract propositions of law enunciated in cases of a different character, but upon the facts of the present case. There is no testimony that any mistake was ever made by purchasers. There is affirmative evidence that no mistake was made to the knowledge of the officials of the two Narragansett Dairy Companies.

The plaintiffs' equity rests upon its showing of a prior use of the trade-mark "Queen of The West" and of the trade-name "Queen." It is a hardship to the defendant that it should be deprived of the benefits of a trade-mark corresponding to the trade-name earlier used in connection with plaintiffs' business. The plaintiffs' right to an injunction is not free from doubt, but seems justified in order to prevent confusion likely to arise in the natural expansion of trade. 240 U. S. 420, 36 Sup. Ct. 357, 60 L. Ed. 713. In view of the peculiar circumstances of this case, it seems both impracticable and inequitable to impose upon the defendant the burden of an accounting or assessment of damages. Ludington Novelty Co. v. Leonard, 127 Fed. 155, 62 C. C. A. 269; Rushmore v. Badger Brass Mfg. Co., 198 Fed. 379, 117 C. C. A. 255; G. & C. Merriam Co. v. Saalfield, 198 Fed. 369, 377, 378, 117 C. C. A. 245; Worcester Brewing Corp. v. Reter & Co., 157 Fed. 217, 84 C. C. A. 665; G. & C. Merriam Co. v. Ogilvie, 170 Fed. 167, 95 C. C. A. 423; Keystone Type Fdy. Co. v. Portland Pub. Co. (C. C.) 180 Fed. 301, and cases cited.

While some of these cases relate to unfair competition rather than to trade-mark infringement, yet they discuss principles which seem equally applicable to both classes of cases in respect to the question of an accounting, since the common law of trade-marks is but a part of the broader law of unfair competition. See Hanover Milling Co. v. Metcalf, 240 U. S. 413, 36 Sup. Ct. 357, 60 L. Ed. 713.

The plaintiffs' draft decree is not in all respects in conformity with equity rule 71 (198 Fed. xxxviii, 115 C. C. A. xxxviii). The defendant's proposed draft seems both to conform to the rule and to cover all that plaintiffs are entitled to under this and the former opinion.

A decree in the form proposed by the defendant will be entered by the clerk as of this date.

UNITED STATES v. SIXTY-FIVE CASES OF GLOVE LEATHER (KARPLUS & HERZBERGER, Claimants).

(District Court, N. D. New York. December 27, 1918.)

1. JUDGMENT ⊜299(1)—FINAL JUDGMENT—EXPIRATION OF TERM.
   A District Court loses power over its own final judgments at the close of the term at which rendered, if such term is not continued for the purpose of the particular case.
2. DISMISSAL AND NONSUIT ⊜81(3)—"FINAL JUDGMENT"—REINSTATEMENT.
   A docket entry of dismissal, made pursuant to an order of the District Court intended to clear its docket of stale cases, *held* not a "final judg-

ment," depriving the court of power to reinstate the cause, though the term had expired.

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

3. DISMISSAL AND NONSUIT ⟸81(3)—REINSTATING CAUSE—LACHES.

Where, after a docket entry of dismissal was made under a general order, the United States attorney put the case on the calendar at two different terms, and it was postponed at the instance of defendant, or by agreement, *held*, that restoration of the case to the docket cannot be denied, on the theory that the United States was guilty of laches.

At Law. Proceeding by the United States for the forfeiture of Sixty-Five Cases of Glove Leather, claimed by Karplus & Herzberger. Application by the United States to revive and restore to the calendar such cause, opposed by the claimants. Dismissal vacated, and cause restored to docket.

This is an application to revive and restore to the calendar of this court the above-entitled cause, to the end that the prosecution and trial thereof may be proceeded with. The claimants oppose the motion or application mainly on the ground that the case has been dismissed by this court, and that, as the term at which dismissed had passed and ended before the application was made, the court is now without jurisdiction or power to open and restore the case to the calendar, or take any action in the case. Laches is also urged, and it is further claimed that this court never acquired jurisdiction.

D. B. Lucey, U. S. Atty., of Ogdensburg, N. Y.

Brown & Gerry, of New York City (Walter H. Dodd, of New York City, of counsel), for claimants.

RAY, District Judge. In 1912, a special agent of the Treasury Department of the United States actually seized 65 cases of glove leather which had been imported into the United States from Germany on the ground same had been fraudulently undervalued. The goods before such seizure were in the actual possession of one Joseph Bondy at Gloversville, N. Y., in the Northern district, who was the acting agent of Karplus & Herzberger, of Germany, and who were the owners, consignors, and importers.

An agreement was entered into between such importers, represented by Mr. Bondy and the United States, acting through the Treasury Department, by which $6,000 was to be and was deposited by such importers with the collector of customs at Albany, N. Y., Northern district of New York, as representing such goods and in place of same and as representing their maximum value, and which agreement contained the following:

"In event of any judgment of forfeiture or otherwise being obtained, or in event that any liability arising from the importation of said merchandise shall accrue to the United States, in so far as the said sum of $6,000 may be applicable, it shall be applied to the satisfaction in settlement of such liability or judgment."

The United States, acting by the agent of the Treasury, thereupon relinquished and surrendered possession of the said glove leather to

said Bondy, representing Karplus & Herzberger, who disposed of such property. The said $6,000 so deposited was subsequently paid over to the collector of customs in the city of New York and is now in his hands awaiting the final disposition of this case.

On the 16th day of January, 1914, this action was commenced for the forfeiture of such glove leather on the grounds same had been undervalued and a writ was issued. Same was returned with the following return indorsed thereon by the United States marshal:

"Not executed by direction of United States attorney. The claimant has filed a bond for $6,000 to cover any damages which the government might recover, and the defendants' property was returned to them."

The said $6,000 was then in the hands of the United States under the agreement referred to. From November 10, 1914, when issue was joined, until about February, 1918, no further action was taken. In the meantime another case had been pending, involving some of the question involved in this case, and there had been a change in the office of the United States attorney for the Northern district of New York.

On the 14th day of November, 1917, this court, on its own motion, made and entered a general order during the continuance of the October term held at Auburn, N. Y., wherein and whereby it was—

"Ordered, that in all cases at law now pending in the Northern district of New York, or hereafter docketed and pending, and where action is not stayed or enjoined by a court or a judge of competent jurisdiction, in which no action has been or is taken by the attorneys or parties, or either of them, within the two years last past, or following such docketing in cases hereafter docketed, the same be dismissed for want of prosecution, without prejudice, and that the clerk enter in the docket of such cases the words 'Dismissed W. P.,' which shall mean dismissed without prejudice: Provided, however, that on application and motion of either party, and for cause shown, such cause so dismissed may be revived, and its prosecution resumed or continued; and provided, further, that such 'dismissal W. P.' in such cases shall not make the clerk of this court responsible" for certain fees, etc.; "it appearing that such docket fee is not taxable until the case is finally disposed of," etc.

The reason for this order and the action of the clerk under it was to clear the docket of the court of old and stale cases many of which had been settled or otherwise disposed of, but which appeared on the docket of the court to be live cases. It is apparent from the order itself that it was not the purpose to finally dispose of the cases, or to enter any final judgment or order of dismissal, but to leave such cases open to be proceeded with on a proper showing. It is true no provision was inserted in the order continuing the term or terms at or during which such entries on the docket of the court might be made. No formal orders of dismissal were made.

[1, 2] The main question is: Has the court lost jurisdiction and control of such cases, so that it is powerless to proceed with a case, if "on application and motion of either party, and for cause shown," the court sees fit to revive and continue the prosecution of the case as provided in the order itself. The terms of court in the Northern district are fixed by statute, and one term continues until the beginning of another; but the court may and often for certain purposes continues

a term into and even far beyond another and succeeding term. In this case the entry on the docket of the court, "Dismissed W. P.," was made during the October, 1917, term which ended with the beginning of the December, 1917, term. But in January or February, 1918, notice of trial in this case was served, and not returned for the February, 1918, term, and the cause was put over that term by consent, and it was again noticed for the April, 1918, term, and again adjourned to the subsequent or October, 1918, term of this court. The order of this court, above referred to and quoted in part, was not made on notice to parties or their attorneys, and the attorneys for the claimants herein state, what is undoubtedly true, that until during the October, 1918, term they were not aware of such order. It is quite true, I think, that a United States District Court may lose its power over its own "final" judgments at the close of the term at which rendered, if such term is not continued for the purposes of the particular case, or of particular cases including the one in question. In Bronson v. Schulten, 104 U. S. 410, 26 L. Ed. 797, the court said:

"But it is a rule equally well established that after the term has ended all final judgments and decrees of the court pass beyond its control," etc.

In United States v. Mayer, 235 U. S. 55–67, 35 Sup. Ct. 16, 19, 59 L. Ed. 129, the court said:

"In the absence of a statute providing otherwise, the general principle obtains that a court cannot set aside or alter its final judgment after the expiration of the term at which it was entered," etc.

The docket entry of dismissal in the instant case as fully appears by the order pursuant to which made was not a "final" dismissal or judgment or disposition of the case, nor was it intended to be. On the other hand, it was expressly provided in the order that the action might be revived, and its prosecution proceeded with and continued, on application and showing made. The purpose was to clear the docket of stale cases, but not to deprive the parties of the right to be heard and to proceed with their cases, if the court so ordered. The power of the court to deprive the parties of such right may well be questioned. I think it a strained construction to hold that such dismissal was a final judgment in the case, and that such is not the effect of the action taken. The other questions raised on this motion should not be now disposed of, except that of laches.

[3] The record shows, as stated, that after such order was made the United States attorney put the case on the calendar at two different terms, and that the trial was postponed at the instance of the defendant, or, at least, by agreement. The United States was not guilty of laches certainly. The other questions should be raised and presented at the trial. I express no opinion whether or not the court was without jurisdiction by reason of the fact that by agreement of the parties money was substituted for the property itself, and held by the United States in place thereof; the importer, on the faith and basis of the stipulation and substitution, taking and disposing of the property itself.

There will be an order vacating the dismissal and restoring the case to the docket for trial in due course on due notice.

BROWN v. SPELMAN et al.

(District Court, E. D. New York. June 3, 1918.)

1. ARMY AND NAVY ⟸20—SELECTIVE SERVICE ACT—PROCEEDINGS BEFORE LOCAL AND DISTRICT BOARDS.
   In view of the regulations promulgated by the President under the Selective Service Act, local boards provided for by the act have the widest possible latitude for the purpose of informing themselves of the truth or falsity of statements made by registrants, and such boards are not in any way restricted to what would be competent legal evidence in any judicial proceeding.
2. ARMY AND NAVY ⟸20—SELECTIVE SERVICE ACT—RELIEF IN COURTS.
   The civil courts can grant relief from orders of local and district boards provided for by the Selective Draft Act only where such boards have acted without or in excess of their jurisdiction, or the proceedings have been unfair, or show an abuse of discretion; hence, where the boards, in disposing of registrant's claim that he was over the age prescribed in the act and that his name should be stricken from the list, followed the regulations, etc., no relief could be granted by the courts.

At Law. Application by Sam Brown for writ of certiorari, or writ of mandamus, directed to James J. Spelman and others, as members of the Local Board for Division No. 35 of the Borough of Brooklyn, City of New York, and Charles J. Pflug, as Adjutant General of the State of New York. Application denied.

Solomon S. Schwartz, of Brooklyn, N. Y., for plaintiff.
Melville J. France, U. S. Atty., of Brooklyn, N. Y., for defendants.

GARVIN, District Judge. This is an application for a writ of certiorari, or a writ of mandamus, directing the defendants, who are members of a local board in the city of New York, created under the provisions of the act of Congress, known as the Selective Service Law, approved May 18, 1917 (40 Stat. 76, c. 15), and the adjutant general of the state of New York, to strike the plaintiff's name from the list of persons registered under the Selective Service Law, and asking that a writ of prohibition be issued, restraining the defendants from inducting the plaintiff into military service.

The petition sets forth that on June 5, 1917, the petitioner was over the age of 31 years; that on that day he appeared before the registration board of the 158th precinct of the county of Kings, city and state of New York, and stated to said board that he was born April 17, 1886; that three members of the board said that he would not have to register, as he was past the age of 31 years; that one member, who appeared to be the chairman of the board, after a telephone conversation with some one, informed the petitioner that he would have to register on a doubt, but that, if it appeared subsequently that he was not subject to registration, his name would be stricken from the roll; that the petitioner, believing at the same time that he was not liable to military duty under the Selective Service Law, so registered; that he subsequently discovered that he was not liable to military duty under the law, and made application in writing to local board for division 35, of which the defendants Spelman, Walsh, and Pflug are mem-

bers, to cancel his registration and to strike his name from the list of persons certified for military duty, which the defendants refused to do; that the petitioner then offered to produce witnesses to prove that he was over the age of 31 years on June 5, 1917, but said defendants refused to grant a hearing, at the same time stating to petitioner that he would have to submit his claim and proof in writing; that the petitioner has submitted his claim in writing to the said local board, and also affidavits, made by himself and other persons, stating that he was born on April 17, 1886; that said local board members subsequently informed petitioner that they had forwarded his claim and affidavits to the adjutant general of the state of New York; that thereafter the petitioner received a communication from the adjutant general of the state of New York requiring him to produce further proof of his age, including a requirement to produce his birth certificate; that the petitioner thereupon forwarded to the adjutant general his (petitioner's) affidavit, stating that he was not in possession of a birth certificate and could not obtain one, as the province in which he was born is now under German occupation. In addition to this affidavit the petitioner also forwarded to the adjutant general affidavits of other persons who knew petitioner's age; that with petitioner's claim and proof forwarded to the adjutant general as above set forth the local board forwarded its finding of fact and its recommendation; that petitioner was subsequently informed by the local board (which is made up of three of the defendants as aforesaid) that the petitioner's claim that he was registered through error and not subject to military service has been denied.

[1] A careful reading of the regulations promulgated by the President under the Selective Service Law indicates a clear intention on the part of Congress that the proceedings before the local and district boards shall not be conducted with the same regard for rules of evidence as must be observed by the courts in determining issues presented. Section 95 of the selective service regulations reads in part:

"All affidavits and other written proof (not an integral part of the questionnaire) filed by the registrant, or by any other person in support of any claim for exemption or discharge, whether of his or their own motion, or in response to the requirement of the local or district board, must be legibly written or typewritten on one side only of white paper of the approximate length, but no longer than a page of the questionnaire."

From this it appears that Congress did not intend that the boards should consider only affidavits as proof. Section 101 of the selective service regulations provides:

"In classifying registrants, local boards shall first examine the registrant's entries on the first page of the questionnaire, and also the answers to the questionnaire and all other proof in the case, and shall proceed to classify the registrant in accordance with the following rules."

From this it is evident that Congress intended to give the local boards the widest possible latitude for the purpose of informing themselves concerning the truth or falsity of the statements made under oath by registrants, and that the boards are not to be in any way restricted to what would be competent legal evidence in any judicial proceeding.

[2] In the case at bar the three defendants who comprised local

board 35 followed section 61 of the selective service regulations carefully. The adjutant general acted in accordance with the law, after a careful investigation, as is indicated from the papers presented by petitioner himself. With its conclusions this court cannot interfere, unless the case is brought within the provisions of Angelus v. Sullivan, 246 Fed. 54, 150 C. C. A. 280, which holds that:

"The civil courts can afford relief from orders made by such boards in any case where it is shown that their proceedings have been without or in excess of their jurisdiction, or have been so manifestly unfair as to prevent a fair investigation, or that there has been a manifest abuse of the discretion with which they are invested under the act."

The members of the local board acted strictly in accordance with the law, and the adjutant general, after a careful investigation, directed that the registrant be held for military service.

The application must be denied.

SRERE et al. v. GOTTESMAN et al.

(District Court, S. D. New York. November 18, 1918.)

JUDGMENT ⇐585(4)—MATTERS CONCLUDED—MATTERS WITHHELD.

Where a seller of pulp, to be delivered monthly, by letter expressly repudiated and canceled the contract for defaults in payments, and the purchaser afterward, in an action between them, unsuccessfully counterclaimed for wrongful breach on grounds other than the letter, which was not pleaded nor in issue, the judgment was a bar to a subsequent action by him for failure to make further deliveries.

At Law. Action by Alfred A. Srere and Harry Srere against Mendel Gottesman and David S. Gottesman. On motion by both parties for direction of verdict. Verdict directed for defendants.

This action is upon a contract between the parties by which the defendant agreed to deliver 4,800 tons of pulp to the plaintiff at $1.95 per 100 pounds, deliveries to be monthly at 150 tons a month, beginning May, 1915, and ending December, 1917. The contract contained the following provisions, which are the only ones of importance: "Each shipment under this contract to be considered as a separate contract, and default of one or more shipments not to invalidate the rest of the contract." Again: "If the buyer makes default in any payment, * * * seller may at his option cancel future deliveries."

In October of 1915 the parties had a difference as to the execution of the contract, and correspondence passed between them, which it is not necessary here to detail. The controversy resulted in a claim by the defendants against the plaintiff in the sum of $3,482, for which they made claim. On February 3, 1916, the defendants wrote as follows to the plaintiffs: "We have repeatedly written you within the last few months regarding your account, which is in a deplorably overdue condition. We now wish to serve notice on you that unless settlement is in our hands not later than February 8th we will cancel the balance of the contract in accordance with claim 10." The account referred to was for the sum mentioned, and was made up of three items. Clause 10 is the clause already quoted, for cancellation.

As the controversy still continued, the defendants sued the plaintiff in the Supreme Court of New York, and the cause was afterwards removed to this court, claiming in the sum of $3,482.19 as the amount due under the contract. To this the present plaintiffs (the defendants therein) counterclaimed upon the contract in question. They laid the breach in the sixth article of their counterclaim as follows: "That in or about the month of October, 1915,

the defendants not being in default under the terms of said agreement, the plaintiffs notified defendants that they declined and refused to continue the delivery of pulp under said agreement, and that they considered the same terminated, and the said plaintiffs have ever since declined and refused to perform said agreement, to the defendants' damage of $200,000." The defendants here required a bill of particulars of the default alleged in the said sixth article, which was accorded by the plaintiffs here, and which consisted of the correspondence which passed between the parties during the months of October, November, and December, but did not set up the letter of February 3, 1916.

That cause came on for trial in this court before Judge Mayer, and resulted in a verdict for the defendants here upon their complaint, but not for the whole sum; their recovery being $2,209.29, two of the three items of their claim being disallowed. The counterclaim was left to the jury, who found against the plaintiffs here. It appears from the charge of Judge Mayer, as indeed necessarily would have been so, that no question arose in that cause of the letter of February 3, 1916. The defendants' complaint in that suit was filed on March 16, 1916, and the counterclaim in July, 1916, each of them, consequently, after the letter of February 3d. On January 8, 1917, judgment was entered in the former action for the sum of $2,029.29, without mention of the counterclaim.

The present complaint sets up the contract and alleges the breach as follows in article fifth: "Said agreement being in full force and effect, and the plaintiffs being entitled to deliveries of the said pulp during the year 1917 as therein provided, plaintiffs have neglected and refused to deliver the monthly installments of 150 tons each of pulp due under said contract for the months of January, February, March, April, and May, 1917, although repeatedly requested so to do, and on or about the 27th day of February, 1917, defendants notified plaintiffs that they considered said agreement terminated, and that no further pulp would be shipped thereunder, to the defendants' damage in $200,000."

The plaintiffs here introduce in evidence a letter of February 27, 1917, of which the important part is as follows: "We have heretofore advised you that, owing to your default under the contract, no further pulp would be shipped to you, and as all matters in connection with said contract, default thereunder, and termination thereof were litigated in the action recently tried in the United States District Court of this city, we do not see that there is anything further to be said in the matter, as our relations have been completely terminated." It is agreed that no deliveries were made during the year 1917.

Delevan A. Holmes, of New York City, for plaintiffs.
Harold Nathan, of New York City, for defendants.

LEARNED HAND, District Judge (after stating the facts as above). The plaintiffs attempted in the former action to recover upon a repudiation of the contract through the October correspondence, and failed. They necessarily exercised their putative option, arising by virtue of that correspondence, to declare the contract at an end through the defendants' breach. This they might have done, had there been such a breach. Central Trust Co. v. Chicago Auditorium, 240 U. S. 581, 36 Sup. Ct. 412, 60 L. Ed. 811, L. R. A. 1917B, 580; Johnstone v. Milling, L. R. 16 Q. B. D. 460; Landes v. Klopstock, 252 Fed. 89, — C. C. A. —. But I shall assume, for the purposes of argument, that they failed because the defendants had not repudiated the contract at all by the October correspondence. If so, the effect of the judgment in that action would not put an end to the contract; the plaintiffs had missed their blow and struck in the air.

In fact, nevertheless, the defendants had already expressly repudiated the contract, not by the October correspondence, but by the let-

ter of February 3, 1916. This, if wrongful, gave the plaintiffs a second option, and, I may also assume, the only real one, to treat the contract as terminated by a breach, or as continuing. Had the counterclaim been filed before February 3, 1916, it would not have affected their rights under that letter, but it was not so filed. The second option, the only real one, had arisen before the counterclaim.

Now, it must be admitted that the plaintiffs never actually elected to treat the letter of February 3, 1916, as a repudiation; they confined themselves to the October correspondence. If, therefore, they were free to reserve their rights under the letter, the contract was not at an end on February 27, 1917. I think they were not so free, but that, having elected to declare the contract at an end in July, 1916, by filing the counterclaim, that election included, not only the grounds for it which they asserted, but all grounds which they had. The position of treating the contract as wrongfully repudiated was not determined by any wish to establish a fact but a legal relation. If they might reserve from consideration any of the grounds upon which that relation might stand, they could litigate twice the same "cause of action"; that is, the same legal position towards the mutual obligations of the parties. This they may not do; the judgment in the first action would be a bar. United States v. California & Oregon L. Co., 192 U. S. 355, 24 Sup. Ct. 266, 48 L. Ed. 476; Watts v. Weston, 238 Fed. 149, 151 C. C. A. 225.

The judgment, therefore, concluded the plaintiffs from asserting that the defendants were wrong in repudiating the contract. Only in case they were wrong could the contract endure, because a rightful repudiation put an end to it and a repudiation there had been. The contract could not persist after the judgment, and no future deliveries were due under it. Therefore this action will not lie.

I direct a verdict for the defendants.

O. & W. THUM CO. v. DICKINSON.

(District Court, W. D. Michigan, S. D. January 29, 1918.)

TRADE-MARKS AND TRADE-NAMES ⇐98—SUITS FOR INFRINGEMENT—ACCOUNTING BY INFRINGER.

On an accounting for damages and profits by an infringer of a trademark, defendant may, in the discretion of the court, be required to file an account showing the names and addresses of all purchasers of infringing goods.

In Equity. Suit by the O. & W. Thum Company against Albert G. Dickinson. On review of master's order. Affirmed.

See, also, 245 Fed. 609, 158 C. C. A. 37.

Chappell & Earl, of Kalamazoo, Mich., for complainant.

Butterfield & Keeney, of Grand Rapids, Mich., for defendant.

SESSIONS, District Judge. The master's order, requiring defendant to file his account and to include therein the names and addresses of all purchasers of goods bearing the infringing trade-mark, is in the form used and employed for many years in this district in

accountings of like nature, and should be approved, unless it invades some substantial right of defendant, or violates some established rule of practice, and thus constitutes an abuse of discretion. Equity rule 63 (198 Fed. xxxvii, 115 C. C. A. xxxvii) prescribes the form and not the contents of the account. An account is none the less "in the form of debtor and creditor" because it is complete and contains such matters of detail as are essential to the determination of the rights of the parties. Independently of the rule, it lies within the discretion of the court to require the defendant to disclose in his account such facts as are necessary to show, not only his own profits from his wrongdoing, but also the extent of the injury otherwise done by him to the plaintiff.

The finding of the Circuit Court of Appeals that defendant has been a willful and persistent trespasser upon plaintiff's rights is binding upon this court, and constitutes the controlling rule of decision in this case. At best, defendant occupies the position of a trustee ex maleficio and must account as such. The primary object of requiring an unfaithful trustee "to bring in his account is to compel discovery from him as to the details of the transaction under investigation." Defendant is not entitled to protection against the consequences of his own malfeasance, and if the full and fair disclosure, which the law requires him to make, incidentally involves some personal loss or business disadvantage, the blame therefor rests upon himself alone. Courts should not be so tender of his claimed rights as to destroy the very purpose which the rule was designed to accomplish, or to jeopardize or sacrifice the adjudicated rights of plaintiff.

The claim of defendant that he ought not to be required to disclose the names and addresses of his customers might rest upon a somewhat more substantial foundation, if the profits made by him in the manufacture and sale of the infringing goods alone were involved; but the accounting is ordered to ascertain both his gains and profits and the damages suffered by plaintiff. In a recent petition defendant has averred that he has made no profits. If this averment is true, and he cannot now gainsay its truth, plaintiff will be limited in its recovery to the damages (as distinguished from the infringer's profits) it has sustained. An important element of such damages, if any, may be sales of goods bearing the infringing trade-mark, which have prevented sales by plaintiff of its own goods to its own customers. Whether any such sales have been made cannot be learned until after the discovery of the names of the purchasers of infringing goods from defendant. An account merely stating dates, amounts, and prices would afford little, if any, assistance in the determination of this important question. To hold that plaintiff is not entitled to such information until after the filing of his account and exceptions thereto, and not even then unless, possibly, it can be obtained from an examination of the defendant either viva voce or upon interrogatories, would be to create and to invite the delays which the rule was intended to prevent.

Decisions of District Courts, which seem to rule differently, have not been overlooked. In some vital respects the cases cited differ materially from the present one. Those cases, in themselves, when

carefully examined, particularly as to dates, furnish glaring examples of the delays caused in some measure by following the rule of practice therein approved. In a mandamus proceeding in one of the cases, the opinion of the Court of Appeals is in harmony with the views herein expressed. In re Beckwith, 203 Fed. 45, 121 C. C. A. 381. The whole trend of modern decisions and rules of procedure is to eliminate delays wherever possible, and courts ought not to permit the use of equity rule 63 as an instrument to produce the serious evil which it was intended to remedy.

The order of the master is approved and affirmed.

In re MADIGAN.

(District Court, S. D. New York. August 1, 1918.)

1. BANKRUPTCY ⟸421(1)—DISCHARGEABLE LIABILITIES—JUDGMENT FOR NEGLIGENCE.
   A judgment for damages caused by negligence is dischargeable in bankruptcy.
2. BANKRUPTCY ⟸393—RELEASE FROM IMPRISONMENT.
   Where bankrupt, having recklessly driven an automobile, was arrested under order of the state court made prior to filing of his voluntary petition in bankruptcy, and judgment was recovered against him, he could be released by the bankruptcy court having jurisdiction pending his application for discharge; the judgment being dischargeable in bankruptcy.
3. BANKRUPTCY ⟸293(1)—DISCHARGE OF BANKRUPT FROM ARREST—POWER OF COURT IN ANCILLARY PROCEEDINGS.
   A bankruptcy court in ancillary proceedings has power to discharge a bankrupt from an arrest made prior to the bankruptcy proceedings, where he has the substantive right to relief.

In Bankruptcy. In the matter of Andrew M. Madigan, bankrupt. On motion by bankrupt for discharge from arrest. Granted.

Edward F. Lindsay, of New York City, for judgment creditor.
Barney & Schuldenfrei, of New York City, for bankrupt.

AUGUSTUS N. HAND, District Judge. [1-3] The judgment here was for negligence, due to the reckless driving of an automobile, and is in my opinion dischargeable in bankruptcy. The bankrupt was arrested under an order of the state court made prior to the filing of his voluntary petition in bankruptcy in the Eastern district, and is now on the jail limits. That proceeding has now gone to adjudication, and, under my decision in Matter of Margiasso, 38 Am. Bankr. Rep. 524, 242 Fed. 990, the bankrupt may be released pending his application for a discharge, unless the court is without jurisdiction because the bankruptcy proceedings are not in this district. Under the decision in Re Von Hartz, 142 Fed. 726, 74 C. C. A. 58, I would be without jurisdiction, and the amendment of 1910 (Act July 1, 1898, c. 541, 30 Stat. 544, as amended by Act June 25, 1910, c. 412, 36 Stat. 838), which only extended ancillary jurisdiction "in aid of a receiver or trustee," would not avail. But that decision has been expressly disapproved by the Supreme Court in Babbitt v. Dutcher, 216 U. S. at page 114, 30 Sup.

Ct. 372, 54 L. Ed. 402, 17 Ann. Cas. 969. I think, if a bankrupt has the substantive right to relief, there is, under the doctrine of Babbitt v. Dutcher, supra, a remedy in this court ancillary to the proceeding in the Eastern district.

The motion is granted.

Ex parte TINKOFF.

(District Court, N. D. Illinois, E. D. February 13, 1918.)

Nos. 32786-32788, 32815.

1. HABEAS CORPUS ⟸54—SUFFICIENCY OF PETITION.
Where unlawfulness of detention alleged in petition consists in order of an inferior tribunal, legally constituted and having jurisdiction over subject-matter and person detained, petition must state facts constituting arbitrary or capricious action.

2. ARMY AND NAVY ⟸20—SELECTIVE DRAFT ACT—ACTION OF DISTRICT BOARD.
The denial of a rehearing on a claim for draft exemption by a district board is not arbitrary action.

3. ARMY AND NAVY ⟸20—SELECTIVE DRAFT ACT—EFFECT OF MARRIAGE OF REGISTRANT.
The marriage of a person subject to Selective Draft Act May 18, 1917, after his registration, cannot defeat the government's right to his services.

4. HABEAS CORPUS ⟸16—SELECTIVE DRAFT ACT.
The court in a habeas corpus proceeding cannot relieve against a merely erroneous decision of a draft board.

5. ARMY AND NAVY ⟸20—SELECTIVE DRAFT ACT—EXEMPTION OF ALIENS.
A nondeclarant alien is not ineligible to service under Selective Draft Act May 18, 1917, and, while he may not be compelled to serve, provided he claims exemption as the law requires, if he fails to do so, the draft boards are without authority to exempt him, and their action in treating such failure as a waiver is not reviewable in habeas corpus proceedings.

6. ARMY AND NAVY ⟸20—SELECTIVE DRAFT ACT—EXEMPTION OF ALIENS.
Neither the draft board nor the court in habeas corpus proceedings can base action in favor of alien claimants to exemption on alleged ignorance of facts or law.

7. HABEAS CORPUS ⟸3—SELECTIVE DRAFT ACT—HABEAS CORPUS TO OBTAIN EXEMPTIONS.
The failure of a registrant denied exemption by the local board to appeal to the district board is a bar to relief by habeas corpus.

Separate petitions by Ella Hutchinson Tinkoff, on behalf of Paysoff Tinkoff, by Steve Zozaski, by Hugo Carlson, and by Victor Zukowski, for writs of habeas corpus, to secure release from military service, into which they were drafted under Selective Service Act May 18, 1917. Writs denied.

Orders affirmed 254 Fed. 912.

Stedman & Soelke, of Chicago, Ill. (Swan M. Johnson, of Chicago, Ill., of counsel), for petitioners.

Charles F. Clyne, U. S. Atty., Robert T. Neill, Sp. Asst. U. S. Atty., and Lieut. Col. Nathan William MacChesney, Judge Advocate, U. S. Army, all of Chicago, Ill. (Lieut. Col. Nathan William MacChesney and Leslie M. O'Connor, Department Judge Advocate's Office, Cent. Dept., U. S. Army, both of Chicago, Ill., of counsel), for respondents.

LANDIS, District Judge. These applications are for writs of habeas corpus to release or exempt persons from service in the National Army created by Act May 18, 1917, c. 15, 40 Stat. 76.

The Tinkoff application asserts that he registered on June 5, and that three weeks thereafter he married. Later he asked the local board to exempt him from service, his ground of exemption being the dependency of his wife; the local board granted his claim and denied an application which he made to file additional affidavits in support of his allowed claim. From the local board's order in Tinkoff's favor the United States appealed to the district board, and on the hearing of that appeal the district board reversed the local board's decision, and ordered Tinkoff into the eligible list; thereafter Tinkoff applied to the district board for a rehearing; this application was denied by the district board, and it is on this denial by the district board that the Tinkoff application here is based, it being charged that the denial was arbitrary action by that board. Tinkoff is in the army, stationed at Camp Grant.

The Zukowski application avers that he is of Russian birth; that he has never declared his intention to become a citizen of the United States; that he registered on June 5, and claimed exemption because of his status as an alien; that the local board denied him exemption; and that he appealed to the district board, which board affirmed the decision of the local board.

The Carlson and Zozaski applications assert that these men are of alien birth, and that neither had declared his intention to become a citizen; that they lived in the United States on May 18 and June 5, 1917; that each registered as required by law, and neither one of them attempted to claim exemption from military service. They both assert, however, that they were ignorant of their political status and their right to exemption until after the time, fixed by the regulations issued by the President under the authority of the statute, in which to claim such exemption, had expired. They further assert that they learned of their right after they were examined and found qualified for military service; that they then applied to the local board for exemption, which applications were denied by the local board on the ground that the applicants' failure to make the claim within the statutory time operated as a waiver of their exemption rights. Neither Carlson nor Zozaski appealed to the district board, and each was certified into service by the local board.

[1] The function of the writ of habeas corpus is to release a person unlawfully restrained of his liberty, and this unlawfulness, or probable cause for the belief that it exists, must affirmatively appear in the petition. Where the unlawfulness claimed is the order of an inferior tribunal, legally constituted and clothed with jurisdiction over the subject-matter and the person detained, the petition must charge facts constituting arbitrary or capricious action by such inferior tribunal. In the pending applications, neither the legal existence nor the jurisdiction of the draft boards, local and district, is challenged, nor is there any averment of arbitrary or capricious action by either of them.

[2] I must qualify this as to Tinkoff. For him there is the bare assertion, a general charge, that the refusal of the district board to grant him a rehearing was arbitrary. But under well-recognized general rules that govern such matters, that refusal was not arbitrary action. The same rule applies to that refusal as to the denial of a petition for rehearing by a reviewing court.

[3] Although it is not necessary, it appears appropriate to observe that, as stated above, Tinkoff married after registering on June 5, and claims that such subsequent marriage discharged his liability to serve as it existed when the law was passed and the registration occurred. Of course, such voluntary subsequent action on his part cannot operate to defeat the government's right to his services, and it is perfectly clear that the board's action was not arbitrary.

[4] The Zukowski petition amounts only to a claim that the board reached an erroneous conclusion. Habeas corpus cannot relieve against mere error. And this is the rule, even though the court might have reached a conclusion on the facts different from that expressed in the order complained of.

[5] In the Carlson and Zozaski applications the question presented is one of waiver. For the applicants the representation is that they were aliens, had not declared their intention to become citizens, did not know their political status and consequent rights to exemption, and therefore had failed to make the claim before the board within the prescribed time.

Nondeclarant aliens are not ineligible to service under the act, nor are they, by the act, automatically exempted from service. They are eligible, but they may not be compelled to serve against their will to the contrary, provided that will be expressed as the law requires. Ex parte Hutflis (D. C.) 245 Fed. 798; U. S. ex rel. Koopowitz v. Finley (D. C.) 245 Fed. 871; U. S. ex rel. Cubyluck v. Bell (D. C.) 248 Fed. 995; Summertime v. Local Board (D. C.) 248 Fed. 832.

The applicants having totally failed so to express their will not to serve within the time fixed by law, the draft boards were without authority to exempt them. Those boards were bound to regard this failure of the applicants as a waiver, and it follows that the boards' action is not reviewable. Angelus v. Sullivan, 246 Fed. 54, 158 C. C. A. 280; U. S. ex rel. Troiani v. Heyburn (D. C.) 245 Fed. 360; and cases supra.

[6, 7] Neither the boards, after the time expired, nor this court, by habeas corpus, can base actions in the applicants' favor because of alleged ignorance of facts or law. They are conclusively held to knowledge of both. Furthermore it will be observed that neither Carlson nor Zozaski appealed to the district board, as they might have done. Section 4. This failure on their part, in and of itself, is a bar to relief here. Summertime v. Local Board (D. C.) 248 Fed. 832; U. S. ex rel. Cubyluck v. Bell (D. C.) 248 Fed. 995; United States v. Sing Tuck, 194 U. S. 161, 24 Sup. Ct. 621, 48 L. Ed. 917; In re Lancaster, 137 U. S. 393, 11 Sup. Ct. 117, 34 L. Ed. 713; The Japenese Immigrant Case, 189 U. S. 86, 102, 23 Sup. Ct. 611, 47 L. Ed. 721.

Writs denied.

Ex parte TINKOFF.

(Circuit Court of Appeals, Seventh Circuit. June 11, 1918.)

Nos. 2621–2624.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois; Kenesaw M. Landis, Judge.

From orders (254 Fed. 222) denying writs of habeas corpus to Paysoff Tinkoff, Steve Zozaski, Hugo Carlson, and Victor Zukowski, petitioners separately appeal. Affirmed.

Paysoff Tinkoff and Stedman & Soelke, all of Chicago, Ill. (Swan M. Johnson, of Chicago, Ill., of counsel), for appellant Tinkoff.

Stedman & Soelke, of Chicago, Ill. (Swan M. Johnson, of Chicago, Ill. of counsel), for appellants Zozaski, Carlson, and Zukowski.

Charles F. Clyne, U. S. Atty., Robert T. Neill, Sp. Asst. U. S. Atty., and Lieut. Col. Nathan William MacChesney, Judge Advocate, U. S. Army, all of Chicago, Ill. (Lieut. Col. Nathan William MacChesney and Leslie M. O'Connor, Department Judge Advocate's Office, Central Department, U. S. Army, both of Chicago, Ill., of counsel), for appellees.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

PER CURIAM. The orders heretofore entered by the District Court in these cases, refusing to issue writs of habeas corpus for discharge from military service of the United States under Selective Service Law May 18, 1917, c. 15, 40 Stat. 76, will be affirmed, as the petitions do not set forth facts justifying their issuance.

FYKE v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. December 10, 1918.)

No. 3217.

1. INTERNAL REVENUE ⟸2—HARRISON NARCOTIC ACT.
   Harrison Narcotic Act, § 2 (Comp. St. 1916, § 6287h) is not invalid on the ground that its provisions are in no sense provisions of a revenue measure, but are purely police restrictions.
2. POISONS ⟸2—DRUG ACT—SALES.
   Harrison Narcotic Act, § 2 (Comp. St. 1916, § 6287h) declaring that it shall be unlawful for any person to sell named narcotic drugs, except on a written order of the person to whom the drug is sold, applies not only to registered dealers, but to all sellers, for revenue is raised from the sale of prohibited drugs.
3. POISONS ⟸9—DRUG ACT—VIOLATIONS—INDICTMENT.
   An indictment charging that defendant sold narcotic drugs in violation of the Harrison Narcotic Act *held* sufficient to charge a violation of the act, and show defendant to be subject to the penalty prescribed by section 9 (Comp. St. 1916, § 6287*o*), regardless of whether it was alleged defendant was required to register.
4. INDICTMENT AND INFORMATION ⟸111(1)—STATUTORY EXCEPTIONS.
   Const. Amend. 6, does not preclude Congress from exacting, as it has in Harrison Narcotic Act, § 8 (Comp. St. 1916, § 6287n), that it shall not be necessary to negative in any indictment any of the statutory exemptions or exceptions therein.
5. INDICTMENT AND INFORMATION ⟸111(4)—EXCEPTIONS—NEGATIVING.
   An indictment charging a violation of the Harrison Narcotic Act (Comp. St. 1916, §§ 6287g–6287q) *held* to sufficiently negative any of the exemptions and exceptions therein contained.

In Error to the District Court of the United States for the Northern District of Texas; William R. Smith, Judge.

E. D. Fyke was convicted of violation of Act Dec. 17, 1914, known as the Harrison Narcotic Act, and he brings error. Affirmed.

Chas. Mays, of Ft. Worth, Tex., and A. S. Baskett, of Dallas, Tex., for plaintiff in error.

Wilmot M. Odell, U. S. Atty., of Ft. Worth, Tex.

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

GRUBB, District Judge. The plaintiff in error was convicted of a violation of an act of Congress approved December 17, 1914, and commonly known as the Harrison Narcotic Act (Act Dec. 17, 1914, c. 1, 38 Stat. 785 [Comp. St. 1916, §§ 6287g–6287q]). All the 11 counts of the indictment are based upon an alleged violation of section 2 of that act (section 6287h), which, so far as pertinent to this case, is as follows:

"That it shall be unlawful for any person to sell, barter, exchange, or give away any of the aforesaid drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue."

The counts of the indictment charged the plaintiff in error with having made various distinct sales of morphine, at different times, of different amounts, and to different persons, but were otherwise identical. Each charged the sale to have been made, "not in pursuance of a written order such as is required by an act of Congress approved December 17, A. D. 1914, and then and there under such circumstances that neither the said Billie Brown (the purchaser) nor the sale as aforesaid came under any of the exceptions and exemptions provided for in the said act of Congress." The defendant was convicted under counts 1, 6, 9, and 11, and sentenced to two years in the federal penitentiary at Leavenworth, Kan.

The sole ground of error assigned is based upon the action of the District Court in overruling the motion to quash (demurrer) to the indictment.

[1] 1. The plaintiff in error supports his demurrer upon three distinct grounds. In the first place, he asserts the unconstitutionality of section 2 of the act upon the idea that its provisions are, in no sense, provisions of a revenue measure, but are purely police restrictions. The case of Baldwin v. United States, 238 Fed. 793, 151 C. C. A. 643, recently decided by this court, per curiam opinion, determines this question against the contention of plaintiff in error.

[2, 3] 2. The second ground upon which the indictment is assailed by the demurrer is that it charges an offense under section 2 of the act, which the plaintiff in error contends is only applicable to the class of registered dealers, and the indictment fails to allege that the defendant was registered. Reliance is placed upon the case of United States v. Jin Fuey Moy, 241 U. S. 394, 36 Sup. Ct. 658, 60 L. Ed. 1061, Ann. Cas. 1917D, 854, which held that section 8 of the act, which made it

unlawful for any person not registered under the act, and who had not paid the tax provided for by the act, to have in his possession any of the prohibited drugs, applied only to the classes who were required to register and pay the tax under section 1 of the act (section 6287g), and that it was not unlawful for one, not embraced in these classes, to have possession of the prohibited drugs. The ground of the decision was that the act, being a revenue and not a police measure, the competency of Congress to make the possession of persons, not required to register and pay the tax, unlawful, was doubtful, and, to preserve its constitutionality, the court would construe this prohibition of the act as not embracing those not required by it to register and pay the tax.

The distinction between that case and this prevents its use, even by way of analogy. No tax is imposed by the act upon the having possession of the prohibited drugs, but only their production, importation, manufacture, compounding, dealing in, dispensing, selling, or giving away. As no revenue could be derived from a mere possession, not in any one of the mentioned capacities, it was thought Congress was without power to regulate such mere possession. However, revenue is to be derived from the sale of the prohibited drugs. It was, therefore, clearly competent for Congress to punish the unlawful sale of the prohibited drugs by all classes of persons, those actually registered and those not. All sellers were members of the class required to register and pay the tax, under section 1, and the revenue derived from sellers, as provided for by that section, could manifestly not be collected unless Congress had the power to, and did in fact, punish the sale of the prohibited drugs by all persons except when made in conformity to the act. The necessity of prohibiting sales by unregistered persons and of sales by registered persons, not complying with the act, were of equal importance. If only the latter class were subject to its penalties, all persons, by failing to register, could sell with impunity, without paying the tax or complying with the other requirements of the act.

Section 1 punishes sales by persons who have neither registered nor paid the tax. Section 2 punishes persons who sell, not in pursuance of a written order of the person to whom the sale is made. The language of section 2 is general, and does not restrict the prohibition to registered sellers in terms. Indeed, the exception, lettered "d," applies to a class expressly excepted from registry and payment of the tax by section 1. This exception would seem to be superfluous, if section 2 applied only to registered persons, since the excepted class would not then be included in the class against whom the penalties of the section are directed. There are some provisions in section 2 that may be persuasive of the correctness of defendant's contention, viz. those applying alone to the conduct of the business by those who have registered. We think, however, its terms broad enough to include all persons, whether actually registered or not, who sell the prohibited drugs.

Taking the law in its entirety, no person, whether registered or unregistered, can lawfully sell the prohibited drugs, "except in pursuance

of a written order of the person to whom such article is sold," and an indictment which charged even an unregistered person with selling, not in pursuance of such a written order, would charge him with all the elements of a sale prohibited by the act. It would, we think, be unnecessary, in this view, for the indictment to allege that the defendant was actually registered and had paid the tax, and, as the law itself imposes the duty of registry and payment of the tax on all persons who sell, it would be unnecessary for the indictment to allege that the defendant, being charged with making a sale, was in the class required to register and pay the tax.

The plaintiff in error contends that section 1 and section 2 create distinct offenses, the former directed alone against unregistered persons, who have failed to pay the tax, and the latter directed alone against registered persons, who have paid the tax, but have failed to conduct the business in other respects in accordance with the act. The act in different sections defines what sales are unlawful. It does not, however, affix separate penalties to each class of prohibited sales. Section 9 (section 6287*o*) provides a penalty to be imposed upon any person who violates or fails to comply with any of the requirements of the act. Sales of the prohibited drugs may be unlawful (a) when made by an unregistered person, who has not paid the tax, or (b) when made by any person, except in pursuance of an order blank. The offense punished is the making a sale in violation of the act. If the sale is prohibited by the act, it is not important that the indictment should be framed under any particular section of the act, provided its averments sufficiently show a sale made unlawful by the act in its entirety. An indictment which charges a sale to have been made in a way that no person, registered or unregistered, could lawfully make it by the terms of the act, sufficiently shows that the defendant, in making it, violated the act in a way that subjects him to the penalties prescribed for its violation by section 9.

[4, 5] 3. The third proposition presented by the demurrer is that the indictment does not sufficiently aver that the defendant did not come within one or more of the statutory exceptions or exemptions.

Section 8 of the act (Comp. St. 1916, § 6287n) contains this language at the end of it:

"Provided further, that it shall not be necessary to negative any of the aforesaid exemptions in any complaint, information, indictment, or other writ or proceeding laid or brought under this Act; and the burden of proof of any such exemption shall be upon the defendant."

There are exceptions and exemptions in section 8, to which the language of the proviso might be referred. The Court of Appeals for the Seventh Circuit has, however, construed it to apply to all exceptions and exemptions, theretofore mentioned in the act, including those in section 2. We cannot agree with the contention that Amend. art. 6 of the federal Constitution would prevent Congress from so enacting. An indictment, though it failed to exclude defendant from the excepted classes, would sufficiently inform him of the nature of the accusation against him. If, in the light of the proviso of section 8 and the construction given it, there was any necessity resting upon the

government to negative the fact that defendant was a member of one of the excluded classes, we think the indictment sufficiently does so. Each count alleges that—

"Neither the said Billie Brown [the buyer of the drug] nor the sale as aforesaid came under any of the exceptions and exemptions provided for in the act of Congress aforesaid."

The criticism is that, while it covers an exemption in favor of the buyer and the sale, it does not exclude the possibility of the exemption of the seller. If the sale was not excepted from the prohibition of the act, as alleged in the indictment, then the seller was necessarily punishable for making it, since the act imposes upon the seller penalties for making any sale made unlawful by its terms. We think the averments of the indictment sufficient in their exclusion of the statutory exceptions and exemptions, which we construe to be synonymous terms, even if a necessity for said averment were held to exist.

There being no error in the record, the judgment is affirmed.

Affirmed.

WESTERN UNION TELEGRAPH CO. v. PRESTON.

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

No. 2396.

1. DEATH ⊂=15—ACTION FOR WRONGFUL DEATH—PENNSYLVANIA STATUTE.
Under Act Pa. April 15, 1851 (P. L. 674) § 19, and Act Pa. April 26, 1855 (P. L. 309), providing that, when no suit for damages is brought by the person injured during life, his widow may maintain an action for the death within one year thereafter, the widow may sue, although at the time of death decedent's right of action was barred by limitation.

2. DEATH ⊂=11—ACTION FOR WRONGFUL DEATH—CONSTRUCTION OF STATUTES.
Under statutes modeled upon Lord Campbell's Act, giving a right of action for wrongful death, such right of action is different from and independent of the right of action of the deceased for the injury, although the cause of action, which is the tort, is the same.

3. DEATH ⊂=16—ACTION FOR WRONGFUL DEATH—REMOTENESS OF INJURY.
That a person injured lived for 10 years after his injury does not, as matter of law, preclude recovery for his death.

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

Action at law by Mary E. Preston against the Western Union Telegraph Company. Judgment for plaintiff, and defendant brings error. Affirmed.

For opinion below, see 250 Fed. 480.

W. B. Linn, of Philadelphia, Pa., for plaintiff in error.

Hugh Roberts, of Philadelphia, Pa., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. Preston, a telegraph lineman in the employ of the defendant below, was injured in September, 1905. He died in October, 1915.

Preston brought no suit for damages during his life. His widow brought this action within one year after his death. She alleged, and the jury found, that her husband's injuries were due to negligence of the defendant and that his death was occasioned by the injuries he had sustained.

[1] The action is brought under statutes of the commonwealth of Pennsylvania, which read:

"Whenever death shall be occasioned by unlawful violence or negligence, *and no suit for damages be brought by the party injured during his or her life*, the widow of any such deceased, or if there be no widow, the personal representatives may maintain an action for and recover damages *for the death* thus occasioned." Act of April 15, 1851 (P. L. 674) § 19.

"The declaration shall state who are the parties entitled to such action; the action shall be brought within one year after the death, and not thereafter." Act of April 26, 1855 (P. L. 309).

Preston's right of action at the time of his death was barred by a statute of limitation.

We have been referred to no decision by a court of Pennsylvania construing the Act of April 15, 1851, with reference to a situation similar to the one presented by the facts in this case. Reluctant as we are to impose upon a state statute the interpretation of a Federal court, we find ourselves called upon nevertheless to construe the statute on which this action is based, in order to decide the first question raised by the defendant on this writ of error. This question is: Whether the statute affords a widow a right of action for the death of her husband occasioned by negligence, where, at the time of his death, his right of action for the same negligence was barred by a statute of limitation.

The evident purpose of the Pennsylvania statute, in giving a right of action after death occasioned by negligence, was to remove the hardship of the common-law rule—"actio personalis moritur cum persona." This rule was changed in England by the Act of 9 and 10 Vict. chapter 93, section 1, known as "Lord Campbell's Act," which gave such an action to certain designated persons injured by the death. The relevant parts of the act are set out in the margin.[1]

The distinguishing features of Lord Campbell's Act have been re-enacted by many states in statutes which preserve, though in varying forms of expression, its original purpose. Among the states that have used the English Act as a model in changing the common-law rule is the Commonwealth of Pennsylvania. Hill v. Penna. R. R.

[1] Section 1. "* * * That whensoever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof then, and in every such case, the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony."

Section 2 designates the person who may maintain the action.

Section 3. "* * * Provided, always, and be it enacted, that not more than one action shall lie for and in respect of the same subject matter of complaint; * * * and that every such action shall be commenced within twelve calendar months after the death of such deceased person."

Co., 178 Pa. 223, 231, 35 Atl. 997, 35 L. R. A. 196, 56 Am. St. Rep. 754.

Differences in the language of the American and English statutes have in many instances caused differences in their interpretation, not with reference to the main object of giving a new action after death, but with reference to the nature of the action and the circumstances under which it can be enforced.

[2] While at first there was much judicial dispute as to the precise nature of the action conferred by Lord Campbell's Act and by American statutes modeled upon it—whether it was a new action or the continuance of the action of the person injured, whether it was cumulative upon the action of the person injured, thereby imposing a double liability in the sense of permitting double recoveries for the tort, whether the action was on the death or on the tort—the courts in England and America have now decided beyond profitable controversy that the new action given by such statutes is not a continuance of any right of action which the injured person would have had except for his death, but is "a new or independent cause of action," founded on a new grievance, and is awarded "for the purpose of compensating certain dependent members of the family (of the injured person) for the deprivation, pecuniarily, resulting to them from his wrongful death," Michigan Central R. R. Co. v. Vreeland, 227 U. S. 59, 69, 33 Sup. Ct. 192, 195 (57 L. Ed. 417, Ann. Cas. 1914C, 176); or, stated substantially in the language of the English decisions, the act does not transfer the right of action of the injured person to his widow or other designated person, but gives to such person a totally new right of action, on different principles, Blake v. Midland Ry. Co., 18 Q. B. 93, 109; Seward v. The Vera Cruz, 110 App. Cases, 59. While it is thus decided that the new action is for the death and is independent of the husband's common-law action for his injury, the courts have gone further and have decided with equal finality, that "*the cause of action* contemplated by the statute is the tort which produces death and not the death caused by the tort." Centofanti v. R. R. Co., 244 Pa. 255, 262, 90 Atl. 558, 561; Michigan Central R. R. Co. v. Vreeland, supra. In arriving at these decisions, we discern a clear distinction made by the courts between the *right of action* after death given by the statutes and the *cause of action* on which such right of action may be enforced. This distinction has, we believe, a controlling bearing on the question before us for decision.

Referring for convenience to the two rights of action respectively as the widow's right of action and the husband's right of action, it is now the law, that, although the widow's right of action is wholly independent of that of her husband, it is dependent on the original wrongful injury inflicted upon him. Both rights of action spring from the same tort, therefore the same tort is the cause of action for both. The tort being the basis of both actions, the courts have held with entire consistency that the widow's right to recover in her action for the wrong done her by occasioning her husband's death depends primarily on the liability of the wrongdoer to her husband for

the wrong done him. Liability for the tort is affected of course by the character of the tort, and it may even be destroyed by the injured husband in a way that will altogether deprive his widow of a cause of action to sue upon. The tort, as a cause of action enuring to the widow, is affected by considerations of the husband's assumption of risk and contributory negligence, and of negligence of a fellow servant. Liability for the tort may be released by the husband before its commission, as under a contract involving a release to a carrier from liability for future negligence of its servants, Perry v. P. W. & B. R. R., 24 Del. 399, 77 Atl. 725; and by his acceptance of a free pass similarly releasing liability, Northern Pacific Ry. Co. v. Adams, 192 U. S. 440, 24 Sup. Ct. 408, 48 L. Ed. 513, reversing C. C. A. Ninth Circuit, 116 Fed. 324, 54 C. C. A. 196. Liability for the tort may also be released by the husband after its commission by his acceptance of compensation for the injury he has sustained. Hill v. Penna. R. R. Co., 178 Pa. 223, 35 Atl. 997, 35 L. R. A. 196, 56 Am. St. Rep. 754.

If the wrongdoer has never been legally liable for the wrong or if he has in any way been acquitted of the wrong, then the tort is no longer a cause of action on which the widow can prosecute her statutory right of action, and this is for the reason that the widow succeeds to her husband's cause of action—the tort—with all its infirmities, those that are inherent, and those that have been imposed upon it by her husband.

What infirmity is there in the tort in this case, considered purely as a cause of action, that precludes the widow from asserting her right of action? The defendant says that the husband had lost his right of action on the tort prior to his death because of the bar of the Statute of Limitations, and for that reason the widow also has lost her right of action. But the Statute of Limitations operated against the husband's right of action, not against the tort, the cause of action. That admittedly stood unaffected by any act of his. When he died without suing, the husband left the tort just as it was when it was committed, though he left the wrong done him unredressed. But upon his death a new injury was occasioned by the same tort, this time to the widow. For redress of this injury, the statute gave her a new and altogether independent right of action, if the cause of action, the tort that occasioned the death, still existed. The question is, Did it still exist? We think it did. The husband had done nothing to it, and had done nothing that affected it; he simply permitted a statute of limitation to deprive *him* of *his* right to sue upon it. The statute that deprived him of his right of action was not applicable to the widow's right of action. Being inoperative against her, it deprived her of nothing. In this situation the husband died.

We are of opinion, that the right of action afforded the widow by the Pennsylvania statute, though dependent on the original wrongful injury to the husband, is not dependent by implication on her husband's right of action not being barred by a statute of limitation at the time of his death, and that, in consequence, the plaintiff in this case was not barred of her action. Opposed to this opinion, counsel for the defendant cited with confidence decisions of courts in a num-

ber of states in harmony with a view expressed by the Supreme Court of the United States with reference to the right of action afforded by various statutes modeled after Lord Campbell's Act, in Michigan Central R. R. Co. v. Vreeland, 227 U. S. 59, 70, 33 Sup. Ct. 192, 196 (57 L. Ed. 417, Ann. Cas. 1914C, 176), where the matter was not involved in the decision. It is as follows:

"But as the foundation of the right of action is the original wrongful injury to the decedent, it has been generally held that the *new action is a right dependent upon the existence of a right in the decedent immediately before his death to have maintained an action for his wrongful injury.* Tiffany, Death by Wrongful Act, § 124; Louisville, E. & St. L. R. R. Co. v. Clark, 152 U. S. 230 [14 Sup. Ct. 579, 38 L. Ed. 422]; Read v. G. E. Ry., L. R. 3 Q. B. 555; Hecht v. O. & M. Ry., 132 Indiana, 507 [32 N. E. 302]; Fowlkes v. Nashville & Decatur R. R. Co., 9 Heisk. [Tenn.] 829; Littlewood v. Mayor, 89 N. Y. 24 [42 Am. Dec. 271]; Southern Bell Tel. Co. v. Cassin, 111 Georgia, 575 [36 S. E. 881, 50 L. R. A. 694]."

This, indeed, is the general rule, but an examination of the statutes under which the cited decisions were made and the rule was announced shows that in each instance the statute was radically different from that of Pennsylvania in the important particular that the right of action given the widow by these statutes *is in terms made to depend upon* the existence of the husband's right of action at his death and upon his ability immediately theretofore to maintain his action. Some of these statutes are cited in the margin together with cases in which their interpretation was involved.[2]

Under statutes like these the courts have held with reason that the widow's right of action is made dependent on the husband's right of action and on his liability to *maintain an action* before his death, and that the test of his ability to maintain an action is that he shall be able to prevail over all defences which may be interposed to it, including, of course, the defence of the Statute of Limitations. But the Supreme Court of Pennsylvania, in discussing the statute now under consideration has said:

"The English statute is somewhat broader than ours, because it is not limited to cases in which an action had been brought by the injured party and he had died pending the action, nor yet to cases in which no action has been

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[2] In Lord Campbell's Act, the condition which qualifies the new right of action is where "the act, neglect or default is such as would, if death had not ensued, *have entitled the party injured to maintain an action* and recover damages in respect thereof." Read v. G. E. Ry. Co., L. R. 3 Q. B. 555; Blake v. Midland Ry. Co., 18 Q. B. 93, 109; Seward v. The Vera Cruz, 10 App. Cases, 59.

By the Alabama statute it is provided that "a personal representative may maintain an action * * * for * * * negligence * * * whereby the death of his testator or intestate was caused, *if the testator or intestate could have maintained an action* for such wrongful act * * * if it had not caused death. * * *" Suell v. Derricott, 161 Ala. 259, 49 South. 895, 23 L. R. A. (N. S.) 996, 18 Ann. Cas. 636; Buckalew v. T. C. & T. Co., 112 Ala. 146, 20 South. 606; L. & N. R. R. Co. v. Robinson, 141 Ala. 325, 37 South. 431; Williams v. Ry. Co., 150 Ala. 324, 43 South. 576, 10 L. R. A. (N. S.) 413; Seaboard Air Line Ry. Co. v. Allen (C. C. A. 2d) 192 Fed. 480, 112 C. C. A. 642.

The New York statute provides that "the executor or administrator of a decedent who has left him or her surviving a husband, wife, or next of kin, may maintain an action to recover damages for a wrongful act, neglect or default, by which the decedent's death was caused, against a natural person

brought by the injured party in his lifetime, *and the remedy is given without qualification in all cases.*" Hill v. Penna. R. R. Co., 178 Pa. 223, 232, 35 Atl. 997, 999 (35 L. R. A. 196, 56 Am. St. Rep. 754).

This intimation of what would be the view of the Supreme Court of Pennsylvania were the precise question in this case before it, supports our construction, that the Pennsylvania statute does not make the widow's right of action dependent wholly on the husband's ability to maintain an action immediately before his death; but, on the contrary, it makes it (in terms) dependent only on the fact that his death was caused by the original wrongful act and on the fact that before his death he had brought no suit for damages, and (by implication, as in other statutes) on the liability of the wrongdoer for the tort. The statute imposes no other condition upon the widow's right to sue save that she bring her action within one year after her husband's death. As these are all the conditions imposed by the General Assembly of Pennsylvania, we feel that this court has no authority to impose additional or different ones. Louisville & St. L. R. R. v. Clarke, 152 U. S. 230, 238, 239, 14 Sup. Ct. 579, 38 L. Ed. 422.

We find no error in the ruling of the trial court sustaining the plaintiff's right of action.

The remaining matter assigned as error was the court's refusal to direct a verdict for the defendant. This assignment is based on two aspects of the case, as viewed by the defendant; one, that Preston's death was not caused by his injuries; the other, that his injuries were not occasioned by the defendant's negligence.

[3] With respect to the first, the defendant says it is obvious that Preston's death in 1915 cannot in any legal sense be traced to the accident in 1905, and maintains, accordingly, that the trial court erred in not declaring that conclusion as a matter of law. This contention rests on the principle, that the law, in its practical administration, regards only proximate or immediate and not remote causes, Railway Co. v. Calhoun, 213 U. S. 7, 29 Sup. Ct. 321, 53 L. Ed. 671, and that only an injury which is the natural and probable result of an act of negligence, as distinguished from an injury that could not have been

*who * * * would have been liable to an action in favor of the decedent by reason thereof if death* had not ensued." Littlewood v. Mayor, 89 N. Y. 24, 42 Am. Dec. 271; Kelliher v. N. Y. C. & H. R. R. Co., 212 N. Y. 207, 210, 105 N. E. 824, L. R. A. 1915E, 1178.

The Indiana statute provides that "when the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, *if the former [the party injured] might have maintained an action,* had he lived, *against the latter* for an injury for the same act or omission." Jeffersonville R. R. v. Swayne's Adm'r, 26 Ind. 477; Pittsburgh, etc., Ry. v. Vining's Adm'r, 27 Ind. 513, 92 Am. Dec. 269; Hecht v. Ohio & Mississippi Ry. Co., 132 Ind. 507, 509, 32 N. E. 302.

The Tennessee Act provides that "the right of action, *which a person * * ** whose death is caused by the wrongful act or omission of another, *would have had against the wrongdoer in case death had not ensued,* shall not abate or be extinguished by his death, but shall pass to his personal representative for the benefit of his widow and next of kin." Fowlkes v. Nashville & Decatur R. R. Co., 56 Tenn. (9 Heisk.) 829, 830.

reasonably anticipated as the probable result, is actionable, Armour & Co. v. Harcrow, 217 Fed. 224, 227, 133 C. C. A. 218. Applying this principle to the case, the defendant urges that the span of ten years between the accident and death—a period of time, which, admittedly, is startling—shows that death which followed the injury was too remote to be its natural or probable consequence, and, therefore, there is in the case no evidence of proximate or immediate cause.

We also would apply this principle to the case, if, in the sequence of events between the injury and death, there had intervened nothing which indicated a proximate connection between the two. But the plaintiff produced evidence of Preston's condition throughout the period, showing that his ill health began with the injury and increased slowly but progressively until epilepsy developed and death ensued. This evidence, in amount and character, is quite sufficient, if believed, to show that Preston's death was due directly and proximately to his injuries.

The other question—whether there was sufficient evidence of negligence to submit to the jury—involves no question of law. It may be decided, therefore, without stating the case and discussing the evidence. We are of opinion that the evidence is sufficient to sustain the verdict, and find that the court did not err in submitting the case to the jury.

The judgment below is affirmed.

CHICAGO, R. I. & P. RY. CO. v. UNION PAC. R. CO. et al.

(Circuit Court of Appeals, Eighth Circuit. October 14, 1918.)

No. 5022.

1. COURTS ⟸492—EFFECT OF RECEIVERSHIP—JURISDICTION OF COURT OTHER THAN ONE APPOINTING RECEIVER.
   That one defendant was under receivership in another federal court at the time the trial court heard the bill of complaint against it and others to enforce an award of arbitrators appointed pursuant to contract, etc., *held* not to deprive the trial court of jurisdiction; it not appearing when complainant filed its claim in the receivership suit.
2. ARBITRATION AND AWARD ⟸12—VALIDITY OF AWARD—WAIVER OF DEFECTS.
   Where arbitration was begun under a mutual mistake as to which contract governed, etc., and the parties on discovery furnished the arbitrators the true contract and proceeded, there was a waiver of the defect, and the award was valid.
3. ARBITRATION AND AWARD ⟸4—PARTIES—VALIDITY OF AWARD—RIGHT TO OBJECT.
   Where others interested in the result of an arbitration, though not parties, insisted on its validity, defendant, against whom the award was made, cannot attack it because they were not made parties and might have been injured.
4. ARBITRATION AND AWARD ⟸46—DISQUALIFICATION OF ARBITRATOR—WAIVER.
   Where defendant proceeded with an arbitration after discovery of facts which showed one of the arbitrators was disqualified, it waived the disqualification, and cannot attack the award on that ground.

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5. ARBITRATION AND AWARD ⇐46—HEARINGS—NOTICE.
Where defendant participated in sending arbitrators the true contract, on discovery of the mistake as to the contract applicable, etc., and submitted other evidence, *held*, the award was not open to attack on the ground the arbitrators failed to give notice and refused to hold further hearing after discovery of the mistake, etc.

Appeal from the District Court of the United States for the District of Nebraska; Joseph W. Woodrough, Judge.

Bill by the Union Pacific Railroad Company against the Chicago, Rock Island & Pacific Railway Company and others. From a decree against it, the named defendant appeals. Affirmed.

E. P. Holmes, of Lincoln, Neb. (M. L. Bell, of Chicago, Ill., on the brief), for appellant.

Edson Rich, of Omaha, Neb. (N. H. Loomis, of Omaha, Neb., on the brief), for appellee Union Pac. R. Co.

A. A. McLaughlin, of Omaha, Neb. (Lyle Hubbard and Wymer Dressler, both of Omaha, Neb., on the brief), for appellee Chicago & N. W. Ry. Co.

F. H. Helsell, of Ft. Dodge, Iowa, and William Baird, Edgar A. Baird, and Claire J. Baird, all of Omaha, Neb., for appellee Illinois Cent. R. Co.

Ralph M. Shaw, of Chicago, Ill., and William Baird, of Omaha, Neb., for appellee Chicago Great Western Ry. Co.

B. P. Waggener, of Atchison, Kan., and J. A. C. Kennedy and Yale Holland, both of Omaha, Neb., for appellee Missouri Pac. Ry. Co.

H. H. Field, of Chicago, Ill., and L. F. Crofoot, E. H. Scott, and W. C. Fraser, all of Omaha, Neb., for appellee Chicago, M. & St. P. Ry. Co.

Before HOOK, CARLAND, and STONE, Circuit Judges.

STONE, Circuit Judge. The Union Pacific Railroad Company owns the depot and attaching terminals at Omaha. The Rock Island, with other roads, are its tenants under a so-called "Union Station contract." The contract provisions governing the liability between the roads for accidents within these terminals are that each road shall pay for damage arising out of the "conduct or negligence of its own employés," and that such damages as arise from the "conduct or neglect of employés paid in common" shall be charged to current expenses of operation and maintenance and paid by all in common or on an agreed basis. A collision occurred between Union Pacific and Rock Island engines on these terminal tracks, and the question is whether the Rock Island, or all of the roads, should pay for the damages.

A few months after the accident, on complaint by the Union Pacific to the Rock Island that the latter should assume the damage, the two roads finally agreed to arbitrate the question. The Union Station contract provided for arbitration. The arbitrators were chosen and proceeded to consider the matter. Through mistake, instead of sending the arbitrators the station contract as governing the controversy, another agreement between the roads, governing the use of different trackage near Omaha, was delivered to them. This latter

contract provided, in case of collision between trains of the roads, the one at fault should pay all damages, and "when either is at fault, or both are in fault, each shall bear its own loss"; also that, if the fault was of an employé "whose duties are directly connected with the movement of trains of both parties," the road shall bear all loss suffered by it. Shortly before the arbitration concluded the error was discovered, when the arbitrators were notified, and the proper contract sent to them. The arbitration resulted in a finding that the Rock Island was entirely to blame and should assume the entire loss.

Shortly after this award the Rock Island wrote the Union Pacific that it would not be bound by the award, whereupon the Union Pacific filed this bill against the Rock Island and the other tenant roads, praying that the court determine the validity of the award, and, if invalid, determine whether under the facts the Rock Island alone or all the roads in common should assume the loss, and for a decree against such parties as under the arbitration or facts the court should find liable. A special master was appointed. The master heard all of the testimony, both such as related to the arbitration, and such as related to the accident. The result of his findings and conclusions was that the Rock Island was solely liable, both because the arbitration was binding, and because the sole proximate negligence was the negligence of the Rock Island engine crew. To this report the Rock Island filed exceptions, which were by the court overruled, and decree entered in accordance with the report. From that decree the Rock Island appeals.

[1] At the threshold of the case the appellant insists that, at the time the trial court heard and determined the master's report, it was without jurisdiction to act thereon. This is based on the situation that at that time the Rock Island was under receivership in another federal court, and the Union Pacific had filed before the special master therein a claim covering the subject of this suit under a general order of the court, barring claims not filed within a certain period. This contention is not well founded for several reasons. This suit was not against the receiver, but the railroad; other parties to this suit were interested in its result; the first jurisdiction of this subject and parties was in this trial court; there was not necessarily any conflict of jurisdiction. It may also have a bearing that the Union Pacific had not become a party to the receivership suit, by intervention or otherwise. The record is silent as to when it filed its claims.

The case on its merits naturally divides into two main considerations: (a) The validity of the arbitration; and (b) the seat of the negligence which caused the collision. If the arbitration is valid, and appellant bound thereby, the award therein made measures the rights of the parties. If the arbitration is invalid, then the question is the location of the blame, and in conformity with that determination a settlement of the rights of the parties as defined in the Union Station contract.

The Arbitration.

Appellant attacks the arbitration for the following reasons:

(1) That is was agreed to under a mutual mistake and proceeded thereunder.

(2) That all interested parties did not join therein.

(3) That it was denied an opportunity for a hearing before the arbitrators.

(4) That one of the arbitrators signing the majority award was disqualified because of interest in the controversy.

(5) That the testimony before the arbitrators does not support their findings.

(6) That the arbitrators failed to give notice and refused to have a further hearing when mutual mistake as to contract was discovered.

These will be considered seriatim.

[2] 1. It is true that the arbitration was begun under a mutual misapprehension as to which contract controlled, and this mistake was not discovered for some time, until about a month before the award. It is clear, however, that the manner of selection and the number of arbitrators happened to accord with the requirement of the true contract; also, that when both parties discovered the mistake, instead of questioning the arbitration, they at once furnished to the arbitrators copies of the true contract, and no objection was heard upon that score until after the award. This was a recognition and a waiver of this defect.

[3] 2. It is true that the other tenant lines did not join in the arbitration, and that they were interested in its result. But the interest of each of them was, without exception, opposed to appellant, and they are in this suit insisting upon the validity of the award. Obviously appellant was not injured, or his rights affected by their absence from the arbitration. He cannot register an objection that they were injured, or might have been injured, when they are here asking to be bound by that award.

3. A careful examination of the evidence convinces that there is no foundation for the claim that appellant was denied a full hearing before the arbitrators.

[4] 4. That one of the arbitrators (De Bernardi) signing the majority award was disqualified because of interest is true. He was general superintendent of one of the tenant roads, which appellant at all times knew. Almost a month before the award it discovered the mistake in contract, and from that time knew that his road was interested in the award, and therefore that the disqualification existed. Not only did it make no objection thereafter, but it proceeded with the arbitration and made no objection of this kind until after the award. This was a waiver.

5. In our judgment, the evidence supported the findings of the arbitrators.

[5] 6. The claim that the arbitrators failed to give notice and refused to hold further hearings after discovery of the mistake as to contract is not well taken. As to the notice, it was not only not necessary, but the appellant actively participated thereafter by sending the contract and some further information to the arbitrator chosen by it, who communicated that information to the other arbitrators. The facts had long been before the arbitrators as fully as the parties desired, except for the above one piece of information relating to the

common employment of the engine herder, which was communicated as soon as discovered by appellant. While the parties did not have another meeting, they did hold correspondence, which had the same practical effect. In fact, it was during this correspondence that De Bernardi first called to the attention of the other two the controlling force of the Union Station contract. In our judgment, the arbitration is not subject to attack, and its award is binding upon appellant.

The judgment is affirmed.

GLEN INV. CO. v. ROMERO, County Treasurer.

(Circuit Court of Appeals, Eighth Circuit. October 14, 1918.)

No. 5032.

1. COURTS ⟸328(9)—FEDERAL COURTS—JURISDICTIONAL AMOUNT—"COSTS."
Where a purchaser from a New Mexico county of state tax certificates sued to enjoin the treasurer from issuing redemption certificates, without payment of certain costs and penalties which had accrued up to the date of purchase, such costs, etc., which exceeded the amount necessary to give the federal court jurisdiction, under Judicial Code, § 24,[1] were not "costs," as used in the provision declaring that such accessory demands cannot be counted in computing the jurisdictional amount.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Costs.]

2. CONSTITUTIONAL LAW ⟸139—TAXATION ⟸696—OBLIGATION OF CONTRACT—TAX SALES—REDEMPTION.
One purchasing from a county tax sale certificates after the amendment of 1915 (Laws 1915, c. 78) to Code N. M. 1915, § 5502, which allowed sale of certificates for sum less than total amount of the taxes, interest, etc., must trace all title through the amendment, and, as such sale was optional with county, there was no impairment of contract.

3. TAXATION ⟸709(1)—CERTIFICATE—REDEMPTION—AMOUNT.
A purchaser from a county of tax sale certificates sold under Code N. M. 1915, § 5502, as amended by Laws 1915, c. 78, for less than total amount of the taxes, interest, etc., *held* entitled on redemption to collect only his expenditure plus interest, instead of the sums called for by the certificate.

Appeal from the District Court of the United States for the District of New Mexico; Colin Neblett, Judge.

Bill by the Glen Investment Company against Eugenio Romero, as Treasurer and ex officio Collector of the County of San Miguel, State of New Mexico. From a decree dismissing the bill for want of jurisdiction, complainant appeals. Reversed, with directions to dismiss bill on merits.

Edwin H. Park, of Denver, Colo. (Thomas H. Gibson, of Denver, Colo., on the brief), for appellant.

Chester A. Hunker, of Las Vegas, N. M. (S. B. Davis, Jr., of East Las Vegas, N. M., on the brief), for appellee.

Before HOOK, CARLAND, and STONE, Circuit Judges.

STONE, Circuit Judge. Appellant is purchaser from the county and holder of tax sale certificates issued by the proper authorities of

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

[1] Comp. St. § 991.

the county of San Miguel, N. M. These certificates had been originally issued to the county at the time it bought in the land for nonpayment of taxes. Under a state statute, when the county had bought in land for two or more successive years, it might under certain circumstances here present, sell such sale certificates at public auction to the highest cash bidder for not less than the minimum sum fixed by the county commissioners. At such an auction sale appellant bought a large number of such sale certificates held by the county. The appellee is the treasurer and ex officio collector of that county. Under the statutes of New Mexico the land covered by the above sale certificates is subject to redemption by the owner. At the time of redemption the county treasurer, to whom the redemption money is paid for the use of the sale certificate holder, is required to issue to the owner a redemption certificate, which is made conclusive proof of such redemption. The appellee treasurer was threatening to issue redemption certificates against the above several sale certificates upon payment by the respective owners of the amount paid by appellant for each of such sale certificates, plus interest at the rate of 12 per centum annually since the date of purchase. Appellant contended that the amount required for such redemption was the amount of taxes originally levied upon each of the several parcels of property, together with penalties, costs, and interest as set forth in the several sale certificates. To prevent the issue of the redemption certificates as threatened, appellant sought an injunction.

[1] After answer, the jurisdiction of the court below was there successfully assailed by motion upon two grounds: First, that, although a diversity of citizenship, the controversial amount was less than $3,000; and, second, that no federal question was involved. Plaintiff claimed the right to receive, at redemption of the certificates held by him, the original amount of the taxes, costs, penalties, and interest from the date of the certificate. Defendant claimed that such recovery should be confined to the purchase price paid by plaintiff for the certificates, with interest thereon from date of purchase. The purchase price equaled the original tax. Therefore the amount in dispute was the costs (in connection with the taxation), penalties, and interest which had accrued to date of purchase. The costs here intended are not the costs of this present suit, but such as arose in connection with the tax sale proceedings. The interest is not merely that incidental or auxiliary to the amount in dispute, but is one of the main elements or items making up that amount. Such costs and interest are not within the meaning of those terms as used in the section (Judicial Code, § 24; Comp. St. 1916, § 991) which excludes such from inclusion in the jurisdictional amount. As said in Edwards v. Bates County, 163 U. S. 269, 273, 16 Sup. Ct. 967, 41 L. Ed. 155, the distinction is between "a principal and accessory demand." The matter in dispute here is not the amount of taxes, but what amount beyond the taxes (such as costs, penalties, and interest) must be paid. Admittedly this sum exceeded $3,000. The jurisdictional amount having been shown, with an undisputed diversity of citizenship, the court should have retained jurisdiction of the cause.

Strictly speaking, determination of the existence of jurisdiction as above would cover all matters really before us upon this appeal. However, the parties have expressed their desire that a decision be made upon the merits. A refusal of this request would have the sole result of sending the cause to the trial court, whence it would return here. The facts are fully agreed in the pleadings, and the differences are purely as to the law. We see no good reason to impose upon these litigants the delay and expense of again presenting to the trial court and to this court the precise legal questions upon the same agreed facts which were put before us in briefs and arguments. Nor should the time of these courts be wasted in such useless repetition. We will not consider whether there is in this case a federal question which could cast the jurisdiction of the national courts. Having assumed jurisdiction because of diversity of citizenship, we will treat the merits of the case.

The Supreme Court of New Mexico (State ex rel. Cunningham et al. v. Romero, 22 N. M. 325, 161 Pac. 1103) has decided, in a case involving some of these same certificates and others of like character, that the proper redemption amount upon such certificates is the purchase price, with interest thereon at 1 per centum monthly from date of purchase, to which should be added the amount of any subsequent taxes paid by the purchaser after purchase, with the same interest thereon from payment. Appellee claims that this decision by the highest state court is conclusive upon this court. If this be true, then that decision rules this case. Appellant, however, contends, first, that the result reached in that case would impair the obligation of the contract represented in the certificates; and, second, that this court is not bound by that decision, but should examine the matter for itself, in which event its construction of the statutes would prevail.

[2] As to the impairment of the contract: The contract intended is that contained in the certificate of sale. We waive, without decision, the suggestions that such a certificate is not a contract within the constitutional provision, and that the political and legal character of a county would prevent the application of that provision. Conceding, but not deciding, that the certificates are fully protected by the Constitution as contracts so long as they remain the property of the county, and conceding, but not deciding, that such contracts are in terms as contended by appellant, yet it does not follow that the appellant stands in the place of the county. It is true it bought the certificates from the county, and acquired such title as the county could convey. This, however, it did under the following circumstances: Up to 1915 the laws of New Mexico (section 5498) provided that the collector should make sale of land for delinquent taxes; that at such sale the land should go to the highest cash bidder whose bid equaled the full amount of taxes, penalties and interest due thereon; that in default of such bid the land should be "struck off to the county for such total amount"; that in no case should such interest be released, abated, rebated, or reduced, but should have the force of and become part of the original tax; that one-half of the interest so collected as penalty should be paid into the state interest fund and one-half credited to the county

interest fund; that the county should not by such sale acquire title to such real estate, "but shall sell and assign the duplicate tax certificate, as provided in section 5500." Section 5500 provided that the county treasurer should "sell and assign the duplicate certificate of such sale" to any one who would at any time pay the full face value thereof with accrued interest; if not so sold before time for the next regular tax sale, such certificate shall be sold at public auction to the highest cash bidder, whose bid should equal the full amount of the taxes and interest; that it would be thereafter redeemable in repayment of the amount so paid. Section 5502 was:

"Upon payment of the amount for which any real estate is sold, the treasurer shall give to the purchaser a certificate of sale containing a description of the property sold, stating the name of the person or persons to whom the same was assessed or that it was assessed to unknown owners, as the case may be, the amount paid therefor, and that it was sold for taxes, with the date of sale, and that the sale is subject to the right of the owner to redeem the property within three years by paying the amount paid at such sale with interest thereon at the rate of one per cent. per month, which certificate must be recorded in the office of the county clerk in a book kept for the purpose of recording such certificates. Such former owner may at any time, within three years from the date of recording such certificate, or duplicate certificate, provided for in section 5500, redeem the property by paying to the county treasurer for the use of the purchaser, or his assigns, the amount of purchase money with interest, as aforesaid, together with any taxes which may have been paid upon the property by the purchaser or his assigns, with interest at the same rate, and such former owner may retain possession of the property until the time of redemption has expired.

"Real estate sold for taxes, whether struck off to the county or sold to others, shall continue to be assessed in the name of the original owner, or to unknown owners, as the case may be, until the title shall pass by tax deed or otherwise, and taxes thereon for the time during which said certificate or duplicate shall be held by the county or a purchaser shall be a lien upon said property until paid."

It is evident from the foregoing that, if the land was redeemed, the purchaser at a tax sale or of a duplicate certificate from the county was entitled to receive the amount he had invested in the purchase or expended in later taxes against the land, with interest thereon at 1 per centum monthly from date of such payment. There could be no uncertainty as to the amount required for redemption.

As the county could not sell the land at the tax sales, nor the certificates purchased by it, for less than the total amount due, there were instances where the county could realize no cash return as to such taxes. The county was denied the right, which belonged to the ordinary purchaser, of becoming the owner of land covered by its sale certificates. Thus it was helpless when no one could be found who would pay the minimum purchase price. We may infer that this contingency was realized to a serious extent, as the Legislature in 1915 added to section 5502, with a view of relieving counties which had on hand such immovable certificates, the following amendment:

"Whenever any lot, parcel or tract of land, or any interest therein, or any improvement thereon, shall have been bid in prior to April 1, 1915, by or for any county at tax sales made pursuant to law for two or more years, and the treasurer of such county has been unable to sell the certificates or duplicate certificates therefor so as to realize the total amount of the taxes, interest, penalty and costs due upon such property, said treasurer may sell

the same at public auction to the highest bidder for cash, who shall bid not less than the minimum sum therefor which the county commissioners of said county, by order duly entered upon their records at any regular meeting, may have decided to accept. And at any time prior to the date fixed for such sale in the notice given by the treasurer the owner of such property may redeem the same from such tax sales by paying to the treasurer the minimum amount so fixed by the county commissioners, such sale of said certificates or duplicate certificates, or such redemption by the owner, shall release said property from the lien of all delinquent taxes, penalties, interest and costs standing against the same at the date of such sale or redemption." Laws 1915, c. 78.

The certificates here involved come within the description of the amendment. They were held by the county at the time the amendment became effective and were subsequently sold thereunder to appellant.

The amendment of 1915 was not intended to and did not change the existing law as to tax sales and redemptions with their incidents and requirements. It was designed to meet a temporary, particular and special situation. It dealt only with a definite and determined lot of then existing sale certificates. Its effect was to permit counties to deal with those certificates in a way theretofore forbidden; that is, to sell them at a price below the amount called for by the certificate. Before this change the two provisions of the statute, that the interest on the taxes should not be abated and that the redemption should be for the purchase price plus interest thereon, could not conflict, because the purchase price must equal the total amount of taxes, penalties, costs, and interest. Under the amendment, when the certificates sold below that figure, this divergence would occur. The Legislature could grant the counties a new right affecting the certificates upon any conditions it deemed proper. So long as the county was left free to exercise its choice of maintaining the existing status or of changing it under the conditions prescribed, no question of abrogation or change of its contract rights could arise. The amendment put no compulsion upon the counties. It left them free to sell or not to sell under it. Therefore it might contain any conditions or terms the Legislature desired qualifying an exercise of the privilege thus extended. The Legislature might make it a condition that the purchaser should receive only his expenditure, plus interest thereon at 1 per centum monthly. If the county seeks to sell and appellant to purchase through the authority of this amendment, each must accept the full terms thereof. Appellant must trace its entire title and rights through that amendment. It must therefore accept the certificates with such conditions or alterations, if any, as the amendment prescribes. Hence we conclude that no contract obligation can be invaded unlawfully by any condition the amendment may impose upon the exercise of this new privilege given the counties.

[3] The remaining question is: Was it one of these conditions that the purchaser should collect only his expenditure, plus interest at 1 per centum monthly, instead of the sums called for by the face of the certificate? The state Supreme Court in the above case has said that such a condition exists. That case has been carefully examined. Irrespective of the question as to whether we are bound by that decision, we approve the reasoning and conclusion thereof.

The case is reversed, with directions to set aside the order sustaining the motion of appellee to dismiss the bill for want of jurisdiction, to deny such motion, and to dismiss the bill upon the merits, at the costs of appellant.

SMITH v. DOUGLAS COUNTY, NEB.*

(Circuit Court of Appeals, Eighth Circuit. October 28, 1918.)

No. 5132.

1. REMOVAL OF CAUSES ⟨⟩4—CAUSES REMOVABLE—CONTEST INTER PARTES.
Under Rev. St. Neb. 1913, §§ 6632, 6634, 6635, and in view of sections 1205 and 1212, and Const. art. 6, §§ 1, 16, a proceeding by a Nebraska county to assess inheritance taxes against real and personal property as the property of a decedent which another claimed as surviving joint tenant, is, when it reaches the county court, a contest inter partes, and so is a suit, within the removal statutes.

2. TAXATION ⟨⟩878(1)—INHERITANCE TAXES—CONSTRUCTION OF STATUTES.
The Nebraska inheritance tax statute imposes a tax covering only gifts in contemplation of death, legacies, and inheritances; this being particularly true, as Const. art. 3, § 11, confines the provisions of the act to the title, which is "An act to tax gifts, legacies, etc.," and does not include property passing to surviving joint tenant.

3. JOINT TENANCY ⟨⟩3—CREATION—INHERITANCE TAXES.
A contract between two brothers, who had carried on their affairs jointly at first, without any partnership agreement, *held* to make them joint tenants of real and personal property, under Rev. St. Neb. 1913, §§ 8244, 8285, recognizing joint tenancy.

4. JOINT TENANCY ⟨⟩6—HOLDER OF LEGAL TITLE.
Where owners of property, with no intention to abandon contracts creating a joint tenancy, permitted, for temporary reasons, for convenient handling, property to be taken and held by either of them or some agent, such property was in no wise removed from the control of the contract, and the holders were trustees for the owners as joint tenants, and upon the death of either of owners the complete equitable title and right to the entire legal title would vest in the survivor, and could be judicially enforced.

In Error to the District Court of the United States for the District of Nebraska; Joseph W. Woodrough, Judge.

Proceedings by the County of Douglas in the State of Nebraska, under the Nebraska inheritance tax statute, against real and personal property claimed by the county to have been the property of Francis Smith, deceased, and claimed by George Warren Smith to belong to him as a surviving joint tenant, which were removed from the state to the federal court. There was a judgment for the County of Douglas, and George Warren Smith brings error. Reversed.

See, also, 242 Fed. 894, 155 C. C. A. 482.

Francis A. Brogan, of Omaha, Neb. (Anan Raymond and A. G. Ellick, both of Omaha, Neb., on the brief), for plaintiff in error.

George E. Bertrand and John H. Grossman, both of Omaha, Neb. (George A. Magney, of Omaha, Neb., on the brief), for defendant in error.

Before HOOK and STONE, Circuit Judges, and WADE, District Judge.

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

*Rehearing denied March 4, 1919.

STONE, Circuit Judge. Writ of error from proceeding under the inheritance tax statute of Nebraska, assessing such a tax against real and personal property within that state claimed by the county of Douglas to have been the property of Francis Smith, deceased, and claimed by plaintiff in error to have been the property of him and Francis Smith as joint tenants. The case presents two propositions: The jurisdiction of the court, and the existence or nonexistence of the claimed joint tenancy.

[1] The county challenges the jurisdiction of the court, claiming that the tax proceeding was not removable from the county court to the United States District Court, because not a "suit," within the meaning of the removal statutes. If the tax proceeding, at the time the petition for removal was filed, was a contest inter partes over property or the payment of money, before a judicial or quasi judicial body empowered to hear and determine the rights of the contestants, it was then removable. Boom Company v. Patterson, 98 U. S. 403, 25 L. Ed. 206; Hess v. Reynolds, 113 U. S. 73, 80, 5 Sup. Ct. 377, 28 L. Ed. 927; Pacific Removal Cases, 115 U. S. 1, 18, 5 Sup. Ct. 1113, 29 L. Ed. 319; Searl v. School District No. 2, 124 U. S. 197, 199, 8 Sup. Ct. 460, 31 L. Ed. 415; Delaware County Commissioners v. Diebold Safe Co., 133 U. S. 473, 486, 10 Sup. Ct. 399, 33 L. Ed. 674; Madisonville Traction Co. v. St. Bernard Mining Co., 196 U. S. 239, 25 Sup. Ct. 251, 49 L. Ed. 462. The tax involved the payment of money. The Constitution and statutes of Nebraska establish that this proceeding, when it reached the county court, became a contest inter partes, which that court, acting judicially, was empowered to hear and determine. The method prescribed of levying this tax is for a county judge to appoint an appraiser, who investigates values and reports to the judge. The judge then "forthwith" fixes the value of the property and the amount of the tax, after which he "immediately" gives notice thereof to all known interested parties. Any one dissatisfied with his finding may, within 60 days, appeal to the county court, upon filing bond covering costs and "all taxes that may be fixed by the court." R. S. Nebraska 1913, § 6632. Section 6634 provides that the county courts "shall have jurisdiction to hear and determine all questions in relation to all taxes arising under this article." Section 6635 provides a method by which the county court can take the initiative, if the tax remains unpaid after assessment. It is:

"If it shall appear to the county court that any tax accruing under this article has not been paid according to law, it shall issue a summons commanding the persons or corporation liable to pay such tax or interested in such property to appear before the court on a certain day, not more than three months after the date of such summons, to show cause why such tax should not be paid. The process, practice and pleadings, and the hearing and determination thereof, and the judgment in said court in such cases shall be the same as those now provided or those which may be hereafter provided in probate cases in the county courts of this state and the fees and costs in such cases shall be the same as in probate cases in the county courts of this state."

From the above sections, which are emphasized by other sections of the act, it is clear that the proceeding was ex parte until it reached

the county court; that it became there a controversy inter partes; that the county court was given jurisdiction to hear and determine "all questions in relation" to such taxes, not being confined to the accuracy of the amount assessed; that such action by the court was not merely administrative, but judicial. It should also be noted that county courts in Nebraska are a part of the judicial power of the state (Constitution of 1875, art. 6, § 1), courts of record with certain constitutional original jurisdiction, and such other jurisdiction as given by statute (Constitution of 1875, art. 6, § 16), with a prescribed judicial procedure (R. S. 1913, §§ 1205, 1212).

The conclusion that jurisdiction was properly acquired by removal is not affected by the case of Upshur County v. Rich, 135 U. S. 467, 10 Sup. Ct. 651, 34 L. Ed. 196. Under the statutes and decisions of the state there involved, the county court was purely an administrative body, with no judicial powers, except probate. The court there held that an appeal from a tax assessment to such an administrative body upon the amount of a tax fixed by an assessor was not a "suit"; but Justice Bradley, after carefully saying that such a proceeding approached "very near to the line of demarcation," defined a distinction which here exists when he said:

"Even an appeal from an assessment, if referred to a court and jury, or merely to a court, to be proceeded on according to judicial methods, may become a suit within the act of Congress."

Also here the amount of the tax was admittedly just, but the legal right to levy any such tax on this property was contested—a controversy in its character suggesting the necessity of judicial settlement. Nor has the decision on the appeal to this court of a companion proceeding (242 Fed. 894, 155 C. C. A. 482) any bearing here. In that case Smith sought to enjoin the Douglas county officials from collecting this inheritance tax. That bill was dismissed for want of equity, because there was a remedy at law. The remedy there in mind was that given by section 10 of the act (Rev. St. Neb. 1913, § 6631), which gave a right to repayment of any such tax erroneously paid. It was not there decided that section 10 provided a remedy which was exclusive of other legal remedies or methods of challenging the validity of the tax.

[2, 3] The sole proposition going to the merits of the case is whether this property is within the purview of the Nebraska inheritance tax statute. This necessitates an examination of the scope of that enactment and of the legal manner in which this property came to plaintiff in error. The title of the statute is "An act to tax gifts, legacies and inheritances in certain cases and to provide for the collection of the same." Section 1 (R. S. Neb. 1913, § 6622) defines the property subject to the tax as follows:

"All property, real, personal and mixed which shall pass by will or by the intestate laws of this state from any person who may die seised or possessed of the same while a resident of this state, or, if decedent was not a resident of this state at the time of his death, which property or any part thereof shall be within this state, or any interest therein or income therefrom, which shall be transferred by deed, grant, sale or gift made in contemplation of the death of the grantor, or bargainer or intended to take

effect, in possession or enjoyment after such death, to any person or persons or to any body politic or corporate in trust or otherwise, or by reason thereof any person or body corporate shall become beneficially entitled in possession or expectation to any property or income thereof, shall be and is subject to a tax, at the rate hereinafter specified, to be paid to the treasurer of the proper county for the use of the state, and all heirs, legatees and devisees, administrators, executors and trustees shall be liable for any and all such taxes until the same shall have been paid as hereinafter directed."

Section 2 (R. S. Neb. 1913, § 6623) outlines the method of assessment and payment when the bequeathed or devised estate involves a life estate. From the above it is clear that the Legislature intended to enact a tax, as its title sets forth, covering only gifts (in contemplation of death), legacies, and inheritances. Besides the scope of the title to an act in Nebraska confines the provisions of the act. Const. of 1875, art. 3, § 11; State v. B. & M. R. R. Co., 60 Neb. 741, 84 N. W. 254; State ex rel. Adair v. Drexel, 74 Neb. 776, 105 N. W. 174.

Did the property here involved pass by such gift, legacy, or inheritance? Smith claims that it came to him in the nature of a joint tenant survivorship, springing from certain contracts between him and the deceased, his brother. The essential facts are fixed. The legal meaning and results of the facts make up the controversy. The outstanding facts necessary to a decision are as hereafter set forth. In 1845, the two brothers, then 19 and 21 years old, started out to make their fortunes together. This united effort accumulated more than $1,000,000 by 1880. During this time there was no formal partnership or agreement, though they worked together under the business style of F. & G. W. Smith, took investments and loans, and kept their bank account in that name. At that time deceased was about 56 years old and married, with no children, while plaintiff in error had remained unmarried. They then became concerned, especially the deceased, with the disposition of this large fortune after death. Fearing that the collateral heirs might be spendthrifts and dissipate the money, and preferring it should go to charities, if such tendencies of these heirs seemed to develop, they decided to arrange matters so that the survivor of the two would take all of the property and assume the burden of its ultimate disposition after his death. To carry out this plan they executed mutual wills covering the property, excepting certain annuities to be paid the wife of the deceased. This arrangement continued until 1902. At that time they were advised by counsel that this plan was cumbersome and would necessitate the estate going through probate. To avoid this, and, as they thought, better carry out their plan, they executed the paper following:

"New York, March 3, 1902.

"The following agreement exists and has existed for more than twenty years between Francis Smith and George Warren Smith for the purpose of making investments for the mutual benefit of us both as joint tenants and not as tenants in common, and have used the style name of F. & G. W. Smith. And in the event of the death of either of us we agree that the survivor may use the name of F. & G. W. Smith and continue to buy and sell securities of all kinds, real and personal, in all manner of ways as has been done heretofore, and do every and all acts whatsoever as fully as when we were both alive. We hold and own all the property which we now possess, both real and personal as joint tenants and not tenants as common with

right of survivorship, and all the property of all kinds whatsoever which we may hereafter acquire is to be held and owned in like manner. And to all whom it may concern we state the foregoing agreement and statements continue in full force and hereby ratify and confirm the same in every particular.

"[Signed] Francis Smith.
"George Warren Smith."

The wills were then destroyed. A year later they executed another instrument as follows:

"Warrenton, Rockport, Maine, May 16, 1903.

"We, the undersigned, Francis Smith and George Warren Smith, do state and affirm hereby that the agreement now existing between us whereby we hold all our property as joint tenants with right of survivorship and not as tenants in common that it is intended to include all real estate of every kind and nature. All personal property, stocks and bonds, and in fact all real estate and personal property of all kind or kinds whatsoever, which we or either of us now hold, own or possess or may hereafter acquire. The object of the foregoing is to state more implicitly if need be the agreement between us as to the property which we hold or own as joint tenants with right of survivorship and not as tenants in common or that we may hereafter own or acquire. [Signed] Francis Smith.
"George Warren Smith."

Under this new plan their stocks, bonds, accounts, and bank account, for the most part, stood in the name of "Francis Smith & George Warren Smith as joint tenants with right of survivorship, and not as tenants in common." In some instances, including the Nebraska property, for reasons of convenience affecting conveyancing or the like, the title was held in the name of one or the other, or of an agent. For a while a third brother had been in business with them, but this connection had terminated prior to 1902; also the wife of deceased had died some time prior to his death, at which time he was a widower, with no direct descendants.

There is no ground for any claim that the arrangement between the brothers concerning their business and property was fraudulent, with the object of escaping the payment of inheritance taxes. The good faith of their actions is not attacked. The controversy is over the legal status established by those acts. The county contends that this status was a partnership; the plaintiff in error asserts it was a joint tenancy. If the former, there is no question but that one-half of the partnership property (after payment of debts) would be the property of the estate of the deceased, and as such be liable to this inheritance tax. If a joint tenancy, while the property would pass to the survivor upon the death of the other, it would not so pass because of death, but because of the contract for joint tenancy or because of the actual joint tenancy title. It is clear from the testimony that from 1845 the efforts of the brothers were united, and that they earned and held their property together. Whether during that period they contemplated that the survivor should have all of the property is not entirely clear. The circumstances connected with making the wills in 1880 would argue against such a conclusion. However the statement in the testimony of plaintiff in error that the 1902 and 1903 contracts were in line with their original plans, and that those plans never changed, would seem to the contrary. The county accentuates these statements as

meaning that they had no intention of changing from the first relation, which it says was a partnership. This view of that evidence is not accepted. Whatever the brothers may have had in mind, if anything, before 1880 as to a survivorship, it is certain that at that time they determined upon such, and that such determination was never departed from thereafter, although the method of accomplishing that result was changed. The first method used was mutual wills; the last was the contracts of 1902 and 1903.

It is significant that the sole object of those contracts was to change the method of reaching the same result they had intended from 1880, at least. Not only is this intention to change the method crystal clear, but the new method is defined with care, clearness, and accuracy. The contracts contemplated that the entire property should be held in joint tenancy, with its incident right of survivorship. In fact, that incident was the sole motive of the two contracts. From the date of those contracts, if not before, either brother had the right to have every piece of property placed under that character of title if the laws of the state to which any such property was subject permitted such. The state of Nebraska recognizes joint tenancy. R. S. Neb. 1913, §§ 8244, 8285. The rights of the parties under such a contract would have been and are there enforceable.

[4] When, with no intention to abandon the contracts, they permitted, for temporary reasons of convenient handling, property subject to the laws of Nebraska to be taken and held by either of them, or by some agent, that property was in no wise removed from the control of the contracts. Such holders were trustees for the brothers as joint tenants. Upon the death of either brother the complete equitable title and a right to the entire legal title would vest in the survivor, and could be judicially enforced. The rights and title of plaintiff in error rest upon the solid basis of the contracts. Plaintiff in error secured nothing by gift, legacy, or inheritance. The property did not come within the terms of the Nebraska inheritance tax statute.

The judgment is reversed.

AMERICAN NAT. BANK OF MACON v. COMMERCIAL NAT. BANK OF MACON et al.

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

No. 3240.

BANKS AND BANKING ⟸283—LIQUIDATION OF NATIONAL BANK—SUIT AGAINST STOCKHOLDERS.

Contract for consolidation between two national banks, by which one agreed to voluntarily liquidate and transfer all its assets to the other, which agreed to act as its liquidating agent and to pay all claims against it, construed, and, as acted upon by the parties, *held* to create the relation of debtor and creditor between them, which would support a suit against the stockholders of the liquidating bank on the insufficiency of its assets to pay its debts.

Appeal from the District Court of the United States for the Southern District of Georgia; Beverly D. Evans, Judge.

Suit in equity by the American National Bank of Macon against the Commercial National Bank of Macon and others. Decree for defendants, and complainant appeals. Reversed.

For opinion below, see 248 Fed. 187.

This is an appeal from a decree sustaining motions to dismiss an amended bill in equity filed in the District Court by the appellant, the American National Bank of Macon, against the Commercial National Bank of Macon and its shareholders. The bill as amended showed that it was filed by the plaintiff as a bill in the nature of a creditors' bill on behalf of the plaintiff and all other creditors of the defendant bank against the latter and its shareholders for the purpose of enforcing the statutory liability of said shareholders for the payment of the indebtedness of the defendant bank. The averments of the bill as amended disclosed the following facts (the plaintiff and the defendant banks, each of which was located in the city of Macon, Ga., being hereinafter referred to as the American Bank and the Commercial Bank, respectively):

On the 31st day of July, 1914, the Commercial Bank applied to the American Bank for a loan of money to enable it to meet its obligations and to pay and satisfy its depositors. After some negotiations between the two banks, they, on August 3, 1914, entered into a written contract, of which the following is a copy:

"Georgia, Bibb County.

"Articles of agreement for the liquidation of the Commercial National Bank of Macon, Georgia, by the American National Bank of Macon, Georgia, both being national banking associations, made and entered into between said banks as the contracting parties.

"Whereas, on the 1st day of August, 1914, the board of directors of the Commercial National Bank, at a meeting of said board duly and regularly called, adopted a resolution which authorized the officers of said association to commence proceedings for the liquidation of said association under sections 5220 and 5223 of the U. S. Revised Statutes, for consolidation with said American National Bank, and to transfer to said American National Bank all the assets of said Commercial National Bank, which assets were by said resolution so transferred and assigned, in order to fully protect and secure said American National Bank for all moneys advanced or to be advanced by said association in the assumption and payment of the liabilities of said Commercial National Bank shown by a list of said liabilities hereto attached and identified as Exhibit A, and by the signature of the parties hereto, and which said resolution further provided that said American National Bank should take over the business of said Commercial National Bank, liquidate said assets, and account to the shareholders of said Commercial National Bank for any overplus which might remain after paying the depositors and other indebtedness of said Commercial National Bank in full, and the expense of realizing on the assets so transferred, the said American National Bank to charge nothing for its services in so doing, and which resolution further authorized and directed the officers of said Commercial National Bank to make such contract with the American National Bank as might be necessary or appropriate in order to carry out the general purposes of said resolution, the details of said contract to be left to the discretion of said officers; and

"Whereas, on the same date, the board of directors of the American National Bank, at a meeting of said board duly and regularly called, adopted a resolution whereby said American National Bank assumed the payment of said depositors and other liabilities of said Commercial National Bank, shown by the list of liabilities set out in Exhibit A hereto attached and hereinbefore referred to, upon condition that the assets of said Commercial National Bank should be transferred to said American National Bank sufficient in amount and in value in the estimation of the officers of the American National Bank to fully protect and secure said association for any and all amounts payment of which was assumed under said resolution, and which resolution authorized the officers of said association to make such contract as might be

necessary to carry out the purposes of said resolution, the details to be left to the discretion of said officers; and

"Whereas, the preliminaries and conditions in said resolution mentioned have been complied with, and the assets of the Commercial National Bank have been delivered to said the American National Bank;

"Now, therefore, these articles of agreement witness:

"I. That said Commercial National Bank has transferred, assigned, conveyed, and confirmed, and does by these presents transfer, assign, convey, and confirm, unto the American National Bank of Macon, Georgia, its successors and assigns all of the assets of every kind and description, including cash and cash items on hand at the close of business on August 1, 1914, bills receivable, bonds, real estate, and personal property and interests therein, and choses in action of all kinds, including all of the United States bonds now on deposit with the treasurer of the United States as security for the circulation of the Commercial National Bank of Macon and for deposits of United States deposits, to have and to hold the same unto it, said the American National Bank of Macon, its successors and assigns, in fee simple forever; and the title to said assets and each and all thereof said the Commercial National Bank of Macon, for itself and its successors, hereby warrants unto said the American National Bank, its successors and assigns, against the claims of all persons whatsoever.

"II. That in contemplation of the liquidation of said Commercial National Bank under sections 5220, 5221, and 5223, U. S. Revised Statutes, said Commercial National Bank, by its officers and directors, will call a meeting of the shareholders of said association to be held at Macon, Georgia, on August 12, 1914, and on the date or dates to which said meeting may be from time to time adjourned, and will procure proper resolutions by said shareholders and a sufficient majority thereof to comply with the law in such cases made and provided, liquidating said association and consolidating same with the American National Bank of Macon by the purchase of the assets of said Commercial National Bank by the American National Bank, but without providing for stock in the American National Bank to be issued to the shareholders of the Commercial National Bank, and ratifying and confirming the action of the board of directors of said Commercial National Bank as herein recited, and ratifying and confirming this contract.

"III. That said Commercial National Bank will also procure proper resolutions to be passed by said shareholders, appointing said American National Bank as liquidating agent for said Commercial National Bank in said liquidation for consolidation as aforesaid, said liquidation to be conducted in accordance with law and under the supervision of the board of directors of said Commercial National Bank.

"IV. That said Commercial National Bank, until the final liquidation of its affairs and final settlement with its shareholders, agrees to maintain its corporate existence, and that its directors and officers will at all times when called upon so to do by said American National Bank execute and deliver in the name of said association all other and further writings of all kinds which may be necessary to fully effectuate the transfer of said assets, the liquidation of said association, and this contract.

"V. That in consideration of the foregoing acts and agreements by the Commercial National Bank, said American National Bank hereby agrees that it will, and it does hereby, assume and promises to pay the same when and as the same are presented for payment, the depositors and other liabilities of said Commercial National Bank of Macon shown in Exhibit A hereto attached, and that in addition thereto it will and does hereby assume the redemption of the circulating notes of said Commercial National Bank, and that it will procure such resolution to be passed by its board of directors as may be neccessary for it to assume the redemption of said circulating notes.

"VI. That said American National Bank will accept the appointment as liquidating agent of said Commercial National Bank, and will proceed with all due and reasonable diligence to liquidate said association and to collect and reduce to cash all the assets of said association, all of said assets to be held as security by said American National Bank for all advances made by it in paying the depositors and other liabilities of said Commercial National

Bank and the actual expenses incurred by said American National Bank in realizing on said assets, and that after deducting from the proceeds of said assets the actual expenses incurred by said American National Bank in liquidating said association and acting as liquidating agent and in collecting said assets and realizing upon the same, it will apply said proceeds, first, in repaying to itself all amounts advanced by it hereunder, with interest thereon at the rate of seven (7%) per cent. per annum; next, in discharging the liabilities of said Commercial National Bank which shall not have been paid by advances made by said American National Bank, and that when all of said liabilities have been fully discharged it will account to the shareholders of said Commercial National Bank and from time to time pay over to said shareholders pro rata the surplus remaining in its hands from the proceeds of said assets, said American National Bank to act as such liquidating agent without compensation for its own services.

"It being distinctly agreed and understood that, in the event the said liquidation should be interrupted or discontinued for any reason beyond the control of said American National Bank, then and in that event said American National Bank shall and does hold all of the assets of said Commercial National Bank as security for the advances which may have been made by it, up to the time such liquidation may be so discontinued.

"And it being further distinctly agreed and understood that neither the resolutions of said boards of directors of said associations nor this contract shall relieve the shareholders of the Commercial National Bank from their legal liability as shareholders to respond, in the event it may be necessary to have recourse upon such shareholders' liability, for any deficit which may remain after exhausting the other assets of said association in the payment of its liabilities.

"In witness whereof, the parties hereto have caused these presents to be signed and delivered in duplicate by their proper corporate officers, and their corporate seals to be hereto affixed, this 11th day of August, 1914. Commercial National Bank of Macon, Georgia, by E. Y. Mallary, President. [Seal of Bank.] Attest: E. N. Lewis, Cashier. American National Bank of Macon, Georgia, by R. J. Taylor, President. [Seal of Bank.] Attest: E. C. Scott, Cashier."

The following is a copy of the resolution of the board of directors of the Commercial Bank adopted on August 1, 1914, and referred to in the contract above set out:

"Resolved, that in the opinion of the board of directors of this association it is expedient for this association to go into voluntary liquidation under sections 5220 and 5223 of the United States Revised Statutes, and that the officers of this association be and they are hereby directed to proceed under the by-laws to call a meeting of its stockholders to consider this question and the consolidation of this association with the American National Bank of Macon, Georgia, by the sale of its assets to the said bank.

"Resolved, further, that the exigencies of the situation are such that in contemplation of the liquidation of this association as aforesaid, the board of directors of this association hereby authorize the officers of this association to transfer to the American National Bank of Macon, Georgia, as cash, or as collateral for the notes of this association, all of the assets of this association, including cash, cash items, bills receivable, bonds, real estate, and personal property and choses in action, of all kinds, which said assets are hereby transferred, assigned and delivered to the American National Bank of Macon, Georgia, in order to fully protect and secure said bank for all moneys advanced or to be advanced by that bank under the assumption and payment of its deposits, bills payable, and other liabilities of this association shown by the list of liabilities this day furnished by this association to said bank—said American National Bank of Macon, Georgia, to take over the business of this association and to account to the shareholders of this association for any overplus which may remain after paying the indebtedness of this association in full and the expense of realizing on the assets so transferred, said bank to charge nothing for its services in so doing.

"The officers and finance committee are hereby given full power and authority to carry out the general purpose of this resolution, and the details to be

left to the discretion of said officers and committee, and the said officers and committee are further authorized to make such contracts with said bank as may be necessary or appropriate hereunder."

The following is a copy of the resolution of the directors of the American Bank adopted on August 1, 1914, and referred to in the above copied contract:

"Resolved, that this association assume the payment of the deposits, bills payable, and other liabilities of The Commercial National Bank of Macon, shown by the list of liabilities furnished by said bank to this bank, and agree to pay the same when and as the same are presented for payment, upon condition that said association transfer to this association as cash or collateral for its notes, cash, cash items, bills receivable, bonds, real estate, and other assets, sufficient in amount and in value in the estimation of the officers of this association to fully protect and secure this association for any and all amounts so assumed, or shall otherwise satisfactorily secure this association for all amounts paid or assumed; this association to take over the business of said association in the manner aforesaid, accounting to the shareholders of said association for any overplus which may remain after paying the indebtedness of said association in full, and the expenses of realizing on the assets transferred to this association as aforesaid; this association to charge nothing for its services in so doing. The officers of this association are hereby given full power and authority to carry out the general purpose of this resolution, the details to be left to the discretion of said officers, and said officers are further authorized to make such contract with the directors of said association or with such liquidating agent as may be appointed for said association: Provided, however, that this resolution shall not become effective until the other banks of the Macon Clearing House Association shall, by proper resolutions, agree to supply, in proportion to their respective capital and surplus, their proportionate share of cash and exchange that may be necessary to meet withdrawals by depositors not immediately redeposited in this association, and other cash demands to which this association may be required to respond: Provided, further, that in the event the officers of this association shall, upon a further investigation of the affairs of The Commercial National Bank, deem it unsafe to proceed under this resolution, they shall not do so."

Pursuant to the agreement and resolutions above set out, the American Bank, on August 3, 1914, took charge of all assets of the Commercial Bank so transferred to the former, and from and after that date paid in due course and as called upon all of the depositors of the Commercial Bank, its bills payable, and other liabilities, and proceeded to reduce the transferred assets to cash and to apply the amounts received to reimburse itself for the amounts it had disbursed in the payment of the liabilities of the Commercial Bank pursuant to said agreement. For some two weeks after the above copied agreement between the two banks was entered into, the Commercial Bank continued in active operation, paying off its depositors, cashing checks drawn on it, receiving deposits from its customers, clearing checks on the other Macon banks through the Macon Clearing House, checking on its deposits with other banks, and transacting other business as an active banking institution, its business being handled through its own officers and clerks. Funds to enable it to pay its depositors and meet its other obligations were obtained by it on checks drawn by its proper officers on the American Bank, which checks were cashed by the latter and charged to the account of the Commercial Bank as overdrafts. The amount claimed by the American Bank to be due to it was largely incurred during the period just mentioned.

After the depositors of the Commercial Bank were in large part paid, it continued to draw checks on the American Bank, and these checks were cashed by the latter and charged to the account of the former as above stated. It was found to be impracticable to take notes, as the above-copied resolutions showed had been contemplated, for the amounts disbursed by the one bank in the payment of the liabilities of the other one, and it was agreed by the officers and finance committee of the Commercial Bank with the officers of the American Bank that the amounts so advanced by the latter should be carried by it as an overdraft, and that the overdraft should be secured by the

assets transferred; and this was accordingly done. As collections were made on the notes and other receivables transferred to the American Bank, the amounts so collected were deposited in the American Bank and by it applied to the reduction of the overdraft of the Commercial Bank. In reports made by the Commercial Bank to the Comptroller of the Currency the amount of its overdraft on the American Bank was listed as a liability under the head "Due American National Bank."

While the Commercial Bank was in process of liquidation pursuant to the resolution of its shareholders, by agreement with the liquidating committee appointed by its shareholders the American Bank as liquidating agent offered the Commercial Bank's banking house, with the furniture and fixtures therein, for sale at public outcry after proper advertisement, but, a fair price not being realized at said sale, the American Bank offered to purchase said building at $40,000, said sum to be applied to reducing the indebtedness of the Commercial Bank to it, and this proposition was accepted, and said property was conveyed to the American Bank by the officers of the Commercial Bank pursuant to a resolution adopted by the latter's directors on July 1, 1916, of which the following is a copy:

"Resolved, that the offer of the American National Bank of Macon, as contained in the letter from R. J. Taylor, president, to E. Y. Mallary, president Commercial National Bank, dated July 1, 1916, which said letter has been submitted and read at this meeting, to purchase the Commercial Bank Building, including the vault, safety deposit boxes, bank and other fixtures, and furniture, at and for the sum of forty thousand dollars ($40,000.00), to be credited on the indebtedness of the Commercial National Bank to the American National Bank, be and the same is hereby accepted, and the president or vice president and cashier of this bank are hereby authorized and directed to execute on behalf of this bank and under its seal good and sufficient conveyance of the property to the said American National Bank."

On September 30, 1914, the following resolutions were adopted by votes of more than two-thirds of the shareholders of the Commercial Bank:

"Resolved, that the Commercial National Bank be placed in voluntary liquidation under the provisions of sections 5220 and 5221 of the United States Revised Statutes, to take effect upon this date, and that the American National Bank of Macon, Georgia, be appointed liquidating agent of said bank; that liquidation shall be conducted in accordance with law and under the supervision of the board of directors, who shall require a suitable bond to be given by the said agent in an amount to be fixed by the board of directors; that the said liquidating agent shall render quarterly reports to the Comptroller of the Currency on the 1st of January, April, July, and October of each year showing the progress of said liquidation until said liquidation is completed; that said liquidating agent or committee shall render an annual report to the shareholders on the date fixed in the articles of association for said annual meeting, at which meeting the shareholders may, if they see fit, by a vote representing a majority of the entire stock of the bank, remove the liquidating agent and appoint another in place thereof; that a special meeting of the shareholders may be called at any time in the same manner as if the bank continued an active bank, and at said meeting the shareholders may, by a vote of the majority of the stock, remove the liquidating agent; that the Comptroller of the Currency is authorized to have an examination made at any time into the affairs of the liquidating bank until the claims of all creditors have been satisfied and that the National Bank Examiner will be compensated for his time and expense in making the examination in question."

"Whereas, the board of directors of this association by resolution adopted on August 1, 1914, transferred and assigned to the American National Bank of Macon all of the assets of this association as security for the liabilities of this association which were assumed by the said American National Bank, said resolution being passed in contemplation of the voluntary liquidation of this association under the provisions of sections 5220 and 5221 of United States Revised Statutes; and

"Whereas, on August 11, 1914, a contract between this association and the said American National Bank, signed by the respective officers of said

association, was duly entered into, said contract being made pursuant to the resolution of the board of directors aforesaid; and

"Whereas, on August 12, 1914, a special meeting of the shareholders of this association was held at the banking house of the association in the city of Macon, at which meeting stockholders representing 2616 shares were present in person, and by proxy, at which said meeting a resolution was unanimously passed, ratifying and approving the action of the board of directors in transferring the assets of this association to the American National Bank as aforesaid, and ratifying and approving the contract between the two associations dated August 11, 1914; and

"Whereas, said meeting of stockholders was not called and held in accordance with the articles of association, in that only ten days' notice of said meeting was given instead of thirty days, as required by said articles of association; and

"Whereas, this meeting of stockholders has been called in accordance with the articles of association and after thirty days' notice as provided in said articles of association, for the purpose of ratifying the action of the previous meeting and of taking appropriate action looking to the voluntary liquidation of this association:

"Therefore, resolved, that the action of the board of directors of this association as contained and set forth in the resolution adopted by said board on August 1, 1914, transferring and assigning the assets of this association to the American National Bank of Macon, said resolution appearing on the minutes of said board of directors on August 1, 1914, be and the same is hereby in all respects ratified and approved by the shareholders of this association.

"Resolved, further, that the contract between this association and the American National Bank of Macon, signed by their respective officers and dated August 11, 1914, said contract having been made pursuant to the resolution of the board of directors aforesaid, be and the same is hereby in all respects ratified and approved.

"Resolved, further, that the action of the special meeting of stockholders, approving said resolution of the board of directors and the contract aforesaid and providing for the voluntary liquidation of this association, under sections 5220 and 5221 of the United States Statutes, be and the same is hereby in all respects ratified and approved."

Pursuant to those resolutions the Commercial Bank was placed in voluntary liquidation, the liquidation being practically completed at the time the suit was brought. In satisfying the liabilities of the Commercal Bank the American Bank has paid out more than $320,000 in excess of the amounts realized from the transferred assets. The assets of the Commercial Bank still remaining uncollected and undisposed of are of little value, and there will not be realized from them an amount sufficient to reduce below $300,000 the excess of the American Bank's said payments over the amounts realized from the transferred assets.

Geo. S. Jones and Orville A. Park, both of Macon, Ga., and Alex C. King, of Atlanta, Ga. (King & Spaulding, of Atlanta, Ga., and Hardeman, Jones, Park & Johnston, of Macon, Ga., on the brief), for appellant.

Robert L. Berner, Robert L. Anderson, T. E. Ryals, R. C. Jordan, R. Douglas Feagin, Oliver C. Hancock, W. D. McNeil, J. E. Hall, Warren Grice, and C. L. Bartlett, all of Macon, Ga., and W. A. Dodson, of Americus, Ga. (Minter Wimberly, Jesse Harris, and E. P. Mallary, all of Macon, Ga., and Greene F. Johnson, of Monticello, Ga., on the brief), for appellees.

Before PARDEE, WALKER, and BATTS, Circuit Judges.

WALKER, Circuit Judge (after stating the facts as above). The dismissal of the amended bill is sought to be sustained on the ground

that its averments do not show that the plaintiff bank has a claim or demand against the defendant bank for which the statute (Act Dec. 23, 1913, c. 6, § 23, 38 Stat. 273 [Comp. St. 1916, § 9689]) makes the latter's shareholders individually responsible. In behalf of the appellees it is contended that the alleged transaction between the two banks was a sale of assets by one of them to the other, or a consolidation of the two, and that the contract entered into and performance under it did not result in the creation of the relation of creditor and debtor between them. Provisions contained in the contract give some color to this contention if they are considered by themselves without due regard to the remainder of the contract, the situation with which it dealt, and the conduct of the parties to the contract while performance under it was in progress evidencing what each of them understood was the effect of a compliance by the American Bank with the obligations imposed upon it by the contract. The provisions referred to—namely, the one as to the transfer of the assets, the one in regard to liquidating the Commercial Bank and consolidating it with the American Bank by the purchase by the latter of the assets of the former, and the one in regard to making one of the banks liquidating agent for the other—lose the significance sought to be attributed to them when they are considered in connection with other provisions contained in the contract and in the light of the situation existing when the contract was made and for some time afterwards, and of the construction of the contract by both parties to it as disclosed by what was done under it.

The averments of the bill show that at the time the contract was entered into, and for some time thereafter, the Commercial Bank continued in active operation, performing all the ordinary functions of a bank through its own officers and clerks. Its status then was not that of a liquidating bank. While its board of directors contemplated and made provision for its future liquidation, if and when duly authorized by the required vote of its shareholders, the process of liquidation provided for by the statute (Rev. St. § 5220 [Comp. St. 1916, § 9806]) had not begun, and could not have begun prior to its going into liquidation and being closed by the required vote of its shareholders owning two-thirds of its stock. While the bank was in active operation, its liquidation not having been determined upon by its shareholders, it was capable of incurring obligations for which its shareholders would be responsible under the statute. Schrader v. Manufacturers' National Bank of Chicago, 133 U. S. 67, 10 Sup. Ct. 238, 33 L. Ed. 564; Wyman v. Wallace, 201 U. S. 230, 26 Sup. Ct. 495, 50 L. Ed. 738. The American Bank's obligation to pay the Commercial Bank's depositors and other liabilities when and as the same were presented for payment was effective from the time the contract was made, not being dependent or contingent upon the contemplated closing and liquidation of the Commercial Bank being determined upon by the required two-thirds vote of its shareholders.

Performance was begun by the American Bank while the Commercial Bank remained open, continuing to carry on in the customary way the banking business in which it was engaged. By the terms of the contract the American Bank also obligated itself to continue

to pay the Commercial Bank's depositors and other liabilities when and as the same were presented after the latter went into liquidation and was closed, in the event that happened, the American Bank agreeing to accept the appointment as liquidating agent of the Commercial Bank. In so far as the contract obligated the American Bank to take care of the liabilities of the Commercial Bank prior to the latter being duly closed and put into liquidation, it was one capable of being made by the two banks, acting through their respective boards of directors and managing officers, without being authorized or ratified by a vote of the shareholders of either. Making arrangements for funds needed to meet its liabilities as they accrue is not out of the ordinary course of a banking business. While the Commercial Bank was open, receiving deposits and otherwise continuing the business in which it had been engaged, its directors and managing officers were empowered to incur debts in its behalf to secure funds required to enable it to meet its obligations as they accrued. The creation of debts under such circumstances and for such a purpose is not more out of the ordinary course of a banking business than the incurring of liabilities by the acceptance of deposits.

In determining the meaning and effect of that part of the contract which obligated the American Bank to supply the funds required to take care of the liabilities of the Commercial Bank as they accrued before the question of its closing and going into liquidation should be determined by its shareholders, our consideration is not confined to the language used in the written instrument evidencing the agreement of the parties, but where the terms employed are in any respect equivocal or of doubtful meaning, the construction given to the contract by both parties to it, evidenced by their dealings with each other in the course of carrying out the contract, may be looked to.

The contract contains expressions and provisions which do not seem to us to be reconcilable with the existence of an intention other than that the making by the American Bank of the agreed disbursements in taking care of the liabilities of the Commercial Bank was to have the effect of creating a debt or debts owing by the latter to the former. Those disbursements were called "advances," and it was provided that the amounts realized by the American Bank from the assigned assets was to be applied by it—

"first, in repaying to itself all amounts advanced by it hereunder, with interest thereon at the rate of seven (7%) per cent. per annum; next, in discharging the liabilities of the Commercial National Bank which shall not have been paid by advances made by the American National Bank; and that when all of said liabilities have been fully discharged, it will account to the shareholders of said Commercial Bank and from time to time pay over to said shareholders pro rata the surplus remaining in its hands from the proceeds of said assets."

This plainly indicates that the parties intended that performance by the American Bank of the obligations it incurred was to have the effect of creating an interest-bearing debt owing to it, and that the transferred assets were received and held by it, not as property bought by it, but as a pledge or security for the payment of that debt. If

the stipulated outlays by the American Bank had been understood to be payments on the price of the assets transferred, it is not to be supposed that they would have been called "advances," or that interest on them would have been provided for. Laflin & Rand Powder Co. v. Burkhardt, 97 U. S. 110, 24 L. Ed. 973. The concluding provision of the contract was to the effect that neither the contract nor the resolutions authorizing it—

"shall relieve the shareholders of the Commercial National Bank from their legal liability as shareholders to respond, in the event it may be necessary to have recourse upon such shareholders' liability, for any deficit which may remain after exhausting the other assets of said association in the payment of its liabilities."

It hardly is conceivable that this provision would have been inserted in the absence of an intention that the making by the American Bank of the disbursements it obligated itself to make would result in creating a liability of the Commercial Bank for which the latter's shareholders would be individually responsible.

But it may be assumed or conceded that the language of the contract fails to show unambiguously that performance by the American Bank of the obligations it incurred was to have the effect of making it a creditor of the Commercial Bank. The averments of the bill show that both parties to the contract, from the commencement of performance under it, treated the payments made by the American Bank as having the effect of making it a creditor of the Commercial Bank. The American Bank entered the payments on its books as overdrafts. This was in pursuance of an agreement to which the officers and the finance committee of the Commercial Bank were parties. On the books of the latter these transactions were entered under the head "Due American National Bank." Each of the entries indicated the existence of the relation of creditor and debtor, not that of purchaser and seller. The agreement between the two banks in pursuance of which the disbursements made by the one to discharge the liabilities of the other were entered as overdrafts of the one on the other was as clear a recognition that debts were thereby created as if the one bank had given its notes to the other for the amounts of such disbursements. The incidents mentioned, as well as others disclosed, show that those in charge of the business of each of the banks understood that what was done under the contract had the effect of creating a debt owing by the Commercial Bank to the American Bank. It fairly appears from the averments of the bill as amended that neither party to the contract during the period of performance understood that it had the meaning now attributed to it in behalf of the appellees, and that the conduct of each of them from the time performance under the contract commenced was inconsistent with the contract having that meaning or effect.

We think the averments of the bill as amended show that the American Bank, while the Commercial Bank in the customary way was transacting business as an active banking institution, so made payments for it and at its instance or request that a claim or demand was created against the last-named bank for which its shareholders

are by the statute made individually responsible to the extent of the amount of their stock. It follows that the dismissal of the bill as amended was erroneous.

The decree to that effect is reversed.

DEASON v. UNITED STATES.

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

No. 3246.

1. CRIMINAL LAW ⟸371(1)—OBSTRUCTING ENLISTMENT—EVIDENCE—OTHER OFFENSES.

On trial of a defendant, under Espionage Act June 15, 1917, for willfully obstructing the recruiting or enlistment service, statements made by him before the passage of the act may be admissible, as tending to show the intent and purpose of statements subsequently made, on which the charge is based.

2. ARMY AND NAVY ⟸40—ESPIONAGE ACT—CONSTRUCTION—"OBSTRUCT" ENLISTMENTS.

In Espionage Act June 15, 1917, § 3, making it an offense to "willfully obstruct the recruiting or enlistment service," the word "obstruct" is not used as the equivalent of "prevent," but rather of "to make difficult," and, to warrant conviction for its violation, it need not be shown that defendant's words or acts actually prevented recruiting or enlistment.

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

In Error to the District Court of the United States for the Western District of Texas; Duval West, Judge.

Criminal prosecution by the United States against Troy Deason. Judgment of conviction, and defendant brings error. Affirmed.

Levi Herring, of Glen Rose, Tex., for plaintiff in error.

Hugh R. Robertson, U. S. Atty., of San Antonio, Tex.

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

GRUBB, District Judge. The plaintiff in error was convicted of a violation of section 3, title 1, chapter 30, of the Act of June 15, 1917 (40 Stat. 219), commonly called the Espionage Act. The germane part of that section is as follows:

"Whoever, when the United States is at war, shall willfully * * * obstruct the recruiting or enlistment service of the United States to the injury of the service or of the United States, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both."

The evidence showed, sufficiently to justify the jury's verdict, that the defendant had made threats against, and in the presence of, a member or members of his local exemption board, because of his not receiving a different classification, and for the purpose of bringing about a change in his classification. Certain technical errors are relied upon for reversal, based upon the admission of alleged incompetent evi-

dence, and certain exceptions to the general charge of the court, involving, among other things, the proper construction of the part of the section of the Espionage Act under which the conviction was obtained.

The first error assigned is based upon the action of the court below in permitting the government's witness, Hubert Thomas, to testify that he was warned by parties to keep a watch out for defendant. The only ground of objection interposed by the defendant was that—

"Said statements, if any, were made to said witness after the defendant was arrested upon the charges complained of in the bill of indictment against the defendant."

The bill of exceptions contains this statement of the evidence excepted to, viz.:

"Witness testified further that some parties, whom he could not now recall, came to me and told me that I had better watch the defendant. I do not recall that they detailed any statements that defendant had made, but warned me to be on my guard."

The record fails to show that the warning was given after the arrest of the defendant, and, as the objection is based solely on that ground, it is unnecessary for us to consider whether it was otherwise admissible.

[1] The second error relied upon is based upon the action of the court below in permitting the government's witness, J. B. Fox, to testify that in April, 1917, before the Selective Service Act (Act May 18, 1917, c. 15, 40 Stat. 76) was approved, he heard the defendant say:

"If Congress passes the draft act, we will have no more liberties in this country, and I think I will go to Mexico. They have a better form of government over there, anyway, than we have here."

The objection was placed upon the sole ground that—

"It was a statement made by the defendant prior to the enactment of the law which he is charged with violating."

If the government had relied upon the statement as a ground of conviction, the objection might have been tenable. It constituted, however, no part of the charge upon which he was indicted and tried. It was offered only to illustrate the intent and purpose with which he made the threats charged in the indictment. The statute punishes only a willful obstruction of recruiting or enlistment. The intent or purpose with which the threats were made was therefore an issue in the case. Unless the purpose to obstruct was deduced from the evidence by the jury, the defendant could not have been convicted. Statements made by the defendant, indicating his hostility to the draft, whether made before or after they became punishable by the Espionage Act, or before or after the draft was made an accomplished fact by legislation, might serve to illustrate to the jury the purpose with which he made the threats alleged to have been made after the approval of the Espionage Act, and which were alone relied upon as a ground for conviction.

[2] The third assignment of error is based on the defendant's exception to the court's general charge. The exception is based on three

grounds: (a) That it was a charge upon the weight of the evidence, in that it charged the jury that the presumption was that the defendant intended to carry out the threats, if any, he made; (b) and (c) because it charged that if the defendant, by words spoken or acts done, reasonably calculated to do so, intended to hinder or to obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, he would be guilty of the offense charged; and (d) because the evidence affirmatively showed that the words spoken and acts done by the defendant did not obstruct said service, and did not prevent the officers of the local exemption board from doing their duty as such. The exception is too broad, in that it includes portions of the court's charge that are unobjectionable with those that are claimed to be objectionable. Pretermitting this infirmity, we will consider whether the charge misconstrued the act of Congress upon which the conviction is based.

The contention of defendant is that the act punishes alone an obstructing of the service to its injury, or that of the United States, that is successful, and that the court's instruction that "the government is not required to prove, nor is it necessary, that any member of the local exemption board of Somerville county was actually prevented from, or hindered in, the performance of his duty as a member of said board, nor is the government required to prove that any person or persons were actually prevented from enlisting in the military service of the United States, or were actually prevented or hindered from doing anything that they were required to do under the provisions of the Selective Service Act," was in conflict with this construction of the act. The exact contention of the defendant's counsel is that the statutory word "obstruct" is equivalent to the word "prevent," and that success in the sense of an actual prevention of the performance of duty is essential to be proven before a conviction can be had.

We do not agree with this contention. It is true that the statute does not punish an attempt to obstruct, and the indictment does not charge an attempt to obstruct. Yet there may be an unsuccessful obstruction that is more than an attempt. We construe "obstruct," not as the equivalent of "prevent," but rather as the equivalent of "to make difficult" or "to present obstacles to the accomplishment of a thing." The obstacles may have failed to prevent accomplishment, but if they served to make accomplishment more difficult, either in the instant case for the members of the local exemption board against whom the threats were made, or in the future performance of their duties as such members, then we think the service was obstructed, within the meaning of the statute, to the injury of the service or of the United States, though the local board in the case of defendant overcame the obstruction and performed their duty by refusing to reclass him on his demand. That a threat of the nature indicated by the record would make it more difficult for the members of the local board to do their duty, both in defendant's case and in classifying future drafted men, is obvious. Presenting such an obstacle to the performance of the duty of the board in classifying under the draft act, we do not think the government was required to go further, and prove that the obstruction prevailed to the

extent of causing a miscarriage in a particular case. It was enough that it proved that the natural and inevitable tendency of such threats was to make it more difficult for the members of the board who were threatened to do their duty impartially than it would otherwise have been.

This being our view of what the act requires to be charged and proven, we think the court below correctly charged the jury that the threats, of themselves, and without direct proof of their success in preventing the board from doing its duty, might show to a jury a sufficient obstruction of the recruiting or enlistment service, to its injury and to that of the United States. In this view of the matter, the denials of all the members of the board that they were dissuaded from doing their duty by the threats are not conclusive of that issue, but at most mere evidence for the jury to act upon in determining it. The difficulty of making proof that the threats operated on the minds of the members of the local board effectively is reason enough for the adoption of the construction of the statute we have arrived at, if the language were less clear than it is, that the opposing of obstacles and difficulties to, and not the success of such obstacles and difficulties, is what determines guilt under the statute.

Being of the opinion that the District Court committed no reversible error, the judgment is affirmed.

KENNEY v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. November 21, 1918.)

No. 3192.

1. CRIMINAL LAW ⊜448(2)—CONCLUSIONS—FALSE ACCOUNTS BY POSTMASTER.
On trial of a postmaster for presenting a false account in reporting excessive postage cancellations, testimony of an inspector, from examination of the records of many offices of the same class, as to the ratio of sales of stamps to cancellations, and also that there were no industrial plants in defendant's town likely to receive stamps from other places, and his testimony from the records of defendant's office as to the relation of sales to cancellations before his incumbency, *held* not incompetent as conclusions.

2. CRIMINAL LAW ⊜322—EVIDENCE—PUBLIC RECORDS.
The records of a public office, as a post office, are presumptively correct.

In Error to the District Court of the United States for the Eastern District of Texas; Gordon Russell, Judge.

Criminal prosecution by the United States against James Kenney. Judgment of conviction, and defendant brings error. Affirmed.

J. Q. Mahaffey, John J. King, and W. L. Estes, all of Texarkana, Tex., for plaintiff in error.

Clarence Merritt, U. S. Atty., of McKinney, Tex., and J. B. Dailey, Asst. U. S. Atty., of Beaumont, Tex.

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

GRUBB, District Judge. The plaintiff in error was tried and convicted of a violation of section 206 of the Penal Code of the United States (Act March 4, 1909, c. 321, 35 Stat. 1128 [Comp. St. 1916, § 10376]). The first count of the indictment, under which alone he was convicted, charged him with having made a false account, while postmaster at Nash, Tex., in the prosecution of his business as such postmaster, to the Auditor for the Post Office Department, in which he claimed that during the period from April 1, 1916, to June 30, 1916, he canceled $258.10 in stamps, when, in fact, he had canceled a substantially less amount, and that he had made the false account for the purpose of increasing his compensation as postmaster. It was proven that the defendant below was postmaster at Nash during the period stated, and, as such postmaster, had made the report of cancellations of postage in the amount alleged for that period. The disputed questions were whether he had canceled as great an amount of postage as he had reported, and, if not, whether he had reported a greater amount with the fraudulent intent of increasing his compensation as postmaster. Fourth-class postmasters are compensated according to the amount of cancellations of postage. Their compensation increases with their cancellations, under the law by which it is fixed.

The assignments of error relied upon by the plaintiff in error are based on rulings of the District Judge admitting evidence objected to by him, and the denial of requested charges and exceptions taken to the court's oral charge.

[1] The first assignment of error is based on the action of the court in permitting the post office inspector, a witness for the government, to testify:

"That there are no plants or other things being operated there [at Nash], from investigation, as far as he could ascertain, whereby they would send stamps from other places to these local plants."

The ground of objection was that it was a conclusion, and not testimony of a fact. The witness had testified that at fourth-class post offices, generally, sales of stamps exceeded cancellations, and that this was always true, in his experience, unless there were plants at the places which procured their postage from post offices located elsewhere than where the plant was, instancing sawmills and factories, whose home offices, located elsewhere, supplied the mill or branch office with postage. The witness testified that he had been in Nash three days, and had investigated the kind of business done there. He was qualified to testify, as a fact, and not as a conclusion, that he had found in Nash no industries of the kind he described (mills and branch houses), which were likely to be supplied with postage from an office other than that at Nash. The weight of his evidence might be affected by his limited opportunity, but this would not render it inadmissible.

The second and eighth assignments of error are both based on the action of the court below in permitting the same witness to testify:

That "in the ordinary course of business of fourth-class post offices, the sales of postage exceed the cancellation of postage, and that such is the case in about 98 per cent. of the fourth-class post offices."

The witness had testified that he had investigated about 1,000 fourth-class post offices, and had noted the comparison between cancellations and sales, in his investigations, and gave that as the result of his experience. We think the evidence was competent. It was not hearsay, since it was the result of the witness' personal examinations of the books and records of the offices he had examined, and not of statements made to him by the various postmasters of those offices. For the same reason, the defendant was not denied the privilege, accorded him by the Constitution, of being confronted by the witnesses against him. The fourth-class postmasters were in no sense the witnesses who furnished the testimony. It came from the mouth of the inspector, testifying from the records of the various post offices.

Nor do we think it was either practicable or legally necessary to have produced the records of the various offices his examinations covered. The records of a public office are presumed to be correct. His testimony related to a course of business among fourth-class post offices, and such a course of business could be established by a witness familiar with the conduct of the business, whether his familiarity came from his being engaged in the business himself or from supervising those who were. A bank examiner, as well as a banker, is competent to testify to a banking usage or course of business. If the inquiry had been confined to a single office, and had not been as to the course of business of fourth-class offices generally, production of the records of the single office and of the postmaster who kept them, might have been required. The fact that sales would normally exceed cancellations, unless stamps were procured by patrons from other offices, is so obvious as to require no proof. This is all that the testimony of the inspector amounted to. He excluded from the rule offices where stamps were accustomed to be procured by patrons at other offices than the office of cancellation. The percentage of such offices was unimportant. The important fact was whether Nash was an office of that kind.

[2] The third assignment of error is based on the ruling of the court below in permitting the post office inspector to testify from the records of the post office at Nash at a time prior to the defendant's incumbency as to the relation between sales and cancellations in that office. The records of the office were produced and identified by the defendant, and delivery of them to the inspector made by the defendant. This was a sufficient identification of them as records of the Nash office for the period they purported to cover. The books themselves were introduced in evidence. The only ground of objection was that the defendant was not in charge of the office when they were made, and their correctness had not been established. Being the records of a public office, they were presumptively correct. They were material to furnish a basis of comparison between the office in the respect involved before and during the defendant's incumbency as postmaster.

The fourth assignment of error is based on the ruling of the court below in permitting the government to introduce in evidence "15

envelopes containing mail matter addressed to the Nash post office, on which there were marks showing postage to be due on each of them." The ground of objection was that the evidence was immaterial and irrelevant, and related to a different offense than that for which the defendant was being tried. The defendant, on cross-examination and without objection from his counsel, identified the envelopes, and testified that they did not bear canceled due stamps, and did contain a notation of due postage, and that they were received at the Nash post office while he was postmaster, and were delivered by him to the cashier of the bank to which they were addressed, and that he either failed to collect the due postage from the addressee, or, if he collected it, failed to place due stamps on the letters, but did place the amounts collected in the postal funds of the office. The envelopes do not appear in the record. They are described as being "15 envelopes last referred to, on each of which was a notation that postage from 2 to 10 cents was due, but on which there were no overdue stamps."

The defendant, without objection on his part, had already testified to the fact that the 15 envelopes which had been received by him and delivered to the addressee had a notation of postage due on each, and had no overdue stamps on them. Clearly the introduction of the envelopes themselves added nothing to his voluntary recital of their contents. Nor would the defendant be permitted, after giving his version of their contents, without interposing any objection to the inquiries, to object to the introduction of the envelopes, if they conflicted with his version. There was, however, no conflict between the envelopes introduced by the government over defendant's objection and his verbal description of them, made without the interposition of any objection from him. As the plaintiff in error could have suffered no injury from the introduction of the envelopes, after voluntarily testifying to their contents, we find it unnecessary to determine whether their admission was erroneous.

The fifth and sixth assignments of error are based on the refusal of the trial court to give requested instructions on the law of circumstantial evidence and reasonable doubt. The District Judge declined to grant the requests, because their subject-matter had, in his opinion, been fully covered in the oral charge. We agree with the trial judge's conclusion in this respect.

The seventh assignment of error is based on an exception to that part of the court's oral charge defining reasonable doubt. We find no error in the definition, and think the court below fairly and fully instructed the jury upon this matter. The exception did not direct the court's attention to any specific defect in the definition.

As we are of the opinion that there is no prejudicial error in the record, the judgment of the District Court is affirmed.

UNITED STATES v. DIAMOND COAL & COKE CO.

(Circuit Court of Appeals, Eighth Circuit. December 4, 1918.)

No. 5146.

1. LIMITATION OF ACTIONS ⟸100(10)—PUBLIC LANDS—PATENTS—SUIT TO CANCEL.

Under Act March 3, 1891, § 8 (Comp. St. 1916, § 5114), providing that suits to vacate patents hereafter issued shall be brought within six years after the date of issuance, where the fraud is concealed, the cause of action is not deemed to accrue until discovery; but, whether the fraud is concealed, or is committed so that it conceals itself, reasonable care and diligence by the United States to discover it are indispensable conditions to a suit to vacate a patent after the bar of the statute has fallen.

2. LIMITATION OF ACTIONS ⟸195(5)—SUIT TO CANCEL PATENT—BURDEN OF PROOF.

Where the United States, after more than six years from the date of issuance, sues to cancel a patent and seeks equitable relief from the bar of Act March 3, 1891, § 8 (Comp. St. 1916, § 5114), it has the burden of showing that it exercised reasonable care and diligence to discover the fraud before limitations ran, that it had no knowledge or notice of facts which would have incited an ordinarily prudent person to inquiry which would have led to a discovery of the fraud, and that defendant concealed the fraud.

3. STATES ⟸190—UNITED STATES ⟸124—EQUITABLE CLAIMS—RULE APPLICABLE.

The equitable claims of a state or nation appeal to the conscience of a chancellor with no greater or less force than would those of a private citizen under like circumstances; and, barring the effect of mere delay, they are judicable in a court of chancery, to whose jurisdiction the state or nation submits them, under the rules applicable to private citizens.

4. PUBLIC LANDS ⟸120—SUITS TO CANCEL PATENT—LIMITATIONS.

A court of chancery cannot grant relief, in a suit by the United States to cancel a patent on account of fraud, after the expiration of six years, in the absence of reasonable care and diligence on its part to discover the same, for Act March 3, 1891, § 8 (Comp. St. 1916, § 5114), expressly forbids such suits, and to grant relief would be a species of judicial legislation.

5. LIMITATION OF ACTIONS ⟸179(2)—PUBLIC LANDS—SUIT TO CANCEL PATENT—BILL.

In a suit to cancel a patent to public land, begun more than six years after issuance, *held*, that the bill, which showed defendant was and had been in possession, was insufficient to show such diligence on the part of the United States to discover the fraud as would relieve it of the bar of Act March 3, 1891, § 8 (Comp. St. 1916, § 5114).

6. NOTICE ⟸6—POSSESSION.

Possession of real estate is notice to the world of the possessor's title.

7. LIMITATION OF ACTIONS ⟸179(2)—PUBLIC LANDS—SUIT TO CANCEL PATENT—BILL.

A bill seeking cancellation of a patent to public land more than six years after issuance, despite Act March 3, 1891, § 8 (Comp. St. 1916, § 5114), is insufficient, where it merely averred ignorance on the part of the United States at one time, and knowledge of the fraud at a later date, for such allegations are of no effect.

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

Bill by the United States against the Diamond Coal & Coke Company. The bill was dismissed, as not stating a cause of action, and the United States appeals. Affirmed.

This is a suit in equity, brought by the United States against the Diamond Coal & Coke Company, a corporation, to avoid for fraud in obtaining them the patents to 18 tracts of land, aggregating 2,283 acres, and the deeds thereof made by the 18 patentees to the coal company. The alleged fraud was the hiring and causing by the coal company of dummy entrymen to enter as coal lands, procure patents for, and to convey the lands in controversy to the coal company at its expense and for its benefit, by means of false representations to the local land officers of the United States that each entryman had expended the requisite sums of money in developing the coal mines upon the land he entered, that he was in the actual possession of that land, that he made his entry for his own use and benefit, and not directly or indirectly for the use or benefit of any other person or party, when the facts were that the coal company was in the actual possession of all the land, that it had paid all the expenses of developing mines thereon and all the expenses of entering it, and that it was entered for the benefit of the coal company, and not for the use or benefit of any of the entrymen, all of whom conveyed the lands they respectively entered to the coal company immediately after they finally entered them. The plaintiff alleged that this fraud was perpetrated between February 26, 1895, and December 13, 1903, and that prior to the latter date all the entrymen had conveyed the lands they respectively entered to the coal company. This suit was commenced on October 17, 1917, a little more than 13 years and nine months after the completion of the fraud. The coal company made a motion to dismiss the bill of complaint, on the grounds that it failed to state a case which entitled the plaintiff to any relief in equity, that it disclosed the facts that the alleged cause of action was barred by the act of Congress, and that the plaintiff was guilty of such negligence in failing to discover the fraud and commence the suit, that it was estopped from maintaining it. The court below granted the motion, and the complainant appealed.

David J. Howell, Asst. U. S. Atty., of Cheyenne, Wyo. (Charles L. Rigdon, U. S. Atty., of Cheyenne, Wyo., on the brief), for the United States.

W. B. Rodgers, of Anaconda, Mont. (L. O. Evans and D. M. Kelly, both of Butte, Mont., and B. M. Ausherman, of Evanston, Wyo., on the brief), for appellee.

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

SANBORN, Circuit Judge (after stating the facts as above). [1, 2] The Act of Congress of March 3, 1891, c. 561, § 8, 26 Stat. 1099 (Comp. St. 1916, § 5114), provides:

"That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents."

But this statute is construed and enforced pursuant to decisions of the federal courts in co-operation with the familiar equitable principle that where the victim of a concealed fraud exercises reasonable diligence to discover it and fails so to do, or to receive such notice thereof as would excite the attention of, and incite a person of ordinary prudence and ability in his place to an inquiry which would have led to a discovery of the fraud, the cause of action for the fraud does

not accrue until such discovery or the receipt of such notice. Exploration Company v. United States, 247 U. S. 435, 38 Sup. Ct. 571, 62 L. Ed. 1200; United States v. Exploration Co., 203 Fed. 387, 121 C. C. A. 491; Exploration Co. v. United States, 235 Fed. 110, 111, 148 C. C. A. 604; Linn & Lane Timber Co. v. United States, 196 Fed. 593, 116 C. C. A. 267; Bailey v. Glover, 88 U. S. (21 Wall.) 342, 348, 22 L. Ed. 636. In the case last cited, which is approved in Exploration Co. v. United States, 247 U. S. 435, 38 Sup. Ct. 571, 62 L. Ed. 1200, the Supreme Court, after stating that ignorance of the fraud produced by affirmative acts of the perpetrator whereby the facts were concealed relieves from the bar of the statute, added that the weight of authority was in favor of the further proposition:

"That where the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party."

So the rule is that, whether the fraud is concealed by special acts of the perpetrator after its commission or is so committed that it conceals itself, reasonable care and diligence of the injured party to discover it are indispensable conditions of the maintenance of a cause of action upon it after the bar of the statute has fallen. The act of Congress declares that suits by the United States to vacate patents for fraud shall not be brought subsequent to 6 years after the date of the patents. When the 6 years have expired such suits are therefore presumed to be barred. And when the injured party invokes the aid of a court of equity to release him from that bar, the burden unavoidably falls upon the plaintiff to plead and prove (1) that it exercised reasonable care and diligence to discover the fraud before the statute of limitations ran; (2) that it had no knowledge or notice of any action which would have excited the attention of and would have incited a person of ordinary prudence and ability in the plaintiff's situation to an inquiry which would have led to a discovery of the fraud; and (3) that the defendant concealed the fraud by trick or artifice, or so committed it that it concealed itself. Hence the question which the case presents is whether or not the United States has so pleaded these facts as to entitle it to relief by a court of equity from the plain bar of the statute.

[3] By the terms of the Act of Congress of March 3, 1891, this suit is forever barred unless the court of equity ought to relieve the plaintiff from that bar on the equitable principle which has been stated. The United States accordingly has invoked the aid of the court of equity and of this equitable principle to secure this relief. The equitable claims of a nation or a state appeal to the conscience of a chancellor with the same, but with no greater or less force, than would those of a private citizen under like circumstances, and, barring the effect of mere delay, they are judicable in a court of chancery, to whose jurisdiction the nation or state voluntarily submits them, by every principle and rule of equity applicable to the rights of a private citizen under similar circumstances. United States v. Stinson, 197 U. S. 200,

204, 205, 25 Sup. Ct. 426, 49 L. Ed. 724; United States v. Detroit Timber & Lumber Co., 131 Fed. 668, 677, 67 C. C. A. 1, 10; United States v. Debell, 227 Fed. 775, 779, 142 C. C. A. 299; United States v. Chandler-Dunbar Water Power Co., 152 Fed. 25, 81 C. C. A. 221; United States v. Midway Northern Oil Co. (D. C.) 232 Fed. 619, 631; State of Iowa v. Carr, 191 Fed. 257, 266, 112 C. C. A. 477, and authorities there cited.

[4] Nor will mere delay by the United States after the expiration of the 6 years in the absence of reasonable care and diligence on its part to discover the fraud suffice to induce a court of chancery to grant the relief from the bar of the act of Congress and the maintenance of its suit under the rule and the authorities, such as United States v. Nashville, Chattanooga & St. Louis Ry. Co., 118 U. S. 120, 125, 6 Sup. Ct. 1006, 30 L. Ed. 81, United States v. Beebe, 127 U. S. 338, 344, 348, 8 Sup. Ct. 1083, 32 L. Ed. 121, United States v. Kirkpatrick et al., 9 Wheat. 720, 6 L. Ed. 199, Gaussen v. United States, 97 U. S. 584, 24 L. Ed. 1009, and United States v. Insley, 130 U. S. 263, 266, 9 Sup. Ct. 485, 32 L. Ed. 968, cited by counsel in support of it, that no time runs against the sovereignty, or as the Supreme Court states it, that the "United States, asserting rights vested in them, as a sovereign government, are not bound by any statute of limitations, unless Congress has clearly manifested its intention that they should be so bound." 118 U. S. 125, 6 Sup. Ct. 1008, 30 L. Ed. 81. And this because, first, Congress has clearly manifested its intention by the Act of March 3, 1891, that mere delay for 6 years after the date of the patent shall no longer constitute an excuse for failure to bring, and shall be fatal to, a suit to avoid the patent for fraud, unless a court of chancery relieves it from the bar, on the equitable principle which has been stated, and reasonable care and diligence of the party injured to discover the fraud are a sine qua non of such relief; and, second, because the judicial affirmance of the contention that the mere delay of the United States without reasonable care or diligence on its part to discover the fraud, warrants the maintenance of a suit to avoid the patent after the 6 years would, in effect, repeal the act of Congress and authorize the maintenance of such suits as freely after as before the expiration of the 6 years, and such a decision would constitute pernicious judicial legislation. United States v. Puget Sound Traction, Light & Power Co. (D. C.) 215 Fed. 436, 441.

[5, 6] Hence the first question in this case is: Has the plaintiff averred in its bill of complaint facts which show that it exercised reasonable care and diligence to discover the fraud, that it had no means of knowledge thereof, no notice sufficient to put it on its guard and call for inquiry, and has it alleged the time when the fraud was discovered, the circumstances of its discovery, what the discovery was, and why it was not made before so that the court may clearly see that the discovery could not have been made before by the exercise of ordinary diligence? For the rule is firmly established by repeated decisions of the federal courts that all these allegations and more are indispensable to the statement of a cause of action in equity for relief from a statute of limitations on the ground of ignorance of the fraud. Wood

v. Carpenter, 101 U. S. 135, 138, 139, 140, 141, 148, 25 L. Ed. 807; Felix v. Patrick, 145 U. S. 317, 321, 12 Sup. Ct. 862, 36 L. Ed. 719; Badger v. Badger, 69 U. S. (2 Wall.) 94, 95, 17 L. Ed. 836; Pearsall v. Smith, 149 U. S. 231, 236, 13 Sup. Ct. 833, 37 L. Ed. 713; Hardt v. Heidweyer, 152 U. S. 547, 559, 14 Sup. Ct. 671, 38 L. Ed. 548. The only facts averred in the bill of complaint pertinent to the question whether or not the plaintiff exercised reasonable diligence to discover the fraud between 1903 when its perpetration was complete and the commencement of this suit on October 11, 1917, were these: The coal company and the entrymen conspired to commit the fraud before they perpetrated it, and, as a part of that conspiracy, they then had an understanding and agreement that they should be silent concerning it and should conceal it. They have done so. "Neither the plaintiff nor any officer of the United States having authority in the premises ever had any knowledge or information concerning the frauds perpetrated upon the plaintiff, as aforesaid, excepting that on or about the month of November, 1916, there was filed in the General Land Office of the United States, at Washington, D. C., a report upon said entries by one John A. Smith, Special Agent of the Department of the Interior." Ever since that day the Interior Department and the Department of Justice have been diligently investigating the fraud and preparing and instituting judicial proceedings to avoid its effect. At the time the lands were entered and at the time the conspiracy to enter them was formed the coal company was in possession of the land, and it has been in possession thereof ever since, and for many years it has been mining these lands and extracting coal therefrom. Each of the entrymen conveyed the portion of these lands that he entered to the coal company immediately after the final entry thereof. The complaint contains no allegations of any other facts tending to show diligence to discover the fraud.

The Supreme Court quoting from Angell on Limitations, § 187 and note, said in 101 U. S. 141, 25 L. Ed. 807:

> "The presumption is that if the party affected by any fraudulent transaction or management might, with ordinary care and attention, have seasonably detected it, he seasonably had actual knowledge of it."

The transaction here was in reality a sale of the lands by the United States for cash through its local land officers. The fraud alleged was that the United States was induced by the false representations of the coal company and its agents, the entrymen, to sell the lands to the coal company in the belief that it was selling them to the entrymen. But the coal company was in possession of the lands at the time the sale was made and has been in possession of them and operated them ever since. Possession of real estate is notice to the world of the possessor's title. The entrymen conveyed all these lands to the coal company prior to the year 1904. There is no averment in the bill of complaint that these conveyances were not seasonably recorded. In reality this is a suit to rescind a sale for cash of speculative mining property, a proceeding which demands extraordinary promptness and diligence on the part of him who would rescind, on account of the changing values of the property. It is incredible that, under this state of facts, a ven-

dor to whom the open, continuous, operative possession of the fraudulent vendee gave constant notice of its claim of title ever after 1903, could not or would not, if it exercised ordinary diligence, have discovered to whom it had sold its property long before the six years allotted by the statute expired.

[7] Again the burden was upon the complainant to allege facts disclosing persuasive equitable grounds for excusing its failure to discover and avoid the fraud. The Supreme Court has repeatedly pointed out the averments necessary to be made in a pleading to enable the plaintiff to bear this burden. In Wood v. Carpenter, 101 U. S. 140, 143, 25 L. Ed. 807, it declared that a general allegation of ignorance at one time and knowledge at another, was of no effect, that there must be distinct averments as to the time when the fraud was discovered, what the discovery was, how it was made, why it was not made sooner, that the circumstances of the discovery must be fully stated, and that the delay must be shown to have been consistent with requisite diligence. Over and over again has the Supreme Court approved this statement from Badger v. Badger, 69 U. S. (2 Wall.) 95, 17 L. Ed. 836:

"The party who makes such appeal should set forth in his bill specifically what were the impediments to an earlier prosecution of his claim, how he came to be so long ignorant of his rights, and the means used by the respondent to fraudulently keep him in ignorance, and how and when he first came to a knowledge of the matters alleged in his bill; otherwise the Chancellor may justly refuse to consider his case, on his own showing, without inquiring whether there is a demurrer or formal plea of the statute of limitations contained in the answer."

The bill of complaint fails to contain the allegations thus specified and adjudged indispensable to the complainant's alleged cause of action. It contains no averments of any impediments to an earlier prosecution of the plaintiff's claim other than the immaterial fact that it was ignorant of its claim in 1903 and aware of it in 1916. The agreement and understanding of the coal company and the entrymen, to keep silent about and conceal the fraud, is alleged to have been made before it was committed and is therefore merged therein. United States v. Puget Sound Traction, etc., Co. (D. C.) 215 Fed. 436, 440. The complaint contains no allegation of any means used by the coal company after the completion of the fraud in 1903 to keep the plaintiff in ignorance of it. There is nothing in the complaint to show why the fraud could not have been discovered and the suit brought as well at any time after 1903 and prior to 1915 as after the latter date. There is no material averment in it of how and when the plaintiff first came to a knowledge of the matters alleged in the bill. The averment on that subject fails to state any pertinent or material fact except that the plaintiff and all its officers having authority in the premises were ignorant of the fraud until and except that in November, 1916, a special agent of the Interior Department filed a report on the entries on which complaint is made. But the bill contains no statement of the facts this report revealed, of who discovered them, when they were discovered or how or why the special agent made the report, or of any other material facts tending to show that the knowledge of the fraud could not have been discovered as well in 1904 as in 1916. And the conclu-

sion of the whole matter is that the complaint states a case in which, in view of the constant operative possession of the coal company of all the lands in controversy, from prior to 1903 to the present time, and of the conveyance of them to it by the entrymen prior to 1904, the exercise of ordinary care and diligence could and would have discovered the fraud long before the expiration of six years from the dates of the patents and it fails to contain allegations indispensable to constitute a cause of action in equity to relieve the plaintiff from the bar of the Act of Congress of March 3, 1891.

The decree below must therefore be affirmed; and it is so ordered.

MANUEL v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. October 14, 1918.)

No. 4988.

1. JURY ⟸131(8)—EXAMINATION OF JURORS—CAPITAL PUNISHMENT.
   Examination of jurors on the point of prejudice against capital punishment, determination of which is, by Cr. Code, § 330,[1] committed to the jury, should be confined to ascertainment of their views and the strength thereof, with the sole object of determining whether they would approach the issue in the proper frame of mind.
2. CRIMINAL LAW ⟸655(4)—EXAMINATION OF JURORS BY COURT—CAPITAL PUNISHMENT.
   Statements of court to jurors, excused for prejudice against capital punishment, determination of which is, by Cr. Code, § 330, committed to jury, as to duty to enforce the laws as made, *held* prejudicial, especially where, relative to letters received by all members of the panel, the court had said some one had tried to obstruct the proper administration of justice in the case by seeking to prevent assessment of death penalty.
3. WITNESSES ⟸48(1)—CONVICT AS WITNESS.
   A convict is a competent witness in a federal court.
4. CRIMINAL LAW ⟸703—OPENING ARGUMENT—REFERENCE TO FORMER CONVICTION.
   Reference by prosecuting attorney in opening argument to the crime, murder, for which defendant was serving sentence at the time of the killing of a prison guard, was unnecessary and prejudicial.

In Error to the District Court of the United States for the District of Kansas; John C. Pollock, Judge.

Ono Manuel was convicted of murder, with sentence of death, and brings error. Reversed.

Redmond S. Brennan, of Kansas City, Mo., for plaintiff in error.

L. S. Harvey, Asst. U. S. Atty., of Kansas City, Kan. (Fred Robertson, U. S. Atty., of Kansas City, Kan., on the brief), for the United States.

Before HOOK and STONE, Circuit Judges, and WADE, District Judge.

STONE, Circuit Judge. Writ of error from a conviction, with sentence of death.

Eleven so-called assignments of error are here urged, but it is unnecessary to decide all of them. It is charged that during the in-

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

[1] Comp. St. § 10504.

panelment of the jury the court made prejudicial statements concerning the capital penalty, and concerning the receipt by the panel of circulars and form letters concerning capital punishment. Although not known at the time of this trial, it is stated by the district attorney with commendable frankness that these circulars and letters had been sent to the entire panel by the mother of a man to be tried at the same term for another killing. The entire panel, in the instant case, were examined concerning the receipt of these papers, and concerning their views upon capital punishment. In the course of the examination of the first juror the court made a statement to the panel regarding these papers. This statement was within proper bounds. It did, however, emphasize to the panel that some one had endeavored to obstruct the proper administration of justice in that case to the extent of seeking to prevent the assessment of the death penalty. This is important in connection with the further action of the court in remarks regarding the death penalty.

In course of the examination of several jurors it developed that they did not favor the death penalty, and some were excused because they declared that they would not assess it. In connection with this examination the court engaged in the colloquies following:

"Q. Do you believe in the enforcement of the laws of our country? A. Yes, sir; I do, but I don't—My conscience does not take that law as one that should be there, the death penalty.

"Q. You have nothing whatever to do, sir, with the making of the laws; it is the obligation of some one else to make the laws. It is the duty of courts and jurors to enforce the law as made. You say you have conscientious scruples against enforcing the laws as made by the lawmaking power? A. Against inflicting the death penalty, I have.

"Q. Well, answer my question. As I understand, you have conscientious scruples against the enforcement of the laws as made by the lawmaking power; that is, the Congress of our country? A. Yes, sir; as it applies to that.

"The Court: Stand down."

"The Court: You understand, do you, that in this country of ours, that we have different departments of government? A. Yes, sir.

"Q. You understand it is the duty of the lawmaking power to make the law? A. Yes, sir.

"Q. You understand it is the duty of our courts of justice to enforce the laws as made? A. Yes, sir.

"Q. Notwithstanding that fact, notwithstanding the fact that you now are an officer of the court, you tell me that you are not in favor of enforcing the laws as made in cases where you would believe that the law required the infiction of the death penalty? A. No, sir; I couldn't vote for it.

"The Court: Stand down."

"The Court: Q. You understand, of course, that as a juror here in this court you have nothing whatever to do with the making of the laws, do you? A. Yes, sir.

"Q. You understand that our courts of justice are organized by the law for the purpose of enforcing the law? A. Yes, sir.

"Q. Do I understand you to say that as an officer of this court, engaged in the administration of justice, that you are not willing to enforce the laws as made by the lawmaking power? A. Not on capital punishment.

"The Court: You may stand down."

"Q. I am endeavoring to tell you, in this court the jury, and the jury alone, is the exclusive judge of the weight of the evidence, the credibility of the witnesses, and the facts proven in the case; on the other hand, the court, and

the court alone, is the exclusive judge of the law of the case, and it is the duty of a juror to take the law precisely as declared by the court, and to find the facts from the evidence offered here in court, and thus determine whether any one is or is not guilty. Now, if you have any conscientious scruples, sir, against doing that, you are not a fit juror. A. Well, I would have to admit that I have those scruples.

"Q. Have what? A. That I have a conscientious scruple against administering the death penalty; that is, that would be first degree murder, if I understand it right.

"Q. That is, you would have conscientious scruples against doing your duty under the law as an officer of this court and as a citizen of our country—is that right? A. I think so.

"Q. Well, sir, you can stand down. If we had fewer men of such view, we would have less crimes committed.

"(Juror excused.)"

"Q. You mean to say that you wouldn't follow the law as given you by the court in considering your verdict? A. I couldn't do it with the right feeling.

"Q. How? A. I don't believe in capital punishment; I couldn't do it with the right feeling.

"Q. Well, you had nothing whatever to do with the making of the law, had you? A. I know it.

"Q. How? A. I know I didn't.

"Q. Well, so long as it is the law, whatever the law is, as made by the lawmaking power, you wouldn't be willing as a citizen and an officer of this court to enforce it? A. Not with that feeling.

"Q. That is what I am talking about. You have some sort of a notion it is the duty of a citizen to obey the law, do you? A. Yes, sir.

"Q. You have some sort of a notion it is the duty of any good citizen called on to aid in the enforcement of the law to enforce the law as written, have you not? A. Yes.

"Q. Now you say you have conscientious scruples against performing your duty here as a citizen under the law? A. Yes.

"Q. How? A. How is that, I didn't understand it.

"Q. You say—you tell us, you have conscientious scruples, since you have been called here as an officer of the law to enforce the law, against enforcing the law as it is written? A. Not since I have been called here; I have previous had that.

"Q. But you were called here— A. Yes, sir.

"Q. Called here in the manner provided by the law for the purpose of administering justice? A. Yes, sir.

"Q. Now, since you are here, you tell the court that you have conscientious scruples against performing your duty as a citizen and enforcing the law as it is written? Is that what I am to understand? A. Yes.

"The Court: All right, you may stand down."

[1] In capital cases the jury determine for or against capital punishment. Criminal Code (Act March 4, 1909, c. 321), § 330, 35 Stat. 1152 (Compiled St. 1916, § 10504). Considering the delicate position in which every juror must have felt himself placed by the circulars and letters which had been sent with the purpose of affecting his judgment upon that issue, and brought out in the examination of the panel, we deem the above remarks of the court prejudicial to a proper determination by the jury of that matter. The examination upon the point of any prejudice against capital punishment should have been confined to an ascertainment of the juror's views and the strength thereof, with the sole object of determining whether he would approach the issue of capital punishment in the proper frame of mind.

[2-4] It seems proper to notice three other matters called to the attention of the court. The attack upon the jurisdiction of the court is not well taken. The claim that defendant would be entitled to the testimony of other convicts is sustained by the cases of Rosen v. U. S. and Pakas v. U. S., 245 U. S. 467, 38 Sup. Ct. 148, 62 L. Ed. 406. It is also objected that in the opening address the district attorney used prejudicial language. Defendant was indicted while a convict at the Leavenworth penitentiary for killing E. A. Barr, a prison guard. In his statement the district attorney said:

"Mr. Barr came in contact from time to time with this defendant who was a convict there, and I may say that this defendant was a convict there pursuant to a conviction had in the district of Alaska in 1910, at which time and in which district he was there convicted of the crime of murder, this very man, and on account of that conviction is serving a term here in this prison."

The reference to the crime for which defendant was confined was unnecessary and prejudicial.

The judgment is reversed.

ST. CHARLES AMUSEMENT & TRANSPORTATION CO. v. ELHARDT et al.

(Circuit Court of Appeals, Eighth Circuit. December 2, 1918.)

No. 5027.

1. ADMIRALTY ⇐=44—APPEARANCE—EFFECT.
Where the claimant of a vessel libeled had notice and appeared on the return day but did not file its answer, it is immaterial that notice of the seizure and the time when the libel would be heard were not published as required by general admiralty rule 9 (29 Sup. Ct. xl).

2. ADMIRALTY ⇐=91—DEFAULT DECREES—VACATION.
Under general admiralty rule 29 (29 Sup. Ct. xlii), providing that the court may in its discretion set aside a default of a defendant, the court should consider in a general way the questions proposed to be raised, as bearing on the question whether the defendant has been deprived of any important right.

3. ADMIRALTY ⇐=91—DEFAULT DECREES—VACATION.
The refusal of the District Court to set aside a default, and allow the claimant of a vessel libeled to answer after sale, *held* not an abuse of discretion; it appearing the defendant had actual notice and that irregularities before the sale were merely technical, etc.

Appeal from the District Court of the United States for the District of Minnesota; Wilbur F. Booth, Judge.

Libel by Ludwig B. Elhardt and others against the steamer Frontenac and barge Mississippi. Petition by the St. Charles Amusement & Transportation Company to set aside its default and be permitted to answer the libel. From an order refusing to set aside the default, petitioner appeals. Affirmed.

Lowrie C. Barton, of Pittsburgh, Pa., for appellant.

H. C. Mead, of Knoxville, Tenn., for appellees Streckfus and Wisherd.

William N. M. Crawford, of Minneapolis, Minn., for libelants.

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

CARLAND, Circuit Judge. On November 28, 1916, the appellant, claiming to be the owner of the steamer Frontenac and barge Mississippi, by its vice president, F. X. Ralphe, filed a petition in the court below to set aside its default in this case and to be permitted to answer the libel filed therein. A copy of the proposed answer was attached to the petition, which was also verified by Ralphe. The petition alleged that on May 15, 1916, appellees filed a libel in the court below in a cause of contract, civil and maritime for wages, against the above-named vessels; that process by attachment and monition was duly issued returnable July 3, 1916. As grounds for setting aside the default of appellant, the petition alleged that the marshal did not cause public notice of the seizure of said vessels to be given in such newspaper within the district of Minnesota as the District Court should order. The petition also contained the following allegation:

"That, as hereinbefore stated, your petitioner received no actual notice of the filing of said libel and proceedings thereunder, but only received constructive notice by reason of the attachment of said vessels. That its officers were ignorant of the proper practice in the premises, fully expecting that actual notice would be served on them as to when they should appear. That it did appear on the 3d day of July, 1916, at 10 o'clock in the forenoon, at Winona, expecting the matter to be called, but the matter was not taken up; they left, expecting that notice would be given them of any further action, and the next it knew was the advertising for sale of the vessels, when it then believed it was too late to take any further steps in the matter, and continued in that belief until a short time since."

These are all the allegations in the petition tending to show any excuse for appellant's default, and in view of the admissions made in the petition it is doubtful whether any cause for setting aside the default is stated. However, we will consider the kind of service that was made upon appellant.

The marshal's return showed that he attached the Frontenac and Mississippi, their engines, etc., on June 1, 1916, at Winona, in said district, and at the same time and place, posted a copy of a notice on said vessels which stated that the marshal had, on the 1st day of June, 1916, seized said vessels and taken them into his custody, and that all persons claiming the same, were notified that the United States District Court, for the district of Minnesota, would on the 3d day of July, 1916, at 10 o'clock a. m. of said day, proceed to the trial and condemnation thereof should no claim be interposed for the same. The return further showed that on the day of the seizure there was served a copy of the monition together with a copy of the above-mentioned notice, on H. C. Bear and George French, at St. Charles, Minn., and on June 2, 1916, the same papers were served on F. X. Ralphe, at Hastings, Minn.

In 1911 appellant, according to the laws of Minnesota, appointed said H. C. Bear, its agent at St. Charles, Minn., for the service of process, the appellant being a foreign corporation, and provided in the appointment that service upon Bear should constitute due and personal service upon the corporation. At the time of the service of

process on Ralphe, he was vice president of appellant and George D. French was secretary thereof. Ralphe applied to the clerk of the District Court on June 14, 1916, and obtained a copy of the libel. On its own admission, it appeared in court in response to the monition on July 3, 1916, at 10 o'clock in the forenoon, expecting the matter to be called. The matter was not taken up and the officers of appellant left.

[1-3] The requirement of general admiralty rule 9 (29 Sup. Ct. xl) that a notice of the seizure and the time when the libel would be heard shall be published, it is admitted, was not complied with nor does it appear that the court ordered such notice to be published; but this fact is immaterial as to the appellant, because it had notice and appeared in court on the return day. It could have filed its answer to the libel in the clerk's office, whether the matter was called up in open court or not. We are fully satisfied from an examination of the record that the appellant had actual notice of the return day of the libel, and that no excuse whatever has been made for setting aside its admitted default. The argument in the court below and here proceeded on the theory that the appellant was properly in the case, and could attack all proceedings in the court below subsequent to the default; but, if the default be not set aside, appellant has no right to discuss the questions raised by its proposed answer, because it is not in the case and has no pleadings therein. General admiralty rule 29 (29 Sup. Ct. xlii) provides that the court may in its discretion set aside the default of a defendant and admit him to make answer to the libel at any time before final decree. As bearing upon this discretion, the court would consider in a general way, the questions which the appellant proposed to raise, if admitted to defend, not for the purpose of deciding them, but as bearing upon the question as to whether the appellant had been deprived of any important right.

We have therefore considered the objections which the appellant makes in regard to the validity of the sale of the vessels. It is claimed that there was no judgment of default and condemnation before a sale of the vessels. The record does not show such a judgment; but, if it did, it would simply be evidence of the default, which appellant admits, and therefore, so far as appellant is concerned, is largely technical. It is also claimed that the vessels were sold for such an inadequate price as to justify the setting aside of the sale. We are not satisfied by any means that the price for which the vessels were sold was inadequate. The purchaser took great risk in the purchase of the vessels in the condition in which they were at the time of the sale, and there has been spent more than $10,000 in repairs upon the same since the purchase thereof. The record also shows that Ralphe, as vice president of appellant, who verifies the petition to set aside the default and also the proposed answer, was present at the sale with a certified check for $7,000, and did not make a bid, for the alleged reason that he did not propose to furnish money for the purpose of allowing libelants' proctor to get a fee. The record shows that Ralphe and others interested in the vessels were continually importuning the marshal to use his influence with the proctor for the libelants to either have the libel

dismissed or the vessels sold. The record also shows that the officers of appellant had actual notice of every step in the proceeding from the filing of the libel on, and did nothing until the present petition was filed November 28, 1916, the sale having been made August 31, 1916.

The other matters complained of in the answer are all matters which the appellant had ample opportunity to set up before its default, and upon their face are without merit in this proceeding. We are therefore satisfied there is no equity in appellant's motion. It was addressed to the sound discretion of the trial court, and that discretion was wisely exercised. That it was abused, as claimed by appellant, has no support whatever.

The order of the District Court, refusing to set aside the default, is therefore affirmed, with costs.

FULLER v. ATLANTA NAT. BANK.

In re PHŒNIX PLANING MILL.

(Circuit Court of Appeals, Fifth Circuit. November 21, 1918.)

No. 3242.

1. MORTGAGES ⟸29, 173—EQUITABLE MORTGAGE—ASSIGNMENT OF BOND FOR DEED.
   Under Civ. Code Ga. 1910, § 3257, an assignment of a bond for title as security for a debt, which clearly expresses its purpose and specifies the debt and the property, is in legal effect a mortgage, and, to be effective against subsequent liens, must be recorded.
2. MORTGAGES ⟸173—RIGHTS OF TRUSTEE—PRIORITY OF LIENS.
   Under Civ. Code Ga. 1910, § 6038, as construed by the state Supreme Court, one holding land under bond for title has no leviable interest therein; but a judgment creditor, nevertheless, has a lien upon his interest which may be enforced as provided by the statute, and the debtor's trustee in bankruptcy, having the rights of a judgment creditor, has a lien which takes precedence of an unrecorded assignment of the bond.

Pardee, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Northern District of Georgia; William T. Newman, Judge.

In the matter of the Phœnix Planing Mill, bankrupt. From an order awarding a fund in court to the Atlanta National Bank, William A. Fuller, trustee, appeals. Reversed.

J. H. Porter and Walter S. Dillon, both of Atlanta, Ga., for appellant.

Alex C. King, Jack J. Spalding, Hughes Spalding, Daniel MacDougald, Eugene Dodd, and Harry Dodd, all of Atlanta, Ga., for appellee.

Before PARDEE, WALKER, and BATTS, Circuit Judges.

BATTS, Circuit Judge. Phœnix Planing Mill, December 22, 1909, purchased land in Atlanta from J. F. Leary, taking bond for title. On March 22, 1913, Phœnix Planing Mill assigned and delivered the bond for title to Lowry National Bank to secure debt. March 25,

1913, it executed a second assignment (subject to the previous assignment) of the bond for title to the American National Bank to secure a debt. This assignment was delivered to the Lowry National Bank, to be attached to the bond for title. July 29, 1913, the bond for title and the first assignment were recorded. The second assignment was not recorded. Subsequently, the Phœnix Planing Mill becoming bankrupt, the trustee sold the land free from the claims of the vendor and the claims of the transferees of the bond for title. The claims of Leary and of the Lowry Bank were paid, and the controversy between the trustee and the Atlanta National Bank (successor to the American National Bank) is over the balance of the proceeds of the sale.

The trustee has the rights of a judgment creditor with a lien. These rights were fixed prior to a record of the assignment to secure debt to the Atlanta National Bank of the bond for title executed by Leary. There is no requirement in the Georgia law that a bond for title be recorded. Executed with certain formalities, its record is permitted. Sections 4213 and 4214, Civil Code of Georgia of 1910. The litigation, however, deals, not with the record of a bond for title, but with the failure to record the assignment of a bond for title; the assignment being made to secure debt.

The legal effect of an assignment to secure a debt of a bond for title is to create a mortgage. The mortgage results from and is evidenced by the assignment; the bond for title defines and limits the rights which the mortgagor has, and upon which he fixes a lien. That this interest is capable of being subjected to a mortgage is indicated by Owens v. Kenney, 146 Ga. 257, 91 S. E. 65, in which it is held that the grantor in a security deed has an interest which he may convey by deed, and by Wood v. Dozier, 142 Ga. 538, 83 S. E. 133, in which a distinction is made between a mortgage of the equity resulting from a security deed with bond for reconveyance, and a mortgage on the "entire interest or estate."

[1] The assignment under consideration names the parties, "clearly indicates the creation of a lien, specifies the debt to secure which it is given, and the property upon which it is to take effect," and must be held a mortgage. Civ. Code 1910, § 3257. A mortgage "shall, as against the interest of third parties acting in good faith without notice, who may have acquired a transfer or lien binding the same property, take effect only from the time it is filed for record." If a judgment creditor could, by his judgment, or by judgment and any character of process, acquire on the property a lien superior to the lien of the unrecorded mortgage, the trustee in this case has a lien superior to that of the mortgagee holding under the unrecorded mortgage.

[2] Since the passage of an act in 1894 (section 6038, Civ. Code 1910) prescribing the procedure when the defendant in execution has an interest in, but not the legal title to, property, the ruling has been that one holding land under bond for title has no leviable interest therein. The interest of a grantor in a security deed, or of one holding bond for title, is not changed by the legislation. Shumate

v. McLendon, 120 Ga. 396, 48 S. E. 10. The rights of the judgment creditor would not appear to be affected, except as to the remedial procedure. Instead of sale of the property and application of proceeds to the extinction of the debt due the holder of the legal title, the statute requires that his "debt be paid before sale." Notwithstanding the statute, there may be circumstances under which a judgment creditor could have his rights enforced by levy and sale before title has become revested by redemption. V. C. Chemical Co. v. Rylee, 139 Ga. 668, 78 S. E. 27.

The change in procedure effected by this act apparently has no effect in creating or preventing a lien. This would seem to be definitely determined by O'Connor, Executrix, v. Georgia Railroad Bank, 121 Ga. 88, 48 S. E. 716, wherein it is held that:

"Regardless of the inability of A.'s creditors to levy on the equity of redemption, the lien of their judgments attached to his interest in the land from the date of rendition; * * * and the right of the creditors to subject the surplus realized under the sale under the security deed to the payment of their judgments was superior to the claim of the transferee of the bond to reconvey, whose interest was acquired subsequently to the date of their judgments."

It is clear that there may be a lien, notwithstanding the absence of a "leviable interest." To this effect also is Va. Car. Chemical Co. v. Rylee, 139 Ga. 668, 78 S. E. 27. The trustee has had, since the date of the bankruptcy, the status of a lien creditor. The transfer of the bond for title, being a mortgage, and not having been recorded prior to that date, is without effect in so far as his rights are concerned.

In this case the remedy of the statute is superseded by the remedies of the Bankruptcy Law. All liens against the property having precedence over the rights of the trustee have been discharged. Procedure under the statute requires that such liens be paid as may be required for placing the legal title in the defendant in execution. If a lien exists, payment of which is necessary to give legal title, but which is subordinate to the judgment lien, the judgment creditor would not, of course, be without a remedy.

The judgment is reversed, for proceedings to conform herewith. Reversed.

PARDEE, Circuit Judge (dissenting). Considering the facts and circumstances of this case, I have serious doubts as to whether this court has jurisdiction of this appeal.

The proceeding in the bankruptcy court was one for marshaling liens on property and funds within the custody of the court, administrative in character, in which there was no contest over the amount of any claim, and the only contest was as to the rank of the lien of the Atlanta National Bank, and therefore it seems to me that no appeal lies from the final decision of the court. The right to appeal must be found in section 25 of the Bankruptcy Law (Act July 1, 1898, c. 541, 30 Stat. 553 [Comp. St. 1916, § 9609]), and, as that section has been construed by the courts, no appeal lies thereunder in administrative proceedings. In re Whitener, 105 Fed. 180, 44 C. C. A. 434; Coder, Trustee, v. Arts, 213 U. S. 223, 29 Sup. Ct.

436, 53 L. Ed. 772, 16 Ann. Cas. 1008; Matter of the Petition of Loving, Trustee, 224 U. S. 183, 32 Sup. Ct. 446, 56 L. Ed. 725.

If the court has jurisdiction in the case, I dissent from the reasoning and conclusion of my Brethren denying the lien of the Atlanta National Bank, because the same was not duly recorded. The question presented arises, and should be decided, under Georgia law, and under that law I think the decision in the lower court was correct. The reasoning and authorities are fully stated in the opinion of Judge Newman, found in the transcript, and I concur with him as to the conclusion reached.

EMPIRE TRUST CO. et al. v. AUBREY.

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

No. 3224.

1. RECEIVERS ⟸96—ATTORNEYS—APPOINTMENT.
It is for the court, and not the trustee named in a mortgage, upon whose suit for foreclosure a receiver was appointed, to determine who should be attorney for the receiver, and be compensated under order of court; so the trustee could not select, in place of the attorney appointed, a firm of which the receiver was a member.

2. RECEIVERS ⟸96—ATTORNEYS—CHANGE.
Merely because it is cheaper, the court, appointing a receiver on mortgage foreclosure, is not required to permit its receiver to employ as his attorney a firm of which he is a member, and which represents one of the parties in the cause, but the court may determine what is for the best interest of all.

3. RECEIVERS ⟸96—ATTORNEYS—DISCRETION OF COURT.
The refusal of the court, appointing a receiver on mortgage foreclosure, to grant the request of the trustee under the mortgage that the attorney appointed to represent the receiver be removed, and a firm of which the receiver was a member be substituted, *held* not an abuse of discretion.

Appeal from the District Court of the United States for the Western District of Texas; William R. Smith, Judge.

Bill by the Empire Trust Company against the Medina Valley Irrigation Company, on which Floyd McGown was appointed receiver. From a decree denying the motion of the complainant to set aside the order appointing William Aubrey, attorney for the receiver, etc., the complainant and receiver appeal. Affirmed.

Floyd McGown, of San Antonio, Tex., and Alex S. Coke, of Dallas, Tex., for appellants.

Frank H. Booth and William Aubrey, both of San Antonio, Tex., for appellee.

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

WALKER, Circuit Judge. On August 12, 1914, under a bill filed in the District Court by the Empire Trust Company (hereinafter referred to as the Trust Company) against the Medina Valley Irrigation

Company, for the foreclosure of a mortgage or deed of trust given by the latter, Floyd McGown was appointed receiver of the properties embraced by the instrument sought to be foreclosed, and William Aubrey (hereinafter referred to as the appellee) was appointed the general attorney for said receiver. On January 11, 1915, the court made an order authorizing the receiver to pay to the appellee for his services as such attorney $250 per month until further ordered by the court, that order providing that—

"The sums so paid on said account shall be taken into consideration by the court when the compensation of said William Aubrey for such services is finally fixed by the court for payment herein."

In pursuance of the orders mentioned, the receiver made payments to the appellee until June, 1915. On August 23, 1917, the court ordered the receiver to pay to the appellee, for services rendered by him as attorney for the receiver, $250 per month from and including July, 1915, until further ordered by the court; the order providing that the sums so paid shall be taken into consideration by the court when the compensation of the appellee for his services as attorney for the receiver is finally fixed by the court. By the same order the receiver was directed to employ and avail himself of the professional services of the appellee in all litigation to which the receiver is a party and in all matters and things affecting said receivership, the property in the hands of the receiver as such, and the said receiver in his official capacity. Thereafter the Trust Company moved the court to set aside the order appointing the appellee attorney for the receiver, and the above-mentioned orders of January 11, 1915, and August 23, 1917. By a decree entered on the 18th day of December, 1917, the just-mentioned motion was overruled, the receiver was directed to pay to the appellee $250 per month from the time of his appointment as general attorney for the receiver, less any sums theretofore paid to him under the orders of the court, and it was further ordered that—

"Neither the law firm of Denman, Franklin & McGown, or either of the members of said law firm, shall be or act as attorney or counsel of Floyd McGown, receiver of this court, as such, in any matter affecting this receivership or the property in the hands of said receiver, as such, or the action of said receiver in his official capacity."

The appeal is from the last-mentioned decree.

[1-3] The record discloses nothing upon which to base an attack upon the correctness or propriety of the decree appealed from, unless it is the existence of a contract entered into some time during the year 1916 between the trustee and the law firm of Denman, Franklin & McGown, of which the receiver is a member, by which that firm, for an agreed compensation of $25,000, undertook to represent the trustee in all litigation affecting the trust estate held under mortgages or deeds of trust in suit, and also to represent the receiver in all matters and litigation affecting the trust estate held by him as receiver. Not long before the making of that contract the trustee had terminated the employment of the attorneys who had theretofore represented it in the suit, and had settled with them for the services rendered under

their employment. The fitness and competency of the appellee for the proper and efficient discharge of the duties of attorney for the receiver were not questioned. That the services he had already rendered as such attorney at the time the decree was entered were reasonably worth more than the amount payable to him under that decree was shown by evidence which was practically undisputed. At any time the court may, of its own motion or at the instance of an interested party, order the discontinuance or reduction of the monthly payments provided for, if it is made to appear that the services rendered or to be rendered by the appellee as attorney for the receiver have been or will be properly compensated for by the payments already made or to be made under the orders of the court. It was disclosed that the receiver, without any order of the court, discontinued the payment to the appellee of the monthly compensation, and to a considerable extent ceased to avail himself of the services of the appellee in matters requiring the rendition of legal services to the receiver, because of the existence of the above-mentioned contract between the trustee and the firm of which the receiver is a member, and because the trustee objected to the appellee's continued rendition of services as attorney for the receiver.

It was for the court, not for the trustee, to determine who was to render the legal services required by the receiver and to be compensated for under the orders of the court. The court's selection of the agencies for the administration and protection of the estate in its custody was not subject to be set aside in whole or in part by the action of a party to the cause, taken without the court's consent or approval. It was beyond the power of the trustee, the plaintiff in the suit, or of the receiver, to substitute in the place of the attorney selected by the court to represent the receiver a firm representing the plaintiff in the suit, of which firm the receiver was a member, entitled to share in its earnings. It has not been made to appear that the court abused its discretion in making the order appealed from. It was not even made to appear that it would cost the trust estate more for the receiver to be represented by the appellee, pursuant to the orders of the court, than it would be for the court to set aside those orders and permit the firm of which the receiver is a member to act as the attorney for the receiver, pursuant to the contract between that firm and the plaintiff in the suit.

The aggregate of the sums payable to the appellee under the court's orders and that properly chargeable against the trust estate for services rendered to the plaintiff by its attorneys under the above-mentioned contract may be less than $25,000. But merely because it is cheaper, the court is not required to permit its receiver to employ as his attorneys a firm of which he is a member and which represents one of the parties to the cause. It was for the court to determine whether the due protection of the estate in its custody required that the receiver have an attorney not in the employment of a party to the cause, and one whose compensation would not be shared in by the receiver. It is no more than a proper precaution to deprive a receiver of any incentive to magnify the services rendered by his attorney. An appro-

priate means to that end is the selection for the position of attorney for the receiver of one in whose compensation the receiver has no interest.

We discover no error in the action of the court evidenced by the decree appealed from. That decree is affirmed.

UNITED PRESS ASS'NS v. NATIONAL NEWSPAPERS ASS'N.

(Circuit Court of Appeals, Eighth Circuit. November 21, 1918.)

No. 5157.

1. APPEAL AND ERROR ⟸1195(1)—RETRIAL—LAW OF CASE.
   A decision on a former writ of error that plaintiff was entitled to recover future profits is the law of the case on subsequent trial; the relevant facts remaining the same.
2. APPEAL AND ERROR ⟸1062(1)—HARMLESS ERROR—SUBMISSION OF QUESTION TO JURY.
   The erroneous submission of issues to the jury is harmless, where the verdict is in favor of the plaintiff in error.
3. APPEAL AND ERROR ⟸977(1)—DENIAL OF NEW TRIAL—ABUSE OF DISCRETION.
   While ordinarily the ruling of the trial court on motion for new trial is not subject to review, the motion being addressed to the sound discretion of the court, yet, if an abuse of discretion is shown, the matter may be reviewed.
4. NEW TRIAL ⟸75(3)—GROUNDS—INCONSISTENT VERDICT.
   In an action for breach of contract, where the jury found that defendant broke the contract, but awarded plaintiff a much less sum than the undisputed evidence showed it was entitled to recover, *held*, that the verdict was so inconsistent that the refusal of the trial court to grant plaintiff a new trial was an abuse of discretion.
5. ESTOPPEL ⟸88(1)—EQUITABLE ESTOPPEL—DAMAGES.
   A telegram by plaintiff's agent, stating that the damages for a certain breach of contract would not be less than $500, *held* not to estop plaintiff from claiming greater damages in a subsequent suit on the contract.

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

Action by the United Press Associations against the National Newspapers Association. There was judgment for plaintiff for part only of the recovery sought, and plaintiff brings error. Reversed, and new trial ordered.

G. B. Arnold, of St. Louis, Mo. (Tyson Dines, Jr., of Denver, Colo., and J. W. Curts, of Cincinnati, Ohio, on the brief), for plaintiff in error.

Frank M. Lowe, of Kansas City, Mo. (John T. Bottom, of Denver, Colo., on the brief), for defendant in error.

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

CARLAND, Circuit Judge. [1] This case was before us at a previous term, and a reference to the opinion then rendered is made for a

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

statement of facts. 237 Fed. 547, 150 C. C. A. 429. On the former writ of error it was decided that upon the facts found by the trial court the plaintiff was entitled to recover future profits. This result was reached by deciding that on the facts found the plaintiff had not waived its right to treat the contract between the parties at an end on March 13, 1911. This is the law of the case; the relevant facts remaining the same. The evidence whereby the defendant sought to justify its breach of the contract was not considered by us when the case was here before, as such a defense had not then been pleaded. By an amendment which is known in the record as the third defense of defendants' second amended answer, the defense of justification is pleaded; but, as the jury found in favor of the plaintiff on that issue, any error committed by the court in submitting to the jury the evidence relating to justification was not prejudicial, and therefore no cause for reversal.

[2] The facts upon which we based our decision when the case was here before consisted largely of letters and telegrams, and this evidence was the same on the second trial of the case as on the first. Notwithstanding this, the trial court submitted the questions which we had decided to the jury. This was error, but as the jury found for the plaintiff it was error without prejudice, and not cause for reversal.

[3] It is assigned as error that the trial court abused its discretion in denying the motion for a new trial. Ordinarily the ruling of the trial court on motion for a new trial is not subject to review, the motion being addressed to the sound discretion of the trial court. There is, however, an exception to this rule in cases where the trial court has, as the law terms it, abused its discretion. Pugh v. Bluff City Excursion Co., 177 Fed. 399, 101 C. C. A. 403; Vallery v. Glenwood Irrigation Co., 248 Fed. 483, 160 C. C. A. 493.

[4, 5] On the question of damages there was an item of $875 conceded to be due from defendant to plaintiff for services rendered under the contract. This sum, with interest, amounted to $1,259. The jury were instructed to return a verdict for this amount in favor of the plaintiff. The other damages claimed were for future profits, had the contract been performed by defendant. The jury retired for deliberation on their verdict June 6, 1917. On the next day they returned their verdict in favor of the plaintiff for $1,259, as directed by the court, and assessed damages for future profits at $1. This verdict, being manifestly inconsistent with the evidence and charge of the court, was not received, and the court, at the request of counsel for both parties, resubmitted the case to the jury in the following language:

"Gentlemen of the jury, it is believed by counsel for each of the parties, and also by the court, that your verdict is inconsistent, so much so that it cannot stand. Your verdict involves the necessary implication that you find that the defendant broke the contract, but it refuses to allow anything more than merely nominal damages; whereas, there is no controversy whatever in the case as to the approximate amount of that damage, and under these facts appearing from the evidence in this case, if you find that the defendant broke the contract, then the plaintiff is entitled to substantial damages. If, on the other hand, you find that the defendant did not break the contract, then the plaintiff is not entitled to any damages at all—not even $1. It is true that

under the instructions of the court both of these subjects and questions of law were left to you—that is, whether or not the contract was broken, and also the amount of damage. Those questions still remain with you, and are the questions for you to consider when you go back to the jury room. If the contract was broken as charged, I repeat, then the plaintiff is entitled to more than $1 damages, under the uncontradicted evidence; if the defendant did not break the contract, then the plaintiff is not entitled to any damages—not even $1, and your verdict must be consistent in that respect, so the bailiff will hand you this form of verdict, and you will retire to further consider."

There was no exception to this charge by either party. In the original charge the court stated the items of damage which the plaintiff claimed, and also stated the total amount to be $13,017, irrespective of the item of $1,259. In the supplemental charge the court stated that there was no controversy whatever in the case as to the approximate amount of plaintiff's damages, if the defendant broke the contract. This statement was true. The damages according to the evidence of the plaintiff amounted to $13,017. Conceding all that the defendant claimed on the question of damages, they amounted to $11,317.30. The jury returned a second verdict in favor of plaintiff for the sum of $1,259, as directed, and fixed the damages for future profits at $500. In explanation of the amount allowed for future profits, we are referred by counsel to a telegram sent by Mr. Clayton D. Lee, formerly vice president of the plaintiff, to the defendant, which reads as follows:

"New York, February 10, Mr. F. G. Bonfils, Care the Kansas City Post, Kansas City, Missouri. Our Kansas City manager reports that you have served notice on him that bureau space and proofs will be refused United Press after Sunday unless your request for a discontinuance of our day service is granted refusal of access and news will be plain breach of your contract damage to us will be not less than five hundred dollars. Our contract made in good faith will be protected."

This telegram was sent long before this suit was commenced, and was simply the opinion of the sender of what damages would be suffered in regard to the items referred to in the telegram. The statement that plaintiff's damages would not be less than $500 in no way estopped the plaintiff from showing that they were much more. If this telegram had been the only evidence in the case on the question of damages, it would not have supported a verdict for the plaintiff in any sum whatever. Neither can the telegram be used to reduce the damages actually proven to the sum of $500. On the evidence the last verdict was just as inconsistent as the first.

It is our opinion that the trial judge, being an integral part of the court charged with the duty and responsibility of seeing that justice was administered between the parties, should have granted a new trial, and that his failure so to do was an abuse of his discretion. The jury not only disregarded the undisputed evidence in the case, but also the charge of the court.

For the error in refusing to grant a new trial, the judgment below is reversed, and a new trial ordered.

UNITED STATES v. MINCEY.

(Circuit Court of Appeals, Fifth Circuit. November 8, 1918.)

No. 3162.

INTERNAL REVENUE ⊂=46—FORFEITURE OF PROPERTY USED IN VIOLATIONS—OWNER'S INNOCENCE.

Where the owner of an automobile sent an employé therewith on a lawful errand, and the employé used it in removing and concealing distilled spirits on which the tax had not been paid, with intent to defraud the United States, the automobile is subject to forfeiture, under Rev. St. § 3450 (Comp. St. 1916, § 6352), despite the owner's innocence of any fraud.

Batts, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Northern District of Georgia; William T. Newman, Judge.

Proceeding by the United States, under Rev. St. § 3450 (Comp. St. 1916, § 6352), for the forfeiture of one Ford automobile, claimed by James M. Mincey. There was a judgment for claimant, and the United States brings error. Reversed.

Hooper Alexander, U. S. Atty., of Atlanta, Ga.

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

WALKER, Circuit Judge. This was a proceeding for the forfeiture of one Ford automobile, on the alleged ground that, before its seizure, it was by one W. F. Mincey used in the removal and for the deposit and concealment of 25 gallons of distilled spirits, with intent to defraud the United States of the tax thereon, which had not been paid. James M. Mincey interposed a claim to the automobile.

In the trial it was conceded that the automobile had been used, as charged, in violation of law, and for the purpose alleged. The evidence for the claimant tended to prove that the automobile was the property of the claimant, who was a farmer and merchant living in Dawson county, Ga.; that W. F. Mincey was in the employment of the claimant, and that on the day in question the claimant had sent W. F. Mincey in said automobile to the town of Gainesville, in Hall county, Ga., with instructions there to procure certain hardware and other lawful merchandise; and that claimant had no knowledge of the fact that W. F. Mincey would use the automobile for any other purpose, and had no reason to apprehend that W. F. Mincey had the purpose of defrauding the United States, or would use the automobile for that purpose.

Exceptions were duly reserved to instructions of the court to the jury to the effect that the automobile was not subject to forfeiture if it was used for the illegal purpose charged without the claimant's consent, and without reason on his part to apprehend that it would be used for an improper purpose.

The proceeding is based upon the following statute:

"Whenever any goods or commodities for or in respect whereof any tax is or shall be imposed, or any materials, utensils, or vessels, proper or intended

to be made use of for or in the making of such goods or commodities are removed, or are deposited or concealed in any place, with intent to defraud the United States of such tax, or any part thereof, all such goods and commodities, and all such materials, utensils, and vessels, respectively, shall be forfeited; and in every such case all the casks, vessels, cases, or other packages whatsoever, * * * respectively and every vessel, boat, cart, carriage, or other conveyance whatsoever, and all horses or other animals, and all things used in the removal or for the deposit or concealment thereof, respectively, shall be forfeited." R. S. U. S. § 3450 (Comp. St. 1916, § 6352).

Nothing in the terms of this statute indicates an intention to make the right to a forfeiture dependent upon the property being owned by the person guilty of a specified unlawful use of it, or upon the fact that the owner of the property shared in the guilt of the unlawful user of it. It has been authoritatively decided that under similar statutes property may be forfeited for misconduct not participated in by the owner of it. Dobbins' Distillery v. United States, 96 U. S. 395, 24 L. Ed. 637; United States v. Stowell, 133 U. S. 1, 10 Sup. Ct. 244, 33 L. Ed. 555. In each of the cases cited the court sustained a judgment forfeiting property for an unlawful use of it by a party other than the owner, to whom the owner had intrusted possession of it for an entirely lawful purpose. It is not a novelty to subject property used for an unlawful purpose to forfeiture, though the owner of it was not a participant in the wrongful conduct, and no criminality is imputed to him. In the opinion rendered in the first cited case it was said:

"Cases often arise where the property of the owner is forfeited on account of the fraud, neglect, or misconduct of those intrusted with its possession, care, and custody, even when the owner is otherwise without fault."

We understand it to be settled that, under statutes like the one in question, property is subject to forfeiture, though the owner did not share in the guilt of the user of it, to whom the owner had intrusted possession and control. The Frolic (D. C.) 148 Fed. 921; United States v. One Black Horse (D. C.) 129 Fed. 167; United States v. Two Hundred and Twenty Patented Machines (D. C.) 99 Fed. 559. Whether the automobile would have been subject to forfeiture if the person who made use of it for the purpose of committing a fraud on the public revenue had acquired possession of it without the knowledge or consent of the owner is a question not presented by the facts of the case. On the facts disclosed, the nonparticipation of the owner in the unlawful use of his property was not a bar to the forfeiture sought. The court erred in the above-mentioned rulings.

Because of that error, the judgment is reversed.

BATTS, Circuit Judge (dissenting). The holding in United States v. Stowell, 133 U. S. 1, 10 Sup. Ct. 244, 33 L. Ed. 555, that buildings and fixtures erected for distilling, and leased and used for that purpose, may be forfeited for failure of lessee to comply with the revenue laws, may be justified by the owner's destination of the property for a business necessarily under strict regulations, with knowledge of the consequences of their infraction.

To hold that section 3450, R. S. U. S. (Comp. St. 1916, § 6352)

subjects property designed for and used in transportation generally to forfeiture, when used in carrying distilled spirits upon which the tax has not been paid, by one to whom it has been let for an innocent and proper purpose, the owner being without fault, is to ascribe to the legislative department an indifference to fundamental constitutional principles not warranted so long as another construction is possible.

That the powers incidental to taxation are necessarily strong, and that in their practical administration inequalities and injustices almost necessarily result, can afford no justification for the disregard of basic rights which the government was formed to protect.

BRADLEY et al. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. November 26, 1918.)

No. 4923.

1. INDIANS ⟸38(5)—INTOXICATING LIQUORS—EVIDENCE.
   In a prosecution for introducing intoxicating liquor into an Oklahoma county, evidence *held* sufficient to sustain the conviction.
2. CRIMINAL LAW ⟸721(5)—ARGUMENT OF PROSECUTOR—COMMENT ON DEFENDANT'S FAILURE TO TESTIFY.
   Argument by the attorney for the United States that the evidence against defendants was conclusive, and that it had not been contradicted, is not objectionable as a comment on the failure of defendants to testify.
3. CRIMINAL LAW ⟸304(5)—VENUE—JUDICIAL NOTICE.
   Where the evidence showed the location of the offense with reference to a city, a river, and lines of railroad, the court may take judicial notice of the location of the same, and that the offense occurred in the county where prosecution was had.
4. CRIMINAL LAW ⟸829(1)—TRIAL—REFUSAL OF INSTRUCTIONS.
   The refusal of requested instructions covered by those given is not error.

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

B. W. Bradley, Frank James, and others were convicted of introducing liquor into the county of Muskogee, state of Oklahoma, and defendants named bring error. Affirmed.

S. E. Gidney, of Muskogee, Okl. (John M. Gidney, of Muskogee, Okl., on the brief), for plaintiffs in error.

C. W. Miller, Asst. U. S. Atty., of Muskogee, Okl. (W. P. McGinnis, U. S. Atty., of Muskogee, Okl., Walter J. Turnbull, Asst. U. S. Atty., of Durant, Okl., and Alvin F. Molony, Special Asst. U. S Atty., of Muskogee, Okl., on the brief), for the United States.

Before HOOK and STONE, Circuit Judges, and WADE, District Judge.

WADE, District Judge. Plaintiffs in error, with others, were convicted under an indictment charging introduction of liquor into the

county of Muskogee, state of Oklahoma. Upon this appeal the sufficiency of the evidence is challenged, and other errors are relied upon.

Twenty-two sacks of whisky were loaded into an ore car at Joplin, Mo., which car was part of a train on the Missouri, Oklahoma & Gulf Railroad, already made up and ready to leave the yards at Joplin, to run to Muskogee, Okl. The particular car in which the liquor was placed was billed to Kusa, Okl., 40 or 50 miles south of Muskogee, on the Missouri, Oklahoma & Gulf Railroad. Upon reaching a point a short distance north of the city of Muskogee, where the Missouri, Kansas & Texas Railway crosses the Missouri, Oklahoma & Gulf Railroad, the door of the car was opened, and the sacks of liquor were dropped out along the right of way by parties in the car, who jumped out, and were promptly arrested by officers lying in wait. These officers had been advised of the loading of the liquor upon the train by an officer at Joplin.

Defendant James was arrested while in the act of picking up one of the sacks of liquor. Defendant Bradley was shown to have procured one Jones, his employé, to take his (Bradley's) horse and get a wagon to meet this train, advising Jones that he had a telephone message from Joplin to have some one meet the train.

[1] 1. Defendants each contend that the evidence is insufficient to warrant a verdict of guilty. We have gone over the record carefully, and we are satisfied that the evidence is ample to sustain the guilt of each of the defendants.

As to James, there was no direct evidence that he had alighted from the car; but the evidence does show that, about 9 or 10 o'clock at night, Deputy Sheriff Hughes and five or more other parties went out upon the right of way, responding to the information from an officer at Joplin that this liquor was on the train, and "paired off" in different positions along the railway, and waited something like 2½ hours before the train arrived. They had a full view of the right of way. It was not at a point where pedestrians would travel, nor where there was occasion for travel along the right of way, or adjacent thereto. James was not seen by these watchers until he was caught in the very act of stooping over one of the sacks of liquor which had been dropped from the car. He was practically in possession of the contraband liquor. His acts and conduct corresponded with the acts and conduct of the other defendants who had alighted from the train. He was right beside the train. It must be quite apparent that he was not on the right of way before the train arrived, or he would have been observed by the men in waiting.

"He was starting to pick up a sack of whisky—bent over it and took both hands, and the sack of whisky was right along by the track. He just bent over and was in the act of picking up this sack."

His presence there, and his acts and conduct, clearly indicated an association with the others arrested at that time. There can be no question but what the evidence was ample to sustain conviction.

The defendant Bradley was the proprietor of a store, and John Paul Jones was in his employment. On the day the liquor was transported, Bradley told Jones of receiving a telephone message from

Joplin to have some one meet the train, "at this first cut outside of the yards"; told him to take the horse and wagon, and to go through a certain gate near the cut, and told him that probably he could get a couple of cases of whisky cheap by hauling it. Jones executed his request and was there at the proper place—waiting in the darkness ready to receive the shipment of liquor.

It is clearly shown that Bradley had full knowledge that the liquor was coming, and where the liquor was to be unloaded from the car, and that he had the responsibility of having it carted away from the right of way. There can be no question about the sufficiency of the evidence as to this defendant.

[2] 2. Complaint is made because the attorney for the United States, in his argument to the jury, stated that—

"The evidence against said defendants was conclusive and convincing of their guilt, and the said evidence had not been contradicted or denied, thereby calling to the attention of the jury the fact that said defendants had not taken the stand to testify in their behalf."

That there was no error in the remarks of counsel is settled by the holding of this court in Rose et al. v. United States, 227 Fed. 357, 142 C. C. A. 53.

[3] 3. It is contended that the government failed to prove the venue. It was clearly proven that the liquor was unloaded from the interstate train three quarters of a mile north of where the Missouri, Kansas & Texas Railway crosses the Missouri, Oklahoma & Gulf Railroad, north of Muskogee, between what is known as the Katie crossing and the Arkansas river—a short distance north of the city of Muskogee. The court taking judicial notice of the river, and the lines of railway, and the city of Muskogee, there can be no question about the venue having been established.

[4] 4. Error is assigned as to the refusal to give certain instructions asked by the defendants. A careful examination of the instructions given by the court satisfies us that the substance of the instructions asked were incorporated in the charge of the court.

5. There was no error in that portion of the instruction referred to in the fourteenth assignment of error. Fielder et al. v. United States, 227 Fed. 832, 142 C. C. A. 356.

Upon the whole record, the judgment against each defendant is affirmed.

FRIEDMAN v. VANDALIA R. CO.

(Circuit Court of Appeals, Eighth Circuit. October 28, 1918.)

No. 5009.

1. RAILROADS ⊜358(1)—INJURIES TO SERVANT OF ANOTHER ROAD—JOINT USE OF RAILWAY PROPERTY—CARE.
While the law of Illinois requires each company, in case of joint use of railway property, to exercise ordinary care for the safety of employés of the other company while on the property, *held*, that defendant, which owned its own right of way, was under no duty to guard the same for employés of another corporation, whose terminal facilities it used; there being no usage of defendant's right of way by such employés.

2. RAILROADS ⊜256—LIABILITY FOR TORTS—RELATION OF COMPANIES.
Defendant railroad company *held* a stockholder in a corporation furnishing railroads with terminal facilities, which relation furnished no basis for any tort liability for injuries to employés of the terminal company.

In Error to the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Action by Bettie Friedman, administratrix of the estate of William G. Richardson, deceased, against the Vandalia Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

David Goldsmith, of St. Louis, Mo. (M. N. Sale, of St. Louis, Mo., on the brief), for plaintiff in error.

Truman Post Young, of St. Louis, Mo. (S. W. Fordyce, Jr., John H. Holliday, and Thomas W. White, all of St. Louis, Mo., on the brief), for defendant in error.

Before HOOK and STONE, Circuit Judges, and WADE, District Judge.

STONE, Circuit Judge. Writ of error from directed verdict favoring defendant in a personal injury death claim brought by an administratrix.

The deceased was a car inspector employed by the Terminal Railroad Association of St. Louis. At the conclusion of inspections he, with two others, left the yards of the Terminal in the dark of early morning to carry the inspection reports for filing to an office some distance away. The route taken and intended to be pursued was westerly along a Terminal track, across a Terminal bridge over Cahokia creek, thence a short distance further on the Terminal track to a path which led down to a street which passed near the office. About 40 feet east of Cahokia creek this track is crossed by a Vandalia track, which continues westerly across the creek on a Vandalia bridge located a few feet north of the Terminal bridge. This Vandalia bridge was built prior to the Terminal bridge and the Vandalia right of way over the creek reaches to near the north side of the Terminal bridge. There is a space upon this right of way between the two bridges which is unprotected at either bank. Upon the morning of the injury the three men had crossed the above track intersection and were approaching the

Terminal bridge, which they intended to cross. Supposing that he was stepping upon a plank at the end of the Terminal bridge, the deceased mistakenly stepped into the east end of the open space between the two bridges. As correctly said by plaintiff in her statement of the case, he "was proceeding along or near the Terminal track, with the intention of crossing the Terminal bridge; it being dark, so that he could not clearly see where he was going, he fell into this hole."

[1] Several questions have been presented by counsel and examined by the court, but it is unnecessary here to treat but one proposition: Did the defendant (Vandalia) owe any legal duty to the deceased to guard the east end of this opening? The duty intended and necessary to be found is one due the deceased, and one due at the time of the injury and in connection with the place and circumstances thereof.

Plaintiff bases her contention that such duty existed upon the theory that defendant was a joint user with the Terminal of a common yards at the place of the accident. The law of Illinois, the place of this injury, is that joint usage of railway property involves certain duties of care by each railway toward the employés of the other. The limits of this rule seem to be that such a railway owes to such employés the duty of ordinary care for their safety while they are on its property in the discharge of their duties.

"Under the facts, as the jury must have found, the appellant owed the same duty to the servants of the Michigan Central Company, when crossing the former's tracks in the regular discharge of their duties, that it did to its own servants when crossing the same tracks." Ill. C. R. R. Co. v. Frelka, 110 Ill. 498.

"The evidence warranted the jury in believing that the inspection at these tracks was made in the regular course of business pursuant to the understanding of the two roads. Under these circumstances, plaintiff, while working as inspector for the Pere Marquette, was not a mere licensee, but was there by defendant's invitation, in the course of defendant's business as owner and possessor of the premises in which plaintiff's employer, under a business arrangement, was transacting its own business. The defendant, therefore, owed him a duty to exercise ordinary care." Arens v. Chicago Junc. Ry. Co., 159 Ill. App. 427.

To the same effect is a portion of a quotation made in plaintiff's brief from 1 White on Personal Injuries on Railroads, par. 229, as follows:

"Where different companies use the same track, depots, or yards, each company will be held liable for a failure to use ordinary care for the protection, not only of its own employés but also of those of the other company, rightfully on the premises, in the discharge of their various duties."

In other words, the use of the railway's property by the foreign employé must be in the necessary or natural performance of his work. Here each road owned its separate right of way, tracks, and bridges. None of deceased's duties required or naturally caused him to use the Vandalia property in the course of his work for the Terminal. No licensed usage thereof by him or other inspectors was shown, but, on the contrary, a usage of the Terminal, and not the Vandalia, right of way in this vicinity. At the time of the injury deceased was not knowingly or intentionally on or using the Vandalia right of way. In short, no general duty of his employment carried him onto the Vandalia right of way near this place; the particular duty which then engaged

him did not carry him there, and had nothing to do with the Vandalia, and no right by user is claimed or shown, but the opposite. We conclude that no such duty to deceased from defendant as claimed existed.

[2] This conclusion is not shaken by the contractual relations between the two companies. Those relations were as follows: The Terminal Association is a corporation organized by various railways (including defendant) entering St. Louis for terminal purposes. Its stock is held in equal shares by these railways. Under a contract between it and the various railways they are given joint use of its properties; it is bound to receive, deliver, and transfer all of their traffic; they each appoint a member of its board of directors, which board governs the Terminal Company; they pay for such services a sum slightly in excess of the expenses, with a limited responsibility for deficits; three-fourths of the directors determine as to additions and betterments, if such require stock or bond issues or contributions from the railways; cost of replacement of destroyed property, beyond insurance, is to be borne by the railways; all subordinate officers and employés of the Terminal Company are subject to removal on request in writing by any of the railways, and for good cause shown. The relation of the Vandalia to the Terminal is, in legal terms, as a stockholder, and as a party contracting for the use of the services of that company. These relations constitute no basis for any tort liability for injuries to Terminal employés.

The judgment is affirmed.

BENTALL v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. October 28, 1918.)

No. 5117.

WITNESSES ⇐396(3)—EXAMINATION—SURREBUTTAL.

Where defendant on cross-examination was asked if he had an identified conversation, and he not only denied having said the things to which his attention was directed, but gave his understanding of the conversation, and the government in rebuttal placed a witness on the stand who contradicted him, defendant on surrebuttal is not entitled to again give his version.

In Error to the District Court of the United States for the District of Minnesota; Wilbur F. Booth, Judge.

Jacob O. Bentall was convicted of aiding, abetting, counseling, commanding, and inducing another to refuse to register for military service, pursuant to Act May 18, 1917, c. 15, § 5, 40 Stat. 80, and he brings error. Affirmed.

T. E. Latimer, of Minneapolis, Minn., for plaintiff in error.

Alfred Jaques, U. S. Atty., of Duluth, Minn., for defendant in error.

Before HOOK and STONE, Circuit Judges, and MUNGER, District Judge.

STONE, Circuit Judge. Writ of error from a conviction for aiding, abetting, counseling, commanding, and inducing one John F. Kas-

sube to willfully fail and refuse to register for military service pursuant to section 5 of the act of May 18, 1917, entitled "An act to authorize the President to increase temporarily the military establishment of the United States."

Three errors are assigned. Two of these are the same in substance, and attack the sufficiency of the evidence to justify the verdict of guilty. The evidence has been carefully examined, and we have no doubt of its sufficiency to sustain the verdict.

The other error relates to the refusal of the court to permit defendant to answer a certain question asked of him on surrebuttal. While he was on the stand in his own defense he was cross-examined as follows:

"Q. Didn't the sheriff ask you if you had a man working for you that had not registered? A. He did.

"Q. Then you had that talk about the boy? A. John was not there at the time.

"Q. And did you say to the sheriff you didn't have a man working there who had not registered, and that there had been nobody working on your place that failed to register? A. I did not say that.

"Q. You did not say that? A. No, sir; I told him I had a boy; his father and this boy. The father was working there; the two of them came about the 3rd of July. They were working at my place at that time.

"Q. I am asking you whether you didn't say to the sheriff of Meeker county that there hadn't been anybody working on your place, farm, that summer, that failed to register? A. No, sir; I did not.

"Q. Then, if he claimed that you did say that to him, he is— A. He is mistaken, absolutely.

"Q. Then the sheriff asked you how it was that the rumor started that there was a man out there that was not registered? A. No, sir.

"Q. Do you remember of having said to the sheriff, in that conversation, that you had started that rumor to fool the government? A. No, sir.

"Q. But that he was too good a friend of yours, and you did not want to fool him, and that there was nothing in it? A. The boy had been—this boy who was working for us at the time had been—interviewed by the sheriff in the northern county from which he came, up near Richville. This is the way that happened—

"Q. What happened? A. The impression Mayor Konshak may have spoken of—this boy said a sheriff there had interviewed him, and he had evaded the question of his age for the purpose of some joke. What that was, I don't know, but they were sort of neighbors and he was joking with him.

"Q. I should think it was a joke. A. I did not say so; that is what the boy said about the former interview by a sheriff. And I said, 'How old a boy?' That was this boy, John McFadden. Then I said to Mr. Konshak, I would not do that which that boy did with the other sheriff—perfectly legitimate. I said to Mr. Konshak, 'You are a friend of mine, and I would not try to fool you as the sheriff up in the other county.'

"Q. Didn't you say to him you didn't start that rumor to fool the government, but you would not fool him; you are too good a friend? A. No, sir; did not."

The government, in rebuttal, placed the sheriff upon the stand, who testified as follows:

"Q. At that time did you have a conversation with him in regard to registration? A. I had.

"Q. Did you ask him whether there was anybody on his farm, or had been anybody on his farm, that failed to register? A. I did.

"Q. And what did he say? A. He said, 'No.' Of course, he said—when I asked him that, if he had any man on his farm, or his working man, which

did not register, or if he had any under the age of registration age, that didn't register during the registration time, and he says, 'Yes, I have a couple of men working here for me; always thought they was going—something similar—I can't remember the exact words; he said something similar, if they would ask him he would say, 'No, I had men that didn't register;' and he says he didn't like to lie to me, and he says he had one which was too young and one which was too old; that is the reason he didn't register. Then I asked him if he ever had a man during that time that worked for him that did not register, and he said, 'No.'"

Upon surrebuttal, the defendant was asked concerning that conversation, which resulted as follows:

"Q. What was said at that conversation? A. Mr. Konshak—

"Mr. Jacques: Objected to, not being proper rebuttal; the witness having gone over the conversation on cross-examination, and denied he said what the witness said he said.

"The Court: I think the question was asked in direct examination whether he made certain statements, and he said he did not. Now, the sheriff was called simply to prove that he did make that particular statement. It doesn't seem to me it is proper rebuttal; what the conversation was would not be material. He has already denied making the statement specified in the question that was put to him. That is as far as it is necessary to go.

"Mr. Latimer: Exception."

We think the court made no substantial error in its ruling. The defendant had been asked on his cross-examination if he had a certain identified conversation. He not only denied having said the things to which his attention was directed, but went further and stated his understanding of what was there said. The purpose of the cross-examination was evidently solely to lay the ground for impeachment by proof that he had made the statement incorporated in the inquiry. That statement in substance was covered by the testimony of the sheriff in rebuttal. As said above, defendant not only denied this statement in the cross-examination, but he went further and gave his version of what was there said. How could he add to that situation? The jury had clearly his version and that of the sheriff. The question was objected to as not proper rebuttal, and that objection was properly sustained.

The judgment is affirmed.

NULOMOLINE CO. v. DICKINSON, District Judge, et al.

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

No. 2305.

INJUNCTION ⊜189—SCOPE OF RELIEF.

Where petitioner contended its invert sugar was of special and superior kind, one who unfairly obtained petitioner's formula, and from a faithless employé obtained the names of petitioner's customers, to whom he sold sugar made under the formula at a reduced price, will not be restrained from selling any kind of invert sugar to such customers, as petitioner asserted they desired only sugar having the characteristics of its brand.

Petition for Mandamus to the District Court of the United States for the Eastern District of Pennsylvania.

Petition by the Nulomoline Company for a writ of mandamus against Oliver B. Dickinson, District Judge, to require the insertion of certain provisions in the decree entered by the District Court pursuant to the decision in Nulomoline Company v. Stromeyer, 249 Fed. 597, — C. C. A. —. Petition denied.

Chester N. Farr, Jr., of Philadelphia, Pa., for petitioner.

Michael J. Ryan, of Philadelphia, Pa., opposed.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. This petition grows out of the decision in Nulomoline Co. v. Stromeyer (C. C. A. 3) 249 Fed. 597, — C. C. A. —. After that decision a decree was entered by the District Court for the Eastern District of Pennsylvania that was intended to carry out our directions, and no complaint is made of its provisions, except in one particular. The company asked, and the District Court refused, the insertion of the following paragraph:

"The said Julius Stromeyer is enjoined and restrained from at any time hereafter selling any products of invert sugar, manufactured in any manner or by any formulas whatsoever, whether those of the said Julius Stromeyer, or those used by the plaintiff company, or otherwise, to any customers previously the customers of the plaintiff company, whose names were disclosed to the said Julius Stromeyer by the said Maxwell Tausek, the plaintiff's former employé. * * *"

The present petition asks us to direct the court below to adopt the foregoing paragraph, or its equivalent. The company insists, that as Stromeyer, by his unlawful conduct with Tausek, has taken away certain of the company's former customers, he should be wholly and forever prevented from selling to these customers any invert sugar, no matter how, or when, or by whom, such sugar might be manufactured. In our opinion the authorities to which we have been referred (Witkop Co. v. Boyce, 61 Misc. Rep. 126, 112 N. Y. Supp. 874; s. c., 64 Misc. Rep. 374, 118 N. Y. Supp. 461; Witkop Co. v. Great Atlantic & Pacific Tea Co., 69 Misc. Rep. 90, 124 N. Y. Supp. 956; People's Coat Co. v. Light, 171 App. Div. 671, 157 N. Y. Supp. 15; Vulcan Co. v. American Can Co., 72 N. J. Eq. 387, 67 Atl. 339, 12 L. R. A. [N. S.] 102; Stevens v. Stiles, 29 R. I. 399, 71 Atl. 802, 20 L. R. A. [N. S.] 933, 17 Ann. Cas. 140; Empire Laundry Co. v. Lozier, 165 Cal. 95, 130 Pac. 1180, 44 L. R. A. [N. S.] 1159, Ann. Cas. 1914C, 628; Grand Union Tea Co. v. Dodds, 164 Mich. 50, 128 N. W. 1090, 31 L. R. A. [N. S.] 260), do not go as far as this, and we do not think the principles that underlie them support the petition.

The theory of the bill is that the company's secret process produces a kind of invert sugar so characteristic and so marked as to be superior to the product of its competitors. Nulomoline, although belonging to the class of invert sugars, is said to stand apart, and therefore a customer that orders it does not receive what he wants, if he is given another invert sugar. The gravamen of the charge is that Stromeyer unfairly obtained knowledge of the company's process, made Nulomoline thereby, and sold it at a lower price to certain consumers, who

had theretofore been customers of the company; their names having been obtained by Stromeyer from the faithless employé. Presumably, what the customers wanted was a sugar that had the special characteristics of Nulomoline, and this they not only believed themselves to be getting, but they actually got, although under another name. This unfair practice has been forbidden by the decree, and we think the company is not entitled to the additional provision for which it asks in the paragraph quoted, which indeed amounts, not only to the future prevention of a wrong, but to the infliction of a punishment as a penalty for the past. Because Stromeyer has sold Nulomoline unfairly, and has thereby taken away (at least for the present) certain customers that wanted this product, we are asked to decree that he shall no longer sell to these customers invert sugar of any kind, made at any time, by any process, or by any person. Now, if all invert sugars were so much alike that one was practically identical with another, some support might be found in the cases for the proposition that Stromeyer should not be allowed to profit by the trade he had unfairly acquired; but, as we have already said, the company's theory is that Nulomoline is distinctive, so good that no other variety will take its place, and, if that be so, the company obtains adequate relief when Stromeyer is prevented from making and selling its peculiar product. If its former customers want Nulomoline, they can no longer get it from Stromeyer, and must go back to the company; but if they want Syrline, or some other sugar, from Stromeyer, we do not see our way to deny him the right to supply them. He has made Syrline for years, and has a right to sell it for what it is; but, of course, he cannot sell it as Nulomoline, nor can he make Nulomoline, and sell it as Syrline, in order to keep these particular customers or to gain others.

The proposed paragraph is too sweeping, and the District Judge was right in refusing to adopt it.

The petition is therefore refused.

ST. LOUIS MERCHANTS' BRIDGE TERMINAL RY. CO. v. MUNGER.

(Circuit Court of Appeals, Eighth Circuit. October 28, 1918.)

No. 5116.

CARRIERS ⊂=348(3)—PASSENGERS—INJURY—INSTRUCTIONS.

In an action by plaintiff, struck by defendant's engine at one of its passenger stations, after he had passed through the gates, which had been unlocked by the gateman, who announced plaintiff's train, etc., instructions on invitation to plaintiff to pass through gate, etc., *held* to correctly announce the law.

In Error to the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Action by Carlton A. Munger against the St. Louis Merchants' Bridge Terminal Railway Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

T. M. Pierce, of St. Louis, Mo. (J. L. Howell, of St. Louis, Mo., on the brief), for plaintiff in error.

Marion C. Early, of St. Louis, Mo. (Edward E. Campbell, of Louisiana, Mo., on the brief), for defendant in error.

Before HOOK and STONE, Circuit Judges, and MUNGER, District Judge.

STONE, Circuit Judge. This case, on writ of error from judgment for damages because of personal injuries, is here for the second time. See 246 Fed. 938, 159 C. C. A. 210. The facts and pleadings necessary to understand the point now presented are as follows:

Munger was struck by a Terminal Company engine at one of its passenger stations. The waiting room of this station opened upon an inclosed space, separated from the tracks by a high iron fence, with sliding gates, which could be locked. These gates were in charge of a gateman, who controls the movement of passengers through them. Munger was one of a crowd of passengers in the inclosure waiting to take a train. Upon its approach the gateman announced the train, passed through the passengers in the inclosure, unlocked the south gate nearest Munger, went through, leaving that gate unlocked, and almost, if not entirely, closed, passed to the other gate 30 feet distant, which he unlocked, but did not open, turned, and stood watching the approaching train. The testimony does not show who afterwards opened the south gate, through which Munger passed, but it is evident that it could have been done only by some passenger other than Munger. Munger was struck, not far outside this gate, by a rapidly moving engine, while crossing an intervening track toward his train.

The petition relied upon several acts of negligence, all connected with the operation of this engine. The answer was a general denial, and a plea of contributory negligence "in attempting to cross the railroad tracks in front of, and in close proximity to, a moving locomotive."

The proposition of error here presented is that the court did not properly submit to the jury the matter of "invitation" to Munger by the company to pass through the gates, and therefore onto the tracks. This matter of invitation arises as bearing upon the legal status of the parties at the time of injury.

The company requested the court to charge as follows:

"The court instructs the jury that, if you find and believe from the evidence that the gate through which the plaintiff went onto the platform carrying the two tracks was open by some unauthorized person not in the employ of the defendant, St. Louis Merchants' Bridge Railway Company, and the plaintiff was thereafter injured by going onto the south-bound track so close to an approaching engine as to render a collision inevitable and unavoidable, your verdict must be for said defendant."

It also complains that the court—

"prominently left the decision of the case by the jury to the negligence alone of the engineer in charge of the engine, and in disregarding the issue tendered in the pleadings by the plaintiff, as to whether or not there was an invitation to pass through the gates onto the platform, and in disregarding the defense and denial of such invitation, and in utterly disregarding the plaintiff's fail-

ure to prove an invitation to pass through said gates, although pleaded in the petition."

Those parts of the given charge relating to the matter of invitation were as follows:

"The evidence here is that, about the time that train was due to arrive, an agent and servant of the defendant announced the train, and himself passed through the middle gate—two gates being in use, the south and the north gate; that he unlocked the gate, went through the gate, and out onto the platform in front of the gate. There is no controversy about that. He says that he latched the gate, but did not lock it. One witness says that he left the gate ajar, neither locking nor latching it. These are questions that you have to deal with; they are matters that concern you. He says that, after he walked out of that gate, he walked up the platform to the other gate and unlocked that. It need not be told you, nor anybody else who is an observer of things, that when the train came, and the opportunity seemed to be there presented for their reception upon that train, the people started. It is estimated that from 40 to 75 people were behind that gate when the train came. They started to go to take the train, as they were in the habit of going to that train, and, as I have said, a train that had been running there for years before this accident happened. Those are facts about which there is no controversy. * * *

"Something was said in the course of the argument, and in an instruction that I am asked to give you, about applying the rule that it was the duty of the passenger [this plaintiff] at that time to stop, listen, and look.

"The general principle of law is that one who goes to a railroad station, and purchases a ticket for a train due shortly afterwards, is entitled to the right of a passenger in crossing the track to board the train after it has been announced. A passenger who is required to cross a track on which a train is approaching, in order to board it, may rely on the invitation of the station agent to cross at a particular time as an assurance that it may be done in safety.

"It was the duty of the defendant to use care in seeing that passengers were not injured. If passengers go over, and it is known to the railroad company that they have to cross another track to get to the one on which the train stands, they have a right to assume that everything has been done to provide for their care, and under such circumstances the doctrine of 'stop, look, and listen' does not apply.

"I have stated this to you as clearly as I can. This plaintiff was there as a passenger. If that gate was unlocked and open, and the agent of the defendant announced the coming of the train, it is for you to say whether that was an invitation to this passenger, who was to board that train, that everything was safe."

We consider that the charge fairly presented to the jury the determination of whether the evidence showed an invitation to Munger to go through the gate. We are confident the evidence justified such a submission.

The judgment is affirmed.

PARENT v. PICOTTE.

(Circuit Court of Appeals, Eighth Circuit. October 28, 1918.)

No. 5106.

1. EQUITY ⊂=293—PLEADING—AMENDMENTS.
Where complainant was entitled to no relief under the evidence, the denial of an amendment to the bill, at close of testimony, as to a certain matter, and changing the prayer for relief, was not error.

2. QUIETING TITLE ⊂=10(1)—TITLE OF PLAINTIFF.
Plaintiff's suit to establish title to and regain possession of Indian lands allotted and patented to the defendant can be maintained only on the strength of complainant's title, and the weakness of defendant's title is immaterial.

3. INDIANS ⊂=27(6)—INDIAN LANDS—ALLOTMENT.
Evidence *held* insufficient to show that complainant selected, and applied for as her allotment, Indian lands allotted to defendant.

Appeal from the District Court of the United States for the District of South Dakota; James D. Elliott, Judge.

Suit by Josephine Parent against Irene L. Simmons Picotte. From a decree for defendant, complainant appeals. Affirmed.

Thomas L. Sloan, of Washington, D. C., and H. C. Brome, of Worland, Wyo., for appellant.

Edward E. Wagner, of Sioux Falls, S. D., for appellee.

Before HOOK and STONE, Circuit Judges, and MUNGER, District Judge.

STONE, Circuit Judge. Appeal from dismissal, upon the merits, of a bill by Josephine Parent to establish title and regain possession from Irene L. Simmons Picotte and her tenant of land allotted and patented from the Yankton Sioux lands.

Appellant claims that she is a Yankton Sioux mixed-breed; that she selected and applied for allotment of this tract in 1892; that defendant Picotte, to whom the land was allotted and patented, was not qualified to receive an allotment.

[1] At the close of the testimony appellant was denied an amendment to the bill. The object of this offer was, as stated in the printed argument, not "for the purpose of introducing new evidence, but in order that the complainant might receive appropriate relief upon the case as made by the pleadings and proof." The bill alleged a written application for allotment. The amendment sought to vary this to an allegation that it was written or oral. There was no testimony whatever of any oral application, so that this amendment would have been futile. The amendment also contemplated a change in the prayer. As the appellant was not entitled to any relief, this amendment would have been of no value.

[2] Counsel have discussed at length the weakness of the right of appellee to the land. The primary issue in a cause of this character is the strength of complainant's title. As we are unable to find that

complainant has any rights to this land, we need not discuss the standing of the defendants in that regard.

[3] Appellant's rights involve two propositions: Was she entitled to an allotment; and, if so, did she select and apply for this tract of land. She must maintain both. A careful examination of all of the testimony shows the following as all of the testimony as to the selection and application for this particular tract. Mrs. Zallie Dripps, first cousin to appellant, testified:

"I know about Mrs. Parent making a selection of land for allotment. In 1892 Mrs. Parent came to my mother's home on the Ponca reservation; Charles Rulo and myself drove over to the Yankton reservation. Walter Archorn, grandfather of the defendant, it was through knowledge from him that we selected this land. We drove over to about where the description of this land we supposed was. My brother Charlie walked around. We had a spade and looked for the corners of the survey, and he found what he thought was the corner of this land, and he put two or three mounds there, and we went down to the agency. I left the application with the agent in charge. We stayed all night with my cousin, Susan Fredrick. Mr. Foster, I think, was in charge of the agency. He took the paper and told us this land was allotted, and he didn't think there was any use to put in an application, but he would look after it for her. He would see about it. I made the application in writing for Josephine Parent. For the southeast quarter—

"Mr. Wagner: I object that the application would be the best evidence.

"The Court: Yes.

"I have not seen the application since. I made a number of applications since, so I never made a search for it. No; I wasn't able to find the original application. The application was made in the spring of 1892, April or May. It was during the allotments were being made. Mr. La Rochelle told us that there was land unallotted, but the agent in charge told us it was all allotted. Mr. Foster said he would look after it and write us, but we never received a letter from him."

The agent testified that no such application could be found in the office files, where it naturally would and should be. No attempt was made at improvements upon the land until 1913.

In our judgment the trial court rightfully ruled that, as against the patent to appellee, no selection and application for this land was shown by the above proof.

The judgment is affirmed.

UNITED STATES v. FERNANDEZ.

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

No. 3293.

1. WAR ⇐5—RESTRICTIONS ON TRADE—STATUTE.

Where the United States libeled gold coin, on the ground that it was delivered for export and shipment and for the purpose of being taken out of the United States, in violation of Act June 15, 1917, and of the presidential proclamation of September 7, 1917, *held* that, as the proceeding fell within title 7 of the act dealing with exports, return of the coin on the giving of bond, etc., could not be allowed, under title 6, § 5, which is part of the general provision relating to seizure of arms, etc.

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

2. APPEAL AND ERROR ⊂⊃1177(1)—REVIEW—REMAND.
Where gold coin was forfeited in proceedings under Act June 15, 1917, on the ground it was delivered for export outside of the United States, but it was ordered delivered to the claimant on his giving a bond conditioned that it would not be exported, etc., *held* that, though the provision for delivery on bond was unwarranted, the entire judgment will be reversed, to enable the trial court to pass on questions of law and fact under a proper construction of the statute.

Appeal from the District Court of the United States for the Southern District of Texas; William B. Sheppard, Judge.

Libel by the United States to forfeit $40,300 in gold coin, alleged to have been delivered for export and shipment, and for the purpose of being taken out of the United States, which was claimed by Jesus Fernandez. From a judgment of forfeiture, providing that the coin should be delivered to the claimant upon the giving of a bond, conditioned that the coin should not be exported, etc., the United States appeals. Reversed and remanded.

John E. Green, Jr., U. S. Atty., of Houston, Tex.
Maco Stewart, of Galveston, Tex., for appellee.

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

BATTS, Circuit Judge. Libel by the United States government to forfeit $40,300 in gold coin, alleged to have been "delivered for export and shipment, and for the purpose of being taken out of the United States," in violation of title 7 of the Act of June 15, 1917, c. 30, 40 Stat. 225, and of the President's proclamation of September 7, 1917. Judgment was that the coin be forfeited, but that it should be delivered to the claimant, Jesus Fernandez, upon the giving by him of a bond, conditioned that it would not be exported or employed contrary to law.

[1] The judgment is evidently based upon section 5 of title 6 of the cited act. The subtitle of title 6 is "seizure of arms and other articles intended for export." The title deals with "arms and munitions of war, and other articles" intended for export, in violation of laws for the protection of neutrality. The law is general and permanent in character. Title 7 deals with exports "during the present war." The words "or other articles," as used in section 1 of title 6, while literally all-inclusive, should be construed with reference to "arms and munitions of war," used in connection with them, and should be limited to articles exportation of which is at all times unlawful, or to be made so by proclamation of the President. The reference in section 6 of title 6 to the action of the President "as provided in section 1 of this title" might (no action being there provided for) present difficulties in applying title 6, but the conclusion reached obviates necessity for construing that section.

Title 7, the only law under which a forfeiture could be had in this case, does not provide for the giving of a bond and the release of the property.

[2] Instead of amending the judgment by eliminating the provision with reference to the giving of the bond, the entire judgment will be reversed. It is possible that the forfeiture would not have been adjudged, except as the predicate for a bond. We prefer that the questions of law and fact involved in the forfeiture, under the assumption that title 7 is alone applicable, should be primarily determined by the trial court.

The judgment is therefore reversed, and the cause remanded.

Reversed and remanded.

LEITNER et al. v. UNITED STATES.

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

No. 3208.

APPEAL AND ERROR ⊂=554(3)—BILL OF EXCEPTIONS—NECESSITY.

Where there was no bill of exceptions, and no error appeared in the record, judgment must be affirmed on writ of error.

In Error to the District Court of the United States for the Western District of Texas; W. R. Smith, Judge.

Proceeding between William Leitner and another and the United States. There was a judgment for the United States and Leitner and another bring error. Affirmed.

Hugh R. Robertson, U. S. Atty., of San Antonio, Tex., and W. H. Fryer, Asst. U. S. Atty., of El Paso, Tex.

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

PER CURIAM. There is no bill of exceptions in this case, and we discover no error in the record.

The judgment is affirmed.

NATIONAL METAL MOLDING CO. v. TUBULAR WOVEN FABRIC CO.

(Circuit Court of Appeals, First Circuit. November 14, 1917.)

No. 1288.

PATENTS ⊂=328—INFRINGEMENT—FLEXIBLE ELECTRICAL CONDUIT.

A modified structure of defendant *held*, in a supplemental bill, not to infringe the Osborn patent, No. 652,806, for flexible electrical conduit, as construed in the original case.

Appeal from the District Court of the United States for the District of Rhode Island; Arthur L. Brown, Judge.

Suit by the National Metal Molding Company against the Tubular Woven Fabric Company. On supplemental bill. Decree for defendant, and complainant appeals. Affirmed.

For opinion below, see 248 Fed. 526.

Charles F. Perkins and William K. Richardson, both of Boston, Mass. (Carroll L. Perkins, of Boston, Mass., on the brief), for appellant.

Livingston Gifford, of New York City (William Quinby, of Boston, Mass., on the brief, for appellee.

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

ALDRICH, District Judge. The questions in this case arise under a supplemental bill, and they relate to flexible electrical conduits. The original case concerned the Osborn patent, No. 652,806, in which the question of its validity was at issue and the question of infringement as well. The patent was sustained, and it was held that the defendant's conduit, as then manufactured, infringed certain of its claims. The defendant thereafterwards modified its conduit, and, as claimed here, thereby eliminated the infringing feature.

In the original case there was an opinion by the Circuit Court of Appeals (227 Fed. 884, 142 C. C. A. 408), sustaining the patent and holding infringement, and the case was remanded to the District Court for further proceedings not inconsistent with the opinion, where there was an interlocutory decree in which the defendant was enjoined from constructing, using and vending any article embodying the invention described in the claims of the Osborn patent numbered 1, 2, 3, 4, 5, 6, 9, 10, 11 and 12.

Subsequently to such decree, and to the alleged modified structure of the defendant, the plaintiff instituted a contempt proceeding based upon the allegation that the newly made conduit did not differ in structure from the one originally complained of. The District Court declined to adjudge the defendant in contempt upon the ground that the character of the alleged new infringing structure raised a new question of infringement, and that the proper mode of procedure was upon a supplemental bill, and the motion that the defendant be adjudged in contempt was continued to await such proceeding, and in the event of such proceeding not being instituted within thirty days the motion for contempt was to be dismissed. This line of procedure was approved by the Court of Appeals (239 Fed. 907, 153 C. C. A. 35), upon the theory that it was properly open to the District Court in its discretion to proceed summarily upon the ground of contempt if it deemed the new structure to be only colorably different from the one formerly at issue, and if it deemed a supplemental bill as the method best adapted to do justice, that it might direct the question involved to be presented by supplemental bill.

It results from this that the particular question before us is whether the defendant's modified or changed article of manufacture is an infringement of the Osborn claims enumerated, and as sustained and construed by the Court of Appeals in the original case. It becomes necessary, therefore, to consider the theory upon which the Osborn patent was sustained, and the intended scope of the claims involved as explained in the decision sustaining the patent and holding infringement.

The opinion of Judge Brown under the supplemental bill in the court below is so exhaustive, analytical, and convincing, not only in respect to what was decided by the Court of Appeals, but in respect to the prior art and the new question of infringement, that very little remains to be said. It may be observed, however, that the fundamental and leading idea of the decision below was that the Osborn patent and structure contemplated different materials, one to be semiflexible and the other flexible, and that while the Osborn patent device embodies two elements only, that "the defendant's structure is of three, all essential, and all co-operating under a principle of combination different from that of Osborn's structure," the defendant's third element, consisting of the step involved in stiffening its loosely woven and soft tube of one material by successively immersing it in waterproofing and fireproofing compounds. The defendant in argument and on its brief deals with its new conduit as embodying only two steps; first, that of manufacturing through loosely weaving on a circular loom, using for its wefts and warps a single material consisting of cotton—that of soft twist cotton yarn—and the second step as involving the saturation of the conduit of the first step with waterproofing and fireproofing compounds. But the question whether the defendant's completed conduit involves two or three steps or elements is quite immaterial, if it results that its means of manufacture and its means of properly stiffening are substantially different from the means described and employed by Osborn.

Now, what did the Court of Appeals decide in respect to the Osborn patent and its infringement? It is apparent that that decision was based upon the idea that Osborn, in describing his device, was for his helix, dealing with a material sufficiently flexible to yield to tube formation, and sufficiently flexible to yield to turns and angles when subjected to use, and yet sufficiently rigid and nonflexible as to be noncollapsible under such use, and that for his material to resist longitudinal strain and extension, that he was dealing with a pliable or flexible material so interwoven or interconnected with the turns of the semiflexible helix as to accomplish the desired result. Indeed, Osborn, in his specification, describes the term "interwoven," as employed, as contemplating association of the binding material with the outer and inner faces of the circumferentially extending elements or with the spaces between the same, to impart strength to the structure in a longitudinal direction, and for the pliable or flexible material used to bind or lock the convolutions together he enumerates thread, yarn, wire or any similar material lending itself to being readily interwoven with the semiflexible element. He speaks of the convolutions of the helical coil form, as it were, the woof threads, or elements of the fabric, and of the elements of pliable material extending longitudinally as constituting the warp threads or elements, and he speaks of the two series of elements as being interwoven to form as a whole a tubelike structure or fabric possessing a necessary resistance to collapsing and the necessary longitudinal rigidity, while being readily flexed due to the relative movement permitted between the adjacent turns or convolutions. And he says:

"My structure thus comprises, in effect, a series of woofs extending circumferentially, and a series of warps extending transversely thereto to interlock and bind the same together into a tubelike structure."

The means thus described necessarily require, in the manufacture of the article intended, different kinds of material, or at least materials performing different functions, and it is plain that the original decision of the Court of Appeals sustaining the patent was alone upon the idea of the conception of such means, and a description of such a structural combination of the materials, as would accomplish the desired result, and not permit of the removal of the helix with the consequent loss of its insulating qualities and its useful circumferential rigidity.

The defendant in its new conduit, so far as its structure, or structural step, is concerned, does not at all employ the idea of material sufficiently flexible as to permit of being bent or twisted into spiral form and of yielding sufficiently to permit of use around the angles of walls and ceilings, and yet sufficiently rigid to be noncollapsible under such use, and so adjusted as not to permit of the removal of the helix. The defendant in its new conduit apparently aims to accomplish all these results through substantially different means. Quite independent of the element of stiffening, so far as the structural step is concerned, it takes the old principle involved in circular loom weaving, which produces tubing like that of the garden hose, and using a single material consisting of soft absorbent cotton warps and wefts, and working quite within the scope of the old art, produces a soft and flexible tube or conduit which it subjects to treatment by immersing it first in waterproofing, and second in fireproofing, compounds. The compounds, being in a melted state, are applied to the exterior without penetrating to the interior, and when cooled bind the warp and wefts together, thereby stiffening them against lateral pressure and collapse, and thereby uniting them against longitudinal strain; and these results of stiffening and strengthening are thus accomplished without loss of the required flexibility, together with the result that there is no helix susceptible of being removed.

It is true that the Court of Appeals alluded to fireproofing and waterproofing compounds in connection with the Osborn patent; but it is not understood that the allusion was to compounds, as an element of the Osborn invention, but to something old in the art, bearing upon the question whether Osborn's was an invention for an electrical conduit and something which might, through implication, be read into the patent as old means contemplated for insulating purposes. Thus the observation of the Court of Appeals in this respect was quite independent of the idea of the stiffening means and elements described and included in Osborn's invention and structure.

Neither the patent nor the opinion in the original case deals with the disparity between the sizes of the wefts and warps as an essential element of the Osborn invention; nor does Osborn in his invention make any point in respect to either the weft or woof strands being susceptible of waterproof or fireproof absorption. Therefore, the question of infringement under the supplemental bill cannot be made to turn upon such grounds.

In Osborn there is no hint suggesting the employment of liquid compound materials, which, when applied and cooled, should perform the function of stiffening a woven cotton tube to be used as a conduit in electric wiring, but not to the degree of excluding the necessary flexibility, and yet to the degree of creating a rigidity sufficient to prevent collapse when the tube should be subjected to use; nor was there any suggestion that compounds so applied would perform the function of creating the strength required to resist longitudinal strain.

The required stiffening of the Osborn conduit is inherent and is perfected in Osborn's contemplated structure, without any regard whatever to subsequent treatment by compounds as a stiffening element, while in the defendant's new conduit the required stiffening is not at all involved in the structural process, but results altogether, or at least in every substantial sense, through subsequent treatment by old and different materials from those described and used by Osborn for structural stiffening.

In conclusion, we think the defendant produced its new conduit by combining elements old in the art under conditions which differ substantially from Osborn's conception, and by employing means which are quite independent of the means and combination which Osborn described. Osborn was not a pioneer inventor, and we do not think his claims should be so broadly construed as to include the defendant's new conduit.

The decree of the District Court is affirmed, with costs of this court.

DOWSE v. FEDERAL RUBBER CO. et al.

(District Court, N. D. Illinois, E. D. December 6, 1918.)

No. 973.

1. PATENTS ⟸93—OWNERSHIP—INVENTIONS OF EMPLOYÉ.
Whether a patent for an invention made by an employé belongs to him or the employer depends upon his position. If the work for which he is paid is done under direction of others, any invention he makes outside of such work is his own; but if he contracts to devote his time and services to making improvements in articles made by the employer, a patent for any such improvement belongs in equity to the employer.

2. PATENTS ⟸93—OWNERSHIP—INVENTION OF EMPLOYÉS.
A patent for an essential and valuable improvement in rubber tires for automobiles, developed by employés of a rubber company as the result of many and various experiments, and for which patent was issued to the president and general manager, who had sole charge of the company's business and was the second largest stockholder, *held*, under the facts shown, to be the property of the company.

3. PATENTS ⟸328—VALIDITY—OWNERSHIP—RUBBER TIRE.
The Dowse patent, No. 1,174,238, for a method of reinforcing automobile tires, *held* valid, and to be in equity the property of the Federal Rubber Company in whose plant the invention was developed.

In Equity. Suit by Byron C. Dowse against the Federal Rubber Company and others. Decree for defendants.

Albert H. Graves and Cyril A. Soans, both of Chicago, Ill., and Louis Quarles and Charles B. Quarles, both of Milwaukee, Wis., for plaintiff.

George T. Buckingham and Edward Rector, both of Chicago, Ill., Chester H. Braselton, of Dayton, Ohio, and George T. May, Jr., and Harry W. Lindsey, Jr., both of Chicago, Ill., for defendants.

SANBORN, District Judge. There are three defendants, the Federal Rubber Manufacturing Company, a Wisconsin corporation, formerly located at Cudahy, Wis., the Federal Rubber Company, a Massachusetts corporation, which succeeded to the manufacturing company, and the Federal Rubber Company of Illinois, the selling agent of both the other corporations successively. The latter was the only original defendant; the others being later brought in.

The suit involves both the validity and ownership of patent No. 1,174,238, of March 7, 1916, issued to B. C. Dowse, upon a method of reinforcing automobile tires known as the "double cable base." The patent was applied for in Dowse's name, while he was employed by the manufacturing company, and issued to him after he left it. The main question is whether the patent equitably belongs to the corporation, or whether it has merely a shop right. Plaintiff relies on Hapgood v. Hewitt, 119 U. S. 226, 7 Sup. Ct. 193, 30 L. Ed. 369, on the question of ownership, and also contends that the shop right has lapsed because it was incapable of transfer from the manufacturing company to the rubber company. An assignment from the manufacturing company to the rubber company was made May 12, 1916, purporting to assign all its property, expressly mentioning patents, patent rights, and shop rights. At this date the Dowse patent had been issued to him. Dowse sold his stock and left the manufacturing company December 8, 1915.

The patent relates to the means for retaining the tire upon the wheel rim; also for prevention of tire destruction. It is unnecessary to consider it in detail, because the chief question in the case is patent ownership, and the equitable claim of the rubber company to an assignment. It may be said, however, that it covers the wire cable imbedded in the base of the tire which holds the tire firmly on the rim. There is a presumption of validity. Cantrell v. Wallick, 117 U. S. 689, 6 Sup. Ct. 970, 29 L. Ed. 1017. The tire has been quite a successful one. The patent has great utility. It should be sustained in both its claims.

[1]The all-important question is Dowse's relation to the tire-manufacturing business. If he was only a hired man, taking orders as to his work from another officer or employé, the invention belonged to him, leaving only an implied license or shop right to the corporation, and this right was only personal to it, incapable of being assigned. The Supreme Court thus states the rule:

"An employé, performing all the duties assigned to him in his department of service, may exercise his inventive faculties in any direction he chooses, with the assurance that whatever invention he may thus conceive and perfect is his individual property." "That which he has been employed and paid to accomplish becomes, when accomplished, the property of his employer. Whatever rights as an individual he may have had in and to his inventive powers, and that which they are able to accomplish, he has sold in advance to his employer." Solomons v. U. S., 137 U. S. 342, 11 Sup. Ct. 88, 34 L. Ed. 667.

It thus becomes necessary to examine Dowse's relation to the corporation. He did not expressly contract as a part of his duties to design new tires; but if he did so agree in substance, and was more than a mere employé, having the main responsibility to make the business successful, then he should be compelled to assign the patent. In this connection Judge Buffington's statement of the governing rule is pertinent:

"The obligation of an employé to assign to an employer an invention made in the course of his employment does not arise from the existence of the relation of employé and employer alone, but there must be in addition a contract to assign. Thus, in Dalzell v. Dueber Mfg. Co., 149 U. S. 320, 13 Sup. Ct. 888, 37 L. Ed. 749, it is said: 'A manufacturing corporation, which has employed a skilled workman, for a stated compensation, to take charge of its works, and to devote his time and services to devising and making improvements in articles there manufactured, is not entitled to a conveyance of patents obtained for inventions made by him while so employed, in the absence of an express agreement to that effect. Hapgood v. Hewitt, 119 U. S. 226, 7 Sup. Ct. 193, 30 L. Ed. 369.'" Pressed Steel Car Co. v. Hansen (C. C.) 128 Fed. 444.

[2] So the real test is whether Dowse occupied such a relation to the corporation that he was its alter ego, in such a capacity that it is only consistent with good faith that he should recognize its ownership of the patent issued to him. Can he, without breach of his obligation toward his late employer, insist upon retaining and enforcing against it the patent he took out? Worthington Pumping Engine Co. v. Moore, 19 Times Law Rep. 84.

The facts from which defendants argue that Dowse was not a mere employé, but the principal and directing officer of the corporation, are as follows:

B. C. Dowse has been engaged for many years past in manufacturing rubber tires. Just prior to 1911 he was president of the G. & J. Tire Company engaged in such manufacture. Before that he had had extensive experience with other tire manufacturers.

J. N. Willys, of Toledo, Ohio, is, and was in 1911, president of the Willys-Overland Company, engaged in automobile manufacturing and selling. For a number of years his company had been purchasing tires from concerns with which Dowse was identified. He had known Dowse for over 20 years. He had the fullest confidence in Dowse as an individual and in his knowledge of the tire-manufacturing business. Willys, personally, had had no experience in tire manufacturing in 1911. Early in 1911 these two men decided to become jointly interested in a rubber tire manufacturing enterprise. In March they arrived at a general understanding. An investment of about $1,000,000 was contemplated. A plant would be purchased. Willys was to advance the principal amount of money. Dowse was to be president and general manager of the company to be formed, and to operate it; the running of the business was to be left to him. Willys was to furnish 80 per cent. of the money, and Dowse 20 per cent.; Willys to "carry" Dowse for the latter's share.

The plan was put in prompt execution. Dowse negotiated the purchase of a plant of the Federal Rubber Company, a Wisconsin corporation, at Cudahy, Wis. The purchase price, plus incidental expenses,

amounted to about $125,000. Title to the property was taken by James E. Kepperley, as trustee. Kepperley was attorney for Willys. Thereupon, in April, 1911, a new Wisconsin corporation, namely, the Federal Rubber Manufacturing Company, was organized, and the property was turned over to it. The capital stock of this corporation was $1,000,000 (all common). The property was conveyed to the new company in payment of $250,000, par value, of stock. Ultimately all of the capital stock was disposed of at par; over 90 per cent. of it being taken up on behalf of Willys and Dowse, and the remainder going to a few stockholders, some of whom like Dowse, were "carried" by Willys.

In so far as the financial relation of Dowse to the company and to Willys is concerned, the following is substantially correct: Dowse put up in cash $11,050. When the plant, purchased for approximately $125,000, was turned over to the manufacturing company for $250,000 value of stock, Dowse received $50,000, par value, of that stock as a bonus or promotion stock, and received his 20 per cent. of the remainder, after a few shares—his 20 per cent. of the small amount allotted to Kepperley—had been deducted. At the end of the business relationship, Dowse, on his investment of $11,050 cash, owned outright of the common stock $72,200, and was being "carried" by Mr. Willys for $164,000. On each issuance of stock for which Mr. Willys supplied the entire amount of cash, 20 per cent. was issued to Dowse, who gave his note for the purchase amount to Willys and made the purchased stock collateral to the note.

The original $1,000,000 of common stock was all issued and paid for in the manner above stated by the last of June, 1912. It then became necessary to have more capital, and an additional issue of $1,000,000 preferred stock was authorized to be sold at par. Ultimately Willys bought somewhat more than 95 per cent. of this.

On August 31, 1911, Messrs. Dowse and Willys made a written agreement showing their basic relation, which contained, among other things, the following language:

"Whereas, party of the second part is a competent rubber manufacturer, with experience extending over a period of 15 years, and has been induced to take hold of and manage the said Federal Rubber Manufacturing Company upon the promise and undertaking that party of the first part would furnish the major part of the finances necessary to organize and operate said corporation, and party of the first part has been induced to agree to furnish a large percentage of finances and to enter into said enterprise with the distinct understanding that party of the second part would affiliate himself and remain with said enterprise and give his entire time and attention thereto. * * *"

Willys testified (and it is not denied by Dowse) that at the inception of their relation Dowse agreed that he would take full and entire charge of the contemplated enterprise and would "give his entire time, thought, and attention wholly and solely to this particular business."

When the manufacturing company acquired the Cudahy plant, Dowse selected his own organization, chiefly of men who had been identified with him, took charge of the business of the new corporation, and thereafter was president and general manager. Initially his

salary was $10,000 per year; and in December, 1912, it was raised to $12,000 per year.

As president and general manager of this corporation Dowse had sole, full, exclusive, and complete control of its operation and management. Willys relied on him absolutely. Thus Kepperley says:

"I had no means of knowing as to the actual handling of that plant there because, as I have repeated two or three times, I knew nothing about rubber manufacturing. I knew nothing about the business, and relied entirely upon Mr. Dowse, as those were Mr. Willys' instructions to me—that Mr. Dowse was in charge of that plant and was the one upon whom we were relying. I was largely there in a legal capacity."

And Willys says:

"I was to advance the principal amount of money and he was to run the business. I was to leave the running of the business practically to him. He was to be general manager and president of the company, and operate it. I was very busy engaged in my own business, and didn't have any time or any knowledge about the tire business, and of course I appreciated that he did, so naturally I did just the same as I have in lots of other enterprises—got hold of some man who had the knowledge, put some money in with him, and went ahead."

On December 10, 1915, Dowse sold his stock to Willys for $90,000, yielding him a net profit of approximately $60,000, resigned as president and general manager, and retired from the corporation. There was some dissatisfaction with Dowse's management, but it is unnecessary to notice it, or pass upon the merits of Dowse's claim that he was forced to resign.

The business of making automobile tires, in 1911, was in a rapidly developing state, and many and successive improvements in construction details were being made by all manufacturers in that product. The former company which had operated the Cudahy plant, at the time it sold out, did not make, and for a year before the sale had not made, automobile tires, and therefore the manufacturing company proceeded to develop a tire-manufacturing business "from the ground up." Several different kinds and types of tires were manufactured at first, and, on being tried, changes were successively made in them from time to time, and various improvements resulting from experiment and experience succeeded each other, as a part of the evolution of the new company's tire product. This enterprise, undertaken by Dowse and Willys, with the practical details left wholly to the former, was inherently one of development of a satisfactory product, and on Dowse, and the operatives selected by Dowse, rested the practical duty of that development.

During the course of this development, Dowse and his organization began the manufacture of tires of the "straight wall" or "straight side" type. This was a type that then was fast coming into the popularity that now makes it the standard construction. Such a type of tire was a necessity to meet the then existing demands of the trade. The construction adopted included in the "bead filler" of the tire base a single "cable" of five turns of piano wire. This is called in the record the "single cable base" tire.

After these straight wall tires had been put out and widely sold and distributed, it developed that many of them were unsatisfactory, because of their tendency to blow off the rim and also to pinch the inner tube. Complaints of this began coming in through the sales department in the latter part of 1912, and by the early part of 1913 the situation had become acute. Dowse, F. Haskell Smith, factory manager, his assistant, Frank, Githens, sales manager, Thompson, in charge of the laboratory, and all the other important men in the construction and sales organization, were greatly concerned over this situation, and there was an active and earnest effort on the part of every one to locate the trouble, and to find a remedy for it. The matter stood as a manufacturing impediment in the course of the development essential to the enterprise, and naturally every one concerned in the production sought to find the channel of escape from the difficulty. Meanwhile the manufacture of this straight wall type of "single cable base" tires was almost suspended. It ran down from 4,075 tires in the month of January, 1913, to 1,397 in the month of April, 1913, and to 1,173 in the month of May, 1913, both of which last months are at the height of the tire-manufacturing season. Indeed, the situation was so acute that Dowse, by his own account, was unable to sleep at night because of the worry thereby occasioned.

Some time in the month of May, 1913, there was evolved and constructed in the plant, as the outcome of the many and various experiments, tests, and conferences, a tire construction which proved to be a solution of this manufacturing problem, and this construction is known as the "double cable base." This differed from the former construction only in that there were two cables, instead of one, placed in the bead filler in the tire base. This "double cable base" construction was put in regular production May 14, 1913, and from thenceforth became the standard tire product of this plant, and so remained during the entire business career of the manufacturing company, and afterward, in the same plant, of its successor, the rubber company.

It appears from Willys' testimony that in January, 1913, he went to Europe, returning about April 30th, and that he remained in America until about May 21st, when he again left for Europe. Shortly before his departure he visited the plant at Cudahy, and then it was, according to his recollection, that he learned of this double cable base development. It was represented to him as something on which the business could be greatly extended, as a great improvement, one that had overcome their trouble, and so, as Willys puts it, "* * * when they came along in May and had this thing, and I had a big investment there, I naturally put in a lot of money to back up that investment." It appears from the record that on May 22d Willys put up $247,000 for more of the preferred stock.

Dowse himself states in effect that he extolled the merits of this improvement to Willys as "the best thing ever produced for holding tires on the rim," though he does not know whether it was at this precise time.

Willys returned from Europe in September, 1913, and found the tires to be on the market, in fact, in use on the Willys-Overland cars,

and during the next month he purchased and paid for approximately $125,000 of preferred stock, which exhausted the issue.

In the autumn of 1913, after this new bead construction had been practically tested and found to produce excellent results, the company embarked upon an advertising campaign. It adopted the name "Federal Double Cable Base" as a trade-mark for tires having the improved base construction, and stamped that name upon the tires. It also proceeded in a large way to advertise the tires of this construction under the name "Federal Double Cable Base." This advertising had for its central feature pictures of the two-cable construction, and the nub of the whole advertising campaign was that this particular construction was an exclusive feature of the Federal Rubber Manufacturing Company. Backing up this advertising, effort was made to protect the trade-mark, and to make truly exclusive by patent the feature of construction so heavily advertised.

The advertising designs, which are in evidence, are shown to have been evolved and planned by the advertising staff of the company, and to have all received the approval of Dowse, and to have been used with his specific knowledge. This advertising, in circulars, newspapers, and magazines, was extensive, expensive, and widespread; hundreds of thousands of dollars of the corporate funds being spent on it while Dowse remained president of the company. It held out, and was intended to hold out, to the dealers and to the public that this particular construction, identified under the name "Federal Double Cable Base," was the exclusive feature of the manufacturing company, to be found only in its tires.

The facts relating to the patent application are that Ward, the secretary, first took up the trade-mark matter in a letter to Munn & Co. on October 14, 1913. This letter stated that it was desired to protect the company by "letters patent or copyright" on the name. The New York attorneys replied that a trade-mark registration on this name was probably impossible to obtain, because it was descriptive, and after some correspondence the subject was dropped, pursuant to Ward's letter of October 28th. On January 5, 1914, Ward, for the corporation, again wrote the New York attorneys, this time as to the possibility of obtaining patent on "our new tire construction." With this letter there was inclosed an advertising circular of the corporation showing the construction. Further correspondence ensued, and on March 10, 1914, Dowse in person called on the New York attorneys and confirmed the instructions to proceed with the patent application and effort at trade-mark registration. Dowse took the matter up as president of, and as representing, the Federal Rubber Manufacturing Company.

In due course, and after correspondence, the patent and trade-mark applications, respectively, which had thus been taken up as a company matter, and as part of a single transaction, by Dowse as president of the company, with the attorneys, were prepared and filed; the patent application, which under the law had to be in the name of an individual, being signed by Mr. Dowse personally, and the trade-mark application, which had to be in the name of the company, being signed

by him as president. The patent application was filed in the Patent Office, June 16, 1914, and the trade-mark application was filed June 26, 1914. For the fees and charges for both of these filings, as well as the attorneys' services in connection therewith in the amount of $105, bills were rendered by the attorney to the corporation, and were paid by its check dated June 13, 1914.

In advertisements of the company of the "double cable base" tires, beginning with the April issue of "Motor," 1914, just after Dowse's visit to the patent attorneys in March, the words "Patent Applied for" are printed in conjunction with the illustration of the "double cable base" feature, and in the June issue of this magazine (standing as a typical advertisement of the company) the same "Patent Applied for" legend appears in the same conjunction with the representation of this special construction, again represented by the text to be an "exclusive" feature.

The testimony taken at the trial proves that the charges of the New York attorneys thus paid by the company were never charged against Dowse, or paid for by him, but remain an item of expense on the corporation's books to this day. Dowse and Ward testified generally to the effect that in December, 1915, after Dowse resigned, Dowse said that these patent expenditures which the company had paid were to be charged to him personally on the company books, but it appears that this was not done.

It appears that Mr. Dowse knew of these advertisements. There were also conversations with him to the effect that, if another company undertook to use the double cable base, they would have to pay royalty to the manufacturing company. Nor did the plaintiff ever claim ownership of the patent application until after his resignation from the offices of president and general manager.

It thus appears that plaintiff was not a mere employé, under the direction of a superior officer. During the whole period he was president and general manager, and one of the directors. The others were Githens and Kepperley, the former coming with Mr. Dowse from the G. & J. Company, and the latter representing the Willys interests. The plaintiff, therefore, was practically the corporation, taking orders from no one. His executive authority and control were practically exclusive. He could be dismissed only by the board of directors, and then only by consent of Mr. Githens, who came there with him, until Willys should exercise his majority stock control by changing the board. It is true that Willys had the ultimate power of corporate control, and for the time being this authority was vested solely in Dowse.

While by the law of Wisconsin he was not strictly a trustee for the corporation, only an agent, yet by reason of his relation to Willys, and the great importance of the new cable base to the corporate business success, his position was that of a quasi trustee, such as to make it clear that the patent was taken out by him for the corporation. Had the invention affected only a detail or unimportant part of the corporate business, it is probable that plaintiff would be regarded as its owner, both legal and equitable, as in American Stoker Co. v. Underfeed Stoker Co. (C. C.) 182 Fed. 642; Id., 188 Fed. 314, 110 C. C. A.

292. Here the patent involved the very life of the corporation. It was developed by the whole corporate force as something absolutely necessary, under the supervision of the president, who was straining every nerve to make good. It entered vitally into the very business life of the company, and was finally issued while plaintiff was still drawing his salary, although no longer in control. Under the circumstances it would be grossly inequitable for plaintiff to retain title, and the rule of Hapgood v. Hewitt and the cases following its rule does not apply. In the ordinary case a shop right to the corporation will satisfy all equitable demands; but here the new company's title to that right would be quite doubtful. A case closely in point is Worthington Pumping Machine Co. v. Moore, supra.

[3] There should be a decree sustaining the patent, and that the federal company is the equitable owner, entitled to have an assignment, with costs against plaintiff.

PRESSED STEEL CAR CO. v. UNION PAC. R. CO.

(District Court, S. D. New York. December 17, 1918.)

1. PATENTS ⟸212(1)—LICENSES—EFFECT.
Where plaintiff, the owner of a patent for railroad cars, entered into an agreement with a railroad company providing that it might manufacture cars covered by the patent on payment of a certain royalty per car, or cause them to be built, *held*, that the railroad company was not required to pay royalty on cars bought from another company, which had a nonexclusive license to make and sell cars embodying the invention.

2. DAMAGES ⟸40(2)—PROFITS—SPECULATIVE PROFITS.
Where a contract between plaintiff, the owner of a patent, and a railroad company, which gave the latter the right to build cars covered by the patent, provided that plaintiff should have a preference over other car builders for the construction of cars covered by the patent, *held* that, on the railroad company's breach of the preference agreement, plaintiff could not recover damages, for the profits which plaintiff might have made are wholly speculative.

At Law. Action by the Pressed Steel Car Company against the Union Pacific Railroad Company. Judgment in part for plaintiff, but denying in part the recovery sought.

See, also, 241 Fed. 964.

The parties entered into a contract, the essential features of which are as follows:

"Agreement made the 1st day of November, 1905, between Pressed Steel Car Company, a corporation * * * (hereinafter called the Car Company), of the first part, and Union Pacific Railroad Company, a corporation * * * (hereinafter called the Railroad Company), of the second part;

"Whereas, the Car Company is the owner of certain patents covering various devices or designs used by the Railroad Company in the construction of 'common standard' freight cars; * * * and

"Whereas, the Railroad Company admits the use by it in the construction of its 'common standard' freight cars of certain designs and patented devices owned by the Car Company, * * * and admits the validity of the patents embodied therein, and has agreed not to evade or attempt to evade said patented devices * * * as embodied in its 'common standard' freight cars; and

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

"Whereas, the Railroad Company is desirous of making an arrangement with the Car Company whereby it may build or cause to be built, under royalty, freight cars containing such designs and patented devices for its own use and the use of the various railroad companies now or hereafter owned or controlled by it by the ownership of a majority of the capital stock herein or otherwise, or leased or operated by it, but not for sale; and

"Whereas, the Railroad Company has since the 1st of June, 1904, built and caused to be built 'common standard' freight cars in which the devices covered by said patents of the Car Company have been used:

"Now, therefore, * * * it is agreed as follows between the parties hereto:

"First. From the date of the execution of this agreement until the 21st day of December, 1914, the Railroad Company shall have a right and license to construct or have constructed for its own use and the use of the various railroad companies now or hereafter owned or controlled by it by the ownership of a majority of the capital stock therein or otherwise, or leased or operated by it, and to use and to permit to be used by and upon the lines of the various railroad companies so owned, controlled, leased, or operated by it, freight cars containing the designs and devices covered by patents now owned or controlled or which may during the said period be acquired, owned, or controlled by said Car Company. * * *

"Third. For each car hereafter built or caused to be built during the period of this contract by the Railroad Company (except cars constructed for the Railroad Company by the Car Company or by the Western Steel Car & Foundry Company) containing any of the designs or devices covered by patents now owned or controlled or which may hereafter be owned or controlled by said Car Company, the Railroad Company shall pay as royalty to the Car Company, within ninety (90) days after completion of such car, ten dollars ($10) per car in cash. * * *

"Fourth. The Railroad Company hereby gives to the Car Company and/or to a corporation known as the Western Steel Car & Foundry Company, a corporation organized and existing under and by virtue of the laws of the state of New Jersey, and for which company the Car Company in this regard will act as agent, a preference (provided they can make reasonably prompt or similar deliveries, under the same plans and specifications) over any other car builders in the construction of any or all freight cars containing designs and devices covered by patents now owned or controlled or which may hereafter be owned or controlled by the Car Company, caused to be built by the Railroad Company outside of its own shops, at the price of ten dollars ($10) per car in excess of the price bid by such other car builders for the construction of any freight cars embodying such designs and devices; the Railroad Company, however, reserves the right to build such cars in its own shops, in which event the Railroad Company agrees to pay to the Car Company a royalty of ten dollars ($10) per car for each car so built.

"Fifth. It is further agreed that if the Railroad Company abandons its present 'common standard' and adopts instead thereof a new design, which it contends does not embody any of the designs and devices covered by the patents now or hereafter owned or controlled by the Pressed Steel Car Company, and if such contention is disputed by the Car Company, then the question whether or not such new design does embody any design or device of patent owned by the Car Company, shall upon written request of either party to the other, be referred to * * * arbitrators. * * *"

Kiddle & Margeson, of New York City (John B. Stanchfield, Alfred W. Kiddle, Charles A. Collin, and Wylie C. Margeson, all of New York City, of counsel), for plaintiff.

George S. Payson, of Chicago, Ill., and Henry W. Clark, of New York City (George A. Ellis, James R. Sheffield, and James J. Cosgrove, all of New York City, of counsel), for defendant.

MAYER, District Judge (after stating the facts as above). The action is at law, and was tried without a jury, and numerous questions,

involving (1) the construction of contract relations and (2) the use of alleged infringing devices by defendant, were disposed of in the course of the trial. Two questions remain to be considered, and both arise out of the contract referred to supra.

[1] 1. Plaintiff claims $10 per car on 200 gondola cars built for and delivered to defendant by the Betterndorf Axle Company, to which company, on or about August 17, 1909, plaintiff granted a license to build and sell cars covered by a patent to one Streib, No. 942,224, owned by plaintiff. The license to the Betterndorf Company gave that company the right to make and sell freight cars embodying the improvements or inventions covered by what are the first three claims of the Streib patent. The history of the arrangement between plaintiff and Betterndorf Axle Company may be briefly stated. This history seems to be irrelevant, but is referred to, so that all the facts may be apparent.

An application for a patent covering, as is contended, the same invention as that set forth in the Streib application, was filed by one Betterndorf, and the Betterndorf application was placed in interference with the Streib application. During this interference, Betterndorf conceded priority of invention to Streib, and plaintiff, as assignee of Streib, granted the Betterndorf Axle Company, as assignee of Betterndorf, a nonexclusive license whereby the Betterndorf Axle Company acquired the right to make and sell freight cars embodying the inventions covered by the first three claims of the Streib patent, without the requirement of paying plaintiff any royalty therefor.

The question now is whether defendant can be held liable for cars purchased from Betterndorf Axle Company which embodied claims 1, 2, and 3 of the Streib patent. Plaintiff claims that it has the right to elect under which of the two outstanding licenses the cars in question were built. In other words, the plaintiff, having given to Betterndorf Axle Company the right to manufacture and sell freight cars under the claims of a patent owned by plaintiff, now urges that it may segregate defendant from the rest of the public by virtue of the contract theretofore made between plaintiff and defendant. When plaintiff granted the license to Betterndorf Axle Company, all the world was entitled to purchase cars from the licensee upon any terms suitable to the licensee and the purchaser. In Keeler v. Standard Folding Bed Co., 157 U. S. 659, 666, 15 Sup. Ct. 738, 740 (39 L. Ed. 848) the court points out, with apt expression, that—

"The purchase of the article from one authorized by the patentee to sell it emancipates such article from any further subjection to the patent throughout the entire life of the patent. * * *"

The point is that the monopoly is lost and the article has been "emancipated."

It is quite immaterial as to what the arrangement was between plaintiff and Betterndorf Axle Company. Such an arrangement sometimes takes the form of a royalty, and sometimes is entered into with considerations of mutual forbearance. Whatever the consideration, whether called royalty or not, the passing of the consideration can occur but once, so far as affects the rights of purchasers.

The contract between plaintiff and defendant becomes immaterial, so far as relates to the right of defendant to purchase cars, made pursuant to the patent, from any person having the right to make and sell such cars.

I hold, therefore, that the defense on this ground is good, and plaintiff may note an exception to my ruling. If what has already been decided, in regard to the patent infringement features as to these 200 gondola cars, shall be sustained, then my ruling on this question of license will become academic.

[2] 2. The next question is one of damages. The plaintiff claims that it is entitled to recover substantial, and not nominal, damages by reason of the breach by defendant of the "fourth" paragraph of the contract, in that defendant did not accord to plaintiff, in respect of 702 cars, the preference therein set forth. It was held during the trial that what this provision for a preference meant was that defendant should give equal opportunity to plaintiff, with other car builders, to bid competitively for the construction of freight cars containing designs and devices covered by patents then owned or controlled, or which might thereafter be owned or controlled, by plaintiff company; and if plaintiff bid within not to exceed the $10 in excess of any other car builder, defendant was obligated to award the contract to plaintiff, with the proviso always that defendant could build cars in its own shops, in which event defendant was obligated to pay to plaintiff a royalty of $10 per car. The provision in question is a valid provision, and the breach thereof might entitle plaintiff to certain remedies; but the question now under consideration is whether, as a result of such breach, it can be said that it would be possible for plaintiff to show that it had lost what is spoken of as its manufacturer's profit, or, for that matter, that it had been subjected to any damage by way of loss of profits.

It is important to distinguish between those cases (1) where there is a rule of damage, but great difficulty and sometimes uncertainty in the ascertainment of what the damage is, and (2) those cases to which a rule of damage cannot be applied and where any damages awarded would be the result merely of speculation or conjecture.

The first class of cases is well illustrated by Wakeman v. Wheeler & Wilson Mfg. Co., 101 N. Y. 205, 4 N. E. 264, 54 Am. Rep. 676, and Pennsylvania Steel Co. v. New York City Ry. Co., 198 Fed. 721, 754, 117 C. C. A. 503. The courts, in those cases, did not fail to lay down rules of damage, merely because of the difficulty of ascertaining damages.

The second class of cases is exactly illustrated by the case at bar and, inter alia, by Locker v. American Tobacco Co., 218 Fed. 447, 134 C. C. A. 247, and to some extent by Troy Laundry Machinery Co. v. Dolph, 138 U. S. 617, 11 Sup. Ct. 412, 34 L. Ed. 1083.

Counsel for each side have analyzed with great care the opinion in the Dolph Case and its history as exemplified by the record on review and the various steps which the litigation took. There is some language in the opinion of Mr. Justice Brewer which has led to considerable argument; but the fundamental proposition of the case does

not revolve around the question as to whether the provision there under consideration was a subordinate or principal provision. After all, the main questions were whether the breach of such an optional arrangement as was disclosed in the Dolph Case, and the provision as to "open competition," laid the foundation for substantial damages. That precise question was not present in the Locker Case, supra, but the principle is the same. It will be noted that the Circuit Court of Appeals, at the conclusion of its opinion in the Locker Case, said:

"As we have thus disposed of the case upon the principal question, it is unnecessary to discuss the subsidiary questions involved. We think it proper to say, however, that we find no satisfactory proof of damages; the matter seems to be left to speculation and conjecture."

The Locker Case was brought to recover treble damages under the so-called Sherman Anti-Trust Law (Act July 2, 1890, c. 647, 26 Stat. 209 [Comp. St. 1916, §§ 8820–8823, 8827–8830]), and was tried before the court with a jury. A mass of testimony was there introduced which, in the opinion of the court, failed to lay a foundation for damages except upon a mere speculative basis. The District Court, in that case, was of the opinion, therefore, that plaintiff, as matter of law, had not proved any damages and directed a verdict for defendant. It will be noted that the verdict thus directed was not for nominal damages, but it was for defendant on the theory that no damages whatever had been proved.

In the case at bar, the first step necessary for the plaintiff would be to show that the plaintiff would have availed of the preference. There was no obligation on plaintiff's part so to avail, and whether the plaintiff would have so availed is a matter of speculation, which is but another way of saying that there existed a precedent element of such uncertainty, not as to the amount of damage, but as to the fact of damage, as to disable the plaintiff from laying any foundation whatever for damage. If the provisions of paragraph "fourth" were binding on both parties, so that, for instance, in addition to the right of plaintiff to bid, there would have been the binding obligation of plaintiff to bid, and to manufacture if the bid were properly awarded, then it might be argued that, if plaintiff's bid had not been accepted, it would have been damaged. In such circumstances, it might well be contended that the rule would have been simple enough, and would not have been embarrassed by any uncertainty.

But the difficulty is that no one can say, as of the time when the 702 cars were ordered and manufactured, that the plaintiff would have availed of the preference accorded under the fourth paragraph. In fact, there can be no better illustration of the complete uncertainty of this provision of the fourth paragraph than in this very case, because the testimony shows that in many instances, involving thousands of cars, plaintiff did not bid, and thus did not avail of the preference.

It seems to me, therefore, that any damages are purely speculative, and the logical result would be to allow the plaintiff no damage whatever in this regard. There is, however, some confusion in the cases as to whether no damage should be allowed or whether there should be

awarded to plaintiff nominal damages. In the case at bar the financial result in this particular is substantially the same.

While, therefore, I think the proper conclusion requires that no damage be awarded to plaintiff, I am not disposed to decline to award 6 cents as nominal damages, if defendant so desires. On this question of damages for loss of profits, counsel may arrange to shape the record so as to save the point, if the case should be reviewed.

When counsel shall have figured the correct amount to which plaintiff, under my rulings, is entitled, they will advise me, so that the record may conclude in orderly fashion.

UTAH CONST. CO. v. ST. LOUIS CONSTRUCTION & EQUIPMENT CO. et al.

(District Court, D. New Mexico. December 30, 1916.)

No. 116.

1. REMOVAL OF CAUSES ⟸10—STATUS OF CAUSE AFTER REMOVAL—SUIT BY FOREIGN CORPORATION.

When the maintenance of an action commenced in a state court is prohibited by a state statute, because of the failure of plaintiff as a foreign corporation to comply with its requirements, plaintiff cannot better its position by removing the cause into a federal court.

2. CONTRACTS ⟸284(2)—CONTRACT FOR RAILROAD CONSTRUCTION—CONDITION PRECEDENT TO RECOVERY—ENGINEER'S CERTIFICATE.

Where a contract for railroad construction made the chief engineer of the company the final arbiter of all disputes, and required his final estimate of the work done, and his certificate that it was free from claims for labor or material for which liens might be enforced before any right of action should accrue to the contractor, such certificate is a condition precedent to a right of action, or the contractor must excuse the failure to procure it by alleging and proving by direct and convincing evidence that in refusing it the engineer acted fraudulently, or so arbitrarily as to indicate fraud.

3. CONTRACTS ⟸287(1)—CONTRACT FOR RAILROAD WORK—CONSTRUCTION—"FINAL SETTLEMENT"—"FINAL ESTIMATE."

Under a contract for railroad construction, providing that before final settlement the contractor should furnish evidence to the chief engineer of freedom from liens, and that the engineer should make and certify a final estimate of the amount due, which should be conclusive on both parties, "final settlement" and "final estimate" mean practically the same thing; a final adjustment of the account being necessary to the making of the certificate.

[Ed. Note.—For other definitions, see Words and Phrases, First Series, Final Estimate; First and Second Series, Final Settlement.]

4. CONTRACTS ⟸284(2)—ACTIONS FOR BREACH—CONDITIONS PRECEDENT—ENGINEER'S ESTIMATE.

A provision of a contract for railroad construction, requiring a certificate of final estimate by the chief engineer as a condition precedent to a right of action by the contractor, cannot be ignored by the court.

In Equity. Suit by the Utah Construction Company against the St. Louis Construction & Equipment Company, the St. Louis, R. M. & P. Railway Company, and the Metropolitan Trust Company of

New York City, trustee, with the Bell & Levy Contracting Company as cross-petitioner. Bill and cross-bill dismissed.

POLLOCK, District Judge. This is an action to recover an alleged balance claimed by the plaintiff against the defendant St. Louis, Rocky Mountain & Pacific Railway Company, for construction work in building said railroad in New Mexico, and to enforce a mechanic's lien therefor. The Bell & Levy Contracting Company, a subcontractor, files a cross-petition to enforce a mechanic's lien in its favor on the corpus of the railroad for an alleged balance due it from the principal contractor. The Metropolitan Trust Company of New York City, trustee under a mortgage for the railroad, is made a party defendant.

[1] Among other defenses the defendant Railway Company pleads the following statute of New Mexico, in force at the time of making the contract in question, and yet in force:

"Every foreign corporation, except banking, insurance and railroad corporations, before transacting any business in this territory, shall file in the office of the secretary of the territory a copy of its charter, or certificate of incorporation, certified by the proper authority of the territory, state or county of its creation, and a statement of the amount of its capital stock authorized and in amount actually issued, the character of the business which it is to transact in this territory, and designating its principal office in this territory and an agent who shall be a domestic corporation or a natural person of full age actually resident in this territory, together with his place of abode, upon which agent process against said corporation may be served. * * * Upon the filing of such copy and statement, the secretary of the territory shall issue to such corporation a certificate that it is authorized to transact business in this territory, and that the business is such as may be lawfully transacted by corporations of this territory, and he shall keep a record of all such certificates issued."

"Until such corporation so transacting business in this territory shall have obtained said certificate from the secretary of the territory, it shall not maintain any action in this territory, upon any contract made by it in this territory."

"Every foreign corporation transacting any business in any manner whatsoever, directly or indirectly, in this territory, without having first obtained authority therefor, as hereinbefore provided, shall for each offense forfeit to the territory the sum of two hundred dollars, to be recovered with costs in an action prosecuted by the solicitor general in the name of the territory."

Laws 1905, c. 79, §§ 102, 103, 105.

The Construction Company and the subcontractor were foreign corporations of states outside of New Mexico, and the work to be done was on a railroad situated in said territory. The contractor did not comply with the requirements of the foregoing statute, but after the work was completed, and after suit was brought, it did attempt to comply with the statute.

As the suit was instituted in a territorial court of New Mexico, in 1908, where the principal pleadings were had, and the case was not removed therefrom into the United States District Court of New Mexico until 1912, which removal was made at the instance of the plaintiff, the federal court took the case as it stood at the time of removal, subject to the legal status and rights of the parties as they were established at the time of the removal. If the cause of action

had no right to exist in the jurisdiction where suit was brought, the plaintiff could not vitalize it by getting it transferred to another jurisdiction.

The cause must therefore be considered, in respect of the above provisions of the statute of New Mexico, the same as if the case now stood in the territorial court. We must therefore eliminate, as of any controlling effect, the ruling of the federal courts, of which the case of Lupton's Sons v. Auto Club et al., 225 U. S. 489, 32 Sup. Ct. 711, 56 L. Ed. 1177, Ann. Cas. 1914A, 699, is representative, wherein, under the New York statute, which declared:

"No foreign stock corporation doing business in this state shall maintain any action in this state on a contract made by it in this state unless prior to the making of such contract it shall have procured from the designated office the required certificate authorizing it to do business in the state"

—it was held that, inasmuch as the statute only prohibited the right to bring such action in the state court, it did not have the effect to prevent the nonresident contractor from bringing and maintaining suit in the United States court.

As the statute imposed no other restriction than a denial of the right to sue in the courts of the state, without imposing any penalty therefor, the Supreme Court held that such regulation of the state did not have the effect to deny the right of a citizen of a foreign state to resort to the federal court, when the requisite diversity of citizenship existed.

But the case at bar is where the plaintiff has sued in the local court to enforce a contract made without compliance with the statute, where the statute stigmatizes the dereliction of the corporation as an offense against the state and penalizes it. In this regard it is worthy of note the statute above quoted does not alone prohibit the bringing and maintaining of any action on a contract made in this state in violation of its terms, but it further provides as follows:

"Every foreign corporation transacting any business in any manner whatsoever, directly or indirectly, in this territory, without having first obtained authority therefor, as hereinbefore provided, shall *for each offense forfeit to the territory the sum of two hundred dollars, to be recovered with costs in an action prosecuted by the solicitor general in the name of the territory.*" Laws 1905, c. 79, § 105.

In such case there can be no doubt whatever but that the very business transacted by complainant and cross-complainant, the Bell & Levy Contracting Company, was prohibited by the act, hence unlawful, for which they might have been penalized in the sum of $200.

Mr. Benjamin, in his work on Sales (3d Am. Ed.) § 538, after reviewing at length the authorities, says:

"The propositions that seem fairly deducible from the foregoing authorities are the following; First. That, where a *contract* is prohibited by statute, it is immaterial to inquire whether the statute was passed for revenue purposes only, or for any other object. It is enough that Parliament has prohibited it, and it is therefore void. Secondly. That, when the question is *whether* a contract has been prohibited by statute, it *is* material, in *construing the statute*, to ascertain whether the Legislature had in view *solely* the *security and collection of the revenue*, or had in view, in whole or in part, the protection of the public from fraud in contracts, or the promotion of some object of public policy. In the former case, the inference is that the statute was

not intended to prohibit contracts; in the latter, that it was. Thirdly. That, in seeking for the meaning of the law-giver, it is material also to inquire whether the penalty is imposed once for all, on the offense of failing to comply with the requirement of the statute, or whether it is a recurring penalty, repeated as often as the offending party may have dealings. In the latter case the statute is intended to prevent the dealing, to prohibit the contract, and the contract is therefore void; but in the former case such is not the intention, and the contract will be enforced."

The above text appears to be amply supported by authority. See McMullen v. Hoffman, 174 U. S. 639, 19 Sup. Ct. 839, 43 L. Ed. 1117; Bartlett v. Vinor, Carthew, 253; Pittsburg Const. Co. v. West Side Belt Railroad Co., 154 Fed. 929, 83 C. C. A. 501, 11 L. R. A. (N. S.) 1145; Thorne v. Travelers' Insurance Co., 80 Pa. 29, 21 Am. Rep. 89; Johnson v. Hulings, 103 Pa. 498, 49 Am. Rep. 131; Stevenson v. Ewing, 87 Tenn. 46, 9 S. W. 230; Yount v. Denning, 52 Kan. 629, 35 Pac. 207; Holt v. Green, 73 Pa. 198, 13 Am. Rep. 737; Dillon v. Allen, 46 Iowa, 299, 26 Am. Rep. 145; Woods & Co. v. Armstrong, 54 Ala. 150, 25 Am. Rep. 671.

In McMullen v. Hoffman, supra, the court said:

"The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract. In case any action is brought in which it is necessary to prove the illegal contract in order to maintain the action, courts will not enforce * * * any alleged rights directly springing from such contract. In cases of this kind the maxim is 'Potior est conditio defendantis.'"

In the noted case, often cited with approval by the courts, of Bartlett v. Vinor, supra, Lord Chief Justice Holt said:

"Every contract made for or on account of any matter or thing which is prohibited and made unlawful by any statute is a void contract, though the statute itself does not mention that it shall be so, but only inflicts a penalty on the offender, because a penalty implies a prohibition, though there are no prohibitive words in the statute."

The Court of Appeals for the Third Circuit, in Pittsburg Construction Co. v. West Side Belt Railroad Co., supra, considered a somewhat similar right of a foreign corporation to maintain an action to enforce a similar contract to the one at bar without having complied with the provisions of the statute of the state of Pennsylvania. That statute, as here, required the foreign corporation, before doing any business in the state of Pennsylvania, to file a like statement, to establish an office, and to appoint an agent in the state upon whom service of process could be had, declaring it should not be lawful for any such foreign corporation to do any business in the commonwealth until it had filed in the office of the secretary of state the required statement and obtained from him the specified certificate. It then declared that—

"Any person or persons, * * * who shall transact any business within this commonwealth for any such foreign corporation without the provisions of this act being complied with, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished"

—either by imprisonment or fine in the discretion of the court. The court said, inter alia, that:

"The weight of authority is to the effect that it is not absolutely necessary * * * to make such contracts void that the Legislature should in express terms, declare them so."

After quoting with approval the declaration of Lord Chief Justice Holt, supra, it was said:

"That rule in this state has been generally followed by the courts, especially by the Supreme Court of Pennsylvania in a number of cases. The reason for the enactment of such statute it is said is expressed in the case of Delaware, etc., Co. v. Passenger Ry. Co., 204 Pa. 25, 53 Atl. 538, as follows: 'The purpose of the act is to bring foreign corporations doing business in this state within the reach of legal process.' This purpose is not accomplished by a registration of the corporation at the pleasure of its officers, or *when it may be to their interest to appeal to our courts.* The act is for the protection of those with whom it does business, or to whom it may incur liability by its wrongful acts, and nothing short of a registration before the contract that it seeks to enforce is made can give it a right of action. Any other construction of the act would violate its plain words and wholly defeat its object, by affording protection to the corporation and denying it to the public."

In the case at bar plaintiff, the subcontractor, made a contract to be executed in New Mexico. For years it engaged in the construction work of building a railroad in the territory, dealing with the people, prosecuting the enterprise, before asking leave of the territory, without designating a place of office, or an agent or person on whom legal process could be served, and not until after the business was all transacted, and suit was brought to enforce the contract in its favor, did it undertake to comply with the statute. There was then no occasion for obtaining such permit to transact its business.

The statute unquestionably contemplated that the statement filed with the secretary of state was as to business thereafter to be transacted in the territory, for it expressly stated that the statement should contain—

"the character of the business which *it is to transact* in the territory, and designating its principal office in said territory and an agent who shall be a domestic corporation or a natural person of full age, actually resident in this territory, together with his place of abode, upon which agent process against said corporation may be served, and the agency so constituted shall continue until some other agent is designated."

The certificate the foreign corporation is required to obtain from the secretary of the territory was in the nature of a permit to do business in the territory, and was necessarily prospective in its operation. It would seem to lead to a positive absurdity to give to the second provision of the statute the construction that such statement could be filed with the secretary of state and a certificate obtained from him after the business was all transacted, and then maintain an action thereon.

The Supreme Court of New Mexico has not construed this statute. By the removal of this case into this jurisdiction the plaintiff has prevented an opportunity for such ruling by the Supreme Court of New Mexico. The provisions of the New Mexico statute were taken from the statute of New Jersey, almost literally. The Supreme Court of the latter state in Wolf v. Lancaster et al., 70 N. J. Law, 201, 56 Atl. 172, held that a contract made by a Pennsylvania corporation for business done in New Jersey could not be enforced when the contractor had

failed to comply with the provisions of the statute in question, although the contractor subsequently did obtain such certificate from the secretary of state. The court said that the certificate obtained in November, 1902, was not sufficient, where the contract was made prior to 1902. The general rule is that, where the Legislature enacts the provisions of the statute of another state, the construction placed by the original state on the statute is presumably imported with it.

While frankly confessing the question here involved is not devoid of doubt, yet I may say, were it deemed necessary to a decision of the case, in the light of authority, I would be constrained to hold against the right of complainant and cross-complainant, the Bell & Levy Contracting Company, in the face of the statute above quoted, to maintain their suits. However, the concession of the railway company, made at the hearing, to permit complainant to have a decree for the amount of the contract price unpaid, as determined by the engineer of the railway company, impels me to give complainants the benefit of the doubt, and to proceed to decision of the remaining question presented.

[2] The second defense interposed by the defendant railroad company against this action is that it was prematurely brought, and cannot be maintained, because the chief engineer of the railroad company had not given the plaintiff any certificate of final estimate of the work done.

The contract for the construction work of the railroad is similar in every essential particular to that in the case of Choctaw & M. R. Co. v. Newton, reported in 140 Fed. 225, 71 C. C. A. 655. Briefly stated, that contract constituted the chief engineer of the railroad company the arbiter and umpire between the parties, to prevent dispute or misunderstanding relative to any of the stipulations and provisions of the agreement, as well as the performance of the contract by either of the parties. He was to decide—

"all such questions and matter; and he shall also determine, and set forth in the final estimate, the amount and quantity, character, kind, and classification of all work and materials performed and furnished by the contractor, * * * including all extra work and material; and his decision and determination as to any and all such questions, matters, and things, and in construing any of the terms and provisions of this contract, shall have the force and effect of an award, and shall be final, binding, and conclusive, to all intents and purposes, and in all places, upon the said parties thereto."

The contract also provided that the engineer should make monthly estimates of the work done, out of which said sums found due the engineer should retain 10 per cent. as a safeguard against mistakes and for protection.

The twenty-first section required the contractor to promptly pay all subcontractors, materialmen, laborers, and other employés as often as payments are made to it by the Construction Company, and it also authorized the company to retain from the payments such deficiencies due to employés and pay them. This was followed by the following provision:

"Before final settlement is made between the parties hereto for work done and materials furnished under this contract, and before any right of action shall accrue to the contractor against the company therefor, the said con-

tractor shall furnish evidence satisfactory to the chief engineer of the [Railway] Company that the work covered by this contract is free and clear from all liens for labor or materials, and that no claim then exists against the same for which any lien could be enforced."

Section 22 of the contract is as follows:

"Sec. 22. Whenever in the opinion of the chief engineer of the Railway Company this contract and all things herein agreed to be done by the contractor shall have been completely performed and finished according to the provisions hereof, and within the time herein limited, said chief engineer shall make and return a final estimate of the amount due to it therefor and remaining unpaid, and shall certify the same in writing under his hand, and the Construction Company shall within sixty days after the completion of the work aforesaid, and the return of said final estimate, pay to the contractor the full amount so found to be due it and remaining unpaid, including the percentage retained on former estimates as aforesaid, except as in this contract is otherwise provided. The procuring of such certificate and final estimate shall constitute a condition precedent to any right of action by the contractor against the company."

As this action was instituted without the plaintiff having obtained from the engineer the required certificate of final estimate, the question to be decided is whether or not the plaintiff has pleaded and shown by evidence sufficient reason or excuse for going around the engineer and asking the court to ascertain what the final estimate should be. As such ascertainment would, by the express provisions of the contract, lodge in the engineer prior to the right to bring suit, making his findings conclusive at law, most certainly it devolved upon the plaintiff to show both by its pleadings and evidence that the engineer, in failing or refusing to give such certificate, did so with a fraudulent intent, or acted so arbitrarily as of itself to indicate the fraudulent mind and purpose. Fraud in such cases cannot be supplied by mere epithets or denunciations of the disappointed party. The facts constituting the fraud must be fully alleged, and the proof must be so direct, cogent, and convincing as to fully satisfy the judicial mind. Suspicion is not equivalent to proof, and it ought not to be inferred from refined, metaphysical reasoning, or inference drawn by speculative minds. The proof should be tangible.

What are the facts alleged in the petition to excuse obtaining final estimate from the engineer before suit was brought? They are that the plaintiff had fully performed the contract, and was justly entitled to demand such certificate, and that the engineer, on request therefor, arbitrarily refused to give the same, for the reason that he had received notice from the subcontractor, protesting against giving such certificate of final estimate to the plaintiff, on the ground that the subcontractor had a claim against plaintiff for damages caused in delaying the completion of the work within the time specified in the contract; second, that the engineer refused to give such certificate of final estimate until the plaintiff should furnish him satisfactory evidence that the work was free and clear from all lines for labor or materials, and that no claim existed against the same for which a lien could be enforced.

What is the evidence upon which the court is asked to find that this refusal was tinctured with a fraudulent design? While this action of the engineer is characterized in the pleadings of the contractor and sub-

contractor as having been prompted by sinister, selfish motives, that the engineer was acting collusively with the railroad company to prevent or delay suit on the contract, we are unable to discover any tangible fact developed by the evidence to warrant the court in thus stigmatizing the conduct of the engineer.

Mr. Wattis, representing the Construction Company, testified that in January, 1907, he met Mr. Turner, the engineer, in Raton, and that his purpose of visiting Raton was to check up the condition of the business and endeavor to get a settlement; that this was about the 20th or 21st. He testified that the chief engineer had never furnished the Construction Company with final estimate.

"I went down to his office and spoke to him, and asked him for the final estimate, and was refused. His refusal was sort of evasive. I asked him why he should refuse to give final estimate, and told him our subcontractors were there, and we wanted to get a settlement with them. I said, 'We have finished the work;' and he said, 'Yes, you have finished the work, but I cannot give it to you; you have not settled with your subcontractors.' I said, 'We are ready to settle with them; that is the reason I want this final estimate.' I said, 'We are not asking you for money; before we ask you for money, we will show you our subcontractors are paid.' He said, 'I understand some of them are going to file liens; then they won't take this estimate.' I said, 'We want to see what the estimate is; if it is not satisfactory, our company will be protected, and we will look after the liens.' He continued to refuse in that manner. After I laid down, the office was furnished with figures of some kind purporting to be quantities that had turned up. I suppose it was work done in January, 1907; it was not a summary of all the work that had been done. I think that the only data we have received from Mr. Turner, the chief engineer, is that contained in these monthly estimate sheets furnished the company from time to time and a subsequent sheet for work, part of which was done in January, 1907."

Mr. Turner, in reply, testified, in substance, that he met Mr. Wattis at Raton, just as he was going in or coming out of the post office, that they met just inside the post office door.

"Mr. Wattis said, 'So you refuse to give me a final estimate.' I said, 'Now, Mr. Wattis, I am perfectly willing to give you a final estimate when you have shown me that there are no liens or claims upon which a lien could be enforced, existing;' and he said, 'You refuse to give me a final estimate;' and I said, 'Now, Mr. Wattis, I am perfectly willing to give you a final estimate when you have complied with the conditions of the contract;' then he said, 'You lied.' And this is all the conversation that took place at that time. I had probably two or three conversations with him prior to this one. I told him I was perfectly willing to give him a final estimate, when he had shown me that there were no liens, or no claims upon which a lien could be enforced. Nothing was said in this conversation by Mr. Wattis, requesting me to furnish him estimates for work of the Bell & Levy Contracting Company. I did furnish them estimates for all work that was done by that company. The estimate furnished for September, 1906, contained all of the work done by that company. They should have had all of them by October 10, 1906. I did not make any changes after October, and told representatives of the Utah Construction Company there were no further changes in the Bell & Levy Contracting Company's quantities and classifications. As I recall it, that was in October, 1906. I think I told them in December, also."

From Mr. Wattis' own testimony it would appear that the chief engineer only refused to give him certificate of final estimate because he had failed to furnish satisfactory evidence that all liens or claims for which liens could be filed were satisfied; that monthly statements had

been made from which the work done by the subcontractor was ascertainable. His evidence is quite conclusive of the fact that there was no collusion between Mr. Turner and the Railroad Company to either prevent or delay the bringing of the suit by the contractor, as it is a fact that the representative of the Railroad Company asked Mr. Turner to give the final estimate. That was on the 24th of January, 1907. Of this Mr. Turner testified as follows:

"The general manager, Mr. Van Hooten, insisted that I furnish the Utah Construction Company with a final estimate, which I declined to do, as I did not consider that the Utah Construction Company had complied with their contract; but I informed the general manager that I would notify the Utah Construction Company that there would be no change in the estimates furnished, and I did notify that company."

The letter to the Construction Company was dated January 26, 1907, in which letter Mr. Turner advised the Construction Company that he had received written notice from the St. Louis Construction & Equipment Company, protesting against giving said final estimate now, saying that they had a claim for damages on account of work not being completed within the time and in accordance with the terms specified in the contract, and further said:

"As I understand the contract, such final estimate cannot in any event be given by me until you shall furnish satisfactory evidence that the work is free and clear of all liens for labor and materials, and that no claims exist against the same for which a lien could be enforced. This you have not yet done, and I understand that some of your subcontractors have not yet been settled with. I am ready at all times to give you any detailed information regarding portions of the work done by subcontractors, which you or they may require in order to make settlement."

As the contractor had all the monthly estimates on the work done by the subcontractor, and was notified by the engineer that no changes would be made therein, there was nothing to prevent the contractor from settling with the subcontractors. The Railroad Company was under no obligation to provide money to the contractor with which to pay any subcontractor, and it was under no obligation to adjust any matters of differences between them. The evidence shows that the contractor had been paid on monthly estimates, less the 10 per cent. withheld under the present contract, to be accounted for in the final estimate and adjustment, and that the amount of money so paid to the contractor was amply sufficient to pay the subcontractor what was coming to him. So there was no legal excuse for the contractor not settling with any subcontractor, and preventing the filing of a mechanic's lien later.

If it be answered that the engineer complained to the contractor of having been notified of a claim for damages on account of having delayed the subcontractor in its work, and assigned that among the grounds for withholding final settlement, and, conceding that no mechanics' liens would obtain therefor, yet, as a matter of fact, the subcontractor filed no mechanic's lien on such claim for damages, but did file such lien for the balance claimed on account of the work and materials furnished under the contract. That lien the contractor did not discharge before bringing this suit, and that lien is sought to be en-

forced by the cross-petition of the subcontractor. How, then, can this action be maintained in the face of the express provision of the contract that "before any right of action shall accrue to the contractor against the company therefor, the said contractor shall furnish evidence, satisfactory to the chief engineer of the Railroad Company, that the work covered by this contract is free and clear from all liens for labor or materials," and that no claims existed against the same for which any lien could be claimed?

[3] Counsel for plaintiff on argument placed stress upon the preceding language of said paragraph in the contract:

"Before final settlement is made between the parties hereto for work done and materials furnished under this contract."

With much refinement they have sought to attach to the term "final settlement" an office, in effect, which I think is inapplicable here. The final settlement is one thing, and obtaining the certificate of final estimate is another. Presumptively there must be an adjustment between the engineer and the contractor before the engineer could give the certificate of final estimate, and therefore they mean practically one and the same thing. When the engineer should make the final estimate of the work done, and certified as to the result, he is presumed to have made an adjustment with the contractor of the accounting between them. This must be so, as a certificate of final estimate is conclusive on the Railroad Company, and it must pay the amount so found by the engineer, the umpire, whose estimate binds both parties. Omaha v. Hammond, 94 U. S. 98, 24 L. Ed. 70.

"A certificate of an engineer, when sufficient in form, is conclusive evidence of the performance of the contract, which provides that the work shall be done to his satisfaction to be testified by a writing or certificate under his hand." McGuire v. Rapid City, 6 Dak. 346, 43 N. W. 706, 5 L. R. A. 752, 753.

In Illinois Surety Co. v. Peeler, 240 U. S. loc. cit. 219, 36 Sup. Ct. 323 (60 L. Ed. 609), Mr. Justice Hughes, speaking of the employment of the term "final settlement" in contracts for public transaction and account, said that term "has been used from the beginning to describe administrative determination of the amount due. * * *" The words "settled" and "adjusted" are taken to mean the determination in the treasury department for administrative purposes of the account and the amount due; and we entertain no doubt that in contracts like the one under consideration, so long and so frequently employed in contracts for construction work, it means nothing more than an adjusting of the account of credits and debits to arrive at the final estimate. As the certificate given by the engineer of what the final estimate is would conclude both parties, it would necessarily imply that the final settlement or adjustment of the accounting had been made between the engineer and the contractor.

Stress was laid by counsel for plaintiff on argument upon the case of Springer v. Ford, 168 U. S. 513, 527, 18 Sup. Ct. 170, 175 (42 L. Ed. 562). The distinction between the provisions of the contract there under consideration and the one here is so palpable as to hardly justify discussion. The court in that case held that Ford was excused from showing that the work was free from all danger of liens because of

the failure of the owners to pay him the amount of the final estimate. Ford's contract provided that—

"The amount due to the contractor under the final estimate will only be paid upon satisfactory showing that the work is free from all danger of liens or claims."

Whereas, under the present contract, there could be no amount due until the chief engineer was satisfied that there was no lien. Neither was Ford, under his contract, required to show to the satisfaction of the chief engineer that the work was free and clear from all liens as a condition precedent to the right to demand final payment. All he was required to show was "that there was no danger of liens on account of his failure to pay the subcontractor before he was entitled to receive payment." So that the contractor there was required to make his showing with respect to liens only before final payment; but in the case at bar the contractor was positively required to make such showing before final estimate and certificate therefor.

[4] Counsel for plaintiff and cross-petitioner make earnest appeal that, as all the parties concerned are before the court, this objection to the action brought should be waived, and the court proceed to final ascertainment of the actual amount owing to plaintiff and the cross-petitioner.

Bad precedents, like hard cases, are the quicksands of the law, and are sure to come up to plague the court. If conceded in this instance, why not in any other, where the express stipulation of the parties is that no action shall be brought to enforce such contract until the suitor had obtained from the chief engineer, the umpire, a certificate of the amount due and owing? Any such holding in this case would thwart the very object and purpose of such provision in the contract. It would invite dissatisfied contractors to go around the engineer, the sole arbiter of the parties, and compel the adversary, as in this case, to go into court with pleas and counterpleas, with accumulated costs, annoyances, and delays, the very conditions the contract sought to obviate; and, as in this case, when the controversy comes on for hearing before the court, the contractor presents an array of outside experts to criticize and controvert the estimates and constructions of the engineer, and thus by this indirect method substitute the opinions and estimates of outsiders for that of the engineer, who at the very outset of the contract, conditioning its execution, the parties consented should decide such matters, and this without the persuasive, convincing proof requisite in equity to show fraud and oppression on the part of the engineer to invite the interposition of chancery.

It must follow that the petition and cross-petition should be dismissed, unless the plaintiff will file its written consent herein of acceptance of the offer, made by counsel on hearing, that, rather than have future litigation over this matter, judgment might be entered against it for the sum of $———, which I understand is the amount of the balance due on the estimate made in the testimony of the engineer. This course was pursued in the case of Choctaw & M. R. Co. v. Newton, 140 Fed. 250, 251, 71 C. C. A. 655, which also directed the manner of estimating the allowance of interest on the claim, under a somewhat similar situation.

UNITED STATES v. LEHIGH VALLEY RY. CO. et al. (two cases). SAME v. SCHAEFER et al. (two cases). SAME v. LEHIGH VALLEY RY. CO. (two cases).

(District Court, S. D. New York. January 29, 1918.)

Nos. D4336–D4341.

1. CARRIERS ⟸38—INTERSTATE COMMERCE—DISCRIMINATION—OFFENSES.
Under the statute declaring that every person or corporation, whether shipper or carrier, who shall knowingly offer, grant, or give, or solicit, accept, or receive rebates, etc., shall be guilty of a misdemeanor, the mere offer by a carrier is an offense.

2. CARRIERS ⟸38—INTERSTATE COMMERCE—DISCRIMINATIONS—INDICTMENT.
An indictment charging that railroads had not collected demurrage, and that the shippers had not paid it, *held* insufficient to charge the offense of discrimination, etc.

3. CARRIERS ⟸38—INTERSTATE COMMERCE—DISCRIMINATION—INDICTMENT.
Indictments charging that, while an embargo in respect to the transportation of hay was in force, a railroad company did unlawfully offer, grant, and give permits for transportation to certain shippers, while others similarly situated did not receive certain permits, *held* insufficient to charge the offense of discrimination, etc., it not being alleged there was any transportation, etc.

4. CARRIERS ⟸32(2)—INTERSTATE COMMERCE—"DISCRIMINATION."
Transportation pursuant to authorizations given one shipper while an embargo was enforced against others is an unlawful "discrimination," and constitutes a violation of statute.

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

5. CARRIERS ⟸32(1)—INTERSTATE COMMERCE—EMBARGOES—DISCRIMINATION.
That a railroad embargo was illegal does not make discriminatory transportation under it legal.

The Lehigh Valley Railway Company and others were indicted for conspiracy; Charles Schaefer, Sr., and another, were indicted for knowingly soliciting, accepting, and receiving a concession from a railroad company; the Lehigh Valley Railway Company was indicted for knowingly offering, granting and giving a concession in respect to transportation, etc.; Charles Schaefer, Sr., and another, were indicted for knowingly soliciting, accepting, and receiving a concession and discrimination in regard to shipments; the Lehigh Valley Railway Company and another were indicted for knowingly offering, granting, and giving a discrimination, etc.; and the Railway Company was indicted for willful failure to strictly observe its tariffs. On demurrers to indictments. Demurrers sustained in part, and defendants given leave to plead over, where overruled.

Francis G. Caffey, U. S. Atty., and Julian Hartridge, Asst. U. S. Atty., both of New York City.

Henry A. Wise, of New York City, for defendants Lehigh Valley Ry. Co. and Signer.

Herbert Goldmark, of New York City, for defendants Schaefer.

MAYER, District Judge. Indictments were filed against the Lehigh Valley Railroad Company, Fred E. Signer, Charles Schaefer, Sr., and Charles Schaefer, Jr., as follows:

(1) D 4336. Against all the above-named parties, for conspiracy. Section 37, Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1096 [Comp. St. 1916, § 10201]).

(2) D 4337. Against the two Schaefers, for knowingly soliciting, accepting, and receiving a concession from the Lehigh Valley, etc. (ten counts, re boat demurrage). Section 1, Elkins Act (Act Feb. 19, 1903, c. 708, 32 Stat. 847), as amended June 29, 1906 (34 Stat. 587, c. 3591 [Comp. St. 1916, § 8597]).

(3) D 4339. Against the Lehigh Valley, for knowingly offering, granting, and giving a concession to Schaefer firm, in respect of the transportation of hay, whereby such property was by a device transported at a less rate than that named in the tariffs (ten counts, re boat demurrage). Section 1, Elkins Act, as amended June 29, 1906.

(4) D 4340. Against the two Schaefers, for knowingly soliciting, accepting, and receiving a concession and discrimination from the Lehigh Valley, in regard to shipments of hay (five counts, re receiving "authorizations"; five counts, re actual transportation of hay).

(5) D 4341. Against Lehigh Valley and Signer, for knowingly offering, granting, and giving a concession and discrimination to the Schaefer firm in respect to the transportation of carload shipments of hay, whereby advantages were given and discriminations practiced (five counts, re granting "authorizations"; five counts, re actual transportation of hay). Section 1, supra.

(6) D 4338. Against Lehigh Valley for willful failure strictly to observe tariffs (ten counts). Section 1, supra.

Defendants filed demurrers to each of the above-mentioned six indictments. In respect of indictment (6), D 4338, the attorneys for the Lehigh Valley Railroad Company have requested that they be permitted to withdraw the demurrer and to plead over. Such permission is herewith given.

Since the oral argument, the government has taken over the executive administration of the railroads and the questions involved (except as they affect the particular defendants herein) do not seem to have the broad importance which apparently they possessed at the time of the argument. By this I merely mean that the determination of the interesting questions involved now concerns only situations which arose prior to the exercise of government control, and that, in view of present government administration, it will be some time before these questions will be of practical importance as affecting the future conduct of carriers and shippers. Because of what has been stated supra, I shall dispose of the questions, with a brief statement of my reasons, and without setting forth any elaborate analysis of cases.

[1] *Conspiracy Indictment (No. D 4336).* The statute provides:

"Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor. * * *" Comp. St. 1916, § 8597.

To constitute the crime it is not necessary that the railroad should "offer" *and* the shipper "accept" the discrimination. The mere offer of the rebate, concession, or discrimination, knowingly made by the railroad, is one of the offenses denounced by the statute. The proof may show that the unlawful agreement was that there should be given, and at the same time received, the discrimination complained of. If the proof so develops, the trial judge can deal with the question as he may be advised, and will consider that he is not to be hampered by this memorandum opinion. Here, however, the question must be dealt with as it appears on the face of the indictment. The indictment charges, not only that the railroad and its duly authorized agent and the shippers conspired, but makes as parties to the conspiracy the old-time "divers other persons to the grand jurors unknown." In many conspiracy cases these "divers other persons" unknown to the grand jury never appear and are never mentioned; but the court, in passing on the indictment, must assume that there are such divers other and unknown persons. I think the indictment is good, and the demurrer is overruled.

[2] *Boat Demurrage Concessions (Nos. D 4337 and D 4339).* Stripped of indictment language, all that these indictments amount to is a charge in one indictment that the railroads have not collected demurrage and a charge in the other indictment that the shippers have not paid it. The use of the word "unlawfully" does not help out, because this is merely a conclusion. While, under certain circumstances, a device need not be set forth in the indictment, yet when, in point of fact, it is set forth, the court can determine whether such device is of a character to constitute or help constitute the crime charged. Of course it is plain that what is sought to be shown is that there was an agreement or understanding by which demurrage should not be collected; but these indictments do not set forth an agreement, but are drawn in such a way as to amount merely to charging that the railroad has not collected certain accrued and proper charges and that the shipper has not paid them. The demurrer to each of these indictments is sustained.

[3] *Discrimination re Transportation of Hay (No. D 4341).* This indictment contains ten counts, and may be subdivided into two heads —those counts numbered 1 to 5, inclusive, and those numbered 6 to 10, inclusive. As to counts 1 to 5, inclusive, the indictment sets forth that there was an embargo in respect of the transportation of hay, and that hay would not be transported for shippers by the Lehigh unless a permit or authorization for such transportation was obtained from Signer, acting for the Lehigh; that the Schaefers received such permits, while others similarly situated did not, even though these others requested such permits or authorization.

The mere receiving of permits, unaccompanied by transportation, is not a crime under the act; for the act provides that it is unlawful to "offer, grant or give * * * any rebate, concession or discrimination *in respect to the transportation* of any property in interstate * * * commerce."

If there is no transportation, the mere giving of a permit is an idle act, although the case might be different if the railroad "offered" to transport.

It is sought to sustain these counts because the indictment charges that defendants "did knowingly offer" the alleged concession and discrimination to the Schaefers. Such an argument relies upon the form of words rather than their substance.

Take, for instance, count 1 as illustrative. What the indictment charges against defendants is that they "did * * * knowingly grant" (not offer) to the Schaefers authorizations for 57 carloads of hay. The word "offer," where it appears in this and the similar counts, may therefore be treated as surplusage, or as disregarded, because plainly inconsistent with the facts as definitely set forth in the indictment. The demurrer to the five counts is sustained.

[4, 5] As to the remaining counts, the points raised by defendants go rather to the proof than to the indictment. Transportation pursuant to authorizations to one shipper, and denials to others similarly situated is clearly a violation of the statute. Whether the shippers are similarly situated is a question of fact (or possibly of law) to be determined on the evidence. If the embargo was illegal, that does not make discriminatory transportation under it legal.

Demurrers to counts 6 to 10, inclusive, overruled.

Discrimination re Transportation of Hay (No. D 4340). As to the first five counts, the case is even stronger, if anything, for defendants than in No. D 4341. Demurrer to these counts sustained. Demurrer to counts 6 to 10, inclusive, overruled.

Defendants may, of course, plead over in those instances where the demurrers are overruled.

UNITED STATES v. METROPOLITAN LUMBER CO. et al.

(District Court, D. New Jersey. November 30, 1918.)

1. CARRIERS ⟸38—OFFENSES—DISCRIMINATIONS.
Elkins Act, § 1, as amended by Hepburn Act (Comp. St. 1916, § 8597), embraces the granting or receiving of discriminations or concessions, in transportation service, irrespective of whether they in any way affect transportation rates or charges.

2. CARRIERS ⟸38—OFFENSES—DISCRIMINATIONS.
The receipt of discriminations or concessions in transportation service falls within the criminal provisions of the Elkins Act, as amended by the Hepburn Act (Comp. St. 1916, § 8597), although they were procured by misrepresentations, and were thus granted without knowledge or connivance of the carrier.

3. CARRIERS ⟸38—OFFENSES—INDICTMENT.
Indictments charging violations of the Elkins Act, as amended by the Hepburn Act (Comp. St. 1916, § 8597), in that defendants by misrepresentations obtained the transportation of goods on which a railroad embargo had been laid, *held* to sufficiently allege a discrimination, showing other persons were denied the same transportation service defendants enjoyed.

4. CARRIERS ⟸38—OFFENSES—"SHIPPERS."
One is a "shipper," within the meaning of Elkins Act, § 1, as amended by Hepburn Act (Comp. St. 1916, § 8597), who, although a consignee,

exercises such direct control over shipments of commodities consigned to him by another as enables him, by his own act, to procure for himself discriminations in respect to transportation service.

5. CARRIERS ⟸38—OFFENSES—DISCRIMINATIONS—EMBARGO.
Where defendants by misrepresentations, etc., obtained transportation despite a railroad embargo, thus violating the Elkins Act, as amended by the Hepburn Act (Comp. St. 1916, § 8597), *held*, that prosecution could not be defeated because the embargo had not been submitted to the Interstate Commerce Commission and its reasonableness ascertained and adjudicated.

6. CARRIERS ⟸39—CARRIAGE OF GOODS—EMBARGOES.
Carriers by railroad have the power to lay embargoes for the proper conduct of their business.

7. CARRIERS ⟸38—OFFENSES—ACTION BY INTERSTATE COMMERCE COMMISSION.
A prosecution against shippers charged with obtaining discriminations in violation of the Elkins Act, as amended by the Hepburn Act (Comp. St. 1916, § 8597), cannot be defeated on the theory that the Interstate Commerce Commission should first have determined whether the actions of the shippers constituted violation, because one court might hold they did and another they did not.

8. CARRIERS ⟸23—SUSPENSION OF INTERSTATE COMMERCE ACT—GOVERNMENT OPERATION OF RAILROADS.
In view of the presidential proclamation of December 26, 1917, whereby the President, as a war measure, under the authority of Act Aug. 29, 1917, assumed control of the railway systems of the country, and in view of Federal Control Act March 21, 1918, *held*, that the operation of the Interstate Commerce Acts, including the Elkins Act (Comp. St. 1916, §§ 8563–8604), was not suspended.

9. CARRIERS ⟸23—SEIZURE OF RAILROADS—SUSPENSION OF INTERSTATE COMMERCE ACT.
While Act Aug. 29, 1917, allowing the President in time of war to assume control of the railway systems, was passed pursuant to the war power of Congress, given by Const. art. 1, § 8, *held*, that a railroad embargo promulgated under presidential authority, though giving preference to war material, was nothing more than a regulation incident to the proper conduct of the business of railroads, and the control which the President had assumed.

10. CARRIERS ⟸38—OFFENSES—DISCRIMINATIONS.
Where defendants by misrepresentation obtained transportation service despite an embargo laid after the President had assumed control of the railroads, *held* that, as the Elkins Act, etc., was not suspended, and defendants obtained a discrimination, prosecution could not be defeated on the theory that there was no statute making it criminal to fail to comply with the embargo regulation.

11. CARRIERS ⟸38 — OFFENSES — INDICTMENT — PROMULGATION OF REGULATIONS.
An indictment charging that defendants, in violation of the Elkins Act (Comp. St. 1916, § 8597), obtained a discrimination by securing through misrepresentation transportation service, notwithstanding an embargo laid after the President, under Act Aug. 29, 1917, assumed control of railroads, *held* not defective, on theory that the President's assent to embargo was not alleged; it being obvious he must act through agents.

The Metropolitan Lumber Company and another, the Southern Lumber Company and another, the Franklin Lumber Company, the Boynton Lumber Company, Ira R. Crouse, and Perrine & Buckelew, Incorporated, were severally indicted for alleged violations of Act Feb. 19, 1903, c. 708, § 1, as amended by Act June 29, 1906, c. 3591. On demurrers to the indictments. Demurrers overruled.

Charles F. Lynch, U. S. Atty., of Newark, N. J., and Andrew J. Steelman, Asst. U. S. Atty., of Jersey City, N. J.

Robert H. McCarter, of Newark, N. J., for defendant Crouse.

Osborne & Cornish, of Newark, N. J., for defendants Boynton Lumber Co. and Perrine & Buckelew, Inc.

Harrison P. Lindabury, of Newark, N. J., for defendants Southern Lumber Co., David Jacobson, and Franklin Lumber Co.

Edward P. Stout, of Jersey City, N. J., for defendants Metropolitan Lumber Co. and Jacob Jacobson.

HAIGHT, District Judge. As the indictments in these cases are in all material respects the same, as are also the questions which the demurrers to each raise (at least so far as the points relied upon at the argument are concerned), the demurrers were argued together, and the decision herein announced will apply to all of the cases. The indictments are based on alleged violations of section 1 of the Act of February 19, 1903, c. 708, 32 Stat. 847, commonly known as the Elkins Act, as the same was amended by the Act of June 29, 1906, c. 3591, § 2, 34 Stat. 587, commonly known as the Hepburn Act (8 U. S. Comp. St. 1916, § 8597). All are alike in form, and each contains several counts.

A summary of the first count of the indictment against the defendant Crouse will suffice to illustrate what all set forth. It alleges, in substance, that on January 24, 1918, the Pennsylvania Railroad Company was a common carrier, engaged in interstate commerce, and subject to the various acts to regulate commerce; that on that date, "under the authorization" of the Director General of Railroads, who had theretofore been appointed as such by the President, when the latter, on December 28, 1917, took possession of the railroad systems of the country, and "upon the recommendation of the Regional Director, said Pennsylvania Railroad Company," because of the extremely severe weather, particularly affecting the operation of railroads crossing the Allegheny Mountains, which then prevailed, laid an "embargo against the transportation of property, including, among other things, lumber not constituting war supplies specifically approved by the War Department of the United States," over certain of its railway routes, including the points mentioned in the indictment; that the defendant, who was engaged in "purchasing, shipping, and selling lumber" at Perth Amboy, in this district, on April 2, 1918, in order to deceive the Pennsylvania Railroad Company, and obtain transportation over its lines of a carload of lumber from the state of Virginia, where it was located, to Perth Amboy, in the state of New Jersey, notwithstanding the embargo, caused the lumber to be consigned to "Ira R. Crouse, in care of United States Government Quartermaster, Government Order A-1-1014 U. S. Property G-783-347 at Perth Amboy"; that he thereby caused the railroad company to believe that the lumber consisted of war supplies specifically approved by the War Department, and therefore that the transportation of it was not prohibited by the embargo, and to transport it accordingly, notwithstanding the embargo, although he knew that the lumber was not war supplies specifically

approved by the War Department, or other property excepted from the operation of the embargo; that as consignee of the lumber, which was transported under the circumstances before mentioned, in time of war, and while the embargo was in force, he "did knowingly accept and receive from said Pennsylvania Railroad Company, a discrimination in respect to the transportation by said Pennsylvania Railroad Company of said property in interstate commerce, as aforesaid, whereby a discrimination was practiced in favor of said Ira R. Crouse, and against the United States and all other shippers who desired to ship lumber and other commodities over said railway route of said Pennsylvania Railroad Company—among others" naming various concerns and individuals.

In five of the counts (this likewise applies to all of the indictments) he is charged under the same circumstances with having accepted and received "a concession in respect to the transportation" of lumber, "whereby an advantage was given to" him. Stated concisely, the charge is that the several defendants, by deceiving the railroad officials as to the character of the shipments, through the device of having lumber fraudulently consigned to themselves in care of various army officers, or directly to the latter, procured its transportation in interstate commerce over the lines of the Pennsylvania Railroad Company, while the embargo was in force, and thus procured transportation service which the embargo forbade, and which in some instances others, desiring to ship over the same route of the said Pennsylvania Railroad Company, were unable to procure because of the existence of the embargo, thereby receiving discriminations or concessions in respect to the transportation of such property in interstate commerce.

The indictments are attacked on numerous grounds, all of which, however, are fairly embraced within the fundamental objections which will hereafter appear. As the acts complained of occurred after the President had taken control of the railroads of the country, pursuant to proclamation of December 26, 1917, the objections may be divided primarily into two classes: (1) Those which are claimed to exist irrespective of any effect which the President's act may have had on the Interstate Commerce Acts, and the duties and liabilities of the Pennsylvania Railroad and the defendants thereunder; and (2) those based upon changes alleged to have been effected thereby. I will first consider the grounds of demurrer which fall within the first of the before-mentioned classes. Hereinafter, when the Elkins Act is spoken of, it will be understood, unless the contrary is indicated, that that act as it was amended by the Hepburn Act is meant.

[1] 1. It is primarily contended that section 1 of the Elkins Act—the criminal provisions—does not embrace the granting or receipt of a discrimination or concession such as the indictments allege that the defendants received, a discrimination or concession in transportation service exclusively, but contemplates only discriminations or concessions which in some way affect transportation rates or charges. Although my attention has not been directed to any reported decision wherein this precise question has been directly decided, neither it, nor some kindred questions to be hereafter discussed, are difficult of

solution in the light of the development of the interstate commerce legislation and the objects which Congress had in enacting it. Section 2 of the original Act to Regulate Commerce of February 4, 1887, c. 104, 24 Stat. 379 (Comp. St. 1916, § 8564), provided that it should be unlawful for any common carrier to, directly or indirectly, receive a greater or less compensation for any service rendered in the transportation of passengers or property than it charged or received from any other person for doing a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions. It will be noted that the section referred only to compensation. Section 3 (Comp. St. 1916, § 8565), however, prohibited the making or giving of "any undue or unreasonable preference or advantage" to any person, locality, or any particular description of traffic "in any respect whatsoever," and the subjecting of any such person, locality or kind of traffic "to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." The last section is broad enough to embrace a discrimination in the matter of transportation service, as distinguished from the compensation to be paid for such service, and so it has been construed. See Interstate Com. Com. v. Ill. Cent. R. R., 215 U. S. 452, 475, 30 Sup. Ct. 155, 54 L. Ed. 280. Section 6 (Comp. St. 1916, § 8569) forbade any carrier to charge or receive a greater or less compensation for transportation than the rates, fares and charges specified in the tariffs, which the act required to be filed and published. This section was extended, by the Hepburn Act, to forbid the granting of any privileges or facilities in transportation except such as were specified in such tariffs.

By section 10 (Comp. St. 1916, § 8574) a criminal liability was imposed upon any common carrier who should willfully do or cause to be done, or suffer or permit to be done, "any act, matter or thing in this act prohibited or declared to be unlawful, or who shall aid or abet therein," etc. By the same section, as amended by the Act of March 2, 1889, c. 382, § 2, 25 Stat. 855, it was made a criminal offense for a carrier "by means of false billing, false classification, false weighing or false report of weight, or by any other device or means," to knowingly and willfully assist or suffer or permit any person to obtain transportation for property "at less than the regular rates then established," on the line of transportation of such carrier. The same section, as amended by the act last mentioned, also provided that any one for whom, as "consignor or consignee," property should be carried by a common carrier, who should knowingly and willfully, "by false billing, false classification, false weighing, false representation of the contents of the package or the substance of the property, false report of weight, false statement, or by any other device or means, whether with or without the consent or connivance of the carrier," obtain or attempt to obtain transportation for such property "at less than the regular rates then established," should be guilty of a crime, as should likewise any person who should, "by payment of money or other thing of value, solicitation, or otherwise, induce or attempt to induce any common carrier * * * to discriminate unjustly in his,

its, or their favor as against any other consignor or consignee in the transportation of property."

It will thus be noted that, while the law made it unlawful and criminal for a carrier to give any unreasonable preference or advantage or to subject any person to an unreasonable prejudice or disadvantage in respect to transportation over its lines, and quite comprehensively prohibited and provided penalties for discrimination in the matter of compensation for transportation and from departing from the filed and published tariffs, it did not prohibit the receipt of discriminations in respect to transportation service, strictly speaking, by the shipper, nor make it criminal for him to accept transportation at a less compensation than was charged to others for a like service, or at less than the published tariffs, except when accomplished by false billing or bribery or something akin thereto, mentioned in section 10. In this condition of the law, the Elkins Act, which has been well described as "a 'catch-all' provision for any practice by either carrier or shipper which by any device whatever would tend to defeat the purpose of the law" (United States v. Vacuum Oil Co., 153 Fed. 604 [D. C. W. D. N. Y.]), was passed. The provision pertinent to these cases is as follows:

"It shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said act to regulate commerce and the acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said act to regulate commerce and the acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be guilty of a misdemeanor." Comp. St. 1916, § 8597.

The language used is sufficiently broad and comprehensive to embrace a discrimination in transportation service, as well as a discrimination in respect to rates. The purpose which Congress had in passing the various acts to regulate commerce has been often stated by the Supreme Court. For instance, Chief Justice White, in New Haven R. R. Co. v. Interstate Com. Com., 200 U. S. 361, 391, 26 Sup. Ct. 272, 277 (50 L. Ed. 515), expressed it as follows:

"It cannot be challenged that the great purpose of the act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all and to destroy favoritism, * * * and forbidding rebates, preferences and all other forms of undue discrimination. * * * If the public purpose which the statute was intended to accomplish be borne in mind, its meaning becomes, if possible, clearer. What was that purpose? It was to compel the carrier as a public agent to give equal treatment to all."

In Armour Packing Co. v. United States, 209 U. S. 56, 72, 28 Sup. Ct. 428, 432 (52 L. Ed. 681), Mr. Justice Day said:

"The Elkins Act proceeded upon broad lines and was evidently intended to effectuate the purpose of Congress to require that all shippers should be treated alike."

See, also, the remarks on page 80 of 209 U. S. (28 Sup. Ct. 428, 52 L. Ed. 681).

In Chicago, Indianapolis & Louisville Ry. Co. v. United States, 219 U. S. 487, 496, 31 Sup. Ct. 272, 274 (55 L. Ed. 305), Mr. Justice Harlan said:

"The legislative department intended that all who obtained transportation on interstate lines should be treated alike in the matter of rates, and that all who availed themselves of the services of the railway company (with certain specified exceptions) should be on a plane of equality."

And in Louisville & Nashville R. R. Co. v. Mottley, 219 U. S. 467, 478, 31 Sup. Ct. 265, 269 (55 L. Ed. 297, 34 L. R. A. [N. S.] 671), the same distinguished Justice said:

"But the purpose of Congress was to cut up by the roots every form of discrimination, favoritism and inequality."

In United States v. Union Stockyard, 226 U. S. 286, 307, 33 Sup. Ct. 83, 89 (57 L. Ed. 226), Mr. Justice Day, in referring to the previous decisions of the Supreme Court respecting the purpose of Congress in enacting these laws, said that it was "to require equal treatment of all shippers and to prohibit unjust discrimination in favor of any of them," and on page 309 of 226 U. S., on page 90 of 33 Sup. Ct. (57 L. Ed. 226), he said:

"It is the object of the Interstate Commerce Law and the Elkins Act to prevent favoritism by any means or device whatsoever and to prohibit practices which run counter to the purpose of the act to place all shippers upon equal terms."

Similar expressions in the reported cases could be multiplied, but it would serve no useful purpose to do so. Of course, as happens with almost every piece of remedial legislation, the accomplishment of the end sought was reached by degrees, as the practical operation of the act and the decisions of the courts developed deficiencies, and as one radical change resulted in a further step in advance. Finally in the development of the legislative object the Elkins Act was passed, which, by its language, seems to be all-embracing, and to cover the loopholes which the previous acts left open for discrimination and the exercise of favoritism. It also brought within the prohibition of the law many acts of the shipper which had not theretofore been criminal; thus making the law more effective to accomplish the object sought.

It needs no argument to demonstrate that there is fully as much room for the exercise of favoritism and resulting inequality in the granting or withholding of transportation service or facilities as there is in the matter of compensation to be paid for such service, for as was said by the Interstate Commerce Commission in the matter of The New England Investigation, 27 Interst. Com. Com'n R. 560, 616, "service is often of even greater importance than the rate itself." This is especially manifest when there exists an embargo, such as the indictments in these cases allege. Hence, bearing in mind that the purpose of Congress in passing the Elkins Act was to utterly eliminate every form or kind of discrimination, favoritism, and inequality, it is quite impossible to believe that when Congress used the broad and compre-

hensive language which it did, "whereby any other advantage is given or discrimination is practiced," it intended to cover only advantages or discriminations in the matter of rates or compensation for transportation service. If discrimination in rates was the only evil aimed at, why were the words above quoted added? Discrimination in respect to rates had been as completely covered as the English language is capable of, by the use of the words "whereby any such property shall by any device whatever be transported at a less rate," etc.

The purpose of Congress being ascertained, and it being apparent that to permit discriminations in transportation service would thwart that purpose, and the language used in the act being amply sufficient to embrace such discriminations, it seems to me that the conclusion is irresistible that such a discrimination as is complained of in these indictments is within the criminal provisions of the Elkins Act. Indeed, although he was not passing upon the precise question here under discussion, Mr. Justice Day, in the Armour Packing Co. Case, supra, at page 74 of 209 U. S., at page 232 of 28 Sup. Ct. (52 L. Ed. 681), said:

"For the penal section is not only aimed at offenses whereby property is transported in interstate commerce at less than published rates, but in terms covers the offering, granting, giving, soliciting, accepting or receiving of rebates, concessions or discriminations, 'whereby any other advantage is given or discrimination is practiced' in respect of interstate transportation."

While the decisions which deal with the right of the government, through the instrumentality of the Interstate Commerce Commission or the courts, to restrain undue discrimination or preference in the matter of transportation facilities or service, such as Interstate Com. Com. v. Ill. Cent. R. R. Co., 215 U. S. 452, 30 Sup. Ct. 155, 54 L. Ed. 280, are not dispositive of the question under consideration, which has to do with the criminal provisions of the Elkins Act, they do illustrate the spirit in which the acts have been construed, and demonstrate that any practice which works a discrimination in respect to transportation service is within the general scope of the act. I cannot conceive, therefore, that it can be successfully maintained that Congress, when it used the broad language found in the Elkins Act, did not intend to make it a penal offense to give or receive a discrimination or concession in respect to transportation service or facilities, without regard to whether the same in any way affects the rate or compensation to be paid therefor. This conclusion seems also to be in harmony with the views of Judge Mayer, as expressed in his decision in United States v. Lehigh Valley Ry. Co. et al. (D. C. S. D. N. Y.) 254 Fed. 332.

[2] 2. The allegations of the indictments forbid the possibility of drawing an inference that the discriminations or concessions which the defendants are alleged to have received were procured with the knowledge, acquiescence, or connivance of the carrier. It is defendants' contention that such knowledge, acquiescence, or connivance is essential before the acceptance or receipt of a discrimination or concession is criminal under the Elkins Act. While it is admitted that there is nothing in the act which specifically makes the knowledge or connivance of the shipper an essential element of the crime, yet it is argued that the words "to give or grant" are correlative with the words "to accept

or receive," and that a discrimination cannot be accepted or received unless it has been given or granted. That is, of course, true; but it by no means follows therefrom that a discrimination may not have been knowingly received by the shipper and unconsciously given or granted by the carrier.

Bearing in mind the purpose which Congress had in mind in enacting the Elkins Act, as before set forth, and considering, as will be hereafter shown, that a construction such as defendants urge would in many cases defeat that purpose, and further bearing in mind that one of the ways in which it was sought to eliminate all favoritism and inequality of treatment was by visiting criminal punishment on those who would be the beneficiaries thereof, it would be unjustifiable, I think, in the absence of language from which it can be clearly found; to attribute to Congress an intention to limit the operation of the act to only such transactions as are consciously participated in by both the shipper and the carrier. Such a construction would free from criminal responsibility both the carrier and the shipper in all those cases where the shipper could, without the knowledge of the carrier, secure advantages and discriminations in transportation service, by means which do not fall within the provisions of section 10 of the Act to Regulate Commerce, as it was amended by the Act of March 2, 1889, c. 382, § 2, 25 Stat. 855, and the Act of June 18, 1910, c. 309, § 10, 36 Stat. 539. The provisions of that section, except as to the acts interdicted in the last paragraph, deal only with the procuring of transportation at less than the established rates. The last paragraph seems clearly to deal only with cases in which the carrier knowingly participates, or in which an attempt is made to secure the discrimination by means which would acquaint the carrier with the object sought. The language of that paragraph is:

"If any * * * person * * * shall, by payment of money or other thing of value, solicitation, or otherwise, induce or attempt to induce"

—any carrier to discriminate in its favor. Under the settled rule of construction, the word "otherwise" should be construed to include offenses which are akin to those specifically mentioned; that is to say, bribery and solicitation, both of which would, of course, necessitate acquainting the carrier with the object sought to be accomplished. The use of the word "induce" would also seem to lead to the same conclusion. Hence, section 10, as amended and supplemented, would not cover cases such as these or many others which may be readily imagined. Moreover, if it was intended to cover, by section 1 of the Elkins Act, only the receipt of discriminations which are granted with the carrier's knowledge, that part of the act was quite unnecessary, because it was for all practical purposes already covered by the last paragraph of section 10 of the Act to Regulate Commerce. It was held by the Circuit Court of Appeals of the Sixth Circuit, in Nichols & Cox Lumber Co. v. United States, 212 Fed. 588, 590, 129 C. C. A. 124, that the amendment made to that section by the Act of June 18, 1910, did not repeal the Elkins Act, because they were aimed at different evils.

While the remarks of Mr. Justice Lurton in Mo., Kan. & Tex. Ry. Co. v. Harriman, 227 U. S. 657, 671, 33 Sup. Ct. 397, 57 L. Ed. 690 (second paragraph), are susceptible of the inference which the government seeks to draw from them, and, if interpreted in that light, would fully support the views here expressed, I am not, owing to the facts of that case, sufficiently persuaded that they may be properly considered as an expression of an opinion of the Supreme Court on the point in question. I incline to the belief that the court had reference rather to the fact that the acts therein referred to produced a discrimination which the Elkins Act prohibited, rather than that such acts were necessarily criminal under that statute. Nor do I think that the remarks of the same Justice in Kans. Southern Ry. v. Carl, 227 U. S. 639, 652, 33 Sup. Ct. 391, 57 L. Ed. 683 (referred to by counsel for one of the defendants), is susceptible of the meaning which it is sought to attribute to it. In speaking of connivance, the court did not refer to that as a fact necessary to bring the discrimination or preference within the "act of Congress," but rather referred to the effect of connivance of the carrier on the estoppel which underlay the decision of the case.

It is further urged that the views expressed by Judge Holt in United States v. N. Y. Cent. & H. R. R. Co., 146 Fed. 298, 303 (C. C. S. D. N. Y.), are opposed to those above expressed. It is true that Judge Holt said in that case:

"I think that the offense of giving or receiving rebates is such an act. It requires the concurrence of two persons. A rebate cannot be given unless there is some one who agrees to receive it and who does receive it, and cannot be received unless there is some one who agrees to give it and who does give it."

These remarks may be entirely correct so far as rebates are concerned (and they related only to rebates), because a rebate (a giving back) may very properly imply a consciousness on the part of the carrier of what it was doing. That may have been the reason for the amendment made to section 10 of the Act to Regulate Commerce by the Act of June 19, 1910, which prohibits the procuring of refunds by false statements and representations as to value, injury, etc., of property theretofore transported. But because it may be that the giving and acceptance of a rebate requires the conscious participation on the part of the carrier, it does not follow that every discrimination or concession must also require a like participation. My conclusion therefore is that the receipt of a discrimination or concession such as the indictments in this case allege that the defendants received, is made criminal by the provisions of the Elkins Act, irrespective of whether the carrier consciously and knowingly participated therein.

[3] 3. The next contention of defendants, in orderly sequence, is that the indictments do not allege any such discrimination as is contemplated by the Elkins Act, because they do not show that any other persons were denied the same transportation service as the defendants received. In other words, the objection is, as I understand it, that the indictments do not allege that any other persons, who caused lumber to be consigned in the fraudulent manner that the defendants

did, were denied like transportation facilities. The mere statement of the proposition would seem to be quite sufficient to refute its soundness. In its final analysis it is this: Because the indictments do not allege that others, desiring to avail themselves of transportation service while the embargo was in effect, did not attempt to or were unsuccessful in inducing the railroad company to believe that their particular shipments were within the exceptions of the embargo, when they were not, the indictments do not show that the defendants, who were successful in doing so, received a discrimination. But that, as I conceive it, is not the test; but it is whether the defendants received transportation of lumber which was not within one of the exceptions of the embargo, when others who desired like service could not procure it. In that view full effect can be given to the decision in United States v. Hanley, 71 Fed. 672, 673 (D. C. N. D. Ill.), and the indictments will still be good. They allege that there were others (who are named, including the United States) who desired to avail themselves of the transportation privilege which the defendants secured. The necessary effect of the allegations of the indictments is that such persons were denied what the defendants, by their fraudulent practices, procured. If that does not constitute the receipt of a discrimination, it is difficult to understand what does. This was the view entertained, I think, by the Circuit Court of Appeals of the Sixth Circuit in Hocking Valley Ry. Co. v. United States, 210 Fed. 735, 745, and 746, subdivision 8, 127 C. C. A. 285. At the conclusion of the part of the opinion just referred to Judge Denison pertinently said:

"It cannot be necessary that others should have known of the partiality and should have demanded equal treatment. Such concessions are naturally not made generally known."

Moreover, when the embargo was laid, every person desiring to avail himself of transportation facilities within the area of the embargo had a right to presume that it would be enforced. I do not think, therefore, that it would be necessary, in order to show the receipt of discriminations on the part of the defendants, that others had actually applied for transportation service similar to that which the defendants received, and had been denied it; it would be sufficient to show the promulgation of the embargo, the desire of the others to ship, the fact that they did not do so, or attempt to do so, by reason of the embargo, and the method by which the defendants procured transportation service in violation of the embargo. I think the remarks of Judge Hazel, in United States v. Vacuum Oil Co., 153 Fed. 598, 607 (D. C. W. D. N. Y.), support this view. The indictment in United States v. Hanley, supra, was framed under section 2 of the Act to Regulate Commerce, long before the Elkins Act was passed, and the objection was that it did not allege that the rebate which had been given to the defendant had been denied to others similarly situated. The fact that there were other shippers of lumber, who desired to avail themselves of transportation facilities while the embargo was in force, and who did not do so by reason of the embargo, coupled with the means by which the defendants did procure such service, readily distinguishes this case from the Hanley Case.

All that has just been said has reference to a discrimination, strictly speaking. Some of the counts of the indictment are based on the proposition that what the defendants received were discriminations, while others proceed on the theory that they were concessions. The fact that the indictment characterizes what the defendants did receive as "concessions" or "discriminations," as the case may be, does not make them such. What the defendants actually received, under all the facts and circumstances, will determine whether they were concessions or discriminations. While there undoubtedly is in some classes of cases a real distinction between a concession and a discrimination, there would seem to be no difference in a case where the act consists in conceding to one a transportation privilege which is denied to another because of a general rule or regulation. Whether the defendants in this case received a discrimination or a concession (a discrimination may readily include a concession) would seem to depend upon whether they secured something which others similarly situated could not, without regard to any general rule or regulation, or whether they received something more favorable than an established rule or regulation, such as the embargo, entitled them to, irrespective of whether others were denied the same concession or not. In either case what they did receive the Elkins Act forbade them to receive, and made their act in receiving it a criminal offense.

[4] 4. It is further urged that the indictments do not charge a crime, because the allegations thereof demonstrate that the defendants were not "shippers" within the meaning of the Elkins Act. I will assume, for the purpose of argument, that only "carriers" and "shippers" are within the provisions of section 1, as defendants forcibly contend. It is true that the indictments set forth that the defendants were "consignees" of the lumber which was transported in violation of the embargo; but they further allege that the respective defendants, for the purpose of obtaining transportation, caused the property to be fraudulently consigned, etc. Thus it appears that the defendants were the actors in the illegal transactions; and, so far as the indictments show, they were the persons to be benefited by the discriminations or concessions. The question then is: Were they, under such circumstances, "shippers," within the meaning of the act? I have no doubt that they were. To give to the word "shippers" the narrow meaning sought by defendants, and thus to hold that a consignee, when a different person than the consignor, could under no circumstances be a shipper, would, in many cases, defeat the main purpose of the act. For instance, very frequently the consignee, although he does not initiate the shipment, pays the freight, and the goods are in reality transported for him. Furthermore, in such cases he is the only person benefited by or interested in concessions or rebates. For obvious reasons, unless the very purpose of the act is to be nullified, such a consignee is a shipper, within the meaning of the act, as he is in fact.

That it was the intention of Congress that the criminal provisions of section 1 should reach consignees under such circumstances, is made more manifest when they are read in connection with the last paragraph of that section and section 10 of the Act to Regulate Com-

merce, and in the light of the purposes sought to be accomplished by the Elkins Act, as hereinbefore expressed. In the latter section, the obtaining of transportation, at less than the regular rates, by either the "consignor or consignee," through false billing, etc., is made a crime; and by the last paragraph of section 1 of the Elkins Act, "in addition to any penalty provided by" that act, a "consignor or consignee," "for whom" property is transported and to whom a rebate is given, is made liable to a forfeiture of three times the rebate. Bearing in mind the purpose which Congress had in passing the Elkins Act and the comprehensive language used, it cannot be that it was intended to punish the consignee only in cases falling directly within those provisions, and to leave him unscathed or without criminal responsibility in all other cases, which would undoubtedly constitute the majority. There is no conceivable reason for any such distinction and every reason to the contrary.

The context of the paragraph in which the words "whether carrier or shipper" are found must not be overlooked. "Every person or corporation, whether carrier or shipper," who knowingly gives, accepts, etc., are made thereby guilty of a crime. The use of the words "every person" would seem to indicate that Congress never intended to limit the application of that part of the act to only such shippers as occupy the position of consignors. Hence, without attempting to lay down any general rule applicable to all cases, I think that in a case such as these, where the consignees, as is alleged, exercised such direct control over the shipments as enabled them, by their own acts, to procure for themselves discriminations in respect to transportation service, they are clearly "shippers," within the meaning of the act. In such a case the transportation service is really rendered for them, not for the consignors, and they are in reality the shippers. The view above expressed finds direct support in the remarks of Judge Landis in United States v. Standard Oil Co. (D. C.) 148 Fed. 719, 722, and some support, I think, in that part of the opinion in United States v. Milwaukee Refrigerator Transit Co., 145 Fed. 1007, 1012 (C. C. E. D. Wis.), which deals with the defendant's contention that the Elkins Act touched only the carrier and the shipper, and not to the part of the opinion which construes the words "parties interested in the traffic," as it does also in the decision of the Interstate Commerce Commission in St. Louis Terminal Case, 34 Interst. Com. Com'n R. 453, 460, 461.

[5, 6] 5. It is further urged that the defendants cannot be prosecuted in the absence of proceedings before or previous action by the Interstate Commerce Commission. This proposition seems to be based on two theories. It is first claimed that the embargo should have been submitted to the Interstate Commerce Commission, and its reasonableness ascertained and adjudicated by that body. The obvious answer is that the reasonableness of the embargo is not in issue in these cases; but the question is whether the defendants have knowingly received a discrimination or concession in transportation service which a strict and impartial enforcement of the embargo would not have permitted them to receive. If the railroad company were being prosecuted for

having given, or the defendants for having received, discriminations by means of or through the embargo rather than by violating it, in all probability the defendants' contention would be well taken, for in such a case the question would be whether the embargo was reasonable, or whether it produced unjust and unreasonable discriminations among shippers. In that event an administrative question would probably be presented, which, under the decisions of the Supreme Court, must be passed on by the Interstate Commerce Commission prior to the institution of either civil or criminal proceedings. See Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075; Balt. & Ohio R. R. Co. v. Pitcairn Coal Co., 215 U. S. 481, 30 Sup. Ct. 164, 54 L. Ed. 292; United States v. Pacific & Arctic Co., 228 U. S. 87, 106, 33 Sup. Ct. 443, 57 L. Ed. 742; Penna. R. R. Co. v. International Coal Co., 230 U. S. 184, 196, 197, 33 Sup. Ct. 893, 57 L. Ed. 1446, Ann. Cas. 1915A, 315; Mitchell Coal Co. v. Penna. R. R. Co., 230 U. S. 247, 256, 257, 33 Sup. Ct. 916, 57 L. Ed. 1472.

In the cases at bar the defendants are charged, not with having secured discriminations through or by means of the embargo, but in violation of it; therefore, the reasonableness of the embargo is not in question. There would be nothing for the Interstate Commerce Commission, so far as any action on their part could affect the issues in this case, to pass upon. The distinction between the cases at bar and the supposed case is pointed out in Penna. R. R. Co. v. International Coal Co., supra, and in Mitchell Coal Co. v. Penna. R. R. Co., supra, where the two classes of cases are specifically dealt with, and particularly in Penna. R. R. Co. v. Puritan Coal Mining Co., 237 U. S. 121, 131, 35 Sup. Ct. 484, 59 L. Ed. 867, as it is also in Penna. R. R. Co. v. Stineman Coal Co., 242 U. S. 298, 37 Sup. Ct. 118, 61 L. Ed. 316, Penna. R. R. Co. v. Sonman Coal Co., 242 U. S. 121, 37 Sup Ct. 46, 61 L. Ed. 188, and Hocking Valley R. R. Co. v. United States, 210 Fed. 735, 745, 127 C. C. A. 285 (C. C. A. 6th Cir). The right of a carrier to lay embargoes for the proper conduct of its business is not, and I do not think could be successfully, contested. This right, wholly or partially, is recognized in nearly all of the cases last above cited, and especially in the decision of the Interstate Commerce Commission in Baltimore Chamber of Commerce v. Baltimore & Ohio Railroad, 45 Interst. Com. Com'n R. 40. If the defendants conceived that the embargo was unreasonable, or unjustly discriminatory, so far as they were concerned, they should have applied to the Interstate Commerce Commission for its vacation or modification, as was done in the case last cited, rather than to endeavor to evade it, and thus procure a discrimination over other shippers who were in the same class as themselves.

[7] It next seems to be contended that the Interstate Commerce Commission should first have determined whether the actions of the defendants constituted violations of the Elkins Act, because one court might hold that they did and another that they did not. This contention is based on an entire misapprehension of the doctrine above discussed. The proposition that the construction of a penal statute must

be first submitted to an administrative body before the courts can proceed to enforce it—and that is what defendants' contention amounts to—is so utterly without merit as to need no discussion.

[8, 9] 6. I am now brought to a consideration of such of the defendants' contentions as are based on the proposition that the act of the President in assuming control of the railway systems of the country, by virtue of that part of section 1 of the Act of August 29, 1917, c. 418, 39 Stat. 645, which authorized him to do so in time of war, suspended the operation of the Interstate Commerce Acts, including the Elkins Act, while such systems remained under his control. When the expression "Interstate Commerce Acts" is hereinafter used, it will be understood as including the Elkins Act. It should be observed at the outset that the President's proclamation of December 26, 1917, specifically provided that:

"Until and except so far as said director [the Director General of Railroads] shall from time to time otherwise by general or special orders determine, such systems of transportation shall remain subject to all existing statutes and orders of the Interstate Commerce Commission"

—and that by section 10 of the subsequent Act of Congress of March 21, 1918, c. 25, commonly known as the Federal Control Act, it was provided:

"That carriers while under federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such federal control or with any order of the President."

There was no express provision in the before-mentioned Act of August 29, 1917, repealing, suspending or providing for the suspension of any of the Interstate Commerce Acts; therefore, if that act did bring about or authorized any such suspension (which I do not attempt to decide), it would have to be implied from the fact that control by the President would be inconsistent with all or some of the provisions of the Interstate Commerce Acts. However, it is clear that the President did not consider that his control was thus inconsistent, because, as appears from the above-quoted extract from his proclamation, he specifically provided that the railroads should remain subject to all existing statutes and orders of the Interstate Commerce Commission until the Director General of Railroads should, by general or special order, otherwise provide. To the same effect is the subsequent Act of Congress of March 21, 1918. I do not think that it needs any argument to demonstrate that if the official to whom the law committed the possession and control of the railroads did not deem such possession and control, except as occasion might arise thereafter, so inconsistent with the Interstate Commerce Acts as to necessitate a suspension of them, that any court would be justified in holding to the contrary. Especially is that true when Congress by its later act, in effect gave the same interpretation, as I think it did, to its prior act. If it be assumed that the President could, by special or general order, under either of the Federal Control Acts, authorize discriminations in transportation serv-

ice, among persons similarly situated, of other than war material, supplies, and equipment, and other commodities essential to the prosecution of the war, no such order has been brought to my attention. Thus it follows that the provisions in question of the Elkins Act were not affected by the act of the President in assuming control of the railroads, and the unlawfulness of the discriminations alleged to have been received by the defendants was not removed thereby.

It may be readily conceded that the act, by virtue of which the President first assumed control, was passed pursuant to the "war power" of Congress (article 1, § 8, pars. 11, 12, 13, of the Constitution), as defendants contend; but that in no way affects these cases, because the provisions of the Interstate Commerce Acts, pertinent to them, were, at the time the offenses are alleged to have been committed, in full force and effect, as I have heretofore found. The embargo was not, as some of the counsel for the defendants seemed to assume, promulgated "under the war power of Congress." Even though it gave preference to war material and supplies, it was nothing more than a regulation incident to the proper conduct of the business of the railroads. The President had assumed control by virtue of an act passed under the war power of Congress; but the embargo was only an incident of the control, in the same sense that any embargo laid by a carrier, while a railroad was under its control, would be incidental to the proper conduct of its business.

[10] It is further contended that as there was no statute, when the embargo was promulgated, making it criminal to fail to comply with such "a regulation," the defendants' act in violating the embargo could not constitute a crime. This contention is based on the assumption that when the President took possession of the railroads, the Elkins Act was suspended. As I have heretofore found that there was no such suspension, it of course follows that the conclusion falls with the premise on which it is based. The crime charged is not that the defendants violated a regulation, but that they were recipients of discriminations which the Elkins Act forbade them to receive.

[11] It is also urged that the railroad officials were without authority to lay the embargo, because the railroad had passed under the control of the President, and that the Pennsylvania Railroad was thereafter, as a corporate entity, powerless to act either in respect to laying an embargo or in granting discriminations or concessions. Hence it is argued that the indictments are defective, because they allege that the discriminations were received from the "Pennsylvania Railroad," and because the embargo was laid by it, notwithstanding that they also allege that the embargo was authorized by the Director General. It was, of course, intended by Congress that the President should, in the performance of the duties imposed upon him by the Act of August 29, 1917, act through agents. In the proclamation of December 26, 1917, he provided that the Director General of Railroads should perform the duties imposed upon him (which were the duties imposed upon the President, after he had assumed control) "so long and to such extent as he shall determine, through the boards of directors, receivers, officers and employés of said systems of transportation." The embargo, therefore,

was laid through the agency which the President had created, and the discriminations or concessions were given or granted by those charged by him with the conducting of the Pennsylvania Railroad system of transportation, and that is what I construe the indictments to charge. They are entitled to receive a fair and reasonable construction.

7. I think that all of the objections to the indictment, which need more than a passing remark, are embraced within the points that have been discussed. There are one or two minor ones, of a very technical nature, which I think are deserving of no more discussion than that I have examined them and find them without merit.

My conclusion therefore is that the demurrers should be overruled.

JOHN LYSAGHT, Limited, v. LEHIGH VALLEY R. CO.

(District Court, S. D. New York. December 20, 1918.)

1. CARRIERS ⟸177(3)—LIABILITY OF INITIAL CARRIER—INTERSTATE COMMERCE LAW—"EXISTING LAW."

In Interstate Commerce Act, § 20, as amended by Act June 29, 1906, § 7 (Comp. St. 1916, § 8604a), regulating liability of initial carriers, the proviso that nothing in the section shall deprive the shipper "of any remedy or right of action which he has under the existing law," means the common law as understood in the federal courts, and excludes changes made by state statutes.

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

2. CARRIERS ⟸177(4)—LIABILITY TO SHIPPERS—INTERSTATE COMMERCE LAW.

Under Interstate Commerce Act, § 20, as amended by Act June 29, 1906, § 7 (Comp. St. 1916, § 8604aa), the liability of a connecting or terminal carrier for property lost or damaged while in its custody is the same as that of the initial carrier.

3. CARRIERS ⟸119—LOSS OF PROPERTY—DEFENSES—"ACT OF GOD."

Loss or damage to property in course of transportation through explosion of war munitions, also in transit, cannot be considered in a legal sense an "act of God."

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

4. CARRIERS ⟸177(3)—LIABILITY OF INITIAL CARRIER—INTERSTATE COMMERCE LAW.

Interstate Commerce Act, § 20, as amended by Act June 29, 1906, § 7 (Comp. St. 1916, § 8604a), providing that a carrier receiving property for interstate transportation shall be liable for "any loss, damage or injury to such property caused by it," is not a limitation of the carrier's pre-existing common-law liability.

5. CARRIERS ⟸115—LIABILITY FOR LOSS OF PROPERTY—EXPLOSION OF MUNITIONS.

Compliance by a carrier in the carriage of war munitions with the requirements of Criminal Code, §§ 232–235 (Comp. St. 1916, §§ 10402–10405), does not affect its civil liability in respect to loss or damage to property of other shippers through an explosion of such munitions.

At Law. Action by John Lysaght, Limited, against the Lehigh Valley Railroad Company. On demurrer to pleas. Demurrer sustained.

Demurrer to three pleas interposed to a complaint.

The complaint alleged: That on June 17, and June 22, 1916, the plaintiff caused to be delivered to the receiver of the Missouri, Kansas & Texas Rail-

way two carloads of spelters to be transferred from the state of Kansas to the state of New York for export, consigned to the Iola Zinc Company, New York, and that for each carload the Missouri, Kansas & Texas Railway issued a bill of lading in standard form as approved by the Interstate Commerce Commission. That the defendant as connecting carrier received these two carloads for the completion of the transportation through the states of New York, Pennsylvania, and New Jersey, and to the city of New York. That thereafter, and on the 30th day of July, 1916, while in possession of the defendant, and at the port of New York, the carloads were destroyed by fire, to the damage of the plaintiff in the sum of $15,544.23.

The second cause of action repeats the allegations of the first, and adds that the loss of the spelters was due to the negligence of the defendant. This cause of action is not the subject of the present controversy.

The defendant pleaded, for a first plea: That the spelters were destroyed as the natural result of certain explosives and munitions of war, in the course of transportation in interstate and foreign commerce as a necessary incident to the great European war, and that they exploded without fault of the defendant, for reasons beyond its control. That such explosion was a great public calamity, of which both the plaintiff and the defendant were innocent victims, and for which the defendant was in no wise responsible.

The second plea alleges: That the defendant and its connecting carriers were common carriers of freight and passengers in interstate commerce, and as such subject to the Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 379). That the defendant and its connecting carriers duly published as required by law their rates, charges, bill of lading provisions, and rules and regulations for the transportation of freight, including explosives and munitions of war. That on July 30, 1916, a large amount of explosives and munitions of war were in the possession of the defendant at Jersey City, N. J., in the course of transportation in interstate foreign commerce, and that the spelters mentioned in the complaint were destroyed without any fault or negligence of the defendant, and as the proximate and natural result of the explosion on the date in question of certain of the aforesaid explosives and munitions of war. That the defendant, in the course of its handling and transportation, and while holding the aforesaid explosives and munitions of war, had fully complied with all the requirements of the act of Congress and the rules of the Interstate Commerce Commission applicable, as well as with its own tariffs, classifications, and bill of lading provisions for the transporting of such explosives and munitions of war.

The third plea alleges the same facts as the second, and in addition that the damage resulted from certain explosives and munitions of war, which were not in the possession or under the control of the defendant, but were on barges lying in the waters of New York Bay in the vicinity of defendant's terminal at Jersey City, N. J., which were wholly out of the control of the defendant.

The defendant by the three pleas raises the following points: First. That the "Black Tom explosion," which did immense damage in the neighborhood, was a great public calamity, for which the defendant should not be charged, but which should be regarded as an exception to its liability as a common carrier. That the conventional rule governing carrier's liability will not withstand the results of inquiry into the sources of such liability as found in the history of the subject, and that a carrier should not in law be liable therefor. Second. That the whole subject is regulated by the Interstate Commerce Act and those sections of the Criminal Code, §§ 232–235 (Act March 4, 1909, c. 321, 35 Stat. 1134 [Comp. St. 1916, §§ 10402–10405]), which regulate the carriage of explosives by common carrier. That under this legislation Congress has provided the precautions which carriers shall exercise, and which, if they do, shall exempt them from responsibility in the carriage of explosives. That, furthermore, the liability of a common carrier is only for damages caused by it, and does not include any liability for explosions in which neither it nor its servants can be shown to have any part. Third. That, if the explosion was due to materials not in possession of the defendant, it is not responsible for the same, as in no aspect can it be said to be caused by the carrier itself.

W. K. Post, of New York City, for plaintiff.
Lindley M. Garrison and Charles A. Boston, both of New York City, for defendant.

LEARNED HAND, District Judge (after stating the facts as above). [1, 2] This case depends directly upon the Carmack Amendment of the Interstate Commerce Law, which the Supreme Court has many times declared completely to regulate all the liabilities of common carriers engaged in interstate commerce. Adams Express Co. v. Croninger, 226 U. S. 491, 505, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257; Erie R. R. Co. v. New York, 233 U. S. 671, 681, 34 Sup. Ct. 756, 58 L. Ed. 1149, 52 L. R. A. (N. S.) 266, Ann. Cas. 1915D, 138; N. Y. & Norfolk R. R. Co. v. Peninsula Exchange, 240 U. S. 34, 36 Sup. Ct. 230, 60 L. Ed. 511, L. R. A. 1917A, 193; Southern Express Co. v. Byers, 240 U. S. 612, 614, 36 Sup. Ct. 410, 60 L. Ed. 825, L. R. A. 1917A, 197; Southern Railway v. Prescott, 240 U. S. 632, 639, 36 Sup. Ct. 469, 60 L. Ed. 836; Georgia, Florida, etc., Ry. v. Blish Milling Co., 241 U. S. 190, 194, 36 Sup. Ct. 541, 60 L. Ed. 948; Cincinnati, etc., Ry. v. Rankin, 241 U. S. 319, 36 Sup. Ct. 555, 60 L. Ed. 1022, L. R. A. 1917A, 265; Atchison, etc., Ry. v. Harold, 241 U. S. 371, 378, 36 Sup. Ct. 665, 60 L. Ed. 1050. The Interstate Commerce Law, § 20, as now amended (Act Feb. 4, 1887, c. 104, 24 Stat. 386, as amended by Act June 29, 1906, c. 3591, § 7, 34 Stat. 595 [Comp. St. 1916, §§ 8604a, 8604aa]), provides that an initial carrier shall be liable for all loss or damage "caused by it," but that the section as a whole shall not affect "any remedy or right of action" which the shipper shall have "under the existing law." The phrase "existing law" means existing common law as understood in the federal courts, and excludes changes effected by state statutes. Adams Express Co. v. Croninger, supra, 226 U. S. 504, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257; Southern Express Co. v. Byers, supra, 240 U. S. 614, 36 Sup. Ct. 410, 60 L. Ed. 825, L. R. A. 1917A, 197; Southern Railway Co. v. Prescott, supra, 240 U. S. 639, 36 Sup. Ct. 469, 60 L. Ed. 836. A connecting or terminal carrier's liability is subject to the same rules as the initial carrier's. Georgia, etc., Ry. v. Blish Milling Co., 241 U. S. 190, 36 Sup. Ct. 541, 60 L. Ed. 948.

[3] The question, therefore, becomes whether the "federal law" as so understood excuses the defendant in such circumstances as the pleas allege. That the explosion of the substances carried by the defendant can be regarded as in any sense an "act of God," cannot be supported, as that phrase has always been understood. They were inherently unstable compounds, not combined by spontaneous processes of nature, but under human direction, and from no point of view could the release of energy attendant upon their resumption of stable chemical conditions fall within the definition of that phrase. Even though the conventional limits of an "act of God" be vague and irrational, and though there may be still some latitude for interpretation which did not seek to make the definition turn upon the degree

of violence of the elements, there is a clear difference between the acts of the elements which all must endure, and the results of human contrivance like this. If it be urged that the affinity of the dissociated atoms of an unstable chemical compound be a force of nature, the fact is true; but it is quite irrelevant, for the laws of nature attend every action of man, including even the operation of his consciousness. The distinction was devised, not for chemists, but for common men, and must be read in their terms. So viewed, the elements had nothing to do with the calamity, but only the hand of man. Nor can the damage be attributed to any "vice" of the plaintiff's goods, however that word be construed. They were injured by the "vice" of other goods in the carrier's or others' custody, and not by their own.

[4] If, then, the common expressions of carrier's liability be accepted, there is no escape here for the defendant, and so it insists that these are only loose and ill-founded formulas, which will not endure historical analysis. The answer is, I think, to be found, not there, but in the definite purposes of the statute which covers the whole subject. There cannot be any doubt, from the latest expression of the Supreme Court (Cincinnati, etc., Ry. Co. v. Rankin, 241 U. S. 319, 326, 36 Sup. Ct. 555, 60 L. Ed. 1022, L. R. A. 1917A, 265), that section 20 was intended to adopt the carrier's liability as it was understood at that time, and that the language of Mr. Justice Lurton in Adams Express Co. v. Croninger, 226 U. S. 491, 506, 507, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257, is not to be taken as interpreting the phrase "caused by it" as in limitation of any pre-existing liability. He was indeed discussing, not that question, but only whether the language extended the carrier's liabilities as fixed at common law, which he thought it did not, but that rather it implied "a liability for some default in its common-law duty as a common carrier." It may, perhaps, be too much to assert that the proviso of section 20 incorporates unyieldingly the exact status of the federal common law into the statute in its whole concreteness, yet it certainly does affirm in general the liability of carriers so derived as a part of the statute itself. Any radical departure from that law would violate the fair import of the phrase, and if there is to be any such it must be by express act of Congress. So much follows from the scheme of the section, which since 1906 has been obviously molded with an eye to the generally accepted liabilities of carriers as a foundation for the very specific changes prescribed from time to time.

It is, of course, possible to conceive the common law so incorporated to be such only as the courts might after a historical scrutiny accept, leaving them free even for radical modifications in the doctrine as generally expressed when the language first appeared in section 20. But I do not so understand the substance of the matter. Whether ill or well founded historically, the exceptions to a carrier's absolute liability had come to have a classic form, and I do not agree that a nice inquiry into the foundations of the current doctrine was contemplated by the statute. The section incorporated what was generally accepted in the form in which it had become accepted, and ren-

dered irrelevant the conclusions at which historical scholarship might arrive as to its justification. The structure of the system created by the act presupposed the existing law as then understood, and if it bears too heavily on the railroads their only relief is by an application to the Commission or to Congress. The courts have no such powers.

Therefore it seems to me quite beside the mark to engage in the examination which the defendant invites. Moreover, the implicit assumption of its case I do not accept, that justice necessarily lies on its side. I am aware of no long-accepted convention, which usage has made into an axiom of justice, and which throws a loss like this upon the shipper as against the carrier. Each party is quite innocent, and while it may be that the ordinary risks of ownership should fall upon the shipper, it is not apparent to me that the custody of the carrier may not be thought to modify those risks as between the two. The fact seems rather to be that all such a priori considerations are in vacuo, and that the relative rights of the parties may be only settled in the light of the function assigned to the carrier in the economic system of the country. That is a matter so obviously out of the province of a court and within that of Congress, where the conflicting economic interests may exert their mutual political powers, that I need hardly express any opinion upon it, even if I were in any position to do so. Whatever may be the debatable limitations of a carrier's liability still left open within the accepted general formulas, they do not raise any questions here.

[5] Sections 232–235 of the Criminal Code do not concern the regulation of the carrier's civil liability. They are intended to provide against the carriage of explosives generally on passenger vehicles or vessels, and otherwise to impose conditions upon such carriage as the Interstate Commerce Commission shall prescribe. It may be that their violation might entail a civil liability in addition to that imposed at common law, but upon that I need express no opinion. That they serve as a limitation upon the common-law liability is not suggested in the text of the statute, and is not to be inferred from its purpose. It in no sense follows because shipments are lawful, when they conform to the rules, that there is no responsibility inter partes which arises from their possession. The law has always recognized liabilities which do not depend upon any fault, if that be understood to involve a failure to respond to a conventional standard of foresight. The master's responsibility for his servant is, for example, derived from quite another basis. Recently, as in Workmen's Compensation Laws, the same principle has again appeared. Now, it is true that a carrier is obliged to receive the goods upon fixed terms, and cannot escape the liability after once engaging in the business; but there is no implication from this that a law which establishes minimal requirements for their receipt intends to relieve the carrier of any consequences except those arising from its fault, and in any aspect the Interstate Commerce Law contradicts such a broad result.

The third defense adds nothing to the others, since the carrier's liability is not limited to damage arising to goods received, by oth-

er goods in its possession. If it would be a desirable innovation so to prescribe, it would be an innovation nevertheless. More can be said for it than for a similar exception for damage arising from goods within the carrier's possession, but it involves a radical readjustment of what has long been accepted, and it is not for the courts.

None of the pleas is valid in law, and the demurrer will be sustained. As I understand that the defendant does not wish to plead over, no such leave will be granted.

Demurrer sustained.

PELL et al. v. McCABE et al.

(District Court, S. D. New York. October 21, 1918.)

1. BANKRUPTCY ⟸391(3)—FEDERAL COURTS—STAY OF SUITS AGAINST BANKRUPT.

The power of a bankruptcy court to stay suits against the bankrupt is expressly confined to the period before determination of discharge proceedings, and a District Court can have no wider power to stay suits in a state court on an auxiliary bill dependent upon the bankruptcy proceedings.

2. INJUNCTION ⟸26(5)—RESTRAINING ACTION—ADEQUATE REMEDY AT LAW.

A debtor, released from his debts by the judgment of a court having jurisdiction, to avail himself of the judgment when sued upon a prior debt, may plead it as a defense, and it affords no basis for an injunction to stay the action.

3. EQUITY ⟸51(3)—MULTIPLICITY OF SUITS—BILL "QUIA TIMET."

A bill "quia timet" is very limited, and goes to protect an existing possession which has been already established once after an attack at law, and which is again threatened, thereby threatening such a multiplicity of suits as equity will recognize.

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

In Equity. Suit by Stephen H. P. Pell and others against W. Gordon McCabe, Jr., and others. Decree for defendants.

Emanuel J. Myers, of New York City, for plaintiffs.

William St. John Tozer, of New York City, for defendants.

LEARNED HAND, District Judge. This complicated bill of complaint raises a number of questions which I do not find it necessary to determine. For example, had the bankruptcy court any jurisdiction whatever in the order of composition to do more as to Thompson than to settle claims against the estate? If it had such jurisdiction, did it attempt to exercise it quoad Thompson's creditors, who did not formally accept the composition? Could a composition in any case affect the rights of creditors of Thompson, who was not a bankrupt, who offered no composition, and whose creditors were not before the court? If so, could it affect creditors not mentioned in the schedules, who did not know of the existence of their claims, because they had not yet discovered a fraud practiced upon them by the bankrupts and Thompson? These questions all go to the effect of the order or decree

of January 25, 1915, and as, in the view I take, that order must be pleaded in bar in South Carolina, it is obviously more orderly to avoid any discussion of them beyond the caution that my silence must not be taken as intimating that I should answer any one of them in the plaintiff's favor. Similarly, I pass the question whether this bill is within the ancillary jurisdiction of a court of bankruptcy, or of the District Court as ancillary to the court of bankruptcy.

[1] That the bill cannot succeed as to the bankrupts is too clear to justify much discussion. They got a discharge under the order of confirmation, and that discharge is a bar to certain of their debts, under section 17. The power of bankruptcy courts to stay suits brought against the bankrupt on dischargeable debts is regulated by section 11a, and is expressly confined to a period up to the determination of the discharge proceedings. In re Federal Biscuit Co., 214 Fed. 221, 225, 130 C. C. A. 635. By no "auxiliary bill" dependent upon the bankruptcy proceedings does the District Court get a wider power to stay suits in a state court than it would have had as a court of bankruptcy. Indeed, I do not understand that the plaintiffs so contend. As to the bankrupts, the bill must in any event be dismissed.

[2] As to Thompson the position, if I understand it, is this: The bankruptcy court, having jurisdiction to release Thompson of his debts, undertook to do so. That release, being an adjudication, is property, property within the jurisdiction of the court, and the court by ancillary bill will protect it from attack elsewhere by injunction. As I have said, I shall treat the order as though it effectively released Thompson from such a claim as that set up in the South Carolina action. The first question is whether a judgment releasing a debtor can be the basis of a subsequent suit to enjoin the debt. That, I take it, is at most only one form of the general question whether the plaintiff has an adequate remedy at law. I do not mean that it presents the case as strongly as where there has been a judgment upon a claim sued on and a merger, but only that it is no better for the plaintiff than such a situation. Normally, when any defense is available at law, he must plead it there. Grand Chute v. Winegar, 15 Wall. 373, 21 L. Ed. 170. And this applies as well to the defense of discharge of the liability as to any other defense. Fowler v. Palmer, 62 N. Y. 533; Saunders v. Huntington, 166 Mass. 96, 44 N. E. 127. The same rule generally applies when the defense is of merger or estoppel by judgment. Chicago, etc., Co. v. Chicago, 143 Ill. 641, 647, 32 N. E. 178; Palmer v. Hayes, 93 Ind. 189; Gray v. Coan, 36 Iowa, 296; Bowen v. Gent, 54 Md. 555; B. & O. R. R. Co. v. Latimer, 118 Md. 183, 84 Atl. 377; Chicago, etc., Co. v. St. Joseph, etc., Co. (C. C.) 92 Fed. 22, 26. Now, it is, of course, true that the right to plead in bar may not be sufficient; so much was indicated in Foltz v. St. Louis, etc., R. Co., 60 Fed. 316, 322, 8 C. C. A. 635, where the point was not raised in time. Field v. Early, 167 Mass. 449, 45 N. E. 917, partook of the nature of an interpleader.

[3] A bill quia timet is in this last category, and the plaintiffs seem to suppose that this is such; but a bill quia timet is a very limited affair. It goes to protect an existing possession, which has been al-

ready established once after an attack at law, and which is again threatened. In such a case there is threatened such a multiplicity of suits as equity will recognize. Here there has never been any suit at all between the parties; at best the defendants are concluded by some kind of vague constructive consent, or whatever it may be. There is no property in possession of the plaintiffs, whose title has already been assailed and defended; there is no threatened repetition of any issues ever litigated before. It escapes me upon what possible theory it is supposed that bills quia timet are pertinent.

The same observations apply to those other cases cited in quantity under which courts have protected property once in their custody from becoming the subject of litigation elsewhere. It is not necessary to consider them in detail for they are endless, but they all rest upon the custody, actual or prospective, of a court. Now, a release is not property, and, if it were, it would not, under these circumstances, be property of which the court has taken custody for the purpose of distribution. The mere statement of the supposed analogy shows how remote it is. Whatever rights Thompson got were to be used like a discharge, wherever he was sued. There is no possible reason why his supposed release should stand upon any different footing from the discharges in bankruptcy. And there is no escape from the conclusion that, if this court draw to itself under the guise of an ancillary jurisdiction, every litigation, wherever it occurs, which may be commenced against Thompson, the bankruptcy proceedings can never come to a conclusion.

Seeing no ground for equitable intervention, even if all be true that the plaintiffs allege, it follows that the bill is without equity, and as such it will be dismissed, with costs.

BAILEY v. MISSISSIPPI HOME TELEPHONE CO.

(District Court, M. D. Pennsylvania. December 18, 1918.)

No. 879.

1. COSTS ⟸254(1, 5), 258—FEDERAL COURTS—COSTS AWARDED ON REVERSAL.
Under rule 29, par. 3, and rule 23, par. 7, of the Circuit Court of Appeals (224 Fed. xix, xvi, 137 C. C. A. xix, xvi), when a judgment is reversed, with costs, plaintiff is entitled to costs of the appeal, including actual cost of printing the record, but not including cost of printing briefs, nor cost of transcript, which must be taxed in the District Court as costs in the case.

2. COSTS ⟸247—COSTS AWARDED ON REVERSAL.
A mandate from the Circuit Court of Appeals, reversing a judgment, with costs "in the sum of $50.10," *held* not to entitle plaintiff to execution for costs incurred by him in the District Court, but only for costs of the appellate proceedings, including those specified in the mandate.

Action by John R. Bailey against the Mississippi Home Telephone Company. On rules to set aside writs of fi. fa. and attachment execution. Granted conditionally.

John J. Reardon, of Williamsport, Pa., for plaintiff.
J. Fred Schaffer, of Sunbury, Pa., for defendant.

WITMER, District Judge. The plaintiff, John R. Bailey, sued the defendant, the Mississippi Home Telephone Company, in an action of assumpsit. The case was tried in the District Court, and plaintiff was nonsuited. Upon refusal to take off the nonsuit, he appealed, and the Circuit Court of Appeals (252 Fed. 581, — C. C. A. —) reversed the judgment, with costs, and ordered a new trial.

On the 12th day of August, 1918, plaintiff filed the following bill of costs in the District Court:

J. P. Helfenstein, a witness duly subpœnaed in behalf of plaintiff and present at the trial 140 miles circular @ 5¢	$7.00	
4 days' attendance @ 1.50	6.00	$ 13.00
Serving subpœna		2.40
Stenographer's fees (½) for taking, transcribing, and certifying testimony		55.68
Actual cost of printing appellant's paper books		104.70
Clerk's costs paid by plaintiff		11.25
Marshal's costs paid by plaintiff		9.97
Cost of appeal bond		10.00
Atty. fee in District Court		10.00
		$217.00

On the 5th day of September, 1918, the mandate from the appellate court, dated the 3d day of September, 1918, was filed in the District Court. The mandate, inter alia, provides:

"That the said plaintiff in error, John R. Bailey, recover against the said defendant in error, the Mississippi Home Telephone Company, in the sum of fifty dollars ($50.00) for his costs * * * and have execution therefor."

The costs appearing upon the mandate and for which Bailey was awarded execution by the Circuit Court of Appeals, are as follows:

Clerk	$30.00
Attorney	20.00
Total	$50.00

Thereafter Bailey caused a writ of fi. fa. and a writ of attachment in execution to issue for the collection of $267, being the whole of the plaintiff's bill filed in the District Court as indicated, plus the costs appearing upon the mandate. Thereupon defendant obtained these rules to set aside the writs. The dispute between the parties raises the question as to what costs the appellant is entitled to recover at this time from the appellee. He insists upon recovering all the costs embraced in his bill filed in the District Court, which upon examination covers all costs of the plaintiff in the District Court, while the Mississippi Home Telephone Company contends that the appellant is only entitled to recover the costs of appeal, as per the award of costs in the mandate, $50.

[1] The Pennsylvania rule, that costs on a reversal are to abide the event of the suit (Wright v. Small, 5 Bin. 204; Hamilton v. Aslin, 3 Watts, 222; Smith v. Sharp, 5 Watts, 292), does not obtain

in the federal courts (Berthold v. Burton [C. C.] 169 Fed. 495; Jennings v. Burton [C. C.] 177 Fed. 603). When judgment is reversed, with costs, it includes all the costs of the appeal, no matter how or when taxable. Berthold v. Burton (C. C.) 169 Fed. 495.

Rule 29, par. 3, of the Circuit Court of Appeals (224 Fed. xix, 137 C. C. A. xix) provides:

"In cases of reversal of any judgment or decree in this court costs shall be allowed to the plaintiff in error or appellant, unless otherwise ordered by the court. The cost of the transcript of the record from the court below shall be taxable in that court as costs in the case."

Under this rule the costs of transcript of the record cannot be taxed in the Circuit Court of Appeals, but must be taxed in the court below. Lee Injector Mfg. Co. v. Penberthy Injector Co., 109 Fed. 964, 48 C. C. A. 760. In the same case it is also decided that money paid to a surety company for an appeal bond is not taxable as costs in either court.

Rule 23, par. 7, of the Circuit of Appeals (224 Fed. xvi, 137 C. C. A. xvi) provides:

"In case of reversal, affirmance or dismissal, with costs, the actual cost paid for printing the record by the party in whose favor costs are awarded, and the clerk's fee for supervising the printing, etc., where such fee is paid by the party in whose favor costs are awarded shall be taxed against the party against whom costs are given and shall be inserted in the body of the mandate or other proper process."

The cost of printing briefs is not included. Ex parte Hughes, 114 U. S. 548, 5 Sup. Ct. 1008, 29 L. Ed. 281; Kursheedt Mfg. Co. v. Naday, 108 Fed. 918, 48 C. C. A. 140; Lee Injector Mfg. Co. v. Penberthy Injector Co., supra.

It will be noted that, while plaintiff's bill filed in this court contained some items that, as a whole or in part, are allowed as costs of the appeal the greater portion of such cannot be so regarded; nor is it possible, from the information the bill carries upon its face, to determine to any degree of accuracy what portion should be allowed. The item "actual cost of printing appellant's paper books, $104.70," no doubt embraces "the printing of the record," for which, under the rule, appellant may recover; but it is equally certain that it includes as well the cost of his brief of argument, which may not be included, as appears supra. And the same also in turn applies to the item "Stenographer's fee for taking, transcribing, and certifying testimony," "Clerk's costs," etc.

Under the rule the costs paid the clerk for preparation of the transcript of the record in the court below, while taxable as costs, does not include the payment of stenographer's fees incurred previous to the appeal in taking and transcribing notes of testimony used by the clerk in making up the record. The purpose and the end to be obtained by the rules promulgated by the appellate court is to make the appellee whole by way of reimbursement for costs necessarily laid out in bringing his case before the court when and where he is entitled to relief. The costs so far incurred, previous to the appeal, in this court such as "Costs paid marshal," "Attorney's fee allowed in

District Court," "Witness fees," etc., are clearly not recoverable as costs under the order of the appellate court and its recited rules. These will abide the ultimate result and termination of the case.

[2] The orderly way to dispose of this muddle is to have the clerk tax the costs of the appeal including the costs returned by the clerk of the District Court, upon notice to the parties, and if, without appeal of either party, the costs so taxed, together with the costs of the fi. fa. stayed, are not paid within 30 days of notice to the appellee, the defendant herein, the rule to stay is dismissed. If paid, the rule is made absolute, and the attachment and interpleader proceedings are dismissed.

SULLIVAN v. NITRATE PRODUCERS' S. S. CO., Limited.

(District Court, E. D. New York. November 19, 1918.)

1. JUDGMENT ⟸812(3)—CONCLUSIVENESS—RES JUDICATA.
Where libelant had previously libeled a vessel in rem for personal injuries, and the vessel had been claimed by respondent through its agent, *held*, that the judgment rendered in the first proceeding might be pleaded by respondent as res judicata.

2. JUDGMENT ⟸713(2)—CONCLUSIVENESS—RES JUDICATA.
Where the parties to a libel against a vessel in which respondent appeared by its agent and claimed the vessel were the same as those to the second, any issue which could have been determined in that proceeding is res judicata in the later proceeding.

3. JUDGMENT ⟸588—CONCLUSIVENESS—RES JUDICATA.
Where libelant had previously libeled a vessel, and respondent, by its agent, appeared and claimed the vessel, *held* that, as both proceedings were intended to enable libelant to recover for personal injuries, the fact that libelant alleged additional acts of negligence in the second does not of itself prevent the first judgment from being a bar to the second libel.

4. JUDGMENT ⟸812(2)—CONCLUSIVENESS—RES JUDICATA.
Where a libel in rem, in which libelant sought to recover for personal injuries, set up as part of the damages the expenses of care while a cure was being effected, *held*, that a judgment dismissing the libel against the vessel was a bar to a later libel in personam against respondent, which appeared and claimed the vessel in the first proceeding.

In Admiralty. Libel by John Sullivan against the Nitrate Producers' Steamship Company, Limited. Libel dismissed.

Silas B. Axtell, of New York City, for libelant.

Kirlin, Woolsey & Hickox, of New York City (L. De Grove Potter, of New York City, of counsel), for respondent.

GARVIN, District Judge. When this action came on for trial, both parties requested the court, before going into the merits, to determine whether the libelant was barred from a recovery herein on the ground of res adjudicata by reason of a decision of the United States Court for the Southern District of New York, upon which a judgment was entered on or about July 9, 1917, dismissing a libel filed by the libelant

herein against the steamship Anglo-Patagonian, owned by the respondent.

The libelant, a horse handler, one of the caretakers in charge of a cargo of horses being carried by the Anglo-Patagonian, en route from Philadelphia to France, met with an accident as a result of which he lost two fingers of his left hand. For this he brought suit in the Southern district bringing an action in rem, against the Anglo-Patagonian. Barber & Company, Incorporated, filed an answer as agents and claimant of the boat. The libel in that case set forth the particulars of the accident and then alleged:

"Seventh. That by reason of the foregoing, your libelant has been damaged in the sum of five thousand dollars ($5,000.00)."

The libel concludes with the following prayer for relief:

"Wherefore your libelant prays that process in due form of law according to the course of this honorable court in causes of admiralty and maritime jurisdiction may issue against the steamship Anglo-Patagonian, her tackle, apparel, etc., and that all persons claiming any right, title, or interest therein may be cited to appear and answer all and singular the matters aforesaid, and that this honorable court may be pleased to decree the payment of your libelant's claim in the sum of five thousand ($5,000.00) dollars, and that said vessel may be condemned and sold to pay the same, and in the event that he should fail to prove said vessel was unseaworthy for the reasons aforesaid, that he be awarded the expense of his maintenance and cure and wages to the end of the voyage for which he signed, and such other and further relief as to the court may seem just and proper."

The present libel is based upon the same accident, and sets forth two alleged causes of action arising therefrom: First, libelant's right to recover the reasonable expense of his maintenance and cure $1,000; and, second, because of the failure of the respondent and master and officers of the ship to provide libelant with prompt and proper medical care and attention, damages in the sum of $3,000 are demanded.

[1] While the action in the Southern district was in rem and the suit at bar is in personam, nevertheless in the former the respondent here appeared through its agents and claimed the vessel. The respondent may therefore plead res adjudicata. Bailey v. Sundberg (D. C.) 43 Fed. 81.

[2] Therefore any issue that was or could have been determined in the first action is res adjudicata in the case now before the court. Beloit v. Morgan, 74 U. S. (7 Wall.) 619, 19 L. Ed. 205; Fish Bros. Wagon Co. v. Fish Bros. Mfg. Co., 95 Fed. 457, 37 C. C. A. 146.

[3] In the second action libelant has alleged additional acts of negligence. That of itself does not prevent the first judgment from being a bar to the second action. Columb v. Webster Mfg. Co., 84 Fed. 592, 28 C. C. A. 225, 43 L. R. A. 195, and cases therein cited.

[4] The decision by Judge Learned Hand in the first action, which has not been reversed, disposed of the question of negligence on the merits.

In the suit at bar the libelant seeks to recover in his first cause of action the expenses of his maintenance and care. These he sought to recover in the action in the Southern district. If he had proved his

claim, he might have recovered them. The Vestris (D. C.) 252 Fed. 201.

The court holds therefore that libelant's claims are res adjudicata. The libel is dismissed.

GERSON v. IOWA PEARL BUTTON CO., Inc.

(District Court, S. D. New York. June 18, 1918.)

TRADE-MARKS AND TRADE-NAMES ⟸95(2)—UNFAIR COMPETITION—PRELIMINARY INJUNCTION.

Where plaintiff, an individual dealer, in accordance with the New York statute filed a certificate showing his adoption of the name "Iowa Button Company" as a trade-name, and defendant, which was later incorporated under the laws of Iowa, adopted the same in ignorance of plaintiff's action, *held* that, as buttons from fresh-water shells are known to the trade as "Iowa pearl buttons," and neither party was entitled to the exclusive use of the name, plaintiff's motion for a preliminary injunction, restraining defendant, which had begun to do business in New York, from using such name, will be denied.

In Equity. Suit by Stanley Gerson against the Iowa Pearl Button Company Incorporated. On motion for preliminary injunction. Motion denied.

Emanuel S. Cahn, of New York City, for the motion.
Joseph A. Arnold, of New York City, opposed.

MAYER, District Judge. The application is for a preliminary injunction to restrain defendant from using the words "Iowa Pearl Button Company" within the state of New York, or, in any event, within the county of New York.

Plaintiff has used the name since December 2, 1913, having filed a certificate in the office of the New York county clerk in accordance with the statute permitting individuals, as distinguished from corporations, to use the designation of "Company" after compliance with statutory requirements and procedure.

Defendant corporation was organized under the laws of Iowa in 1916, its place of business being in Muscatine, in that state, and, on January 5, 1917, it obtained the usual certificate of authority to do business in the state of New York.

Bishop, the president of defendant, states that after a careful investigation, to ascertain whether the name "Iowa Pearl Button Company" had been used in the United States, he was unable to find that the name was in use. There is no reason to doubt this statement, as it is quite likely that such a search would be confined to inquiry of state secretaries or like state officials, rather than of innumerable county clerks or similar officials. According to Bishop, neither he nor any one else connected with defendant knew of the existence of Gerson's trade-name.

Gerson is a dealer, and trades, not only in Iowa pearl buttons, but also in other kinds of buttons. Defendant is a large manufacturer

of "Iowa," or fresh-water pearl buttons. Nothing in the way of wrongdoing, nor deception, nor unfair trade methods, is shown against defendant. Plaintiff's sole reliance is on the liability to deception and confusion which is likely to result from the use by defendant of a name substantially identical with that of plaintiff's trade-name.

It is unnecessary to analyze at length the cases which deal with this frequently litigated subject, for the motion may be disposed of on the authority of Goodyear's India Rubber Glove Mfg. Co. v. Goodyear Rubber Co., 128 U. S. 598, 9 Sup. Ct. 166, 32 L. Ed. 535.

It seems—rather interestingly—that "Iowa pearl button" is a well-known product, which has grown to have a name as generic as "cotton" or "grain," to use the illustration of the Goodyear Case, supra. In other words, "Iowa pearl button" means a button made out of fresh-water shells. According to defendant, about 25 years ago the manufacture of pearl buttons out of fresh-water shells originated in Muscatine, Iowa. Up to that time there had never been any pearl buttons made out of fresh-water shells, in the United States or elsewhere. Machines for finishing pearl buttons made out of these shells were invented and developed at Muscatine, where the industry started, and the industry has grown large, and especially at Muscatine and other towns in Iowa. Iowa pearl buttons are known exclusively in the button trade as the equivalent of sweet-water buttons made from shells which are found in streams adjacent to Iowa, and many of the prominent firms manufacturing fresh-water pearl buttons are located in Iowa.

Under the heading "Button," it is stated in the Encyclopedia Britannica (volume IV, page 891):

"Pearl buttons were made (in the United States) on a small scale in 1855, but their manufacture received an enormous impetus in the last decade of the nineteenth century, when J. F. Boepple began, at Muscatine, Iowa, to utilize the unio or 'niggerhead' shells found along the Mississippi. By 1905 the annual output of these 'fresh-water pearl' buttons had reached 11,405,723 gross, worth $3,359,167, or 36.6 per cent. of the total value of the buttons produced in the United States. * * * (See U. S. A. Census Reports 1900, Manufacturers, part iii, pp. 315-327)."

Muscatine, Iowa, is mentioned in volume XIX of the same work (page 44) as:

"The center of a pearl-button industry introduced in 1891 by J. F. Boepple, a German; the buttons being made from the shells of the fresh-water mussel found in the neighborhood. * * *"

From the foregoing it is plain that neither plaintiff nor defendant is entitled to the exclusive use of the name "Iowa Pearl Button," nor, under the Goodyear Case, supra, can such use be acquired by adding the word "Company."

In any event, whether this conclusion is right or not, a preliminary injunction should not be granted. The cause can be tried early in the fall, and, meanwhile, an injunction might do great injury to defendant, if improvidently granted; whereas, there is no showing of any real injury to plaintiff at this time, but only a possible injury. Defendant has had the certificate to do business in this state under

the name complained of for over a year, and this motion was only recently made, and the controversy may be safely left for determination upon the trial of the suit.

Motion denied.

UNITED STATES ex rel. DOUGHTY v. HUNT.

(District Court, S. D. New York. December 9, 1918.)

1. WAR ⇐32—COURTS-MARTIAL—REVIEW BY CIVIL COURTS.
A civil court has no power to interfere with the conduct of a court-martial, except where that court has exceeded its jurisdiction, and, if it originally had jurisdiction, it must be shown that, at some point in the proceedings under its governing law, it lost such jurisdiction.

2. WAR ⇐32—COURTS-MARTIAL—JURISDICTION.
That a defendant, on trial for desertion before a court-martial, was shown to have been in a "haze" or "stupor" at the time in question, *held* insufficient, under a plea of not guilty, to raise an issue of insanity, which deprived the court of jurisdiction under section 219 of the Manual of Courts-Martial.

Petition of the United States, on relation of Warren Sandford Doughty, directed to Colonel John E. Hunt, for writ of habeas corpus. Dismissed.

Sidney Lash, of New York City, for relator.

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

LEARNED HAND, District Judge. In this case a writ of habeas corpus was issued to the detaining officer of a disciplinary barracks of the United States, inquiring into the detention of the relator, Warren Sandford Doughty. The respondent justifies under a commitment issuing from the headquarters of the port of embarkation at Newport News, Va., on August 24, 1918. This commitment is signed by the colonel, chief of staff, and recites the proceedings at which a general court-martial convicted the relator for desertion from the army and sentenced him to four years at hard labor in the custody of the respondent. The record on the court-martial has been made a part of the papers by way of traverse to the return, and the question comes up as to whether the court-martial was without jurisdiction.

[1] Every one agrees that a civil court has no power whatever to interfere with the conduct of a court-martial, except in a case where that court has exceeded its jurisdiction. There is no question here but that the relator was within the jurisdiction of the court-martial, and that the charge was such as was within the competency of that court, so that the sole question which can be raised is whether during the conduct of the proceedings the court-martial lost its jurisdiction. As we all know, the cases have held that a court does not lose jurisdiction by any mistake in the general conduct of the cause; you must go further, and show that there is some point in the proceedings at which, under its constituent law, the court actually lost entire jurisdiction over the case. That is a strong position, in any event; but it has been held

in this case (and by that decision I am bound) that under section 219 of the Manual of Courts-Martial the court might lose jurisdiction if the issue of the mental disease, or derangement, of the accused was imported into the trial. So I am disposing of this case upon that issue alone. Was the issue of mental disease or derangement imported into the trial of the case? Did it become an issue?

[2] The plea was "not guilty," under which, by section 154 of the Manual, evidence of insanity might be admitted. The evidence itself was no more than that the accused seemed nervous and not himself at the time in question, and it would not have justified any finding of mental derangement; but it is not upon the evidence, but upon the assertions of the counsel for the defense, Mr. Lash, that the relator now relies. At the time of filing the plea Mr. Lash said:

"I intend to show from my testimony that three days prior to the prisoner's coming to Texas he was in a mental stupor."

In opening he said:

"I hope to show that he had been acting peculiarly, sort of stupor like. * * * He was hazy, and did not know what he was doing. While in Texas, he did not realize he was there."

This language is indeed consistent with mental derangement, but it is not of itself necessarily an assertion of mental derangement. Of course, if the word is to be taken to include every form of confusion of the mental faculties, perhaps it would include so much; but it is not reasonable to give it such a wide scope. The purpose of the section appears to me to require the distinct assertion that the accused was suffering from some form of mental disorder to which normal people are not subject. Any one may be in a "haze," or a "sort of stupor like," whose moral responsibility is not affected in any way which the criminal law will recognize. If the jurisdiction of a court is to be ousted, while it may not be necessary to challenge that jurisdiction formally, the condition upon which it ceases must be distinctly raised. It must appear that the disorder is not one which is consistent with what healthy people are subject to; it is an issue of disease, not of a variation from the complete possession of one's powers. I own that the distinction is not susceptible of accurate definition, because the fact of mental derangement is not so definable; but for that very reason the issue should be presented with certainty, else an accused can secure two trials upon vague assertions of some temporary diminution in the clarity of his mind. This was not what the section intended; the issue must be of the existence of the "necessary criminal mind," as the later parts of the section show. It is clear that the court did not understand that the accused's responsibility was at issue, in this sense, or beyond the general palliation of his offense. It is also clear, from Mr. Lash's summing up, that he did not suppose that his client was criminally irresponsible, in such sense as relieved him in general of moral responsibility.

I have assumed throughout that the issue, within the meaning of the section, involves only the formal issues as made, either by the pleadings or by subsequent assertion. This does not necessarily follow,

especially when a defense such as insanity may be put in without further plea, under the plea of "not guilty." I do not, therefore, necessarily mean that the case is to be determined, except by the evidence actually adduced. The evidence of mental derangement was, however, even slighter than the assertions of counsel, and upon either aspect the court-martial had jurisdiction.

The writ is dismissed.

In re JOHN B. ROSE CO. In re ROSE BRICK CO. In re CORNELL STEAMBOAT CO.

(District Court, S. D. New York. December 26, 1918.)

1. ADMIRALTY ⇐57—ARREST—RELEASE—RE-ARREST.
   While normally a vessel, once arrested and discharged, may not be re-arrested for the same cause of action, yet if the stipulation was entered into improvidently, or through fraud or mistake, the court may order a new arrest; so, where vessels libeled for towage service were released, they may be re-arrested on an amended libel setting forth other items, provided such items constitute separate causes of action, but not if the items which were omitted from the original libel were part of the several breaches of a single contract.
2. ADMIRALTY ⇐57—ARREST—RE-ARREST.
   The rule that a vessel, once arrested and discharged, may not be re-arrested for the same cause of action, unless the stipulation was entered into improvidently, or through fraud or mistake, is designed to compel the libelant to state his cause once for all, and the mistake, etc., must go to the supposed value of the vessel to warrant re-arrest.

In Admiralty. Libels against certain canal boats, which were claimed by the John B. Rose Company, the Rose Brick Company, and the Cornell Steamboat Company. On libelant's motion to amend the libel and re-arrest the boats. Motion to re-arrest denied.

The case came up on a motion to amend a libel in rem against certain canal boats for towage charges and to re-arrest the boats. The original libel set forth a series of charges for towage of the several boats at different times; they were arrested, and released on stipulations for the amounts claimed. It then transpired, as this petition asserts, that the libelant had, "through error and the inadvertent omission of items," erroneously stated the amount of the claims, and that there were due largely increased bills for towage.

Kirlin, Woolsey & Hickox, of New York City (Victor W. Cutting, of New York City, of counsel), for libelant.

George E. Hargrave, of New York City, for claimants.

LEARNED HAND, District Judge. [1, 2] Normally a vessel, once arrested and discharged, may not be again arrested for the same cause of action. The Union, 4 Blatchf. 90, Fed. Cas. No. 14,346; The White Squall, 4 Blatchf. 103, Fed. Cas. No. 17,570; The Thales, 3 Ben. 327, Fed. Cas. No. 13,855; Id., 10 Blatchf. 203, Fed. Cas. No. 13,856; The William F. McRae (D. C.) 23 Fed. 557; The Mutual (D. C.) 78 Fed. 144. There has always been a condition imposed upon the rule that if the stipulation was entered into "improvidently,"

or through "fraud or mistake," the court might order a new arrest, and Justice Clifford approved that condition in U. S. v. Ames, 99 U. S. 35, 25 L. Ed. 295. I have no doubt that it exists. It was extended in The I. F. Chapman, 241 Fed. 836, 154 C. C. A. 538, by the Circuit Court of Appeals for the First Circuit to a case where, in a libel for personal injuries, the libelant later raised his damages, and upon trial recovered more than he had originally claimed. The circumstances justifying the re-arrest were held in that case to be matter of discretion for the District Court, and an order was affirmed, though the first stipulation covered the damages then claimed.

In the case at bar there is no suggestion that the sum fixed in the stipulation was wrong through "fraud or mistake," nor was the amount "improvidently" reached. The trouble was in stating the original items in the libel. Apparently some of the towage services were omitted; at least, that is the more reasonable explanation of the language. Each of these may have constituted a separate cause of action, being by separate contract. If so, I know of no obligation on the part of the libelant to join them all in one libel. In such case it would not be as though they had constituted several breaches of a single contract. If they really are each several separate engagements, I think the rule does not apply.

If, on the other hand, the errors were those of incorrect statement of the amount of the several services, I apprehend that the rule would prevent any re-arrest. It is designed to compel the libelant to state his claim once and for all, and to discharge the vessel finally of the lien, and the mistake or the like, as I read the cases, must go to the supposed value of the vessel, not to the statement of the claim. The I. F. Chapman, supra, does, indeed, extend the rule further; but the cases in this circuit do not go so far.

Hence, if the libelant had a series of independent contracts, so that it need not have joined all in one libel, I see no objection, by way of amendment here, to allow them to be set up and to allow a re-arrest; but, if the correction be in the amount of the several services originally pleaded, I shall not allow it. The papers do not show these facts, and the motion to re-arrest must be denied, but with leave to file further affidavits, if the libelant be so advised.

PEOPLE OF PORTO RICO et al. v. AMERICAN R. CO. OF PORTO RICO.

(Circuit Court of Appeals, First Circuit. December 4, 1918.)

No. 1321.

1. TERRITORIES ⟸20—INSULAR POSSESSIONS—PORTO RICO—POWERS OF LEGISLATIVE ASSEMBLY.
   Under Organic Act of Porto Rico (Act Cong. April 12, 1900) establishing a civil government, and which creates a legislative assembly, with authority extending to "all matters of a legislative character not locally inapplicable" (section 32 [Comp. St. 1916, § 3781]), the exclusive control of the Interstate Commerce Commission over railroad rates did not extend to local tariffs of the intra-island railroads of Porto Rico, but such control was vested in the legislative assembly.
2. STATUTES ⟸56—INSULAR POSSESSIONS—PORTO RICO—VALIDITY OF LEGISLATIVE ACTS.
   Under Organic Act of Porto Rico (Act Cong. April 12, 1900) § 31 (Comp. St. 1916, § 3780), requiring all laws enacted by the legislative assembly to be reported to Congress, which reserved the power to annul the same, it is to be presumed, in the absence of proof to the contrary, that a law was so reported and that it was acquiesced in by that body.
3. CARRIERS ⟸1—POWER—REGULATION OF RATES—STATUTE OF PORTO RICO.
   Act Porto Rico March 12, 1908, § 7 (Comp. St. 1913, § 344), making it unlawful for a railroad company to charge other or different rates than those specified in a tariff schedule approved by the executive council, was within the powers of the legislative assembly and valid.
4. CARRIERS ⟸18(6)—VIOLATION OF REGULATIONS—RATES—INJUNCTION.
   The violation by a railroad company of a statute of Porto Rico regulating rates affords ground for injunctive relief, and the federal District Court for Porto Rico, where it has jurisdiction of the parties, has power to grant such relief.

Appeal from the District Court of the United States for the District of Porto Rico; Peter J. Hamilton, Judge.

Suit in equity by the People of Porto Rico and others against the American Railroad Company of Porto Rico. Decree for defendant, and complainants appeal. Reversed.

Col. Edward S. Bailey, Asst. Judge Advocate General, of Washington, D. C. (Howard L. Kern, Atty. Gen., on the brief), for appellants.

Francis H. Dexter, of San Juan, P. R., for appellee.

Before BINGHAM and JOHNSON, Circuit Judges, and ALDRICH, District Judge.

ALDRICH, District Judge. [1] The central and substantial question in this case is whether, at the time in question, the supposed regulatory provision of section 7 of an act of the legislative assembly of Porto Rico dated March 12, 1908, and entitled "Public Service Corporations" (Comp. Stat. Porto Rico, p. 72), was operative and prohibitive of railroad rate raising without the consent or approval of the executive council of Porto Rico, and we think it was.

The Act of Congress of April 12, 1900, c. 191, 31 Stat. 77, entitled "An act temporarily to provide revenues and a civil government for Porto Rico, and for other purposes," now known as the Foraker Act,

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

and recognized as the Organic Law of the island, created a local legislative assembly, to consist of two houses, and designated the two houses thus constituted as "the legislative assembly of Porto Rico," and provided the manner in which the members should be elected.

As Congress might well do, under its plenary power in respect to territories and possessions of the United States (Clinton v. Englebrecht, 13 Wall. 434, 441, 20 L. Ed. 659; National Bank v. Yankton County, 101 U. S. 129, 25 L. Ed. 1046; Mormon Church v. United States, 136 U. S. 1, 10 Sup. Ct. 792, 34 L. Ed. 481; Dorr v. United States, 195 U. S. 138, 24 Sup. Ct. 808, 49 L. Ed. 128, 1 Ann. Cas. 697), it broadly and plainly delegated local legislative powers to the assembly which it thus created. The purpose is gathered from sections 8, 14, 15, 27, 32 (Comp. St. 1916, §§ 3755, 3762, 3763, 3776, 3781), and from the rather general scope of what was intended as an organic law, creating a temporary civil government to be administered under the auspices of the United States, and we think the plan of government contemplated that the legislative assembly which it created should take the initiative in respect to questions like those relating to local freight rates. Indeed, through section 32 of the act it is expressly declared "that the legislative authority herein provided shall extend to all matters of a legislative character not locally inapplicable."

In a period in which considerations of public policy required government restraint and control in respect to railway rates, and acting under supposed delegated authority to legislate with respect to such a subject, the assembly of Porto Rico through the act of March 12, 1908, which was an act for the regulation of public service corporations in Porto Rico, through section 7, declared that—

> "It shall be unlawful for any public corporation to charge, demand, collect or receive a greater or less compensation for any service performed by it than is specified in the tariff or schedules, rules and regulations approved by the executive council." Comp. Stat. Porto Rico, p. 72.

The railroad in question was a New York corporation and was operating a railway in Porto Rico, and although it had theretofore submitted its schedules to the executive council, rather than to the Interstate Commerce Commission, and had been going along under a schedule of freight rates which had been approved by the executive council of Porto Rico, without authority from that body, and while its petition for permission and authority to increase its schedule of rates was pending before it, put into effect a schedule of freight tariffs for the transportation of sugar cane and its products, which increased the rates twenty per cent. above the schedule which had been approved and under which it had been operating. And the Porto Rican executive council thereafter, in the pending proceeding of the railroad for permission to increase, ordered that no change should be made without its approval.

Upon the general question as to what of the general laws, if any, and upon the question as to which of the acts of Congress having particular reference to a civil government in Porto Rico were exclusively operative and effective there, there was considerable discussion at the arguments in respect to the character of the relation which the island

of Porto Rico sustains to the United States—whether it is that of a territory or that of a possession.

In Downes v. Bidwell, 182 U. S. 244, 21 Sup. Ct. 770, 45 L. Ed. 1088, which was a customs case, and in Kopel v. Bingham, 211 U. S. 468, 29 Sup. Ct. 190, 53 L. Ed. 286, which was a case for the extradition of a fugitive criminal, the relationship of Porto Rico apparently is not recognized as that of a territory fully incorporated into the United States. In Dorr v. United States, 195 U. S 138, 24 Sup. Ct. 808, 49 L. Ed. 128, 1 Ann. Cas. 697, it was decided that the Philippine Islands were not incorporated into the United States, and it was said that until territory ceded by treaty has been incorporated into the United States, it is to be governed under Congress, without the restrictions which are imposed upon it when passing laws for the United States as a political body of states in union.

To sustain its contention that jurisdiction of the Interstate Commerce Commission was exclusive in the island of Porto Rico under the general provision of section 14 of the Foraker Act of April 12, 1900, which declares that the statutory laws of the United States, not locally inapplicable, have the same force and effect in Porto Rico as in the United States, the appellee chiefly relies upon American Railroad Co. v. Birch, 224 U. S. 547, 32 Sup. Ct. 603, 56 L. Ed. 879, and American Railroad Co. v. Didricksen, 227 U. S. 145, 33 Sup. Ct. 224, 57 L. Ed. 456.

The first of these was a case under the Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. 1916, §§ 8657–8665]), and the decision was upon the ground that the act expressly applies to Porto Rico, and this, as we understand, was upon the theory that the act by its terms not only included all common carriers in the states, in the territories, the District of Columbia, the Panama Canal Zone, but "other possessions of the United States." Thus the decision was based upon the scope of the statute rather than upon any strict interpretation of the question whether Porto Rico is a territory of the United States, or a possession.

And in the second of these cases, that of Didricksen, involving the question whether the Safety Appliance Act of March 2, 1903 (Act March 2, 1903, c. 976, 32 Stat. 943 [Comp. St. 1916, §§ 8613–8615]), was in force in Porto Rico, though it did not expressly extend to possessions, it was held that it was; and upon the ground that, while it was not in all respects a territory, that its organization was in most essentials that of political entities known as territories, and upon the theory, as we suppose, that the Safety Appliance Act related to the same subject-matter as that covered by the Employers' Liability Act, which expressly extended to Porto Rico, and was in aid of the protection to life and limb sought to be afforded through legislation upon the subject of the liability of railway common carrier employers. Nor do we consider the Alaska Case, 224 U. S. 474, 32 Sup. Ct. 556, 56 L. Ed. 849, in point, because that involved a continental situation, and a territory acquired by purchase, and a continuous carriage from the state of Washington to a point within Alaska—a territory which, by an act providing for its government, was designated as one which was to

constitute a civil and judicial district, the government of which should be organized and administered as was provided by the act. Moreover, the opinion in that case was written by the same justice who handed down the opinion in the Employers' Liability Case, 224 U. S. 547, 32 Sup. Ct. 603, 56 L. Ed. 879, a month later, in which the Alaska Case was not referred to as having any bearing.

We do not consider, however, that the solution of the question whether Porto Rico is in all respects a "territory" of the United States, in the strict sense, or whether it is "a possession of the United States," in the strict sense in which that term is used, would be altogether controlling upon the question of statutory construction involved in this case. It is not so much a question whether Porto Rico is, or is not, a "territory" of the United States, to be regarded critically, as an apt question, to be decided with legal exactness under refining rules, as it is the broader and more substantial question, whether, under the actual situation of remoteness, and the character of the relationship, Congress intended to carry the Interstate Commerce Commission powers to the island, to be exercised independently and exclusively of the local assembly.

Porto Rico is at least a "possession," and through its organized government, and under the Organic Act of April 12, 1900, has many of the essentials of those political entities known as territories, but, notwithstanding that, the substantial fact remains that it is an insular piece of ground, with a considerable population, many miles at sea and widely separated from the states and territories of the government which is charged with the responsibility of seeing that there is a civil government in the island. Therefore, without much regard to a refinement of the question as to which it is, it is the fact that it is an insular possession, or an insular territory, whichever it is, far removed from physical relations with other territories, and possessions, and with no physical relation to any of the states—with no interstate, interterritorial, or interpossession railroads, and the fact that the legislation of Congress and that of the local insular assembly had reference to such a situation, one in which the railroads were not operated beyond the boundaries of the island, which bears upon the question whether the Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 379), through no expression of its own, but under the general provision of section 14 of the Act of April 12, 1900, that the statutory laws of the United States, not locally inapplicable, shall have the same force and effect in Porto Rico as in the United States, should be accepted as comprehensively applying to such local conditions as are in question here, and to the exclusion of the comprehensive local legislative power delegated by Congress to be exercised under its eye and subject to expressly reserved power to approve or annul.

The District Court seems to have accepted the decisions in the Didricksen Case, 227 U. S. 145, 33 Sup. Ct. 224, 57 L. Ed. 456, and the Birch Case, 224 U. S. 547, 32 Sup. Ct. 603, 56 L. Ed. 879, as a ground for reasoning, and as quite controlling, that the general provision of section 14 of the Act of April 12, 1900, carried bodily to Porto Rico

the Interstate Commerce Act and the exclusive jurisdiction of the Interstate Commerce Commission.

Section 14 expressly qualifies itself by excepting laws locally inapplicable and as "hereinbefore" or "hereinafter" otherwise provided, and in view of the scope of the whole act and of the manifest intention to give the local government a broad power in respect to legislation upon local subjects, we cannot accept the view that Congress intended exclusive Interstate Commerce Commission jurisdiction over local railroad rates in Porto Rico, or that the Supreme Court decisions referred to support that idea.

There is a wide difference between the question of congressional intention involved in the exercise of the national function to protect life and limb, like that in the Employers' Liability and the Safety Appliance Acts—like that in the Bill of Rights of the Jones Act in respect to the protection of life and liberty against undue process of law, or that of the Kopel Case, 211 U. S. 468, 29 Sup. Ct. 190, 53 L. Ed. 286, which was for the extradition of a fugitive criminal—and that of the intention involved in the question whether the Organic Porto Rican law, under its general terms, intended exclusive Interstate Commerce Commission control over the local tariffs of the intra-island railroads of Porto Rico.

This general view, however, in respect to difference of subject-matter, is quite independent of, and aside from, the broad distinction between the apt words of the Employers' Liability Act, which expressly carry it to all possessions of the United States, and those of the general provision of section 14 of the Organic Law, which, it is contended, under an intention to be inferred, gave the Interstate Commerce Commission exclusive control over the subject of the railway rates of the insular possession in question.

Under the circumstances, and considering the Organic Act as a whole, we think the intended and comprehensive congressional delegation of legislative power in respect to local conditions would include subject-matter like that of local railway rates, and would control as against the contention that the Interstate Commerce Commission was clothed with exclusive jurisdiction through the force of the general terms of the same act, which are without any suggestion of a particular intent to carry such jurisdiction to the railroad affairs of the insular situation.

Indeed, the original idea of federal control and federal regulation was based upon physical interstate and interterritorial relations and upon connecting lines, conditions under which local interruptions impair the efficiency of the paramount federal right to regulate commerce between the states and territories. There is no such federal right or federal responsibility as between the people of the island of Porto Rico and their local railroads, and upon this general view, in respect to the question of the intention of Congress under the Organic Act, and after misunderstandings and discussion had arisen as to its scope, and as to the jurisdiction of the Interstate Commerce Commission, it is quite significant and something that must be considered that, through subsequent legislation, Congress declared, through the Act of March 2, 1917, c. 145 (39 Stat. pt. 1, p. 964) § 38, that the Interstate Commerce Act shall not apply to Porto Rico.

The leading theory of all the cases, on which the appellee relies, in support of the idea of the exclusive jurisdiction of the Interstate Commerce Commission, is that the power of regulation and control of interstate commerce and interstate railroads is a federal power, and it having been asserted that it becomes parmount to, and exclusive of, interference under state and territorial governments. But it must be observed that these cases (like Southern Ry. Co. v. Reid, 222 U. S. 424, 436, 437, 32 Sup. Ct. 140, 56 L. Ed. 257; Southern Ry. Co. v. Reid & Beam, 222 U. S. 444, 447, 32 Sup. Ct. 145, 56 L. Ed. 263; Southern Ry. Co. v. Burlington Lumber Co., 225 U. S. 99, 32 Sup. Ct. 657, 56 L. Ed. 1001; Southern Ry. Co. v. Railroad Com'r of Indiana, 236 U. S. 439, 446, 447, 35 Sup. Ct. 304, 59 L. Ed. 661; Erie Ry. Co. v. People of the State of New York, 233 U. S. 671, 34 Sup. Ct. 756, 58 L. Ed. 1149, 52 L. R. A. (N. S.) 266, Ann. Cas. 1915D, 138) proceed upon the idea that federal control is exclusive, because Congress has asserted the right, and because federal control has occupied the field. They thus have no particular weight, first, because states (except as explained in Minnesota Rate Cases, 230 U. S. 352, 33 Sup. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18) might regulate tariffs before the right of federal control was asserted, and second, and more particularly, because, as we interpret the Organic Law, federal railway rate control in the new possession of the Island of Porto Rico, where of course there were no questions as to state control, was intended through the instrumentality of the Porto Rican Assembly, under the supervision of Congress exercised through its plenary right, in respect to federal territories and possessions, which was expressly reserved.

The subject of the local freight rates of a remote insular possession, or territory, railroad is not one suggestive of inherent necessity of regulation and control by a continental commission like that of the Interstate Commerce Commission, and while not doubting the paramount right of control by the United States, which we think was asserted under the Organic Act of April 12, 1900, through its delegation of legislative power and of its reserved right of supervision, we see nothing in any of the laws indicating an intention of Congress to make it a subject of exclusive Interstate Commerce Commission regulation.

It is quite possible that conditions might be created in the island of Porto Rico through corporate and business relations which would make its intra-insular railroad business an interterritorial, or an interpossession business, as by connecting with other territories or possessions, and one justifying federal legislation extending right of regulation to the Interstate Commerce Commission, but that no such exigency exists under present conditions is something to be considered upon the question whether Congress intended, either through the general provisions of the Foraker Act or through the provision of the Hepburn Act to carry the functions of the Interstate Commerce Commission to the intraterritorial transportations of the island.

Neither a statutory enactment like that creating Interstate Commerce Commission jurisdiction in the territories of the United States, nor one like the statute in amendment carrying jurisdiction from one point in

a territory to another point in the same territory, should be accepted as including a remote insular possession like that of Porto Rico, though its relations to the United States are somewhat those of a territory, unless there are apt words or cogent circumstances to show such a legislative purpose. The character and circumstances of Interstate Commerce Commission jurisdiction and the situation of the island of Porto Rico do not support the idea of any such congressional purpose.

It is contended by the petitioners that the intricacies of the commercial relations between the states and territories of continental United States do not apply to Porto Rico in its isolated position, and that seeking remedy in respect to its railway rates through the remote interstate commerce tribunal would be inconvenient, expensive and oppressive, and we regard that as something to be considered upon the question of congressional intent.

There is no reason why Congress as the supreme and paramount legislative body may not legislate broadly with reference to the liability of employer railway common carriers in the possessions of the United States, if it sees fit to do so. That Congress had delegated quite a measure of initiatory legislative power to the local Assembly of Porto Rico, to be exercised subject to its approval, furnishes no reason for saying that Congress may not consistently establish a uniform rule in respect to employer liability to be administered alike in interstate conditions and throughout all the territories and possessions of the United States, and it is difficult to see that the exercise of such right to establish a uniform rule in respect to life and limb, under a law which expressly includes "possessions," furnishes any reason for saying that it carries the idea that Interstate Commerce Commission jurisdiction shall go to Porto Rico under general laws which in all probability did not embody that idea. Employer liability, under a federal statute like that we are discussing, designed to protect life and limb, would be ascertained and established under a uniform rule founded upon a principle, while railroad rates, from their nature, could not be uniform or governed by a single principle. They necessarily depend upon local conditions, and there is thus no analogy between the two subjects in the legislative sense.

It is true that the Act of June 29, 1906, c. 3591 (34 Stat. pt. 1, p. 584), which is now known as the Hepburn Act, and which was an amendment of the act of 1887 to regulate commerce, extends the territorial jurisdiction of the Interstate Commerce Commission and expressly makes it apply to transportations "from one place in a territory to another place in the same territory," but although these words are apt in respect to territories incorporated into the United States and intratransportation therein, we do not think they were apt with respect to a possession like that of Porto Rico whose status at most was only that of a quasi territorial relationship.

At the time of the Foraker Law and the Hepburn Law, and even as late as 1911 and 1912, when the Birch and Didricksen Cases were decided in the Supreme Court, whether Porto Rico was a territory of the United States, within the meaning of that term, was questionable—something in uncertainty and doubt—and, as has been seen, it is con-

tended that these acts apply to Porto Rico, because of the general term "territory," but, under the most favorable view of this contention, Porto Rico was only a territory of quasi territorial organization and relationship, and so the general term "territory" does not expressly include Porto Rico, as did the term "possession" in the Employers' Liability Act, and, under the circumstances, "territory," as used in these statutes should not be broadly construed for the purpose of including a possession, or a quasi territory, whose relationship was that which the island of Porto Rico sustained to the United States.

In the Birch Case, 224 U. S. 547, 32 Sup. Ct. 603, 56 L. Ed. 879, the Employers' Liability Act was held operative in Porto Rico, because the act applied to common carriers in the territories, the District of Columbia, the Panama Canal Zone, and expressly to the "possessions" of the United States, and a contention in respect to the Safety Appliance Act raised the question whether that act, which did not expressly include "other possessions of the United States" and only expressly applied to carriers by railroad in territories and the District of Columbia, extended to Porto Rico, and the Supreme Court, treating that contention as one presenting a serious controversy, did not decide whether the Safety Appliance Act was in force in Porto Rico. In the Didricksen Case, 227 U. S. 145, 33 Sup. Ct. 224, 57 L. Ed. 456, the relationship of the island to the United States was discussed, with the observation, in effect, that while it was not a territory incorporated into the United States, that it had most of the essentials of those entities known as territories; but we infer from the reasoning of the opinion that the real ground on which the case turned was that the rights involved under the Safety Appliance Act were incident to the subject-matter and the rights involved in the Employers' Liability Act, which did by its terms extend to Porto Rico as one of the possessions of the United States, rather than upon the distinct ground that it was a territory in the ordinary sense in which that term is used in legislation in general. At least we think we would not be warranted in accepting these decisions as meaning that the term "territories," when used in congressional legislation with reference to the general subject of commerce, would carry the exclusive jurisdiction of the Interstate Commerce tribunal to an island whose relationship is that of Porto Rico.

In the Act of June 29, 1906 (Hepburn), which we are discussing, Congress was dealing with states and territories of the United States, and with waterways in them, and between them and foreign countries, and its only departure from that idea was to the District of Columbia, which it designated by name, although it is a distinct United States entity, and is, in fact, territory within the United States. Thus when Congress departed from what in the ordinary acceptation would be understood as covered by the general legislative designation of states and territories, with the view of including an entity not understood to be a territory in the general acceptation of that term, like that of the District of Columbia, it expressly named it, though it is in fact, while not having the relationship of a territory of the United States, both a piece of territory and a possession belonging to the United States,

thereby indicating the purpose, when departing from the term "territory," as something having a well understood legislative meaning, with the idea of including a piece of territory, or a possession not usually known as a territory, to expressly designate it.

We think if Congress had intended by this act to carry the powers of the Interstate Commerce Commission to Porto Rico that it would have said so as it did of the District of Columbia. It is highly probable, and quite safe, we think, to assume that Congress did not view Porto Rico as a territory in the sense in which it was legislating, and was without the slightest thought that it was legislating with reference to the internal affairs of Port Rico and the local railway rates of that remote insular possession.

And in addition to these views, which we hold under general rules in respect to interpretation, there is the subsequent declaratory interpretation and expression of congressional intent in what is known as the Jones Act, to which we have referred, designed to provide a civil government for Porto Rico, which declares that the Interstate Commerce Act and its amendments shall not apply to Porto Rico. Act March 2, 1917 (39 Stat. pt. 1, p. 964) § 38.

Moreover, it is not understood that the Interstate Commerce Commission has asserted any authority in Porto Rico, other than to make orders in respect to safety appliance devices on Porto Rican railroads, and these were after the decisions in the Birch and Didricksen Cases, and before this statute declaring that its jurisdiction should not apply to Porto Rico.

[2] By section 31 of the Act of April 12, 1900 (Comp. St. 1916, § 3780), the Organic Law under which the local statute in question was passed by the Porto Rican Assembly, it was provided that all laws enacted by that body should be reported to the Congress of the United States, which reserved to itself the power and authority, if deemed advisable to annul, and the legislative assembly of Porto Rico enacted that the secretary of the island should promulgate all laws enacted by the legislative body. Comp. Stat. Porto Rico, p. 512, § 55 (section 2726).

Under these provisions and under such circumstances, it is to be presumed, we think, in the absence of proofs or suggestion to the contrary, that the local Porto Rican legislation was reported to Congress, or, at least, that Congress was cognizant of such legislation, and in the absence of affirmative action by that body, that there was congressional acquiescence. Clinton v. Englebrecht, 13 Wall. 434, 446, 20 L. Ed. 659; Camou v. U. S., 171 U. S. 277, 287, 18 Sup. Ct. 855, 43 L. Ed. 163; Tiaco v. Forbes, 228 U. S. 549, 557, 558, 33 Sup. Ct. 585, 57 L. Ed. 960; Baca v. Perez, 8 N. M. 187, 42 Pac. 162.

The conclusion is that the Porto Rican Public Service Act of March 12, 1908, was a legislative law warranted under the authority delegated by Congress; that it was a valid enactment and is controlling until disapproved by Congress under its paramount and expressly reserved right of supervision; that its effectiveness was not superseded or impaired by the original Interstate Commerce Law of 1887, or as amended by the Act of June 29, 1906, known as the Hepburn Act, and

that this is so both because they are inapplicable under the present condition of affairs in the island, and because Congress never intended that they should be operative there. And the conclusion in respect to the Act of March 2, 1917, known as the Jones Act, is that it neither superseded nor impaired the Porto Rican Act of March 12, 1908, because section 57 declared that the laws of Porto Rico then in force should continue until amended or repealed by the Legislature.

It is true that the Porto Rican Assembly subsequently passed a law December 6, 1917 (2 Laws of Porto Rico, 432), with respect to public service companies, creating a public service commission, and one which provided for its powers and for control over public service companies, but it is not suggested that there is anything expressly repealing section 7 of the Act of March 12, 1908. On the contrary, the idea of the act is that railway schedules shall not only be just and reasonable, but in conformity with the regulations and orders of the commission, and indeed it is expressly provided by section 23 of article 5 of the act that all rates and charges filed by the extinct executive council shall continue and be in full force until modified or repealed by the commission.

Quite likely this act of the Porto Rican Legislature of December 6, 1917, has no controlling force upon the questions involved in this proceeding, and it is referred to merely to show that there is nothing in the present Porto Rican situation which is inconsistent with the idea that railroads shall submit to local legislative regulations created under the authority of the United States, or with the idea that section 7 is still operative so far as concerns the decision of the questions in this case.

[3, 4] This is an equity proceeding prosecuted by the Attorney General of Porto Rico in behalf of the people and the executive council of the island, and one which was removed from the local district court of San Juan to the District Court of the United States for the District of Porto Rico, upon the ground of diverse citizenship. It was removed by the defendant railroad upon the allegation that the amount in controversy, which it would lose if the relief prayed for by the plaintiff was granted, exceeded the sum of $3,000; and the court to which it was removed, having adequate power under its own comprehensive equity jurisdiction, not by virtue of the local statute in respect to injunctions, may well establish the rights involved and afford relief according to the usual course of equity, as generally administered in the United States courts.

We have in this case questions relating to matters publici juris and the relief sought is an injunction (and perhaps other reliefs, like recovery of unauthorized rates) upon the ground that the railroad was operating under a rate schedule, and was demanding from members of the public, tariff transportation rates in open defiance of a regulatory law. This is plain ground for injunctive relief, and neither the penalty provision of the local law, nor any supposed remedy by way of forfeiture, excluded or limited the jurisdiction of the United States District Court (In re Debs, 158 U. S. 564, 584, 592, 593, 15 Sup. Ct. 900, 39 L. Ed. 1092) to enjoin against publishing and demanding rates

in disregard of the requirements of section 7 of the local law; and in the circumstances, it is not seen that any other remedy, either at law or in equity, would be reasonably adequate.

Holding the view that we do as to the operativeness of the Porto Rican Act of March 12, 1908, there seems to be no occasion for discussing the emergency provision of that law, and this results because the substantial relief sought, that of protection to the people of Porto Rico against unauthorized and unlawful rates, may be had through injunction under their original bill by virtue of the force of section 7 of the Porto Rican law, quite independent of its emergency provision in respect to temporary and tentative reliefs, and quite independent of the proceedings and findings under the amended bill.

The decree of the District Court dismissing the bill should be vacated, in order that there may be an injunction which should be continued until the defendant railroad has complied with the regulatory provisions of the Porto Rican law, and for further proceedings, if any are necessary, not inconsistent with this opinion.

The decree of the District Court is reversed, and the case is remanded to that court with directions to issue an injunction, and for further proceedings not inconsistent with this opinion; and the appellant recovers costs of this court.

VIRGINIA & WEST VIRGINIA COAL CO. v. CHARLES.

(Circuit Court of Appeals, Fourth Circuit. October 10, 1918.)

No. 1605.

1. APPEAL AND ERROR ⟸1008(2)—REVIEW—FINDING OF FACTS BY TRIAL COURT.
   In an action at law tried to the court by consent, every finding of fact made by the court, having reasonable support in the evidence and tending to support the judgment, is binding on the reviewing court.
2. CONSTITUTIONAL LAW ⟸175, 249, 311—OBLIGATION OF CONTRACTS—RULES OF EVIDENCE—DUE PROCESS—EQUAL PROTECTION.
   As there is no vested right in the rules of evidence, the general principle is that the obligation of a contract is not impaired, nor due process of law nor the equal protection of law denied, by a statute making a fact proved presumptive evidence of another, and since the Legislature may create the presumption where it did not before exist, it may by repealing the statute destroy the presumption.
3. TAXATION ⟸788(2)—TAX DEEDS—PRIMA FACIE EVIDENCE.
   Statutes making tax deeds prima facie evidence of the legality of the proceedings under which they were made have been universally sustained.
4. TAXATION ⟸788(2)—TAX DEEDS—PRESUMPTIONS—REPEALING STATUTES.
   Despite Code Va. 1904, § 6, *held* that Act March 14, 1914 (Laws Va. 1914, c. 100), repealing Act March 13, 1912 (Laws Va. 1912, c. 235), making deeds recorded prior to 1865 prima facie evidence that all requirements had been complied with, destroyed any rights which a purchaser during the life of the act of 1912 from one claiming under deeds recorded prior to 1865 might have acquired; the Legislature being entitled to change rules of presumption, and the Code section protecting only substantive rights, etc.

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5. TAXATION ⊂⊃796(1)—TAX DEEDS—COLLATERAL ATTACK.
As a plaintiff in ejectment, claiming under a tax title has the burden of proving such title, an objection to the legality of the tax deeds under which plaintiff claimed was not a collateral attack on the deed.

6. TAXATION ⊂⊃789(4)—ACTION ON TAX TITLE—BURDEN OF PROOF.
A plaintiff in ejectment, who relies on a tax title may be required by defendant in possession to prove due execution of the power under which the deed was made.

7. TAXATION ⊂⊃788(8)—TAX DEEDS—PRESUMPTION.
Both the authenticity and validity of a tax deed may be inferred from long possession under it, with such failure of the alleged defaulting taxpayer to assert his title as to show acquiescence or estoppel.

8. TAXATION ⊂⊃788(8)—PRESUMPTION—VALIDITY OF TAX DEEDS.
Under the Virginia rule that a presumption of the validity of a tax deed does not arise, unless there has been possession for such length of time as would presume any other link in the chain of title, evidence *held* insufficient to warrant a presumption of the validity of a tax sale under which plaintiff deraigned title.

9. TAXATION ⊂⊃773—TAX DEEDS—RECITALS—EFFECT.
The recitals in an ancient tax deed do not prove its authenticity or validity, and are not sufficient to show compliance with the law.

10. TAXATION ⊂⊃615—SALE OF PROPERTY—MANDATORY STATUTE.
The provisions of Act Cong. Jan. 9. 1815. as amended by Act March 3, 1815, providing for sale of land for nonpayment of direct taxes, and for assessment, are mandatory, because designed to protect the taxpayer.

11. TAXATION ⊂⊃855—FORFEITURE OF LANDS—TAX TITLES—"JUST TITLE"—"JUST CLAIM."
Plaintiffs in ejectment, who asserted that the title of the original owner of land west of the Allegheny Mountains had been forfeited to the state, and that their predecessors took title under Act Va. 1842, § 3, *held* not entitled to recover; their predecessors not having "just title," which means a title good against all the world, or a "just claim," which means a claim that would be good, but for the paramount right forfeited to the state, etc.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Just Claim; Just Title.]

12. TAXATION ⊂⊃855—FORFEITURE OF LAND—PRESUMPTION.
There is no presumption of forfeiture of land to state for nonpayment of taxes.

13. TAXATION ⊂⊃851—NONPAYMENT—LAND—STATUTE DECLARING FORFEITURE—PUBLICATION.
While ordinarily provisions for the publication of statutes are directory, yet as the only notice to defaulting taxpayers of the impending forfeiture of their land under Act Va. 1803 (2 Rev. Code, 1819, p. 528), was the publication of the statute provided for in section 2, no forfeiture can be declared were such publication was not had as provided.

14. ADVERSE POSSESSION ⊂⊃16(3)—LAND IN STATE OF NATURE.
It is settled in Virginia that there can be no adverse possession of land in a state of nature, but actual possession of part of a single tract, under a junior patent, extends to the entire patent, including the portion still in a state of nature.

15. ADVERSE POSSESSION ⊂⊃101—CONSTRUCTIVE POSSESSION—ADJOINING PARCELS.
Where several parcels are granted by different patents to the same person, and are so situated that they are covered by an unbroken boundary, they are regarded as forming one tract, and actual adverse possession, for the statutory period, of any portion of the one tract thus formed from several extends to the entire boundary, and perfects the title to all separate tracts so consolidated.

16. ADVERSE POSSESSION ⟸106(4)—EFFECTIVE POSSESSION—LIENS.
Liens existing on land are lost by possession for the statutory period adverse to the owner, so the tax lien of the state is destroyed where an adverse occupant holds the land for the statutory period, though forfeiture be declared before the adverse occupancy ripened into title.

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

Action of ejectment by the Virginia & West Virginia Coal Company against Green Charles and others. There was a judgment for defendant Charles (251 Fed. 83), and plaintiff brings error. Affirmed.

S. B. Avis, of Charleston, W. Va. (J. L. Jeffries, of Norfolk, Va., on the brief), for plaintiff in error.

Barnes Gillespie and William H. Werth, both of Tazewell, Va. (E. M. Fulton, of Wise, Va., G. W. St. Clair, of Tazewell, Va., C. C. Burns, of Lebanon, Va., G. E. Penn, Jr., of Bristol, Va., Hager & Stewart, of Ashland, Ky., Chase & Daugherty, of Grundy, Va., and Chapman, Peery & Buchanan, A. S. Higginbotham, and Greever, Gillespie & Divine, all of Tazewell, Va., on the brief), for defendant in error.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

WOODS, Circuit Judge. On January 14, 1915, the Virginia & West Virginia Coal Company commenced this action of ejectment against Green Charles and about 1,250 other defendants for 146,109¼ acres of land called the "Hagan Survey" or "Pearson Survey," excepting from its claim, however, 11 described tracts lying within the boundaries set out. On the plea of not guilty the District Court by consent tried without a jury the issue of title to the particular tract claimed by the defendant Green Charles, containing 673.52 acres, and found in favor of the defendant.

The plaintiff's claim of title was as follows:

(1) Patent, November 16, 1795, from state of Virginia to Richard Smyth and Henry Banks, for 200,000 acres.
(2) Tax deed, November 3, 1823, from W. D. Taylor, collector of direct taxes of United States, to Wm. Lamb, of 200,000 acres of Richard Smyth and Henry Banks.
(3) Will of Wm. Lamb, probated March 5, 1827.
(4) Deed, Lamb's executor to Joseph Hagan and Sarah Purcell.
(5) Deed, February 7, 1839, Sarah Purcell to James Culbertson.
(6) Decree of circuit court, October 6, 1856, in case of Joseph Hagan v. James Culbertson, directing commissioners to convey to Hagan interest of Culbertson.
(7) Deed, August 6, 1857, Morrison, commissioner, to Joseph Hagan.
(8) Deed, April 4, 1871, Joseph Hagan to Patrick Hagan.
(9) Deed, November 8, 1883, Patrick Hagan to Frederick Pearson.
(10) Tax deed, February 17, 1905, Dennis, clerk, to Buchanan Company of lands bought by state for delinquent taxes of Frederick Pearson.
(11) Deed, Buchanan Company to Virginia & West Virginia Coal Company, April 2, 1914.

Defendant's claim of paper title was as follows:

(1) Patent, May 1, 1861, state of Virginia to Silas Ratliff.
(2) Deed, December 8, 1896, Ratliff's heirs to Margaret Justice.
(3) Deed, May 24, 1910, John W. and Margaret Justice to Green Charles.

The defendant also claimed by adverse possession.

[1] Every finding of fact made by the District Court, having reasonable support in the evidence and tending to support the judgment, is binding on this court.

We consider, first, whether any error of law entered into the finding of the District Court that the plaintiff failed to connect itself with the patent of 1795 to Richard Smyth and Henry Banks. There was no sufficient extraneous evidence of the execution of a valid tax deed by Taylor, collector, to Wm. Lamb. To make this connection it was necessary to establish the validity of the tax deed of 1823 to Wm. Lamb; and on this point it is earnestly contended that under the following statute of Virginia the tax deed is itself prima facie evidence that all provisions of law requisite to its validity were complied with:

"An act to prescribe the effect as evidence to be given to deeds recorded prior to the year 1865. Approved March 13, 1912.

"1. Be it enacted by the General Assembly of Virginia, that in every action at law or suit in equity, in which it shall appear that a deed or other writing, which constitutes a part of the chain of title to any lands has been made by an officer or other person, purporting to act under the provisions of any statute or decree, authorizing or providing for a sale or conveyance of real estate, and that said deed was duly recorded in the proper clerk's office prior to the year eighteen hundred and sixty-five, and that the record or evidence, or some parts thereof of the proceedings under or pursuant to which such sale, deed or other writing was made, has been lost or destroyed, or cannot be produced, the said deed or other writing, or a certified copy thereof, taken from said record, shall be prima facie evidence of the fact that all provisions and requirements of such statute or decree were duly complied with in the making of such sale, deed or other writing as well as the power or authority of such officer or other person to make and execute the same, and of the due execution thereof by him." Laws 1912, c. 235.

A repealing statute was passed March 14, 1914, in these words:

"Be it enacted by the General Assembly of Virginia, that an act * * * to prescribe the effect as evidence to be given to deeds recorded prior to the year eighteen hundred and sixty-five, approved March 13, 1912, be and the same is hereby repealed." Laws 1914, c. 100.

The repeal did not take effect until ninety days after its enactment. The conveyance of Buchanan company was made to plaintiff April 2, 1914, after the repealing statute was enacted, but before it went into effect. The argument is that the act of 1912 conferred a substantive right on those claiming under the old deeds referred to in the statute to such deeds as prima facie valid, and that the repealing statute could not have the effect of taking away that substantive right. To sustain this position, the plaintiff relies on section 6 of Code of 1904, which provides:

"No new law shall be construed to repeal a former law, as to any offense committed against the former law, or as to any act done, any penalty, forfeiture, or punishment incurred, or any right accrued, or claim arising under the former law, or in any way whatever to affect any such offense or act so committed or done, or any penalty, forfeiture, or punishment so incurred, or any right accrued, or claim arising before the new law takes effect; save only that the proceedings thereafter had shall conform, so far as practicable, to the laws in force at the time of such proceedings; and if any penalty, forfeiture, or punishment be mitigated by any provision of the new law, such

provision may, with the consent of the party affected, be applied to any judgment pronounced after the new law takes effect."

[2] As there is no vested right in rules of evidence, the general principle is that the obligation of a contract is not impaired, nor due process of law nor the equal protection of law denied by a statute making a fact proved presumptive evidence of another. This statement of the rule and its limitation has been adopted by the Supreme Court:

"That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law, it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. So, also, it must not, under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed." Mobile, etc., R. R. Co. v. Turnipseed, Adm'r, 219 U. S. 35, 31 Sup. Ct. 136, 55 L. Ed. 78, 32 L. R. A. (N. S.) 226, Ann. Cas. 1912A, 463.

[3] Statutes making tax deeds prima facie evidence of the legality of the proceedings under which they were made, and other like statutes, have been universally sustained. Marx v. Hanthorn, 148 U. S. 172, 13 Sup. Ct. 508, 37 L. Ed. 410; Turpin v. Lemon, 187 U. S. 51, 23 Sup. Ct. 20, 47 L. Ed. 70; Leigh v. Green, 193 U. S. 79, 24 Sup. Ct. 390, 48 L. Ed. 623; Mobile, etc., R. R. Co. v. Turnipseed, Adm'r, 219 U. S. 35, 31 Sup. Ct. 136, 55 L. Ed. 78, 32 L. R. A. (N. S.) 226, Ann. Cas. 1912A, 463; Bailey v. State of Alabama, 219 U. S. 219, 31 Sup. Ct. 145, 55 L. Ed. 191; Lindsley v. National Carbonic Gas Co., 220 U. S. 61, 31 Sup. Ct. 337, 55 L. Ed. 369, Ann. Cas. 1912C, 160; Reitler v. Harris, 223 U. S. 437, 32 Sup. Ct. 248, 56 L. Ed. 497; Meeker v. Lehigh Valley R. R. Co., 236 U. S. 412, 35 Sup. Ct. 328, 59 L. Ed. 644, Ann. Cas. 1916B, 691.

[4] Since the Legislature may create the presumption where it did not before exist, it may by a repealing statute destroy the presumption, and thus deprive of its aid persons who entered into contracts relying on the statutory presumption to establish the claims acquired.

Applying these rules, if the action had been tried while the act of 1912 was in force, it would not have availed the defendant in possession of the land in dispute under a junior grant to say that he took his grant and paid the purchase money after ascertaining that no evidence of the validity of the proceedings under which this land was sold for taxes could be produced. On the other hand, the plaintiff acquired the rights of the grantee under the tax deed charged with notice that the presumption created by the act of 1912 was a mere rule of evidence, that it did not inhere in the title deed, and that in purchasing it took the risk of the destruction of the presumption as evidence by the legislative authority which created it.

The only serious question therefore on this branch of the case is, Was the presumption created by the act of 1912 saved to the plaintiff by section 6 of the Code of 1904, above quoted, notwithstanding the repeal of the act of 1912 by the act of 1914?

"Rights accrued and claims arising under the former law" protected by section 6 from the effect of a repeal, are substantive rights and

claims. Rules of evidence are "proceedings," as distinguished from such rights and claims, which, so far from being protected from the effect of the repeal, are expressly required to conform, as far as practicable, to the law as it remains after the repeal. After a review of the authorities the application of the statute is thus limited in Crawford v. Halsted, 20 Grat. (Va.) 211:

"The court held that the mode of conducting a suit, or the rules of practice regulating it, are not the subject of vested rights. It might as well be contended that the party had a right to have his action tried in the court under the same organization as it existed when the suit was instituted, or by the same number of jurors, as to contend that the rules of evidence, or form of proceeding, the form of the plea and answer, may not be changed so as to affect all future trials, whether of actions then commenced or subsequently instituted. If the law is objectionable as violating vested rights then pending, why not equally so as to all causes of action then existing? The mere fact of having instituted a suit does not give any additional vested rights. It is the demand or claim that cannot be interfered with by legislative enactment."

Philips v. Commonwealth, 19 Grat. (Va.) 485, relied on by plaintiff, may be distinguished by the fact that the prosecution had been commenced at the time of the repeal. Discussion of the distinction would not be pertinent, however, since this court follows the latest construction of the statute by the state court, based as it is on the clearest principle and reasoning.

Even if it be assumed that the right to a rule of evidence was intended to be embraced within the protection of section 6, that statute could not limit or control the plainly expressed or implied contrary intention of subsequent legislation; and we think the act of 1914 does clearly imply a contrary intention. If it does not then it has no substantial meaning. The act of 1912 was general in its terms and conferred upon claimants under the old deeds the benefit of the presumption whether original holders or their grantees or heirs or devisees, without distinction between those who acquired claims before its passage and those who acquired them after its passage. One who like the plaintiff purchased such a claim after the act was passed took only the rights of his grantor; and these embraced no vested right to the rule of evidence provided by the statute. There is no ground whatever for the court to infer that the Legislature intended to make subsequent grantees a favored class. To hold that the repeal was intended to affect only those who might acquire title or claims after the repeal would be to make the repeal of no practical effect, for there would be few, if any, transfers of such titles or claims when the presumption in their favor would be destroyed by the transfer. Looking at the matter in a plain way, the legislation on its face shows that the intention of the Legislature was to take away by the repeal the presumption in every case where it had been conferred by the act of 1912. The Legislature, having in prominent view the hardship sometimes arising from the difficulty of proving the execution of the old deeds referred to in the act, and the authority under which they were made, passed the statute of 1912. At the next session the Legislature, upon reconsideration, having in prominent view the hardship resulting from the act of 1912 in unsettling the titles of those who were claiming adversely to the

old deeds, unmistakably intended to make the repeal coextensive with the act repealed—to restore the rule of evidence in its full scope and application just as it was before the act of 1912. This being the manifest intention of the repealing act, the saving provisions of section 6 have no application. In Town of Danville v. Pace, 25 Grat. (Va.) 1, 18 Am. Rep. 663, it was held that construing sections 5 and 6 together the latter was not applicable when inconsistent with the manifest intent of the Legislature. Great N. Ry. v. U. S., 208 U. S. 452, 28 Sup. Ct. 313, 52 L. Ed. 567.

We conclude (1) that section 6 saves from the operation of a repealing statute substantive claims and rights, but has no application to a change by repeal of a mere rule of evidence; and (2) that it could not bind a future Legislature which expressed a contrary intention in a repealing statute.

[5, 6] The plaintiff next contends that, without regard to the act of 1912, the court should have admitted in evidence the tax deed as valid because it could not be attacked collaterally by the defendant who claimed under an independent title. The fallacy is in assuming that the defendant had to make any attack on the deed. The burden was on the plaintiff to prove its title, and to do this it was necessary to prove that the tax title, one of its links, was executed in compliance with law. Reusens v. Lawson, 91 Va. 226, 21 S. E. 347; Boom v. Simmons, 88 Va. 259, 13 S. E. 439; Sulphur Mines Co. of Va. v. Thompson's Heirs, 93 Va. 293, 25 S. E. 232; Marx v. Hanthorn, 148 U. S. 172, 13 Sup. Ct. 508, 37 L. Ed. 410.

An objection to the legality of a tax deed under which plaintiff claims is not a collateral attack on the deed. Reusens v. Lawson, 91 Va. 226, 21 S. E. 347. When any right is claimed under a naked power, the burden is on the claimant to prove the due execution of the power. One in adverse possession of land may demand strict proof of the execution of the power. Sulphur Mines Co. of Va. v. Thompson's Heirs, 93 Va. 293, 25 S. E. 232.

The case of Munroe v. Winegar, 128 Mich. 309, 87 N. W. 396, and other cases relied on by plaintiff, do not apply, since they merely hold the familiar doctrine that tax sales, under judicial decrees, can only be attacked by direct proceedings to set aside the decree.

[7, 8] It is true that both the authenticity and the validity of a deed purporting to be made under a naked power, including even a tax deed, may be inferred from long possession under it with such failure of the alleged defaulting taxpayer to assert his title as to show acquiescence, or estoppel. Williams v. Conger, 125 U. S. 397, 9 Sup. Ct. 793, 33 L. Ed. 201; Fulkerson v. Holmes, 117 U. S. 389, 6 Sup. Ct. 780, 29 L. Ed. 915; Lenning's Ex'r v. White, 20 S. E. 831, 1 Va. Dec. 873; Bowe v. City of Richmond, 109 Va. 254, 64 S. E. 51; Caruthers v. Eldridge's Ex'r, 12 Grat. (Va.) 670; Nowlin v. Burwell, 75 Va. 551; Cook et al. v. Lasher et al., 73 Fed. 701, 19 C. C. A. 654; Van Gunden et al. v. Virginia Coal & Iron Co., 52 Fed. 838, 3 C. C. A. 294; Wilson v. Snow, 228 U. S. 217, 33 Sup. Ct. 487, 57 L. Ed. 807, 50 L. R. A. (N. S.) 604. The authorities are in some confusion as to what possession or acts of ownership or acquiescence by the former

owner is necessary to give the presumption of validity to an ancient tax deed, or other deed purporting to be executed under a naked power. The rule in Virginia seems to be that the presumption does not arise unless there has been possession for such length of time as would presume any other link in the chain of title. Jesse v. Preston, 5 Grat. (Va.) 130; Allen v. Smith, 1 Leigh (Va.) 231. We do not think, however, the plaintiff's proof measures up even to the most liberal rule laid down in any authority. The only evidences of possession were that Joseph Hagan went to Tazewell county in 1833 and had surveyed some large tracts of land including the land in dispute lying entirely or mainly in Buchanan county; that in 1837 commissioners in the partition suit of Joseph Hagan v. Sarah Purcell made an actual survey and assigned one hundred thousand acres to each party; that in 1842 or 1843 Collins who was then living on the land agreed to hold it for Culbertson; and that about the same time Hagan placed one Looney on another portion of the land as his agent. There was nothing to show the extent of their possessions or their duration after 1855, or that either Collins or Looney ever acted in such way as to indicate that they were agents for Culbertson or Hagan. The presumption that a possession once begun continues is overcome by the fact that with all the diligence shown by the plaintiff not a particle of evidence was adduced of any act of possession for more than 60 years after the alleged agreement of Collins and Looney to hold for the plaintiff's predecessors in title.

The evidence, it is true, tended to show that neither Banks nor Smyth, nor any one under them, had set up any claim to the land since the tax sale. But there was no proof of any affirmative acts or expressions of recognition of the validity of the tax sale by the former owners. It is not evident whether their inaction was due to indifference because of low estimate of value or to acquiescence in the tax sale. We agree with the District Court, therefore, that there was no such evidence of possession or acquiescence by the former owners as to warrant the presumption of the validity of the tax sale.

[9] The recitals in an ancient tax deed do not prove its authenticity or validity. Sulphur Mines Co. of Va. v. Thompson's Heirs, 93 Va. 293, 25 S. E. 232. A tax deed made under judicial authority as in Machir v. Funk, 90 Va. 284, 18 S. E. 197, stands on a different footing under the familiar rule that all presumptions are to be indulged in favor of conveyances and other proceedings of a court of competent jurisdiction. Minor's Tax Titles, 123. But even in such cases the Virginia court has held that the recitals of the deed are not sufficient to show compliance with the law. Miller v. Williams, 15 Grat. (Va.) 213; Walton v. Hale, 9 Grat. (Va.) 194.

[10] The conclusion that there are no presumptions in favor of its tax deed, left the plaintiff's claim that it was valid dependent upon proof of compliance with tax law under which the sale was made and the deed executed. This proof was lacking in several particulars: There was no proof of the assessment; nor of the published notice of the assessment to persons concerned required by sections 13 and 14 of the act of 1815 (Act Jan. 9, 1815, c. 21, 3 Stat. 169); nor of ad-

vertisement that the taxes were due and payable under section 26; nor of the notification of the taxes due by advertisement in one newspaper under section 28; nor filing of the list of property sold in the clerk's office, with a view to its redemption by the owner, required by section 30.

The plaintiff undertook to prove that the tax sale had been advertised as required by sections 28 and 29 of Act Jan. 9, 1815, as amended by Act March 3, 1815 (3 Stat. 230, c. 91). The amendment requires that the advertisement of the tax sale shall be by publication "at least once a week for eight weeks in succession in every newspaper within the state in which the laws of the United States are by public authority published." In support of the tax deed, plaintiff contended that the Richmond Enquirer was the paper, and the only paper, in which the statute required the advertisement of sale, and offered evidence tending to prove that the sale was advertised in that paper. Whether the Richmond Enquirer was the proper medium of advertisement was a mixed question of law and fact, fully discussed in the opinion below. It seems to us there can be no doubt that the District Judge correctly construed the statutes. Designation of the Enquirer as the only newspaper, even one of the newspapers, "in which the laws of the United States are by public authority published," was left by the evidence at least in great doubt, and therefore the conclusions of fact by the District Judge against the plaintiff are not subject to review by this court. This makes immaterial the question whether the advertisement was in the proper form. The statutory provisions referred to were mandatory because designed to protect the taxpayer, and therefore proof of compliance with them was necessary to the validity of the tax deed.

[11] The plaintiff next claims title by operation of law under the familiar section 3 of the act of 1842 (Acts 1841–42, c. 13). The contention is that, since neither Smyth and Banks, nor those claiming under them, were assessed with taxes after 1832, therefore all their title to the land was forfeited to the state; that Joseph Hagan, Sarah Purcell, and James Culbertson were persons having "just claim," if not "just title," to the land under the Smyth and Banks grant; that they paid the taxes which the direct claimants under the Smyth and Banks patent should have paid; and that therefore all title derivative from that patent was vested in them, and hence in the plaintiff, their grantee.

The act of 1842 provides:

"And be it further enacted, that all the right, title and interest, which shall be vested in the commonwealth in any lands or lots lying west of the Allegheny Mountains, by reason of the nonpayment of the taxes heretofore due thereon, or which may become due on or before the first day of January next, or of the failure of the owner or owners thereof to cause the same to be entered on the books of the commissioner of the proper counties, and have the same charged with taxes according to law, by virtue of the provisions of the several acts of assembly heretofore enacted, in reference to delinquent and omitted lands, shall be and the same are hereby absolutely transferred to and vested in any person or persons (other than those for whose default the same may have been forfeited, their heirs or devisees), for so much as such person or persons may have just title or claim to, legal or equitable, claimed, held or derived from or under any grant of the commonwealth, bearing date previous to the first day of January, eighteen hundred and forty-

three, who shall have discharged all taxes, duly assessed and charged against him or them upon such lands, and all taxes that ought to have been assessed or charged thereon, from the time he, she or they acquired title thereto, whether legal or equitable; Provided, that nothing in this section contained, shall be construed to impair the right or title of any person or persons who shall bona fide claim said land by title, legal or equitable, derived from the commonwealth, on which the taxes have been fully paid up according to law, but in all such cases the parties shall be left to the strength of their titles respectively."

Joseph Hagan and Sarah Purcell were not those for whose default the land was forfeited nor their heirs or devisees. Grantees of those in default are not, in terms, excluded by the statute from the general privilege of acquiring title by payment of taxes; and the express exclusion of heirs and devisees indicates that it was not the intention to exclude grantees. It is true that in Wild's Lessee v. Serpell, 10 Grat. (Va.) 405, Levasser v. Washburn, 11 Grat. (Va.) 572, and Atkins v. Lewis, 14 Grat. (Va.) 30, the Virginia court does refer to a subsequent grantee as a person who may obtain title by payment of the taxes, but the court does not decide that only a claimant under a patent different from that under which the forfeiture occurred can acquire title by payment of the taxes. Where the point was expressly involved the West Virginia court in construing a similar statute held that the grantee of the defaulting taxpayer may acquire the state's title by payment of the taxes. State v. Collins et al., 48 W. Va. 64, 35 S. E. 846.

But even under this construction of the statute, we do not think the plaintiff can claim the benefit of it, because it failed to prove either a "just title" or a "just claim." A just title means a title good against all the world. We are unable to find any definition of a just claim by the courts of Virginia or West Virginia. It evidently means something more than a mere asserted claim. Having regard to the context, it must mean at least a claim to the land which would be good under the same patent, but for the paramount right forfeited to the state, or an adverse right acquired under some other patent—a claim susceptible of proof under some patent from the state. As we have seen, the plaintiff was not able to show that Culbertson and others who paid the taxes derived title under any grant from the state, and therefore they could not derive title by payment of the taxes as the holders of a "just title" or a "just claim," under the act of 1842.

The plaintiff must fail under its own evidence of title.

[12, 13] The defendant, in addition to denial of plaintiff's title, set up two affirmative defenses: First, that the land was forfeited to the state either under the act of 1803 or under the act of 1814, and so was not subject to the federal tax of 1816; that therefore the grant of 1861 under which he claims was good against the senior grant of 1795, all rights under the latter having been forfeited.

There is no presumption of forfeiture. Under the act of 1803 (2 Rev. Code, 528), land was forfeited to the commonwealth and made subject to location when the taxes remained unpaid for more than two years. Section 2 of the act required publication of the statute by the auditor in the "Gazette of the Public Printer" and in some newspaper published at the seat of the general government. The general

rule is that provisions for the publication of statutes are directory, and failure to comply with them does not impair the validity of the statute. Endlich on the Interpretation of Statutes, § 432. But in this instance the only notice to the defaulting taxpayer of the impending forfeiture of his land provided by the statute was publication of the statute. The publication was an act not only intended, but apparently necessary, for the protection of the taxpayer. It seems to us, therefore, that contrary to the general rule publication of the statute should be held necessary to a forfeiture, and that no presumption should be indulged that the auditor published it. The like claim of the defendant of alleged forfeiture under the act of 1814 depends upon the issue of fact as to the proper assessment of the land which was found by the District Judge adversely to the claim of forfeiture, and is therefore not reviewable here.

We do not understand that the defendant questions the finding of the District Court that under the proof he cannot rely on outstanding title in Moorehouse, Ralph, or Banks, or any other third person.

[14, 15] The defendant's claim of title by adverse possession presents a difficult question which arises in this way: As early as 1851 Silas Ratliff, whose title defendant acquired, established his residence in the vicinity of the land in dispute, using a number of acres around his dwelling for agricultural purposes. This actual possession embraced a portion of a tract of 15 acres granted to Ratliff in 1854. He held this actual possession until his death in 1896. On May 1, 1861, he obtained a patent for 595 acres adjacent to the 15-acre grant and overlapping a portion of it. On the same day, May 1, 1861, he obtained a patent for 673 acres, including the land in dispute. No part of this last patent adjoined the tract of 15 acres of which Ratliff had actual possession; but in 1862 a patent was issued to him for a tract of 163 acres between the 595 acres and the land in dispute. Thus the land in dispute was connected in 1862 by unbroken boundaries covered by the color of title of junior patents from the state with the small tract in Ratliff's actual possession from 1851 to 1896. The question is whether this possession in contemplation of law extended to and perfected his title to the land in dispute, assuming that there was no actual possession for that period shown under the senior patent. The stay law was operative in Virginia until January 1, 1869, but Silas Ratliff's possession remained unbroken until his death in 1896, and if the adverse possession relied on by defendant extends to the land in dispute it was perfected before the commencement of the action on January 14, 1915.

It is settled in Virginia that there can be no adverse possession of land in a state of nature. Whealton v. Doughty, 112 Va. 649, 72 S. E. 112. But actual possession of a part of a single tract under a junior patent extends to the entire tract, including the portion still in a state of nature. When several tracts are granted by different patents to the same person, and are so situated that they are covered by an unbroken boundary, they are regarded as forming one tract, and actual adverse possession for the statutory period of any portion of the one tract thus formed from several extends to the entire bound-

ary and perfects the title to all separate tracts so consolidated into one. In Overton's Heirs v. Davisson, 1 Grat. (Va.) 216, 229 (42 Am. Dec. 544), the rule is thus stated:

"And, moreover, that upon the question of adversary possession, it is immaterial whether the land in controversy be embraced by one or several coterminous grants of the older patentee, or one or several coterminous grants of the younger patentee; in either case the lands granted to the same person by several patents must be regarded as forming one entire tract."

The same rule is laid down in Hutchinson on Land Titles, § 416; Virginia & Tennessee C. & I. Co. v. Fields, 94 Va. 102, 26 S. E. 426; Roller v. Armentrout, 118 Va. 173, 86 S. E. 906; Sharp v. Shenandoah Furnace Co., 100 Va. 27, 40 S. E. 103; Rich v. Braxton, 158 U. S. 375, 15 Sup. Ct. 1006, 39 L. Ed. 1022.

It is true that in the cases cited the patented land held to be covered by the adverse possession was immediately contiguous to the tract on which there was actual possession. But the principle is the same, namely, that the possession of a part covers all lands embraced in a common boundary under patents from the state.

The case of Harman v. Ratliff, 93 Va. 249, 24 S. E. 1023, is distinguished by the fact that, while the possession proved was on a tract contiguous to one of the granted tracts, it was an entirely independent tract not proved to be embraced in any of the patents. The distinction may be somewhat artificial, but we perceive no other ground of reconciliation of this case with the other cases cited.

The last question is whether Ratliff's adverse possession was broken by reacquisition by the state of the entire tract covered by the patent of 1795. The 200,000 acres of land embraced in the patent of 1795 was sold on October 12, 1886, for delinquent taxes assessed against Frederick Pearson for the past years, beginning February 1, 1876, and bought by the state. The state, by W. L. Dennis, clerk, conveyed on February 17, 1905, to Buchanan Company, from which plaintiff derived title.

Plaintiff's position is that the alleged adverse possession set up by defendant had not matured in 1876, when the state's lien for taxes attached, that it could not thereafter run against that lien, and that therefore the conveyance of the state was not limited to the title of Pearson at the date of the sale in 1886, but carried whatever title he had in 1876, when the lien first attached.

Under the tax laws of Virginia, as is conceded by plaintiff's counsel, the lien for taxes bears only upon the title of the person against whom the taxes are assessed and the tax title carries only his title. As the state's lien was limited to Pearson's title and its conveyance carried nothing more, and plaintiff was unable to show that Pearson had title, it is not in a position to assert a valid lien in favor of the state, defeating defendant's assertion of title by adverse holding by another under whom he claims.

[16] But waiving that, and assuming that Pearson was the real owner and that the state's lien for taxes was good against the world, the question is: Was the lien for taxes assessed against the land as Pearson's, which accrued in 1876, defeated by the adverse possession of Ratliff beginning in 1869? Obviously no statute of limitation ran

against the state's lien in favor of Pearson, or any one claiming in privity with him. Cogent reasons might be stated in support of the validity of the state's lien against an adverse possession of even a stranger to Pearson, begun, but not consummated, at the time the lien attached. We are relieved of the consideration of the question, however, by the decision of the Supreme Court of Virginia in McClanahan's Adm'r v. Norfolk & W. Ry. Co., 123 Va. ——, 96 S. E. 453. There the court held that liens existing on land were lost by a possession for the statutory period adverse to the true owner, on the ground that the liens against the true owner were dependent on his title, that adverse possession conferred, not a derivative, but an independent paramount, title, and that therefore, when the paramount title matured by adverse possession, the former title was lost, and with it fell the lien, which was dependent upon it. The court quoted with approval the opinion of Judge McDowell in this case, laying down the rule stated as applicable to a lien for state taxes.

We must therefore sustain the conclusion of the District Court that title by adverse possession set up by the defendant is good against the conveyance of the state to the Buchanan Company, based on the sale under its lien for taxes.

Other questions concerning the admission and rejection of documentary evidence are discussed in the enlightening opinion of the District Judge, and in the comprehensive arguments of counsel. Without respect to these questions, the conclusions we have stated are decisive of the case.

Affirmed.

SANTA MARINA CO. v. CANADIAN BANK OF COMMERCE.*

(Circuit Court of Appeals, Ninth Circuit. October 22, 1918.)

No. 3113.

1. CORPORATIONS ⊂⊃402—REPRESENTATION BY OFFICER—BANK CHECKS—INDORSEMENTS.
   Indorsements of checks by a corporation's secretary are all in effect in the name of payee corporation by its secretary, though, in some, "Company" is abbreviated to "Co.," and "Secretary" to "Secy.," or "Sec."
2. CORPORATIONS ⊂⊃432(12)—SECRETARY—AUTHORITY TO INDORSE CHECKS—EVIDENCE.
   Evidence *held* to show that secretary of corporation, with knowledge and consent of its president and board of directors, was authorized to indorse checks payable to it, as for five years he did.
3. BILLS AND NOTES ⊂⊃149—CHECKS—NEGOTIABILITY—"GENERAL INDORSEMENT."
   Checks with "general indorsement," defined by Civ. Code Cal. § 3112, as one by which no indorsee is named, are negotiable instruments.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, General Indorsement.]
4. CORPORATIONS ⊂⊃414(4)—AUTHORITY OF SECRETARY—INDORSING CHECKS.
   Authority of secretary of a corporation to indorse in blank checks payable to it was not limited by the mere fact that its president and board of directors supposed he deposited them with its bank.

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

*Rehearing denied February 10, 1919.

5. BANKS AND BANKING ⟸130(3)—CHECKS—DEPOSITS.
Secretary of corporation having authority to indorse in blank checks payable to it, title to checks so indorsed passed on delivery to his bank, when tendered by him to it for deposit to his own account, unless it had timely notice that he had no title, or it acted in bad faith in receiving them.

6. BANKS AND BANKING ⟸130(3)—DEPOSITS—ESTOPPEL.
A corporation, which gives its secretary authority to indorse in blank checks payable to it, is estopped to recover of his bank, which acted in good faith in receiving them for deposit to his account.

7. APPEAL AND ERROR ⟸1033(7)—MATTERS REVIEWABLE.
Appeal from decree by plaintiff alone brings up for review only what was decided adversely to him, and not whether decree, so far as favorable to him, was erroneous.

Appeal from the District Court of the United States for the Second Division of the Northern District of California; Benj. F. Bledsoe, Judge.

Suit in equity by the Santa Marina Company against the Canadian Bank of Commerce. From a decree for part only of the amount claimed (242 Fed. 142), plaintiff appeals. Affirmed.

E. W. McGraw and J. E. Barry, both of San Francisco, Cal., for appellant.

Gavin McNab, R. P. Henshall, and Nat Schmulowitz, all of San Fransciso, Cal., for appellee.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

MORROW, Circuit Judge. This is a suit in equity, in which the appellant, the Santa Marina Company, as plaintiff, brought suit against the appellee, the Canadian Bank of Commerce, as defendant, to obtain a decree declaring the defendant the trustee of a fund amounting to $6,775.98.

One R. T. Hooper was the secretary of the plaintiff corporation from September 21, 1906, until he resigned, on March 17, 1913. During this period the plaintiff was the owner of two pieces of property located in the city of San Francisco. One piece is referred to in the testimony as the "Santa Marina Building"; the other, as the "Front Street Building." The first yielded to the plaintiff an income from rentals amounting approximately to $4,000 per month; the other rental amounting to about $300 per month. Two real estate firms in San Francisco acted as the agent of the plaintiff in collecting the rents from these two buildings, respectively; the rents being paid in checks drawn by the agents in favor of the plaintiff, and delivered to Hooper as secretary of the plaintiff. His function was to indorse these checks and deposit them to the credit of the plaintiff in its bank, which at first was the Mercantile Trust Company of San Francisco, and afterwards the Mercantile National Bank of San Francisco. His failure to so deposit 21 checks, amounting to $6,775.98, and his action in depositing them to his own credit with the defendant, has given rise to the present controversy.

These 21 checks are identified as having been drawn by Bovee, Toy & Co., plaintiff's agent in collecting the rents from the Front Street

Building. They were drawn in favor of plaintiff on the Bank of California, and delivered to Hooper as the secretary of the plaintiff, who indorsed them in blank in plaintiff's name and deposited them to his own credit in the defendant bank. The defendant in the usual course of business passed these checks through the clearing house, and they were paid by the Bank of California. The first check was deposited by Hooper with the defendant on December 31, 1907, and the last on March 23, 1911. Hooper was elected secretary of the plaintiff September 21, 1906, and resigned March 17, 1913. The plaintiff did not discover that Hooper had deposited these checks with the defendant until April 2, 1913. This suit was commenced January 26, 1914.

[1] In the allegations of the complaint it is alleged that each check was drawn in favor of the Santa Marina Company. In 12 checks, the indorsement appeared to be the "Santa Marina Company," and in 9 the indorsement is "Santa Marina Co." It is alleged with respect to each separate check that the indorsement was made by R. T. Hooper, and it so appears in the indorsements set out in the record. In 5 indorsements R. T. Hooper adds the title of his authority as "Secretary"; in 11 he abbreviates it as "Secy.," and in 3 as "Sec." These variations in the form of the indorsements on the checks are of no significance in the routine of passing title to checks in the banking business. They were all in effect the indorsements of the name of the "Santa Marina Company, by R. T. Hooper, Secretary," and would be so recognized in any business transaction.

[2, 3] This is a suit in equity, in which the plaintiff seeks to recover upon the charge that the defendant was a trustee for the plaintiff for the sums of money represented by these checks. To raise such a trust it was necessary for the plaintiff to allege that Hooper, without the knowledge and consent of the plaintiff, had indorsed the checks in the name of the plaintiff and deposited them to his own credit with the defendant. It was also necessary to allege that the defendant, well knowing that said checks and the moneys they represented were the property of the plaintiff, placed the same to the personal account of Hooper. In the complaint the plaintiff so alleges with respect to each of the checks. In defendant's answer these allegations are specifically denied, raising an issue which we think is the controlling question in this case.

Hooper was the secretary of the plaintiff, and in that capacity he indorsed the checks. Mr. E. W. Hopkins, the president of the plaintiff corporation during the time Hooper was its secretary, testified that the duties of the latter "were to take care of the accounts of the corporation and take care of its cash, etc." He supposed that Hooper's authority as secretary "was the usual authority that secretaries have." The by-laws of the corporation provided that the board of directors should elect a secretary, whose duties were specified in several particulars; among other things it was provided:

"He shall keep proper account books, countersign all checks drawn upon the treasury, and discharge such other duties as pertain to his office and are prescribed by the board of directors."

Hopkins testified:

"I must have known that he [Hooper] was receiving checks from Bovee, Toy & Co. on account of the rents. The money of the Santa Marina Company was supposed to be deposited with the Mercantile Trust Company, and subsequently with the Mercantile National Bank. No other place was authorized for such deposits. I cannot tell you whether authority was given Hooper to indorse checks of the Santa Marina Company with the Mercantile National Bank, specially by resolution, or not. * * * I believed he was indorsing checks and depositing them with the Mercantile National Bank. I never objected to his doing so. do not know if any other director objected to it."

H. A. Coggins, a director of the plaintiff corporation and the successor of Hooper as its secretary, testified that he "believed Hooper had no authority to deposit checks with the Canadian Bank of Commerce," and he believed Hooper was "supposed to deposit all checks in the Mercantile National Bank." That Hooper was authorized to indorse checks with the knowledge and consent of the president and board of directors of the corporation is established by this testimony, and by the fact that he did so in transacting plaintiff's business for the period of more than five years. The checks deposited with the defendant by Hooper were negotiable instruments. The indorsements were general (section 3112, California Civil Code), and were made by authority.

[4, 5] It is true plaintiff's president and board of directors supposed Hooper deposited the checks with plaintiff's banks, but this was far from so limiting his authority. His authority to indorse the checks in blank was complete. Where he should deposit the checks was another matter, concerning which there was no express restriction. Plaintiff's officers may have supposed that they had limited his authority to the depositing of the checks in plaintiff's bank, but there is no evidence that they actually did so, or that they required him to so indorse plaintiff's checks. It follows that, when Hooper tendered the checks in question to the defendant for deposit to the credit of his own account, the title passed on delivery, unless defendant had timely notice that Hooper had no title to them, or there was some act of bad faith on the part of the defendant in receiving the checks. There is no such evidence in the record.

In Murray v. Lardner, 2 Wall. (69 U. S.) 110, 17 L. Ed. 857, the Supreme Court had before it the question of the title to certain coupon bonds payable to bearer, which had been stolen from the defendant in error and pledged to the plaintiff in error for a loan. The court reviewed the decisions upon the transfer of commercial or negotiable paper, and concluded by stating the following propositions:

"The possession of such paper carries the title with it to the holder. 'The possession and title are one and inseparable.' The party who takes it before due for a valuable consideration, without knowledge of any defect of title, and in good faith, holds it by a title valid against all the world.

"Suspicion of defect of title, or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker, at the time of the transfer, will not defeat his title. That result can be produced only by bad faith on his part."

In Hotchkiss v. National Bank, 21 Wall. (88 U. S.) 354, 359, 22 L. Ed. 645, the controversy also related to the title to certain coupon bonds stolen from the owner and pledged as collateral securities. The court said:

"The law is well settled that a party who takes negotiable paper before due for a valuable consideration, without knowledge of any defect of title, in good faith, can hold it against all the world. A suspicion that there is a defect of title in the holder, or a knowledge of circumstances that might excite such suspicion in the mind of a cautious person, or even gross negligence at the time, will not defeat the title of the purchaser. That result can be produced only by bad faith, which implies guilty knowledge or willful ignorance, and the burden of proof lies on the assailant of the title. It was so expressly held by this court in Murray v. Lardner, 2 Wall. 110, 17 L. Ed. 857."

In Shaw v. Railroad Co., 101 U. S. 563, 25 L. Ed. 892, the controversy related to an indorsed bill of lading. For the purpose of distinguishing the transfer of such an instrument from the transfer of a bill of exchange or promissory note, the court said of the latter:

"They are representatives of money, circulating in the commercial world as evidence of money, 'of which any person in lawful possession may avail himself to pay debts or make purchases or make remittances of money from one country to another, or to remote places in the same country. Hence, as said by Story, J., it has become a general rule of the commercial world to hold bills of exchange as in some sort sacred instruments in favor of bona fide holders for a valuable consideration without notice.' Without such a holding they could not perform their peculiar functions. It is for this reason it is held that if a bill or note, indorsed in blank or payable to bearer, be lost or stolen, and be purchased from the finder or thief, * * * the bona fide purchaser may hold it against the true owner. He may hold it, though he took it negligently, and when there were suspicious circumstances attending the transfer. Nothing short of actual or constructive notice that the instrument is not the property of the person who offers to sell it—that is, nothing short of mala fides—will defeat his right. The rule is the same as that which protects the bona fide indorser of a bill or note purchased for value from the true owner. The purchaser is not bound to look beyond the instrument."

In Swift v. Smith, 102 U. S. 442, 444, 26 L. Ed. 193, the question related to the transfer of an indorsed promissory note. The Supreme Court said:

"One who purchases such paper from another, who is apparently the owner, giving a consideration for it, obtains a good title, though he may know facts and circumstances that cause him to suspect, or would cause one of ordinary prudence to suspect, that the person from whom he obtained it had no interest in it, or authority to use it for his own benefit, and though by ordinary diligence he could have ascertained those facts. * * * He can lose his right only by actual notice or bad faith."

In First National Bank v. Moore, 148 Fed. 953, 78 C. C. A. 581, in this court, the question related to the title to certain promissory notes alleged to have been given to the original holder without consideration. Assigned to the plaintiff in error, the question was whether the purchaser was deprived of his character of purchaser in good faith by proof that he took the note with knowledge of such circumstances as ought to have put an ordinary man on inquiry to ascertain the facts. The court cites a number of cases, among others Murray v. Lardner, supra, and Hotchkiss v. National Bank, supra, to the effect that to defeat a recovery by an indorsee of a promissory note for value before

maturity, on the ground that the note was given without consideration or was obtained by fraud, the burden rests upon the indorsee to prove that the holder had knowledge of such fact or was chargeable with bad faith.

There is no evidence that defendant had any notice that the checks deposited by Hooper were not his property, and there is no evidence of bad faith on the part of the defendant in the transaction. Upon the controlling question in the case plaintiff has therefore failed to furnish the proof required to sustain the action.

[6] There is, moreover, a well-established principle of equitable estoppel applicable to this case. It is found in numerous cases. In the leading case of McNeil v. Tenth National Bank, 46 N. Y. 325, 7 Am. Rep. 341, the Court of Appeals of New York states it as follows:

"That where the true owner holds out another, or allows him to appear, as the owner of, or as having full power of disposition over, the property, and innocent third parties are thus led into dealing with such apparent owner, they will be protected.

"Their rights in such cases do not depend upon the actual title or authority of the party with whom they deal directly, but are derived from the act of the real owner, which precludes him from disputing, as against them, the existence of the title or power which, through negligence or mistaken confidence, he caused or allowed to appear to be vested in the party making the conveyance."

In Cluett v. Couture, 140 App. Div. 830, 125 N. Y. Supp. 813, it was held that, where a principal granted full power to his agent to indorse checks in blank by writing the principal's name on the back without any restrictive words, but required him to deposit them in a bank to the credit of the principal, any departure by the agent from the authority was a mere diversion of a negotiable instrument from an authorized use, and where a loss occurred it must fall on the principal, rather than on the holder, who took the check in good faith and without any information or knowledge that the agent did not have authority to use the check for the purpose and in the manner in which he used the same.

The same principle is stated more concisely, but with equal clearness, by Mr. Justice Day, speaking for the Supreme Court, in National Safe Deposit Co. v. Hibbs, 229 U. S. 391, 33 Sup. Ct. 818, 57 L. Ed. 1241:

"In such case we think the principles which underlie equitable estoppel place the loss upon him whose misplaced confidence has made the wrong possible."

In the late case of Arcade Realty Co. v. Bank of Commerce (Cal. App.), the court applied this doctrine in a case almost identical with the present case. The syllabus of that case is as follows:

"Where the owner of a building knowingly permits its agent to indorse its name upon checks given in payment of rent, and to deposit them in his own bank, the agent thereafter remitting by his personal check, and this practice continued over a period of 16 months, the owner created and vested in such agent ostensible authority to indorse its name upon the checks, and the bank making payments on the checks so indorsed would not be liable to such owner."[1]

The plaintiff, through mistaken confidence in Hooper, gave him authority as its secretary to indorse checks without restriction, which

[1] For new opinion by California Supreme Court, see 181 Pac. 66.

made the wrong possible in these transactions, and under the rule of equitable estoppel it cannot recover.

[7] The decree of the court below is in accordance with the law of negotiable paper and the rule of equitable estoppel as here stated, except as to certain checks, amounting in the aggregate to $1,666.35, for which a decree was entered in favor of the plaintiff. As to these checks, the court found that they were deposited at a time when Hooper was indebted to the defendant bank in certain overdrafts, and that the defendant appropriated the proceeds of such checks in satisfaction of such overdrafts, thereby becoming liable to plaintiff in that amount.

From this decree both parties to the suit had the right to appeal to this court. Plaintiff appealed. The defendant did not. An appeal brings up for review only that which was decided adversely to the appellant. Loudon v. Taxing District, 104 U. S. 771–774, 26 L. Ed. 923; Cherokee Nation v. Blackfeather, 155 U. S. 218–221, 15 Sup. Ct. 63, 39 L. Ed. 126; Field v. Barber Asphalt Paving Co., 194 U. S. 618–621, 24 Sup. Ct. 784, 48 L. Ed. 1142; Southern Pine Co. v. Ward, 208 U. S. 126–137, 28 Sup. Ct. 239, 52 L. Ed. 420; O'Neil v. Wolcott Mining Co., 174 Fed. 527–535, 98 C. C. A. 309, 27 L. R. A. (N. S.) 200; Swager v. Smith, 194 Fed. 762–765, 114 C. C. A. 482; Sanborn-Cutting Co. v. Paine, 244 Fed. 672–681, 157 C. C. A. 120.

The correctness of that part of the decree in favor of the plaintiff for $1,666.35 is therefore not a question before this court.

This conclusion renders it unnecessary for us to consider the defense that the plaintiff is chargeable with laches in the prosecution of this suit, and the further defense that plaintiff's claim has been fully satisfied in certain direct suits and judgments against Hooper.

The decree of the lower court is affirmed.

GILBERT and HUNT, Circuit Judges, concur in the result.

THE KOREA MARU (two cases).

(Circuit Court of Appeals, Ninth Circuit. October 11, 1918.)

Nos. 3114, 3115.

1. SHIPPING ⇐166(1)—CARRIAGE OF PASSENGERS—PERSONAL INJURIES—MEDICAL TREATMENT.
   A ship is liable for the incompetence and unskillfulness of its physician and surgeon in treatment of an injured passenger only when it failed to exercise reasonable care in his employment.
2. CARRIERS ⇐280(1)—CARRIAGE OF PASSENGERS—INJURY TO PASSENGERS.
   The duty of a carrier to a passenger is the same, whether liability is claimed as a breach of contract or as a failure to perform the duty of a carrier.
3. CARRIERS ⇐280(1)—CARRIAGE OF PASSENGERS—DUTY OF CARE.
   Although a carrier does not insure that a passenger will be carried safely, still it is bound to exercise as high a degree of care, skill, and diligence in receiving a passenger, conveying him to his destination, and

setting him down safely as the means of conveyance employed and the circumstances of the case will permit.

4. SHIPPING ⊂=166(3)—INJURY TO PASSENGERS—ASSUMPTION OF RISK.
Passengers on a steamship, in going upon deck for air and exercise, as was customary, did not assume the risk, unless the danger was apparent and obvious to them, exercising reasonable care for their own safety, or unless warned by the officers of the danger.

5. SHIPPING ⊂=166(1)—CARRIAGE OF PASSENGERS—NEGLECT OF INJURED PASSENGERS.
Failure of a ship's surgeon to treat one of two injured passengers at all, although requested to do so, and treatment of the other for a contused wound, when there was a compound fracture of a bone of her leg, *held* negligence, for which the ship was liable.

Appeal from the District Court of the United States for the Territory of Hawaii; Horace W. Vaughan, Judge.

Suits in admiralty by Uto Yenobi and by Omito Itokazu against the Japanese steamship Korea Maru. Decrees for libelants, and claimant appeals. Affirmed.

Smith, Warren & Whitney, William O. Smith, and L. J. Warren, all of Honolulu, T. H., and Samuel Knight, of San Francisco, Cal., for appellants.

George A. Davis and Charles S. Davis, both of Honolulu, T. H., for appellees.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

MORROW, Circuit Judge. The libels charge the breach of a marine contract in the failure of the owners and officers of the steamship Korea Maru to carry the libelants safely and without injury from the port of Kobe, in the empire of Japan, to the port of Honolulu, in the district and territory of Hawaii, in the United States. The two suits arise upon substantially the same state of facts, involving the same issues, and were heard together, both in the lower court and here, and will be so treated in this opinion.

It is alleged that the libelants were passengers for hire on the Japanese steamship Korea Maru, leaving the port of Kobe, empire of Japan, on the 6th day of December, 1916, and being third-class or steerage passengers on that boat; that the Korea Maru was at that time engaged in carrying passengers, mail, and freight from divers ports and places in the republic of China, the empire of Japan, and other ports and places, to the port of Honolulu, territory of Hawaii, and San Francisco, state of California; that on or about the 11th day of December, 1916, while said steamship was upon the high seas, the libelants were compelled by reason of the stifling condition of their quarters, the heat and impure air, to go from their quarters up to and upon the lower deck of the vessel; that while on the deck, and during heavy weather, and while a heavy swell and a high sea was running, they were struck by a wave, which swept over and across the deck of the steamship, and fell with great force and violence upon the deck of the steamship, throwing libelants down; that the libelant Uto Yenobi suffered a fracture of the metatarsel bone of the right foot,

and the libelant Omito Itokazu suffered a compound fracture of the tibia of her right leg and was otherwise bruised and injured; that neither libelant received any proper medical care after the injuries complained of; and that said injuries were caused by the negligence of the appellants, in not warning the libelants that it was dangerous and unsafe at that time to go on the deck of the vessel, and in failing to provide safety appliances on the deck, and in allowing the libelants to go upon the deck of the steamship without taking the necessary precautions for the safety of the passengers.

During the trial, the libel in case No. 3114 was amended, charging that the claimant employed an unskillful and incompetent physician and surgeon, who wholly failed and neglected to attend and treat the libelant Uto Yenobi, and by reason of such neglect libelant suffered great hardship and pain. The libel in case No. 3115 was also amended, in which the claimant is charged with the employment of an unskillful and incompetent physician and surgeon, who treated the broken leg of Omito Itokazu as an ordinary contused wound, and not as a broken leg, by reason of which unskillful and incompetent treatment the libelant suffered great hardship and pain.

[1] With respect to the charge contained in these amendments, that the physician and surgeon neglected the libelants, we are of the opinion that such neglect was an element in the general charge of neglect for which the vessel was liable; but with respect to the charge that the physician and surgeon was incompetent and unskillful in the treatment of Omito Itokazu we are of the opinion that the vessel was only liable when the claimant failed to take reasonable care in the employment of such an officer on board the vessel. Hutchins v. American Steamship Great Northern, 251 Fed. 826, — C. C. A. —. It is not charged in either of the libels or the amendments that the claimant was negligent in the selection of, or in the employment of, the physician and surgeon, or that his incompetency or lack of skill, as charged, was known to the claimant at the time of his engagement, or that his incompetency and lack of skill, as charged, was subsequently ascertained by the claimant, and that with such knowledge he was retained as an employé of the vessel. In the absence of such a charge, and competent evidence to sustain it, we pass over the evidence relating to the lack of skill and competency on the part of the physician and surgeon in the treatment of Omito Itokazu.

[2] We come, then, to the general charge of negligence, the character of which, with respect to the duty of the carrier to a passenger, is the same, whether the liability of the carrier is claimed as a breach of contract or as a failure to perform the duty of a carrier.

[3] The care required of a carrier in transporting passengers, and its consequent liability, is sufficiently stated for the present purpose under the general rule that, although the carrier does not insure that the passenger will be carried safely, still it is bound to exercise as high a degree of care, skill, and diligence in receiving a passenger, conveying him to his destination, and setting him down safely, as the means of conveyance employed and the circumstances of the case will permit. 10 Corpus Juris, 854.

The testimony relating to the weather conditions on board the vessel at the time of the accident is conflicting. The chief officer testified that the weather was not bad, that the ship did not roll much, and that he did not think the sea was so rough that it was dangerous for passengers to be on deck. He said the spray came on deck, but no wave came over. He testified, further, that there was a standing order given that the passengers were not to go up on deck when it was in any way rough, because it was dangerous.

The head steward testified that he saw the libelants pass his room, going in the direction of the upper deck, just before the accident, and he warned them then that they must not go up. He said to them:

"It is rough, and the spray is coming over the deck," "and that the sea was rough, and not to go up on deck;" "that it was dangerous, and for that reason not to go up on deck."

He subsequently modified his testimony to the effect that he did not say to the libelants that it was dangerous, but that he said it was dark, and the spray would come on deck, and that they would get wet. A steerage boy testified that the steward told him to tell the passengers that the weather was bad, and it would be dangerous for the passengers to go up on deck, and he says he so told the libelants.

The libelants testified that they were not warned not to go on deck, and they were not told it was dangerous. A female companion, who was with the libelants, and who went up on deck with them and was struck down at the same time, testified that she heard no warning that it was unsafe or dangerous to go on deck. A steerage passenger, who was on deck and saw the libelants struck down, testified that the weather was bad and the waves were rough; but he heard no warning that it was dangerous to be on deck. Two other passengers testified that they heard no warning that it was dangerous to go on deck, although they appear to have been situated so as to have heard it, had such a warning been given.

The court below found as facts, from this testimony, that the sea was rough and the weather was bad; that it was in fact dangerous for passengers to be on the steerage deck; that the officers and crew were negligent in not so warning the passengers, and in allowing them to go on deck. The weight of testimony supports this finding, and we find no reason for rejecting it.

[4] The claimant contends that the accident happened by reason of the libelants slipping and falling upon the deck, which was wet from flying spray and rain, and was an ordinary and usual risk of travel at sea, which libelants assumed. This contention is in conflict with the claim that the deck was dangerous and that the libelants were so warned; but, assuming that such an alternative defense may be made, it is not supported by the evidence. The libelants were not walking on the deck at the time they were struck down by the wave. They were standing still on the steerage deck near the entrance to the steerage quarters, from which they had just emerged. The steerage passengers had the right to go on the steerage deck for air and exercise, and it was usual for them to do so when the conditions of weather and sea were

favorable. When the conditions were not favorable, it was the duty, and the evidence shows that it was the custom, of the officers of the vessel to so warn the passengers. If the danger upon the deck was not apparent and obvious to the libelants, exercising reasonable care for their own safety, they assumed no risk, unless warned by the officers of the vessel of the danger, which was not a fact; and it does not appear from the evidence that the danger was obvious or apparent, or that the libelants had been on deck long enough to apprehend the danger from their own observation. The conclusion is that the libelants did not assume the risk, and that they were not guilty of contributory negligence.

[5] It is charged that the libelants were neglected after they were injured. The physician and surgeon carried by the vessel saw Omito Itokazu soon after she was injured, when he was called by the steerage steward to see her. He found her lying on the steerage deck below, suffering pain from an injury which he diagnosed as a contused wound on the front part of her leg. He did not see her again for two or three days, when he was again called by the steerage steward. On this second visit the doctor directed that the bandage should be removed and the leg washed. He applied antiphlogistine and the leg was again bandaged. The next time he saw the libelant she was in the ship's hospital, when the libelant was taken there for inspection on the arrival of the vessel at Honolulu. The bandage of antiphlogistine had been removed and the leg was bare. He did not see her after that, and he did not see her carried from the vessel to the immigration station by a fellow passenger, where she was reported to the surgeon of the United States Public Health Service, who upon examination thought the injury was a fracture. He immediately had her sent to the Queen's Hospital, where she was examined by the surgeon in charge, who found she had a compound fracture of the right tibia. An X-ray picture was taken of the injured limb, to ascertain the position of the fragments. The picture was introduced in evidence, and shows the fracture clearly and unmistakably.

On December 27th the wound had sufficiently healed to place the leg in a plaster cast, and the libelant remained under treatment in the hospital until March 7th, when she was discharged; but she had not fully recovered from the injury when the case was tried in April, 1917. She suffered pain from the time of the injury until about the time she was discharged from the hospital.

The ship's physician and surgeon claims to have discovered that the libelant's leg was broken before she was taken from the ship at Honolulu; but his health report, delivered to the health officer at Honolulu, does not show this fact. In this report it is stated that the injury was to her ankle. The only conclusion to be drawn from this testimony is that the libelant was neglected, and the nature of her injury was not ascertained, although it could have been, very soon after the accident, and some relief easily given.

Uto Yenobi, the other libelant, was carried below after her injury, and she was placed in her berth, where she remained until the arrival

of the vessel at Honolulu. The doctor did not attend or see her, although requested to do so by a friend of the libelant, who was a fellow passenger. At Honolulu she was carried to the immigration station by a fellow passenger and examined by the surgeon of the Health Service, as in the case of the other libelant, and she was found to have an injury to her foot. She was also immediately sent to the Queen's Hospital, where she remained under treatment until February 21, 1917. Her injury was of such a character as to cause her pain until about the time she was discharged from the hospital. The doctor on board the vessel makes no claim to have treated her, or to have seen her, after her injury.

The testimony in the record reveals the fact that these helpless creatures were otherwise shamefully neglected in a way that need not be mentioned in this opinion. Had there been no physician or surgeon on board the vessel, the neglect by the master or other officer to give them proper care would, under the rule we have stated, have rendered the vessel liable.

The District Court entered a decree in favor of Uto Yenobi for the sum of $1,200, and a decree in favor of Omito Itokazu for $2,000. We see no reason for disturbing the decrees on the ground that they are excessive. In our opinion they are not excessive, but under all the circumstances are fair and reasonable.

Finding no error in the record, the decrees of the court below are affirmed.

QUAN HING SUN et al. v. WHITE, Commissioner of Immigration.*

(Circuit Court of Appeals, Ninth Circuit. October 11, 1918.)

No. 3039.

1. CITIZENS ⊂⊃9—WHO ARE CITIZENS—CHILDREN OF CITIZENS BORN ABROAD.
Rev. St. § 1993 (Comp. St. 1916, § 3947), providing that "all children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States," makes no distinction as to race or place of birth.

2. CONSTITUTIONAL LAW ⊂⊃215—DISCRIMINATION—APPLICANTS CLAIMING CITIZENSHIP—CHILDREN OF CHINESE BIRTH.
To apply to a person of Chinese birth, seeking admission on the ground that his father was a citizen of the United States, a different procedure from that provided by the immigration statute and applied to all others making similar claim, is an unlawful discrimination.

3. ALIENS ⊂⊃25—EXCLUSION—CHILDREN OF CITIZENS BORN ABROAD.
A regulation of the Department of Labor, adopted under the Chinese exclusion laws, excluding from admission persons of Chinese birth, although their fathers are or were citizens of the United States, unless they are dependent members of the father's household, is without warrant of law.

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

Habeas corpus by Quan Hing Sun and others against Edward White, Commissioner of Immigration for the Port of San Francisco.

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

*Rehearing denied February 10, 1919.

From an order discharging the writ, and remanding petitioners for deportation, they appeal. Reversed.

George A. McGowan, of San Francisco, Cal., for appellants.

Annette Abbott Adams, U. S. Atty., of San Francisco, Cal., C. F. Tramutolo, Asst. U. S. Atty., of San Jose, Cal., and Caspar A. Ornbaun, Asst. U. S. Atty., of San Francisco, Cal., for appellee.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

MORROW, Circuit Judge. The appellant, Quan Hing Sun, a child eight years of age, arrived at the port of San Francisco, Cal., on the steamship China March 11, 1916, in charge of his uncle, Quan Foo. He applied for admission to the United States as the son of Quan Hay, deceased, who was a native-born citizen of the United States. His claim was that, although born in China, he was the son of a citizen of the United States, and under section 1993 of the Revised Statutes (Comp. St. 1916, § 3947) entitled to enter the United States.

The appellant's father, Quan Hay, died in Los Angeles, Cal., February 25, 1914. His mother, Wong She, died in China two or three months after the death of the father. The appellant's uncle, Quan Foo, was born in the United States. He visited China in 1906, and again in 1914, returning to the United States with the appellant in March, 1916.

The appellant was first examined as to his right to admission under the provisions of the immigration laws, and was found qualified to be admitted. He was then examined by the immigration inspector under the Chinese Exclusion Act, and his application for admission denied, on the ground that the applicant had failed to establish the fact that he was the son of Quan Hay; but it was stated by the Inspector that the applicant was excluded under rule 9 (f) of the then rules governing the admission of Chinese. This finding was approved by the Commissioner of Immigration, and upon appeal to the Secretary of Labor the decision of the Immigration Commissioner was affirmed.

It is claimed on behalf of appellant that the action of the officers of the Immigration Bureau and of the Department of Labor in holding the appellant for deportation was an abuse of discretion committed to them by statute, and resulted in denying him a fair hearing, to which he was entitled under the law. The objection to the hearing is that under the regulations prescribed by the Commissioner General of Immigration a different procedure was pursued by the immigration officers in determining appellant's right to admission into the United States from that pursued under other statutory regulations for determining the right of persons other than those of the Chinese race to enter the United States.

There is such a difference in procedure. Under the provisions of the act of Congress of February 20, 1907 (34 Stat. 898, c. 1134), as amended by the act of March 26, 1910 (36 Stat. 263, c. 128), and March 4, 1913 (37 Stat. 736, c. 141), a person claiming to be a citizen of the United States arriving at a port of the United States, who may not appear to the examining immigration inspector at the port of ar-

rival to be clearly and beyond a doubt entitled to land, will be detained for examination in relation thereto by a board of special inquiry. The same procedure is provided when the decision of the inspector is favorable to the admission of the alien and such decision is challenged by any other immigration officer. Act Feb. 20, 1907, c. 1134, § 24, 34 Stat. 906 (Comp. St. 1916, § 4273). This special board of inquiry is appointed by the Commissioner of Immigration, with the approval of the Secretary of the Department of Labor, and consists of three members selected from the immigration officials. Such boards have the authority to determine whether a person who has been duly held shall be allowed to land or shall be deported. An appeal lies from the decision of the board, through the Commissioner of Immigration and the Commissioner General of Immigration, to the Secretary of the Department of Labor. Act Feb. 20, 1907, § 25, 34 Stat. 906 (Comp. St. 1916, § 4274).

The regulations governing the admission of a person of the Chinese race provide for an examination by an officer (Act May 6, 1882, c. 126, § 9, 22 Stat. 60 [Comp. St. 1916, § 4296]), who makes a report on the case to the Commissioner of Immigration. This officer determines whether the person shall be admitted or not. An appeal from adverse decisions lies to the Secretary of the Department of Labor (rules 3 and 5 governing the admission of Chinese). In this examination of a person of the Chinese race, there is no intervening board of special inquiry between the inspector and the Commissioner of Immigration, or the other superior officers of the Department of Labor. We are advised that in practice there is this further difference: The immigration procedure for persons other than Chinese allows a complete inspection of the entire record, including the findings and reasonings of the board of special inquiry. The practice under the Chinese Exclusion Law withholds this record from the applicant for admission, only advising him of the final result.

[1] The procedure under the immigration statute is provided by law. The regulations under the Chinese Exclusion Act are provided by regulations of the Department of Labor. The appellant claimed the right to enter the United States under section 1993 of the Revised Statutes (Comp. St. 1916, § 3947), providing as follows:

"All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States."

[2] This statute applies to all persons alike, without any discrimination as to race or place of birth. To apply to a person of Chinese birth the procedure provided by the rules of the Department of Labor governing the admission of Chinese, for the purpose of determining whether the applicant's father was a citizen of the United States, and to all others making this claim the procedure provided by the immigration statute, is plainly a discrimination against the person of Chinese birth, and the hearing measured by the immigration statute distinctly unfair. This unfair procedure is made clear by the proceedings in this case.

[3] When the applicant arrived in the United States on March 11,

1916, the rules of the Department of Labor governing the admission of Chinese were the rules approved October 15, 1915. It was provided in rule 9 (f) of said rules that "the dependent members of the household of a Chinese-American citizen may be admitted to the United States" upon certain conditions therein provided with respect to the proof that shall be exacted in such cases. These conditions were as follows:

"Male children 14 years of age and under shall be conclusively presumed to be members of the father's household. Male children 15 years of age or over and under 18 years of age shall be presumed to be members of the father's household, but such presumption shall be subject to rebuttal. Such children 18 years of age and under 21 years of age shall be required to prove affirmatively and to the satisfaction of the Secretary of Labor that they are members of the father's household. No Chinese male 21 years of age or over shall be permitted to be admitted to the United States otherwise than of his own individual status or capacity as a member of the exempt classes, and upon exhibition of the certificate prescribed by section 6 of the Act of July 5, 1884, irrespective of whether he is or is not a member of the household of his exempt father."

All other children of Chinese-American citizens were excluded under rule 2, which provides:

"Rule 2. Only those Chinese persons who are expressly declared by the treaty and laws relating to the exclusion of Chinese to be admissible shall be allowed to enter the United States, and those only upon compliance with the requirements of said treaty and laws and of rules issued thereunder."

We know of no law making a race distinction in American citizenship, and by reason of such distinction excluding the sons of citizens of the United States of Chinese birth who, seeking to enter the United States, if over 21 years of age, are not permitted to do so, except upon the exhibition of a certificate prescribed by section 6 of the act of May 6, 1882, c. 126, 22 Stat. 58, as amended July 5, 1884 (23 Stat. 116, c. 220 [Comp. St. 1916, § 4293]) or if under 21 years of age, except upon evidence that they are dependent members of the household of such American citizen.

That there is no such law is practically admitted by the Department of Labor in the adoption of new rules in which these conditions are omitted. The new rules were adopted May 1, 1917, in which it is provided in rule 9, subdivision 1:

"The lawful children of an American citizen of the Chinese race partake of their father's citizenship, and are entitled to admission into the United States."

No conditions are imposed, except to retain a provision of the previous rule safeguarding the United States against false and fraudulent claims of citizenship as follows:

"In every such case convincing evidence with respect to such citizenship and relationship shall be exacted."

The inspector, who examined the applicant in this case, proceeding under the rules of October 15, 1915, reported:

"He is but a child, and neither of his parents are in this country, both in fact, being dead, and the provisions of rule 9 would prevent his landing.

The testimony of all witnesses was, however, taken in order to ascertain, if possible, if the relationship claimed exists."

The immigration inspector refers to the testimony upon the feature of the case last referred to, and reaches the conclusion that such relationship had not been established, concluding his report as follows:

"In my opinion the relationship claimed does not exist, and even if rule 9 did not prohibit the applicant's landing I would recommend denial based upon applicant's failure to establish that he is the son of Quan Hay."

Upon this report the Commissioner of Immigration rendered the following decision:

"In the matter of the application of the Chinese person, Quan Hing Sun, for admission to the United States as the minor son of a native, the existence of the relationship claimed to his alleged father is not established to my satisfaction, and it further appears that both parents of the applicant are dead, and he is therefore inadmissible under the provisions of rule 9."

From the decision of the Commissioner of Immigration counsel for the appellant appealed to the Secretary of Labor at Washington. The final decision of that official is not in the record, but the Assistant Commissioner General of Immigration advised the Commissioner of Immigration at San Francisco that the Secretary had affirmed the excluding decision of the latter, "on the ground that the relationship had not been established." Whether the decision of the Secretary of Labor was oral or written does not appear.

Passing over the informality in such a disposition of the appeal, the question remains: Was this decision based solely upon the objection that it had not been established that the appellant was the son of Quan Hay, a native-born citizen of the United States, or was it influenced by the fact that Quan Hay was dead, and the appellant was not, at the time of his arrival in the United States, a "dependent member" of his father's household, as required by rule 9 (f)? The exclusion under that rule appears to have been considered, and apparently was an element in the decision of the inspector of immigration and the Commissioner of Immigration at San Francisco, and it is not clear that it did not influence the Department of Labor at Washington.

We are of the opinion that in such an inquiry it should distinctly appear that the department was not influenced in its decision by considerations not authorized by law. The decisions of Judge Dooling in Ex parte Wong Foo (D. C.) 230 Fed. 534, Ex parte Leong Wah Jam (D. C.) 230 Fed. 540, Ex parte Ng Doo Wong (D. C.) 230 Fed. 751, Ex parte Lee Dung Moo (D. C.) 230 Fed. 746, and Ex parte Tom Toy Tin (D. C.) 230 Fed. 747, we think state a rule of caution applicable in all fairness to such a case. The judge said (Ex parte Wong Foo, supra):

"The inquiry of the Immigration Department should be directed, of course, in good faith to the ascertainment of that fact [that the applicant is the son of an American citizen]. The burden of proving such a relationship is entirely upon the applicant, but that burden should not be increased by throwing extraneous matters into the scale against him."

We are also of the opinion that there is but one procedure applicable to such an inquiry, and that is the procedure provided by the im-

migration statute. Upon the record in this case we do not think appellant had such a fair hearing before the Immigration Department as the law provides.

The decree of the District Court will be reversed, with direction to issue the writ as prayed for, and such further proceedings as will not be inconsistent with the opinion. It is so ordered.

ROYAL UNION MUT. LIFE INS. CO. v. LLOYD (two cases).*

(Circuit Court of Appeals, Eighth Circuit. November 20, 1918.)

Nos. 5100, 5102.

1. INSURANCE ⟸587—LIFE POLICY—DELIVERY.
   A husband's delivery to his wife of a life policy *held* not a surrender of his right to revoke the designation of the wife as beneficiary, and so to preclude the insurer from giving effect to a change of beneficiary by the husband.
2. INSURANCE ⟸587—LIFE POLICY—CHANGE OF BENEFICIARY.
   The right to change a beneficiary, if reserved in a life policy, is equally available to the insured as it is in case of a certificate issued by a fraternal benefit association.
3. INSURANCE ⟸587—LIFE POLICY—CHANGE OF BENEFICIARY.
   A provision in a life policy allowing the insured to change the beneficiary, which required return of the original policy, so that an indorsement of the change might be indorsed thereon, is for the benefit of the insurer, and the original beneficiary cannot complain that the insurer, on the representation that the policy had been lost, issued a new policy, in which, at the request of the insured, the beneficiary was changed, though the original policy was in the possession of the first beneficiary.
4. APPEAL AND ERROR ⟸184—OBJECTIONS—NECESSITY.
   Where plaintiff in an action on a life policy made no objection to the trial on the equity side of the court of defenses based on the ground that the policy should be canceled, because a new one, naming a new beneficiary, had been issued at the request of the insured, *held*, that the case was not so wholly without color of equitable jurisdiction that it can be dismissed on appeal.

Appeal from and in Error to the District Court of the United States for the Northern District of Iowa; Henry T. Reed, Judge.

Action by Anzonetta M. Lloyd against the Royal Union Mutual Life Insurance Company, in which the parties stipulated certain issues should be transferred to the equity side of the court. There was a judgment and decree for the plaintiff (245 Fed. 162), and defendant appeals and brings error. Judgment reversed, and decree reversed, with direction.

F. J. Dawley, of Cedar Rapids, Iowa (Dawley & Jordan, of Cedar Rapids, Iowa, N. M. Hubbard, Jr., of Des Moines, Iowa, and F. F. Dawley, of Cedar Rapids, Iowa, on the brief), for appellant and plaintiff in error.

E. A. Fordyce, of Cedar Rapids, Iowa (Leslie H. Whipp, of Chicago, Ill., on the brief), for appellee and defendant in error.

Before HOOK and STONE, Circuit Judges, and MUNGER, District Judge.

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

*Rehearing denied February 22, 1919.

MUNGER, District Judge. The appellee and defendant in error, hereafter called plaintiff, brought an action at law against appellant and plaintiff in error, hereafter called the company, upon a policy of life insurance issued by it upon the life of plaintiff's husband. By the terms of the policy she was named as beneficiary, subject to a right of revocation of such designation. She alleged that her husband had transferred the policy to her as her own property and that she had ever since held it. The company's answer denied the transfer, denied notice of any claimed transfer, and alleged that the insured had filed an affidavit with it showing the loss of the original policy, and an application for the issuance of a duplicate policy; that such duplicate policy was issued, and that the insured had then made a written request to have his mother substituted as beneficiary in place of plaintiff, and that this change was made and indorsed on the policy; that after the death of insured his mother had entered suit against the company and had obtained judgment for the full amount of the policy. The answer concluded with a prayer that the assignment and transfer of the policy be canceled and that plaintiff be required to surrender for cancellation the policy held by her. The reply denied that plaintiff had any knowledge of the application for change of beneficiary, or of the issuance of a duplicate policy or of the indorsement of a change of beneficiary thereon. The parties entered into a stipulation that the case should be transferred to the equity side of the court and the court made an order that the issues presented by a part of the answer and the reply thereto, relating to the change of beneficiary and praying for cancellation and surrender of the policy held by plaintiff should first be tried as a suit in equity, and that after the determination of that issue, the issues made by plaintiff's petition and the remainder of the answer and reply should be tried as an action at law. See section 274b, Judicial Code, Act March 3, 1915, c. 90, 38 Stat. 956 (Comp. St. 1916, § 1251b).

The court heard the testimony and entered a decree in the case that the portion of defendant's answer which prayed equitable relief should be dismissed for want of equity, and on the same testimony and in the same case entered judgment for plaintiff for the amount of the policy and costs. An appeal and writ of error were allowed on application of the company, and both have been submitted on one record.

The chief question presented by the appeal is whether the decree is justified by the evidence. There is no serious dispute as to the essential facts. The plaintiff and insured were married in September, 1911. They lived together until in August, 1915, when they separated, and plaintiff obtained a divorce in November following. He died in December, 1915. When they were married, each had a fair income; the plaintiff's income from her separate estate amounting to about $5,000 a year. In the December following the marriage, plaintiff's husband said to her that, as she had a separate estate, it would be no more than fair that she should pay one-half of the household and living expenses and all of her personal expenses, and that, in return, "he would make out his will in her favor and a life insurance

policy," but did not state for what amount the policy should be. He also stated that, if he took out a policy, "it would not be any more than right that she should pay the premium on that, if he made it in favor of her." She agreed to this arrangement. Her husband stated that, as long as she kept up the premium, the policy would continue in her name, in her favor. Several months afterward her husband told her that he had a policy for her, and then delivered the policy to her. She examined it sufficiently to see what its general nature was, and then at once placed it in her safety deposit box at the local bank, and kept possession of it until after her husband's death. The premiums were paid annually to the company by her husband, but she reimbursed him for the amounts so advanced, in settlements made soon after he had made the payments. The plaintiff had no knowledge of her husband's application for a change of beneficiary, and the company had no knowledge that the original policy was in existence when the change of beneficiaries was made, nor did it know of any agreement or understanding between plaintiff and her husband relating to the insurance.

The company is an Iowa insurance corporation, and the policy was issued in Iowa. By its terms the company agreed to pay $5,000, in case of the death of the insured, to plaintiff, if living, with right of revocation. Among the conditions of the policy were the following:

"If the right of revocation has been reserved, or in case of the death of the designated beneficiary, the insured may at any time while the policy is in force, and subject to any existing assignment of the policy, designate a new beneficiary (with or without the right of revocation) by filing written request therefor at the home office, together with this policy; such change to take effect on the indorsement thereof on the policy by the company."

"No assignment hereof shall be binding upon the company unless a duplicate original thereof shall have been filed at the home office. Assignment blanks will be furnished upon application."

The application for a change of beneficiary was made by the insured in January, 1915, by written application and affidavit sent to the company, and the indorsement of the change of beneficiary from the wife to the mother of the insured was made in the same month on the duplicate policy which the company had issued to the insured, and this policy, so indorsed, was kept by the insured until his death.

[1] Was the attempted change of beneficiaries effective to bind the company in an action upon the first policy? By the terms of the policy a change of beneficiaries was subject to any existing assignment of the policy, but the policy also required that a copy of the assignment should be filed at the company's home office in order to bind the company. Appellee's brief denies that the transaction between plaintiff and her husband constituted an assignment of the policy, and claims that they amounted to a surrender to plaintiff of the right of the insured to revoke the designation of plaintiff as the beneficiary. As the understanding between them was that the policy should continue in her favor so long as she paid the premiums, the reservation of some right to change the beneficiary was not in violation of it. Whether this reserved right was or was not capable

of assignment, the facts in this case do not show any assignment of the policy. The delivery of the policy to the plaintiff was not accompanied by any expression of intention to transfer to her any reserved interest of the insured, and was significant only of a grant of custodianship of the policy.

[2, 3] The remaining question is whether a change of beneficiaries could be made without the surrender of the original policy to the company. It is the contention of plaintiff that this requirement was for her benefit and that the company therefore could not waive it. Since this case was submitted the controlling principles to be applied in a situation of this kind have been declared by the Supreme Court of the United States in the case of Supreme Council of the Royal Arcanum v. Behrend, 247 U. S. 394, 38 Sup. Ct. 522, 62 L. Ed. 1182. It is there determined that the naming of a certain person as a beneficiary in the benefit certificate of a fraternal benefit association confers no vested right, but a mere expectancy which may be defeated at any time by the act of the insured member; that where the certificate promises payments to the beneficiary provided the certificate has not been surrendered and another certificate issued at the request of insured in accordance with the laws of the order, the requirement for a return of the policy is for the protection of the society, and if complied with to its satisfaction, or waived by it during the lifetime of the insured, it cannot be used to support the claim of the former beneficiary.

But the right to change a beneficiary, if reserved in the policy, is equally available to the insured under an ordinary policy of life insurance as it is in case of a certificate issued by a fraternal benefit association. Mutual Benefit Life Ins. Co. v. Swett, 222 Fed. 200, 137 C. C. A. 640, Ann. Cas. 1917B, 298; Hopkins v. Northwestern Life Assur. Co., 99 Fed. 199, 40 C. C. A. 1; Townsend v. Fidelity & Casualty Co., 163 Iowa, 713, 144 N. W. 574, L. R. A. 1915A, 109; May on Ins. § 398m; Joyce on Ins. §§ 740, 741.

The provision for a return to the company of the original policy, so that an indorsement of change of beneficiary may be made thereon, is one for the protection of the company, and not for the protection of the original beneficiary, and whether the policy is an ordinary life policy, or the certificate of a fraternal beneficiary association, if a new policy has been issued in the lifetime of the insured, at his request the original beneficiary will not be heard to complain that the original policy was not returned. Mutual Benefit Life Insurance Co. v. Swett, supra; Lamb v. Mutual Reserve Fund Life Ass'n (C. C.) 106 Fed. 637; Mutual Life Ins. Co. v. Lowther, 22 Colo. App. 622, 126 Pac. 882; John Hancock Mut. Life Ins. Co. v. Bedford, 36 R. I. 116, 89 Atl. 154; Navassa Guano Co. v. Cockfield (D. C.) 244 Fed. 222; Simcoke v. Grand Lodge A. O. U. W., 84 Iowa, 383, 51 N. W. 8, 15 L. R. A. 114; Wandell v. Mystic Toilers, 130 Iowa, 639, 105 N. W. 448; Allgemeiner Arbeiter Bund v. Adamson, 132 Mich. 86, 92 N. W. 786; Marsh v. Supreme Council American Legion of Honor, 149 Mass. 512, 21 N. E. 1070, 4 L. R. A. 382.

A number of cases have been cited by appellee in which it was held that the original beneficiary was entitled to recover when a change of beneficiaries had been attempted, but in these cases the company or society had not accepted the application for a change of beneficiary and acted upon it by the proper entry or indorsement of the change during the lifetime of the insured, and hence the question of waiver was not involved. In this case the company indorsed the change of beneficiaries on the policy, without knowledge of any claim by the plaintiff of an understanding with her husband that she was to remain the beneficiary while she kept the premiums paid. As stated in the case of Supreme Council of Royal Arcanum v. Behrend, supra, the remedy to enforce any contract of that kind is not to be applied in a suit on the policy between the original beneficiary and the company.

[4] Some objection is made in the brief of appellee that the defense urged by appellant should have been made in the action at law. No objection to the trial of the issues as a suit in equity was made in the court below, and the case is not so wholly without color of equitable jurisdiction that this court should now dismiss the suit on that ground. Fay v. Hill, 249 Fed. 415, — C. C. A. —; Audit Co. of New York v. City of Louisville, 185 Fed. 349, 107 C. C. A. 467; Babcock & Wilcox v. American Surety Co., 236 Fed. 340, 149 C. C. A. 472.

It follows, from what has been said, that the decree of the trial court should have canceled the policy in question as an obligation of the company, and should not have rendered judgment thereon in favor of defendant in error.

The judgment in No. 5100, the proceeding in error, will be reversed, with costs, and the decree in No. 5102, the proceeding on appeal, will be reversed, with direction to enter a decree in conformity with the views expressed herein.

CLINCHFIELD FUEL CO. v. HENDERSON IRON WORKS CO.
SAME v. HENDERSON.

(Circuit Court of Appeals, Fifth Circuit. November 21, 1918.)

No. 3264.

1. JOINT ADVENTURES ⟸1—CONTRACTS—CONSTRUCTION.
   A corporate shipowner and a company operating a tug owned by the corporation *held* joint adventurers, responsible for one-half of the expenses and losses; it appearing that the corporation which contracted with one interested in the operating company recognized the company's rights.

2. CORPORATIONS ⟸432(12)—CONTRACTS—EVIDENCE OF AUTHORITY.
   Evidence of a contract relating to a tug owned by a corporation entered into by the president and general manager *held* to show it was made for the corporation, binding on the corporation.

3. CORPORATIONS ⟸447—CONTRACTS—VALIDITY.
   Where a corporation, which under its charter might build vessels, acquired a tug in the discharge of a debt, a contract relating to the operation of the tug was not ultra vires.

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4. CORPORATIONS ⟸379—CONTRACTS—PARTNERSHIP AGREEMENT.
Where the stockholders and officers of a corporation acquiesced in a contract between it and another for the joint operation of a vessel, *held*, that the corporation could not escape resulting liability on the ground that the contract was one of partnership and a corporation cannot be a member of a firm.

5. CORPORATIONS ⟸423—TORTS—NEGLIGENCE—AUTHORITY OF OFFICERS.
Where the officer in charge of a corporation's business entered into a contract for the operation of a tug which it owned, *held*, that the corporation could not escape responsibility for the results of a collision due to negligent operation, on the ground that no person was authorized to so conduct the business of the corporation as to impose upon it liability for negligence.

6. CORPORATIONS ⟸306—LIABILITY OF OFFICERS—ILLEGAL ACTS.
Where the president and general manager of a corporation entered into a contract with respect to the operation of a tug which the corporation owned, and the contract was beyond his authority, he would be personally responsible.

7. COLLISION ⟸153—REVIEW—DETERMINATION.
Where the trial court found against a libelant, seeking to recover on account of collision on the ground that the respondent was not a person responsible, but did not determine the question of negligence, the appellate court, on reversing the decree, will not, regardless of its authority to consider the record, determine the question of negligence, but will remand the case to enable the trial court to determine such question.

Appeal from the District Court of the United States for the Southern District of Alabama; Robert T. Ervin, Judge.

Libel by the Clinchfield Fuel Company against the Henderson Iron Works Company, together with a like libel against Frank Henderson. The two cases were tried together, and, judgment being against libelant in each case, it appeals. Decree reversed as to the Henderson Iron Works Company, and affirmed as to the individual respondent.

Harry T. Smith and Wm. G. Caffey, both of Mobile, Ala., for appellant.

T. M. Stevens, of Mobile, Ala., for appellees.

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

BATTS, Circuit Judge. The Clinchfield Fuel Company filed a libel against Henderson Iron Works Company for injuries alleged to have been caused by the negligence of the master and crew of the tug Helen Henderson, owned by respondent. Upon denial of liability by respondent, a like libel was filed against Frank Henderson. The two cases were tried together, judgment being against libelant in each case.

At the time of the accident the Helen Henderson was being operated by the Steele Towing & Wrecking Company in the harbor at Galveston, Tex. The tug was towing a barge of the Clinchfield Fuel Company, and, according to the allegations of the bills, "the master and crew of the tug so negligently went about the performance of their duties" as to collide with a pier, and subsequently to ram a steamer; the collisions resulting in injuries to the barge.

The judgment of the court was upon the ground that, at the time of the accident, the vessel was under the complete control and management of the Steele Towing & Wrecking Company; and it is now insisted that the respondent corporation had relations alone with T. J. Anderson, and none with the Steele Towing & Wrecking Company.

[1] The contract, signed by T. J. Anderson and Frank Henderson, of importance in determining the relationship between the Steele Towing & Wrecking Company and the Henderson Iron Works Company, was to the following effect:

"This contract, entered into and between T. J. Anderson, partner in the firm of Steele & Anderson, of Galveston, Texas, and Frank Henderson, of the firm of the Henderson Iron Works Company, of Mobile, Alabama, this first day of June, 1915, to wit:

"In consideration of the said Frank Henderson furnishing his tug Helen Henderson, her tackle, apparel, and machinery, for operation along the coast of the Gulf of Mexico, and particularly in the harbor of the port of Galveston, Texas, he agrees to divide the net profits and to assume all cost and liabilities of operation of the said tug to the extent of fifty per cent. (50%), both profit and expense.

"The said T. J. Anderson, as one of the principals of the firm of Steele & Anderson, agrees to keep the said tug Helen Henderson in operation, endeavoring to secure all the profitable employment that he possibly can, both in the harbor and on the outside, maintaining thereon a single or double crew as the necessity might demand, and agrees on behalf of the firm of Steele & Anderson to be responsible for fifty per cent. (50%) of the costs and expenditures of operation in lieu of receiving fifty per cent. (50%) of the net profits of the tug.

"It is further mutually agreed by the parties signing this contract and constituting the principals of this contract that the tug will be operated under the name of the Steele Towing & Wrecking Company, although the direct management shall be in the hands, and all transactions passed through the hands, of the said T. J. Anderson on behalf of the firm of Steele & Anderson.

"All fuel, provisions, wages and any disbursements whatsoever are to be paid for by the said firm of Steele & Anderson, and in the event of loss or profits the division to be made in accordance with that portion of agreement relating as above.

"Witness my hand this first day of June, 1915, at the city of Galveston, Texas, U. S. A.

"This contract can be broken by either party (60) days after written notice.

"T. J. Anderson. [Seal.]

"Signed in the presence of:

"Henry J. Schutte.

"Witness my hand this first day of June, 1915, at the city of Mobile, Alabama, U. S. A.

Frank Henderson.

"Signed in the presence of:

"Adolph Danne."

The contract is one difficult to construe. The intention of the parties is set forth in terms uncertain and ambiguous. It is provided that the tug would be "operated under the name of the Steele Towing & Wrecking Company, although the direct management shall be in the hands, and all transactions passed through the hands, of the said T. J. Anderson." From this provision, from the correspondence, and from the testimony of Anderson, it sufficiently appears that the Henderson Iron Works Company, having peculiar confidence in Anderson, expected him to look after the interests of the Henderson Company, but that the actual operation was to be by the Steele Towing &

Wrecking Company. The possibility of a sale to this company was in contemplation, and insurance was effected, payable to the Steele Towing & Wrecking Company, "as its interest may appear." One of the letters from Anderson contained a sentence to this effect:

"The contract I contemplate writing up in connection with your good self and this office will be in such manner as will give the Steele Towing & Wrecking Company no hold on you whatever, thereby fully protecting you by dealing exclusively through my office."

In another letter Henderson Iron Works Company suggest:

"I would prefer doing business through your office, whom I am well acquainted with, although I believe the Steele Towing & Wrecking Company are first-class, honorable people; but, as you are better acquainted with both sides, this is my reason for expecting you to protect us."

Anderson testified that when the tug went to Galveston he turned her over to the Steele Towing & Wrecking Company to operate; that he and Henderson "conferred and co-operated in suggestions for the betterment of the operations after the Steele Towing & Wrecking Company took charge of her"; that "the vessel was not chartered at so much a month," but "on the mutual understanding that all profits were to be divided as between owners and Steele Towing & Wrecking Company."

Whatever may have been the original understanding and the meaning of the contract, it is quite certain that Mr. Henderson and the Henderson Iron Works Company knew of the actual operation of the tug by the Steele Towing & Wrecking Company, and looked to that company for its part of the profits. Among the letters introduced in evidence was one in which the Henderson Iron Works Company says:

"We have been trying hard to get a settlement with the Steele Towing & Wrecking Company for the tug Helen Henderson's earnings from the last statement up to the time she sunk."

The conclusion reached is that the Henderson Iron Works Company and the Steele Towing & Wrecking Company were, at the time of the accident, engaged in a joint venture, each party undertaking to become responsible for one-half the expenses and losses, and to equally share in the profits.

[2] It is contended that there was no corporate action of any kind with reference to the operation of the vessel or the assumed contract with Steele Towing & Wrecking Company. The incorporators of the Henderson Irón Works Company were Frank Henderson, who subscribed for 25 shares, William Henderson, his brother, who subscribed for 1 share, and Maud Henderson, the wife of William Henderson, who subscribed for 24 shares. The incorporators were the directors, Frank Henderson was president and general manager, and William Henderson secretary. The complete control of the corporation's business was in Frank Henderson. His brother was a practicing physician, and the only thing to indicate that he ever had anything to do with the corporation was a statement by Frank Henderson that "on matters of importance we always consult one another." In the active management of the business he did not participate. The pres-

ident and general manager thought that the company had by-laws, but did not know where they were.

There is nothing to indicate that formal action had ever been taken by the board of directors in any matter pertaining to the conduct of the business of the corporation. In making the arrangement with reference to the operation of the tug, the corporation acted in the same way that it ordinarily did, through Frank Henderson alone. From the circumstance that the tug belonged to the Henderson Iron Works Company, that in the contract Henderson was spoken of as "of the Henderson Iron Works Company," that the letters with reference to this transaction were signed "Henderson Iron Works Company, by Frank Henderson, President," that there was no claim of ownership of the tug by Frank Henderson, and nothing to indicate that any arrangement had been made between him and the corporation by which the tug could be used for his sole benefit, it must be assumed that the contract was made for the corporation, and it must be held that it was so done as to bind the corporation.

[3] Further contention is made that, if there was a contract between the Steele Towing & Wrecking Company and the Henderson Iron Works Company, whereby a partnership between the two corporations for the operation of the tug resulted, the contract was ultra vires.

The Henderson Iron Works Company was a corporation, the objects of which were set forth in the charter as follows:

"To conduct a general foundry, machine shop, boiler, and blacksmith business, or any one or more thereof; to buy, manufacture, and sell all kinds of material, marine and railway machinery and supplies; to buy, manufacture, and sell all kinds of iron and other metal goods; to build or repair engines, vessels, boilers, sawmill and other machinery, and generally to do any and all acts incident to the operation of a general foundry, machine, boiler, and blacksmith shops."

The powers of the corporation were very broad, and the ownership of a vessel was a possibility contemplated. The tug was acquired in the discharge of a debt due the company. It could not be said that the company was without authority to acquire a vessel under such circumstances, when it had power to build and repair vessels. The ownership of a vessel carries along with it the right to use it in a way that will make it a source of revenue, instead of loss. The vessel had brought expense and loss, and the arrangement made was the result of an effort to make it profitable.

[4] The proposition is made that a corporation cannot become a member of a partnership. Doubtless there are many expressions in the books to this effect. Whether a corporation may become a technical partner or not, there is no doubt of its capacity to enter into commercial ventures within the general scope of its corporate powers, whereby the profits or losses of the enterprise are to be divided between the corporation and another person or corporation. Having the right to own and operate the vessel, it had the further right to make a reasonable and not extraordinary arrangement by which this operation could be effected. The rules of law with reference to corporate power will, in a measure, be dependent upon the persons by

whom they are invoked, and the circumstances under which an effort is made to apply limitations of authority. In the instant case, a close corporation, under the complete management of one of the incorporators, enters into an enterprise with another concern, with the expectation of making profit, under a contract whereby expenses and profits are to be divided. It may be that some member of the corporation could have invoked a lack of authority of the corporation or of the president, to prevent such a contract, or to prevent the carrying of it out after it was made. But a court would hesitate to allow a corporation (all of its officers and stockholders acquiescing) to take the possible profits of an enterprise, under a contract beyond its powers, and then, liability resulting, permit it to secure immunity by an appeal to lack of authority.

[5] The proposition is made that no person was authorized to so conduct the business of the corporation as to impose upon it liability for negligence or other tort. Of course, no corporation can lawfully authorize the doing of an unlawful act, or of a tortious or negligent act. Neither can an individual acquire a right to commit a tort; but the absence of the right to do that which is wrong will not absolve him from the consequences of the wrong. A corporation may authorize the doing of that which is within its corporate authority; and if, in the doing of this, the agents or agencies which it selects are, within the scope of their authority, guilty of negligence or other tort, the same rules (with exceptions not necessary to state) are applicable as would be applied to an individual.

[6] If Frank Henderson acted for the corporation without authority, under circumstances under which the corporation would not be bound, he would himself be responsible. The conclusion reached, however, is that that which he did was for the corporation, under circumstances making the corporation responsible for the results. Judgment for him was therefore proper.

[7] The trial judge has not determined whether, under the facts developed, injuries resulted to the barge of the libelant under circumstances fixing negligence upon the master and crew of the tug. While this court would have the right to consider the record, and determine this question, it is believed that more satisfactory results can be attained by referring the matter to the trial court.

The case against Frank Henderson is affirmed, and that against the Henderson Iron Works Company is reversed, for further action consistent with this opinion.

NORTH AMERICAN TELEGRAPH CO. v. NORTHERN PAC. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. November 11, 1918.)

No. 5013.

1. EMINENT DOMAIN ⟸202(2, 3)—DAMAGES—EVIDENCE.
In a proceeding to condemn a right of way for a telegraph pole line on a railroad right of way, *held*, that evidence of the rental paid for similar easements was admissible on the question of damages, and, while it is not to be used as a mathematical formula, witnesses were properly allowed to state what such rental would amount to, if capitalized at 4½ to 5½ per cent.

2. EMINENT DOMAIN ⟸202(2, 3)—DAMAGES—EVIDENCE—"MARKET VALUE."
The expression "market value" indicates the price established in a market where the article is dealt in by such a number of persons as to standardize the price; but as applied to real property the term indicates fair or reasonable value, which the property would have if dealt with as at a market overt. So in a proceeding to condemn a right of way for a telegraph line over a railroad right of way, the price for which rights of way over other railroads were acquired is not admitted to fix the market value except in the latter sense.

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

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

Condemnation proceeding by the North American Telegraph Company against the Northern Pacific Railway Company. There was judgment on the verdict, assessing damages in the sum of $16,850, and plaintiff brings error. Affirmed.

E. T. Young and O'Brien, Young, Stone & Horn, all of St. Paul, Minn., for plaintiff in error.

D. F. Lyons, of St. Paul, Minn. (C. W. Bunn, of St. Paul, Minn., on the brief), for defendant in error.

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

AMIDON, District Judge. This is a proceeding brought by the North American Telegraph Company as plaintiff to condemn a right of way for a telegraph pole line on the railroad right of way of the defendant, the Northern Pacific Railway Company, from White Bear to Duluth, Minn., a distance of 138 miles, and from White Bear to Stillwater, a distance of 12 miles, under section 6246 of the General Statutes of Minnesota for 1913. The case was before this court and was carefully examined in an opinion reported in 230 Fed. 347, 144 C. C. A. 489, L. R. A. 1916E, 572. The decision of the trial court was there reversed, because it failed to receive evidence which we deemed necessary to show the true value of the property, and because the rule of damages adopted was erroneous. On the second trial the rejected evidence was received, and the rule of damages formulated

by this court was stated, with explanations which gave plaintiff no cause for exception. The jury returned a verdict for $16,850, upon which judgment was entered, and plaintiff brings error.

[1] The only exceptions urged in argument of sufficient merit to require mention are these: Mr. Baker, superintendent of the Postal Telegraph Company, testified that he had acquired at the price of $10 per mile, rights over several Southern and Southwestern railroads identical with those sought by plaintiff. Counsel insists that this practice established a "market value" for the right, to which the jury should have been restricted, and excepted to the use of any other standard. The trial court also received, over plaintiff's objection, evidence of witnesses produced by defendant of the annual rental paid for such easements for limited terms of years, and then permitted the witnesses to state what that rental would amount to if capitalized at 4½ to 5½ per cent. Counsel insists that such a valuation would be proper only in case the fee to the property was taken; and, as the statute provides that plaintiff's right is subject to termination whenever the property shall be needed by the railway company for its own purposes, it is urged that the reception of this evidence was highly prejudicial. We might content ourselves by simply referring to our opinion when the case was here before. We then stated that rental value was a proper element for consideration in assessing damages. For the reasons there given, we still adhere to that opinion. As we then explained, such a valuation is not to be used as a mathematical formula. It should be qualified by the limited nature of the right, and that was clearly done by the trial judge. It then constituted one of the most valuable elements for the consideration of the jury.

[2] The term "market value," as the words fairly import, indicates price established in a market where the article is dealt in by such a multitude of persons, and such a large number of transactions, as to standardize the price. Proof of such a market value can only be made by one of the recognized methods of proving the price current in a market. Individual dealings are not competent to prove it. The term is, however, frequently used in a figurative sense, as meaning the fair or reasonable value of the property—that is, such a value as the property would have if it were dealt in according to the practices of a market overt. This is the meaning which the term usually has when applied to real property. To prove market value when it is used in this secondary or figurative sense, it is proper to receive evidence of individual transactions, even offers made in good faith for property of like character, the nature of the property, its location, its rental value, the uses to which it can be put, and all the manifold elements which are admissible to show the fair and reasonable value of property which is not so traded in as to give it a market value in the primary sense of the term. Private dealings in property can never be used to show market value in the primary sense, and, when used to show market value in the sense of fair and reasonable value, individual transactions can never be made the sole basis for ascertaining such value. No text-writer or court has been discovered which supports any such doctrine. The distinction between the two meanings attached

to the term "market value" is now found in the elementary works. Chamberlayne on Evidence, §§ 2099h, 2099i.

When the matter under investigation is so exceptional as the right involved in the present case, to try to fit it into the formula of "market value" leads only to confusion. In such a case all that can be done is to aid the jury by the opinions of men who are shown to have opinions which will prove, in the judgment of the trial court, a help to the jury, and to present the various features of the property to which we have already referred. The elements which witnesses may properly bring forward in such a case are those which experienced and intelligent business men would present, if they were negotiating with respect to the property in question. Boom Co. v. Patterson, 98 U. S. 403, 25 L. Ed. 206; United States v. Chandler-Dunbar Co., 229 U. S. 53, 77, 33 Sup. Ct. 667, 57 L. Ed. 1063. When the minds of jurymen have been enlightened by such evidence and opinions, their composite judgment constitutes the "fair compensation" referred to in our Constitutions. Judges cannot properly make a schedule of the elements which may be brought before a jury by experienced men to aid them in making their assessments. The rule and the elements for its application must be adapted to the subject-matter that is under investigation. That is what was done by this court in its opinion when the case was here before. The Circuit Court of Appeals of the Sixth Circuit, after a careful examination of the same subject, has recently approved the same method. Louisville & Nashville R. R. Co. v. Western Union Telegraph Co., 249 Fed. 385, — C. C. A. —.

The judgment is affirmed.

In re JOSEPH R. MARQUETTE, JR., Inc.

(Circuit Court of Appeals, Second Circuit. November 13, 1918.)

No. 58.

1. BANKRUPTCY ⟸136(1)—SUMMARY PROCEEDINGS.
A bankrupt may be summarily ordered to surrender to his trustee any assets of the estate found in his possession, and for failure to obey such order may be committed as for contempt.

2. BANKRUPTCY ⟸288(1)—SUMMARY PROCEEDINGS.
Where the trustee has possession of and legal title to any property, the bankruptcy court in summary proceedings may adjust demands for the property; but, where the trustee has not title and possession, an adverse claim to property demanded by him cannot be summarily determined.

3. BANKRUPTCY ⟸288(1)—SUMMARY PROCEEDINGS.
Where the bankrupt is a corporation, summary proceedings may lie to recover corporate property in the possession of an officer thereof who makes no personal claim to it; but as against another than the bankrupt, who sets up title in himself, his claim, if more than colorable, cannot be disposed of, except by plenary suit.

4. BANKRUPTCY ⟸288(1)—SUMMARY PROCEEDINGS.
Where imported merchandise was deposited by the owner in a bonded warehouse, and after organizing a corporation such owner pledged the warehouse receipt as collateral security for a corporate debt, *held* that,

as title remained in him, his claim to the property, which he asserted on bankruptcy of the corporation, could not be disposed of in summary proceedings.

Petition to Revise Order of the District Court of the United States for the Eastern District of New York.

In the matter of Joseph R. Marquette, Jr., Incorporated, bankrupt. Petition by Joseph R. Marquette, Jr., individually, to revise an order rendered on petition of the trustee in summary proceedings restraining Marquette from interfering with the sale of certain merchandise, etc. Order reversed, and matter remanded, with directions to dismiss the trustee's petition.

The bankrupt corporation succeeded to the business of and was formed by Joseph R. Marquette, Jr., who became its president. Before incorporation Marquette individually became the owner of a considerable quantity of imported merchandise, which (duty not being paid) was deposited in a bonded warehouse, the proprietor of which issued the usual receipt for said merchandise to said Marquette individually.

Thereafter, the bankrupt corporation having been created, Marquette, on behalf of the corporation, borrowed money from a bank, and as collateral security transferred to the bank the warehouse receipt aforesaid. The merchandise could not be removed from warehouse without the consent of the collector of customs showing that it was duty paid before withdrawal. Bankruptcy having supervened, Marquette refused to sign applications for withdrawal unless the bank would stipulate to pay to him individually, and not to the trustee of the bankrupt corporation, whatever surplus might remain on the sale of the merchandise to liquidate the bankrupt's indebtedness to the bank. Apparently failing to obtain such stipulation, he transferred his right, title, and interest in and to said merchandise to a third party.

The trustee, becoming aware of this situation, brought by petition a summary proceeding against Marquette individually, seeking an order directing him to "instruct the collector of customs that he relinquishes and withdraws any claims which he" might have against said merchandise. After considering affidavits on both sides, the District Court ordered (1) that Marquette be restrained and enjoined from in any manner interfering with the sale by the bank of said merchandise; (2) that the bank and the trustee jointly offer the merchandise for sale, and any surplus over indebtedness be paid to the trustee; and (3) that Marquette be required to execute an instrument in writing signifying that he had no objection to the sale of said merchandise by the bank and the trustee jointly as aforesaid.

Marquette, in his answer to the trustee's petition, averred that the merchandise in question was not, and never had been, property of the bankrupt corporation, and objected to the jurisdiction of the court in the premises. After the passage of the order hereinabove summarized, he brought this petition to revise.

Patrick J. McDonald, of New York City, for petitioner.

Niebrugge & Maxfield, of New York City (Samuel C. Duberstein, of New York City, of counsel), for trustee in bankruptcy.

Rounds, Hatch, Dillingham & Debevoise, of New York City (Stephen Barker, of New York City, of counsel), for Battery Park Nat. Bank.

Before WARD, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). The petitioner, Marquette, never submitted himself to the jurisdiction of the court below, but insisted, and still insists, upon his right as an ad-

verse claimant to a plenary suit. The rules regarding this matter laid down by this court for this circuit may for the purposes of this litigation be restated as follows:

[1] A bankrupt may be summarily ordered to surrender to his trustee any assets of the estate found in his possession, and for failure to obey such order may be committed as for a contempt. In re Schlesinger, 102 Fed. 117, 42 C. C. A. 207.

[2, 3] Where the trustee has possession of, and legal title to, any given piece of property, the bankruptcy court in summary proceedings may adjust demands for said property, or any portion thereof, including the determination of such a question as the validity of a mortgage upon the property so in possession. In re Kellogg, 121 Fed. 333, 57 C. C. A. 547. But, where the trustee has not title and possession, an adverse claim to property demanded by him cannot be summarily determined. In re Baudouine, 101 Fed. 574, 41 C. C. A. 318. Where the bankrupt is a corporation, summary proceedings may lie to recover property of the corporation in the possession of an officer thereof, who makes no personal claim to said property. In re Brockton Ideal Shoe Co., 202 Fed. 199, 120 C. C. A. 447. But as against another than the bankrupt, who sets up title in himself, his claim, if more than colorable, cannot be disposed of otherwise than by plenary suit; summary proceedings will not lie. "Colorable" was defined in Re Yorkville Coal Co., 211 Fed. 619, 128 C. C. A. 570, and extended to cover a question of law, as distinct from one of fact, in Re Midtown Contracting Co., 243 Fed. 56, 155 C. C. A. 586.

[4] Applying these rules to the present case: Undoubtedly the bank, by the transfer of the warehouse receipt, had symbolical possession of the merchandise in question; but on the face of the papers Marquette individually remained the owner at least of the equity in the property hypothecated to secure the debt of his corporation. The issue in this proceeding is whether Marquette did or did not turn this merchandise into the corporation he formed, as he admittedly did do with most of his other belongings. This is a question of fact, and suggestive of several debatable points of law, and is plainly not such a matter as, over timely objection to jurisdiction, could be summarily disposed of by a court sitting in bankruptcy, guided by the above-cited decisions.

The order under review is reversed, with costs of this court, and the matter remanded, with directions to dismiss the petition.

WALKER GRAIN CO. v. BLAIR ELEVATOR CO.

(Circuit Court of Appeals, Fifth Circuit. December 14, 1918.)

No. 3229.

1. TRIAL ⊂⊃412—OBJECTIONS TO EVIDENCE—WAIVER.
Where defendant objected to a question to its witness as to whether he had been indicted for forgery, it was not a waiver of the objection and exception for defendant's counsel to state in the presence of the jury that he was not trying to keep anything back, and would like to have the witness explain the matter, as he stated he could.

2. WITNESSES ⊂⊃345(1)—CREDIBILITY—INDICTMENT.
Evidence of a pending indictment is not competent to affect the credibility of a witness.

3. EVIDENCE ⊂⊃158(28)—BEST AND SECONDARY—ORAL ASSIGNMENTS.
Oral proof of assignment of a cause of action is proper, where it was not shown to have been in writing; and the fact that a memorandum of the terms was contained in a journal entry on the assignee's books of account does not establish that the assignment was in the form of a written contract.

4. SALES ⊂⊃58—REFERENCE.
Where a contract for the sale of corn for future delivery referred to the trade rule, such rule thereby became a part of the contract.

5. EVIDENCE ⊂⊃450(5)—ORAL EVIDENCE—TRADE RULE.
Where a trade rule, which was part of a contract, was ambiguous, oral proof was properly permitted to elucidate it.

6. SALES ⊂⊃64—CONSTRUCTION—TRADE RULE.
Under a trade rule, which by reference was incorporated into and made a part of a contract for the sale of corn for future delivery, *held*, that it was immaterial to the buyer how long before the exercise of the election of the seller to ship the grain, or cancel the contract, notice of election was given, provided it reached the buyer 24 hours before election was exercised.

In Error to the District Court of the United States for the Northern District of Texas; William R. Smith, Judge.

Action by the Blair Elevator Company against the Walker Grain Company. There was a judgment for plaintiff, and defendant brings error. Reversed and remanded for further proceedings.

Wm. H. Slay, Mike E. Smith, Uriah M. Simon, and Theodore Mack, all of Ft. Worth, Tex., for plaintiff in error.

Stanley Boykin, of Ft. Worth, Tex. (H. C. Ray, of Durant, Okl., on the brief), for defendant in error.

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

GRUBB, District Judge. This was an action in the District Court, brought by the defendant in error against the plaintiff in error for alleged breaches of contracts of sale and purchase of corn for future delivery. The defendant in error claimed that the plaintiff in error breached the contracts by failing to accept and pay for the corn agreed to be purchased by it, and that it was entitled to recover, because of such breaches, the difference between the contract price and

the market price on the dates of the respective breaches. Only one shipment of corn was actually made by defendant in error, and it was rejected by plaintiff in error. With reference to the other contracts, the breaches relied upon by defendant in error were charged to have consisted in the failure by plaintiff in error to furnish billing instructions within the time required by the contracts. The issues involved the construction of the contracts in respect to the requirement as to the furnishing of billing instructions, and whether, in fact, such instructions had been sent by the plaintiff in error to the defendant in error, as required by the contract, or at all.

[1, 2] The evidence of defendant in error tended to show that such instructions were not received by it, while that of the plaintiff in error tended to show that they were mailed by it. Upon this issue the evidence was in sharp conflict, and depended largely upon the weight accorded to the evidence of the plaintiff in error's witness, J. L. Walker. Upon the cross-examination of this witness, he was asked whether he had been indicted for perjury. The plaintiff in error interposed an objection, which the court overruled, plaintiff in error excepting. No answer to this question was given. He was then asked if he had been indicted for forgery, and answered that he had. No new objection was interposed to this question. However, the record as to what transpired convinces us that the court below understood the plaintiff in error's objection to have been continued to this line of proof, and that it ruled, with that understanding, upon it. The District Judge, after announcing that he would sustain an objection to it, upon the idea that it was permissible only in a criminal case, finally said that he would change his ruling, and permit it to be shown upon the issue of the credibility of the witness. After the announcement of his final ruling, plaintiff in error again asked the court to note its exception. We do not think that the plaintiff in error waived its objection and exception, because its counsel, thereafter, said in the presence of the jury:

"We are not seeking to keep anything back, for the damage has already been done, and it is all for the jury; but we would like for him to explain, as he stated he could a while ago."

The witness then gave his explanation of the transaction. The plaintiff in error was entitled to have the explanation of the witness go before the jury, without withdrawing or waiving its previous objection to the question. We do not see that its counsel did more than state that, as the evidence of the pending indictment had been allowed to go to the jury, it was desirous that the witness make an explanation to the jury of his version of the transaction. In the case of Coyne v. United States, 246 Fed. 120, 158 C. C. A. 346, we held that evidence of a pending indictment was not competent to affect the credibility of a witness.

[3] As this necessarily results in a reversal of the judgment, it is unnecessary to consider the other assignments of error in detail, as they may not arise upon a future trial of the cause. We are not thereby to be taken as approving all the other rulings of the court below on matters of evidence. For the guidance of the parties in

the future conduct of the case, we may say that we think the court below properly admitted oral proof of the assignment of the cause of action to defendant in error, as it was not shown to have been in writing. The mere memorandum of its terms in a journal entry on the defendant in error's books of account would not show that the assignment itself was in the shape of a written contract.

[4-6] We are of the opinion that the court below properly construed the trade rule, which was referred to in the contracts and thereby became a part of them. The language of the rule is ambiguous, and oral proof was properly permitted to elucidate it. In the state of the evidence in the present record, we have no hesitation in construing the rule as if it read:

"The buyer shall be allowed 3 calendar days, after receipt of a demand from the seller for billing instructions, within which to furnish such instructions, and, failing to furnish such instructions within such time, the seller shall have the right to elect either to ship the grain to the post office address of the buyer, or to cancel the contract and charge the buyer with the difference between the contract price and the market price at the time of cancellation, provided the seller has given the buyer notice of his election for a period of 24 hours before the seller ships the grain or cancels the contract."

This construction is that established by the evidence as that customarily acted upon by the grain trade, which we would be reluctant to depart from for that reason. It also accords with the option given by the contract to the seller to ship during the shipping period. Under the construction contended for by the plaintiff in error (that a demand could only be made during the shipping period), the period of optional shipment given the seller would be diminished at least 3 days. A construction so inconsistent with the spirit of the agreement should only be adopted by the court where the language is compelling and unambiguous. The purpose of the 24-hour notice of election is evidently not to enlarge the 3-day period after demand for furnishing billing instructions but to enable the buyer to take steps to protect himself by getting knowledge for that period, at least, in advance of the exercise of the seller's election either to ship or to cancel and charge the buyer with the loss. For this purpose it is immaterial to the buyer how long before the exercise of the election the notice of the seller's election is given, provided it reaches him at least 24 hours before that election is exercised.

For the error pointed out, the judgment is reversed, and the cause remanded for further proceedings in conformity to this opinion.

MOREY v. CITY OF NEW ROCHELLE et al.

(Circuit Court of Appeals, Second Circuit. November 13, 1918.)

No. 5.

1. WHARVES ⟸20(1)—WHARFINGER—DUTY OF CARE.
A wharfinger is bound to exercise ordinary care and diligence, and no more.

2. WHARVES ⟸20(3)—WHARFINGER—NEGLIGENCE.
The fact that a wharf is so built, or that the berths alongside it are so obstructed, that special care is necessary on the part of any vessel using the wharf, is not per se evidence of that lack of care and diligence on the part of the wharfinger which is negligence, and the existence of danger only increases the quantum of the wharfinger's duty.

3. WHARVES ⟸20(5)—WHARFINGER—NEGLIGENCE.
Where a municipal wharf was built on a ledge of rock in such a manner that there was an under-water projection on the face of the completed wharf, necessitating the use of planks or beams, with appropriate toggles, to keep vessels off the projection, a vessel is justified in assuming that the wharfinger has the best information as to the condition of the premises, and where the master refused to use appliances furnished by the wharfinger, but relied on his own, which proved insufficient, the wharfinger is not liable.

4. SHIPPING ⟸63—MASTER—NEGLIGENCE—ACT OF MASTER.
Where the master of a vessel declined to use appliances furnished by the wharfinger to keep his vessel off an under-water projection, and the vessel was injured, *held*, that negligent act of master was imputable to owner of vessel.

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

Libel by Stephen W. Morey against the City of New Rochelle and another. From a decree for libelant for half damages only, the named respondent appeals. Reversed and remanded, with directions to dismiss libel.

Libelant owned a coal barge of a not unusual size, which was sent to New Rochelle and berthed at a public wharf owned by the city; the municipality collecting the wharfage. This wharf had been in existence for upwards of ten years, and stands upon a ledge of rock rising above the general bottom level. To get a holding or resting place on the ledge for the wharf foundation, it is somewhat set back from the ledge edge.

This construction produces an under-water projection along the face of the completed wharf, which projection at at least one place is something over four feet, and nowhere less than one foot. Vessels lying alongside the wharf will, unless breasted off at least as much as the ledge projects, catch upon it with the fall of the tide.

The city employed a wharf master, and furnished means in the shape of planks or beams, with appropriate toggles affixed, by which boats using the wharf could be, and for years had been, kept clear of the aforesaid under-water projection.

Libelant's boat came to this wharf in charge of an experienced boatman, who was told by the wharf master of the ledge projection and offered the city's appliances for keeping himself breasted off. He did not like them, thought they were "no good," and substituted therefor a contrivance of his own, which he thought superior. The weather was unfavorable; the boat master's apparatus failed him; his vessel came too close to the wharf, was

caught on the projection, and severely strained. To recover for the damage thus caused this action was brought, and the District Court held that the city was "negligent in maintaining such a dangerous berth," but that the boat master "would have known the extent of the danger if he had kept his eyes open," and therefore awarded the libelant half damages only. Respondent thereupon appealed, and on this hearing the libelant urged demand for full damages.

Walter G. C. Otto, of New York City (Arthur H. Longfellow and John Hunter, both of New York City, of counsel), for appellant.

Hyland & Zabriskie, of New York City (Nelson Zabriskie, of New York City, of counsel), for appellee.

Before WARD, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [1] Admittedly the city's responsibility is that of a wharfinger. One occupying this position is bound to "ordinary care and diligence," and no more. Toxaway, etc., Co. v. Sulzberger, 242 Fed. 888, 155 C. C. A. 476.

[2-4] The mere fact that a wharf is so built, or that the berths alongside it are so obstructed, that special care is necessary on the part of any vessel using the wharf, is not per se evidence of that lack of care and diligence which is negligence. The existence of danger only increases the quantum of the wharfinger's duty, and he must inform those in charge of vessels patronizing his wharf of just what they must expect to encounter. A vessel is justified in assuming that the wharfinger has better information than any one else in regard to the condition of his own premises. The Stroma, 50 Fed. 557, 1 C. C. A. 576. In this case proper information was given and means tested by time supplied for guarding against the known and recognized danger. Libelant's master, who was his agent, chose to pursue methods of his own, and no reason appears why the principal should not be bound by his agent's act. No legal difference exists between this case and that of Leo v. McCollum (D. C.) 107 Fed. 742, which in our opinion was well decided.

Finding, therefore, no negligence or lack of diligence on the part of the city as wharfinger, it is ordered that the decree appealed from be reversed, with costs of this court, and the cause remanded, with directions to dismiss the libel, with costs below.

SMITH v. STANDARD SANITARY MFG. CO.

(Circuit Court of Appeals, Second Circuit. November 13, 1918.)

No. 81.

1. BROKERS ⟸64(1)—COMMISSIONS—WITHDRAWAL OF OFFER.
Where a corporation agreed to pay a broker a certain fee if he could effect a consolidation with defendant corporation, and defendant withdrew its offer of consolidation before it was acted upon by broker's employer, broker could not recover compensation from defendant; there being no contract between the two.

2. TRIAL ⟸109—DISMISSAL ON OPENING STATEMENT.
A complaint, sufficient in its allegations, may be dismissed, on admissions made by plaintiff's counsel in his opening clearly showing plaintiff had no cause of action.

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

Action by James Milne Smith against the Standard Sanitary Manufacturing Company. There was a judgment dismissing the complaint, and plaintiff brings error. Affirmed.

Hollander & Bernheimer, of New York City (Herbert Cone, of New York City, of counsel), for plaintiff in error.

Henry A. Blumenthal, of New York City, for defendant in error.

Before WARD, ROGERS, and MANTON, Circuit Judges.

ROGERS, Circuit Judge. In this case a most unusual thing happened. The complaint was dismissed at the trial, before the taking of any testimony and because of admissions made by the plaintiff's counsel in his opening.

The plaintiff is by education an engineer, who since he left college has devoted himself exclusively here and in England to the organizing, promoting, and financing of large enterprises. He commenced this action to recover commissions which he claimed he had earned in bringing about an agreement of consolidation or merger whereby the defendant corporation, having a capital stock of $10,000,000, agreed to take over the J. L. Mott Company, having a capital stock, assets, and business which it was alleged amounted to more than $7,000,000. Both of these corporations are engaged in the manufacture and sale of plumbing and sanitary supplies. The defendant company is a corporation organized under the laws of the state of Pennsylvania, and the J. L. Mott Company is a corporation organized under the laws of the state of New Jersey.

The complaint alleged that between March 15, 1916, and December 18 of the same year, plaintiff was engaged in negotiations with defendant, having proposed to it the advantages of combining with the J. L. Mott Company; that with the knowledge and upon the request of defendant plaintiff continued his negotiations with defendant and with the J. L. Mott Company and its stockholders for the purpose of obtaining the most favorable terms for such combination;

that through plaintiff's efforts and procurement defendant agreed to purchase the entire capital stock, assets, and business of the J. L. Mott Company, paying therefor the sum of $2,651,000 in cash or securities, and assuming the existing bonded indebtedness of the latter, amounting to $2,000,000; that upon information and belief this promise to make such purchase was communicated by defendant to the officers and stockholders of the J. L. Mott Company, the defendant agreeing that it might take such offer under advisement and act upon the same, and that the same would be left open for a period including January 3, 1917, during which time there might be procured the formal acceptance by its stockholders of the said offer; that thereupon the vice president of the company and the stockholders undertook to call a meeting of their stockholders to obtain a formal acceptance of the offer, and a meeting for that purpose was called for December 18th at 2 o'clock; that a few hours before the time set for the holding of the said meeting the defendant, by special delivery letter, withdrew its offer and refused to complete the purchase; that all the services and negotiations of plaintiff with defendant and with the J. L. Mott Company were with the knowledge and consent and at the special request of the defendant.

It was also alleged that plaintiff had been damaged in the sum of $232,550, which was the reasonable value of his services, and judgment in that amount was demanded.

The defendant put in an answer, in which it denied certain of the allegations of the complaint and declared that as to the other allegations it had no knowledge or information sufficient to form a belief.

The case came on for trial, and a jury was impaneled and sworn. In opening for the plaintiff his counsel made certain statements as to what he could prove and what he could not prove, which led the court, on the motion of the defendant, to dismiss the complaint. In his opening he explicitly stated to the jury that no arrangement was had between the plaintiff and the defendant, and that his contract, if any, was one whereby the J. L. Mott Company was to pay him $100,000 in cash in order to consummate the deal. His statement was as follows:

"Smith [the plaintiff] had made the deal with the Mott Company that he was to be paid. I think you will have the letter before you. In order to help the deal go through, he was willing to take $100,000 in spot cash, although he figured his commission at a great deal more. That was the amount that the Mott Company agreed should be paid. As for the Standard Company, he had made no arrangements with them."

[1] This was brought to the attention of the court by defendant's counsel, who asked to have the action dismissed. The plaintiff's counsel was then asked by Judge Mayer what he had to say, and a colloquy of some length followed, in the course of which Judge Mayer said:

"But, as I understand this case, a business man or a business corporation cannot be held in damages when they have not employed a broker or promoter and have made no agreement with him of any kind, manner, or description, because perchance the deal does not go through—if such a doctrine would hold, no business man would be safe. * * * To my way of thinking, the

proposition as advanced has no support in law, in reason, in common sense, in business requirements or in the orderly conduct of business in a great community like New York, or in the United States. People are held in contracts, they are held for what they agree. Where a man does not agree to something and puts himself in a position where an agreement may be inferred, you can see what a hopeless mess such a doctrine as is contended for would bring about, and I am utterly against it."

After some further discussion of the matter, the motion dismissing the complaint was granted.

It appears that no consolidation ever took place between these two corporations. It appears, also, that the offer made by the defendant corporation was withdrawn before it was ever formally accepted by the J. L. Mott Company; so this is not a case where an agreement between these two corporations had ever been made and later breached. Neither is the case governed by that class of cases holding that a real estate broker, employed to sell property upon terms stated by the seller in advance, has complied with his agreement and earned his commission when he has produced a purchaser able and willing to purchase at the price and upon the terms named in his contract of employment, and where the contract for some reason fails of consummation. It more nearly resembles Hale v. Kumler, 85 Fed. 161, 29 C. C. A. 67. In that case the plaintiff sought to recover an agreed compensation under a contract for services rendered as a broker in attempting unsuccessfully to bring about a consolidation of two rival companies. On the facts in that case it was held that nothing short of an actual accomplished consolidation entitled the plaintiff to any compensation from the defendant.

The plaintiff in this court argued that it was no defense to say that no consolidation ever took place, because that would be permitting the defendant to profit by its own wrong in breaching the contract. Breaching what contract? There never was a contract between defendant and plaintiff, and there never was a contract between the defendant corporation and the J. L. Mott Company. Before the offer made to the J. L. Mott Company was accepted, the offer was withdrawn.

[2] So the question presented is whether a complaint which is sufficient in its allegations can be dismissed because of admissions made by the plaintiff's counsel in his opening, and which clearly showed that he had no cause of action against the defendant. The question is answered for us in the decision in Oscanyan v. Winchester Repeating Arms, 103 U. S. 261, 26 L. Ed. 539. In that case the court said:

"In the trial of a cause, the admissions of counsel, as to matters to be proved, are constantly received and acted upon. They may dispense with proof of facts for which witnesses would otherwise be called. They may limit the demand made or the set-off claimed. Indeed, any fact, bearing upon the issues involved, admitted by counsel, may be the ground of the court's procedure equally as if established by the clearest proof; and if in the progress of a trial, either by such admission or proof, a fact is developed which must necessarily put an end to the action, the court may, upon its own motion, or that of counsel, act upon it and close the case."

The judgment is affirmed.

DISC GRADER & PLOW CO. v. AUSTIN-WESTERN ROAD MACHINERY CO.

(Circuit Court of Appeals, Eighth Circuit. December 4, 1918.)

No. 5141.

1. PATENTS ⊂=328—CONSTRUCTION—VALIDITY.
Patent No. 758,148, for a combination in a grading machine of a rotary disc plow and a dirt carrier, *held* invalid, not showing invention, but only mechanical skill.

2. PATENTS ⊂=243—COMBINATION PATENTS—INFRINGEMENT.
Where the principle and mode of operation of a patented combination are appropriated, mere changes of the form or position of the mechanical elements thereof, or the substitution of plain mechanical equivalents for some of the elements of the combination, will not deprive the device of infringement in cases in which the forms and positions changed and the specific elements rather than the equivalents substituted for them were not claimed by the patentee to be, and were not, essential and distinguishing characteristics of the invention.

3. PATENTS ⊂=26(2)—COMBINATION PATENTS—VALIDITY.
A new combination of old elements by which a new and useful result is produced, or an old result is obtained in a more facile, economical, and useful way, may be patented, as well as a new machine or composition of matter.

4. PATENTS ⊂=328—VALIDITY—INFRINGEMENT.
Notwithstanding restrictions because of the prior art, patent No. 816,543, for improvements in rotary disc plowing attachments, *held* infringed.

Sanborn, Circuit Judge, dissenting in part.

Appeal from the District Court of the United States for the District of Minnesota; Page Morris, Judge.

Suit by the Disc Grader & Plow Company against the Austin-Western Road Machinery Company. From a decree of dismissal, complainant appeals. Reversed and remanded, with directions.

Amasa C. Paul, of Minneapolis, Minn., for appellant.

George L. Wilkinson and John L. Jackson, both of Chicago, Ill., for appellee.

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

SANBORN, Circuit Judge. The plaintiff below, the Disc Grader & Plow Company, a corporation, the owner of letters patent No. 758,148, issued April 26, 1904, to Powlison, Erb, and Huston, for the combination in a grading machine of a rotary disc plow and a dirt carrier, and for certain combinations appurtenant thereto, and the owner of letters patent No. 816,543, issued March 27, 1906, to the same grantees, for certain improvements in rotary disc plowing attachments, sued the Austin-Western Road Machinery Company, another corporation, for infringement of these patents. The road company defended on the grounds that the patents were void for lack of invention in the devices patented, and that it had not infringed them. There was a final hearing below upon voluminous evidence, and the dismissal of the

suit on the grounds that patent No. 758,148 was void for lack of invention and that the road company had not infringed the exclusive rights secured by patent No. 816,543.

[1] Each of these patents is, like the great majority of all patents, for a new combination of old mechanical elements. No. 758,148 is for the combination of a rotary disc plow with a dirt carrier or dirt elevator in a grading machine. Grading machines were old, dirt carriers, endless apron dirt carriers for elevating the dirt from the ground to a wagon or other receptacle, were old, the combination of a grading machine, a dirt carrier or elevator, and a moldboard plow, whereby the earth, as it was plowed up, was thrown upon the endless apron, and carried or elevated to a receptacle or other desired location, was old. But when Powlison made, perfected, and applied for patent No. 758,148, upon the combination there patented, no one had ever succeeded in conceiving and manufacturing a successful or useful combination of a grading machine, a dirt carrier or elevator and a rotary disc plow, although unsuccessful attempts had been made to do so, and the need of such a combination had long been felt. The first question is: Was the discovery of this combination an invention? The state of the art at the time Powlison conceived his combination has been patiently studied and considered, and the majority of the court is of the opinion that Powlison's combination was the product of the skill of the mechanic, and that his conception and manufacture of it failed to rise to the dignity of an invention, a conclusion to which the writer is unable to assent. The finding and decree of the court as to patent No. 758,148 must therefore stand undisturbed.

[2-4] This conclusion leaves nothing further for consideration, except the assignment of the grader company that the court below erred in holding that claims 1 and 3 of patent No. 816,543 were not infringed by the road company. That patent by its terms secured to the grader company the exclusive right to manufacture, use, and sell, in or for rotary disc plowing attachments, the combination described in this way:

"Claim 1. In a rotary plowing attachment, a concave rotary plowing disc, a plate secured thereto, an axle secured to the plate, a bearing support having a boxing for said axle, anti-friction devices between the axle and boxing, said bearing support having a socket cast integral therewith, said socket having its plane position at an oblique double angle to the axis of the rotary plowing disc, a standard, said socket adapted to receive the lower end of said standard, an arm connected approximately centrally to said standard, said standard carrying a moldboard scraper, and said standard adapted to be connected to a grading, or ditching, or wagon-loading machine."

"Claim 3. In a rotary disc-plowing attachment, a concave rotary plowing disc, a bearing plate connected centrally to the rear side of said rotary plowing disc, a central axle projecting rearwardly from said bearing plate, a roller bearing placed around said axle, a bearing support carrying a boxing for the roller bearing axle, said bearing plate and bearing support having circular concave ball races opposite each other, a series of bearing balls placed in said ball races, means for retaining the said bearing support in proper adjustment to the said central axle, a standard connected to the said bearing support, and an arm carrying a moldboard scraper."

One of the chief advantages of this combination is the co-operation with the other mechanical elements described therein of the anti-fric-

tion rollers secured about the axle of the plowing disc to resist lateral thrusts against it, and the bearing balls secured in circular concave ball races opposite each other in the bearing plate and bearing support to resist the longitudinal or end thrusts upon the axle. The road company at an early day recognized the value and utility of this combination and for many years, commencing in 1907, purchased from the grader company and sold to its customers the rotary disc plowing attachments manufactured by the grader company under this patent. While the record demonstrates the fact that, prior to the invention in this patent, roller bearings and ball bearings were old, that they had been used separately frequently, and that in one patent, No. 132,100, issued to Perry & Hawley, a description is found of a combination of bearing rollers and bearing balls with a railroad car axle and car box, they had never been successfully combined or used together so far as the record in this case discloses in combination with the axles of rotary disc plows, or with the other mechanical elements described in the claims under consideration until Powlison disclosed his combination in an application for the patent in suit. After the road company had learned by its purchase and sale for some years of the grader company's patent rotary disc attachment, of the utility and superiority of Powlison's combination, it proceeded to manufacture and sell the attachment, which is now claimed to constitute an infringement of the exclusive right patented to Powlison. It made, as usual in such cases, some changes in the forms and positions of some of the mechanical elements of the grader company's combination, but none which changed their effect or utility in the patented attachment. It substituted for Powlison's axle of uniform diameter screwed into the supporting plate of the disc and his single set of bearing rollers an axle made integral with the plate having two cylindrical portions of different diameters and two sets of double coned rollers, one set surrounding each of the cylindrical portions of the axle, but the principle, mode of operation, and effect of the substitutes are the same in the combination as were the parts for which they were substituted, and the substitutes are plain mechanical equivalents thereof. It took the bearing balls out of their circular concave ball races near the top of the axle between Powlison's bearing plate and bearing support and placed them in a cage between the end of the axle and the surface of the chamber in which it is supported, where they performed the same function and wrought the same result in the same way in the combination as did Powlison's bearing rollers and bearing balls in the locations where he placed them. It made other immaterial changes in the method of securing the disc to the boxing and the axle bearing rollers and bearing balls in their places and in one or two other respects.

But after a careful comparison of the road company's combination with Powlison's, and after consideration of these various changes and of the combination and device of the road company in the light of the state of the prior art and of the record, no escape has been found from the conclusion that the road company's device was conceived and constructed with a just and high appreciation of the utility of the com-

bination and co-operation with the other elements specified in claims 1 and 2 of Powlison's second patent with his axle protected against heavy lateral thrusts and friction by his roller bearings, and against friction and longitudinal thrusts by his ball bearings, with the determination to take to itself the benefit of that combination. By making immaterial changes of form and position of some of the elements of that combination, and the substitution of one mechanical equivalent for another, the road company has constructed a device which accomplishes the object it sought. But it has not escaped infringement of Powlison's second patent, because it has appropriated the principle and mode of operation of his combination. In its device the same or equivalent mechanical elements co-operate in the same way and on the same principle as do the elements of Powlison's combination, perform the same functions and accomplish the same desired and useful result. Where the principle and mode of operation of a patented combination are appropriated, mere changes of the form or position of the mechanical elements thereof, or the substitution of plain mechanical equivalents for some of the elements of a patented combination will not deprive the device of infringement in cases like this, in which the forms and positions changed, and the specific elements rather than the equivalents substituted for them were not claimed by the patentee to be and were not essential and distinguishing characteristics of the invention. Machine Co. v. Murphy, 97 U. S. 120, 125, 24 L. Ed. 935; Nat. Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co., 106 Fed. 693, 714, 45 C. C. A. 544; Zittlosen Mfg. Co. v. Boss, 219 Fed. 887, 892, 135 C. C. A. 551; Wm. F. Goessling Box Co. v. Gumb et al., 241 Fed. 674, 680, 154 C. C. A. 432.

This conclusion has not been reached without thoughtful consideration of the argument of counsel for the road company that the scope of the patent to Powlison was so limited by the state of the art when he made the invention and especially by the patents to Casady, No. 592,764; to Jernberg, No. 629,722; to Brummer, No. 644,138; to Lindy, No. 618,110; to Heylman, No. 625,764; to Lindgren, No. 647,720; to Poole, No. 657,204; to Weaver, No. 713,027 and to Hendon, No. 721,591—that the device of the road company escapes infringement. But an examination of these patents and of the other evidence of the state of the art has convinced that the exclusive right granted to Powlison was sufficiently broad to cover the combination which the road company devised and used to appropriate the benefit of that right. While some of the patents disclose some of the mechanical elements of Powlison's combination and others disclose others, none of them shows all of them or of their mechanical equivalents combined together, capable of co-operation and of accomplishing the desideratum on the principle and in the mode of Powlison's combination. This patent is for a combination, and a new combination of old elements by which a new and useful result is produced, or an old result is obtained in a more facile, economical and useful way may be patented as well as a new machine or composition of matter. Seymour v. Osborne, 11 Wall. 516, 542, 548, 20 L. Ed. 33; Gould v. Rees,

15 Wall. 187, 189, 21 L. Ed. 39; National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co., 106 Fed. 703, 45 C. C. A. 544; Stead Lens Co. v. Kryptok Co., 214 Fed. 368, 376, 131 C. C. A. 144; N. Y. Scaffolding Co. v. Whitney, 224 Fed. 452, 456, 140 C. C. A. 138.

The conclusion is that the decree below must be reversed, and the cause must be remanded to the court below, with directions to enter a decree in favor of the grader company and against the road company for an infringement of the first and third claims of letters patent No. 816,453, and for the usual injunction and accounting; and it is so ordered.

TOSTEVIN-COTTIE MFG. CO. v. M. ETTINGER CO., Inc.

(Circuit Court of Appeals, Second Circuit. November 13, 1918.)

No. 94.

1. PATENTS ⊜282—INFRINGEMENT—WHAT CONSTITUTES.
   If a claim cannot be read on defendant's device, there can be no infringement; but, if it can be read, infringement is suggested, not proved, and the prior art, as well as the disclosure, must still be studied.
2. PATENTS ⊜328—INFRINGEMENT.
   The Cottie patent, No. 909,555, relating to a belt coupling, claims 1, 2, and 3, *held* not infringed by defendant's device, in view of the prior art and the limitations of the disclosure.

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

Bill by the Tostevin-Cottie Manufacturing Company against the M. Ettinger Company, Incorporated. From a decree dismissing the bill, complainant appeals. Affirmed.

Arthur L. Fullman, of New York City (Samuel E. Darby and Darby & Darby, all of New York City, of counsel), for appellant.

Frank J. Kent, of New York City, for appellee.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

PER CURIAM. This invention (says the specification) "relates to a belt coupling; with the object in view of providing a simple, durable, and effective coupling for securing the ends of a belt together, leaving the face of the belt, toward the pulley or wheel over which it passes, free from any metallic projection or surface." The patentee also represents that his structure "has the further advantage of requiring no riveting in order to secure the sections of the belt."

The reduction to practice defined by the claims consists (claims 1 and 2) of interlocking male and female sections economically stamped from sheet metal in such wise that the T-shaped tongues of one half fit into the grooves formed by turning back upon themselves the tongues with "reduced extensions" of the other half. Both these claims also require that the end of each section distant from the interlocking device shall be provided with "holding" or "pointed" prongs to "hook

into" the belt body and for "securing the coupling to a belt." Claim 3 omits all reference to means for securing the metal interlocking parts to the fabric of the belt.

Further examination of the specification and drawings to discover with exactitude "what the alleged invention is" (Hall-Borchert, etc., Co. v. Ellanam, etc., Co., 213 Fed. 341, 130 C. C. A. 193) plainly shows that Cottie's prongs were to be "forced into the body of the belt to such an extent as to leave no projecting metal on the inner face of the belt."

Defendant has no prongs at all, and fastens its interlocking sections to the belt ends by rivets, which do leave projecting metal on the inner face of the belt. Plaintiff asserts that the avoidance of inwardly projecting metal is not claimed, is not a part of Cottie's patentable novelty, and that a rivet is the fair equivalent of the fastening device disclosed, being a sort of separate prong—while claim 3 is certainly infringed, inasmuch as it makes no reference to any method of securing the metal sections to the belt ends.

[1, 2] If a claim cannot be read on a defendant's device, there can be no infringement; but, if it can be so read, infringement is suggested, not proved. The prior art, as well as the disclosure, must still be studied. In this instance Cottie's interlocking sections were per se old (Avery, No. 399,962), and so were his prongs, even when embedded in the belt fabric, in order to avoid metal exposure on the inner side (Millar, No. 817,501), while the mechanical distribution of strain by a tongued and grooved junction is utilized for driving belts in Cavin's No. 640,177.

In the light of this art, the only possible field of invention left for Cottie was the economical combination in the especial structure disclosed of all the advantages above described. Therefore claims 1 and 2 cannot be valid, unless confined to prongs as described and applied, while claim 3 is only supportable by reading into it a limitation to the disclosure. Whether this should, or indeed can, be done, is an academic point, on which we express no opinion, for plaintiff's so-called commercial embodiment of Cottie's invention frankly abandons all prongs and uses separate fasteners.

It is enough to say that we agree with the court below in finding no infringement, and affirm the decree, with costs.

W. S. TYLER CO. v. LUDLOW-SAYLOR WIRE CO.

(Circuit Court of Appeals, Eighth Circuit. November 18, 1918.)

No. 5003.

1. PATENTS ⟸328—VALIDITY—INVENTION.
Patent No. 966,599, for woven wire screens used principally for screening ore, *held* invalid, being anticipated, and not showing invention.

2. PATENTS ⟸21—PATENTABLE INVENTION—SUBSTITUTION OF MATERIALS.
Substitution of a hard for a soft metal in one of the parts of a combination patent does not as a rule constitute patentable invention.

Appeal from the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Suit by the W. S. Tyler Company against the Ludlow-Saylor Wire Company. From a decree dismissing the bill, plaintiff appeals. Affirmed.

The following is the opinion of the court below:

I have listened with a great deal of interest to all that was said, and have given attention to all the testimony that was offered. I do not think that a further discussion of this matter will enable the court to do more than it is now able to do from all the testimony in the case. I have specially examined the exhibits that were filed, and I am satisfied, from those exhibits and from the evidence in the case, that there is neither novelty nor invention in this patent, and the result is that the bill will be dismissed.

Frederick P. Fish, of Boston, Mass. (James Negley Cooke, of Pittsburgh, Pa., and W. K. Richardson, of Boston, Mass., on the brief), for appellant.

William E. Garvin, of St. Louis, Mo. (James P. Dawson, of St. Louis, Mo., on the brief), for appellee.

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

AMIDON, District Judge. [1] This suit is brought to restrain infringement of patent No. 966,599, applied for May 27, 1907, and issued August 9, 1910, for woven wire screens. The answer sets up numerous defenses. The only one to which we shall refer is want of patentable invention. The bill was dismissed, and plaintiff appeals.

The patented article is for a woven wire fabric principally used for screening ore. The screen is made of rolled, woven wire. Its meshes are oblong. The weft wires are larger, made of softer metal, and spaced farther apart, than the warp wires. By the rolling the warp wire is pressed into the weft wire, so that it is interlocked with it, and thus the wires are held in place and prevented from sliding upon each other. These screens are fitted into a frame which revolves rapidly. The pulverized metal by centrifugal force is thrown against the sides. Particles smaller than the meshes pass through; larger particles are returned to the rolls for further pulverizing. The

desideratum was to produce a screen whose meshes would remain uniform during the life of the screen, would not clog, and would provide the largest amount of air space for the passage of the ore to be screened.

The principal competitor of the woven wire screen was the perforated slot screen made of plates containing perforations. It is conceded that plaintiff had manufactured, advertised, and sold a wire screen identical in form and size of wire, and serving the same purpose as the patented article, for at least two years prior to the invention. In that screen, however, both the weft and warp wires were of soft metal. The result was that the smaller wire wore out more quickly than the larger one. This impaired the durability of the screen to such an extent as to greatly restrict its sale. The patent calls for a screen in which the small warp wire is of harder metal than the weft wire. All that skillful argument can do to convince us that this change from a soft to a hard wire produced a new structure, having new functions, has been done; but it has failed to convince. It is urged that the substitution of the harder wire gave to the new screen resiliency, and imparted to it, what we must think for purposes of mystery, is spoken of as "the breathing of the screen." The screen, when in operation, is subjected to varying pressure, and it is claimed that, if it is made wholly of the soft metal, it is bent and remains permanently out of form, and thus becomes subject to greater wear; whereas the harder wire gives to the screen a springy or resilient power, so that after the pressure is withdrawn it returns promptly to its original shape. After the most careful study that we can give to the evidence, we are compelled to regard this as simply a "talking point." It is something that never occurred to the patentee. What he claims in his patent and likewise in his testimony, is that the substitution of the harder wire gave to his screen greater durability. That is the only added merit which is claimed, and we believe it is the only one which the screen possesses.

[2] This brings us to the real point in the case. Did the substitution of a hard warp wire in place of a soft one constitute patentable invention? We think it quite obvious that that question should receive a negative answer. The substitution of a different material in a structure has sometimes been held to be patentable. As a rule such substitution has produced difference in structure and in function. Smith v. Dental Vulcanite Co., 93 U. S. 496, 23 L. Ed. 952; Potts v. Creager, 155 U. S. 597, 15 Sup. Ct. 194, 39 L. Ed. 275; Edison, etc., Co. v. Electric Lighting Co., 52 Fed. 308, 3 C. C. A. 83. The general principle has been from the early case of Hotchkiss v. Greenwood, 11 How. 248, 13 L. Ed. 683, that to substitute a superior for an inferior material in one of the parts of a machine does not involve patentable invention. Here, however, the patentee does not do even that much. All he does is to substitute a harder metallic wire, where he had been using a soft one of the same metal. He did this for the simple and obvious purpose of making the two parts of his screens which for functional reasons were of different sizes, equal-

ly durable. He found from experience in the three years that he had made and sold the screen prior to his alleged invention that the smaller wires, being made of iron of the same degree of hardness as the larger wires, wore out faster. So, for the purpose of producing a screen whose two wires, while varying in size, should possess equal durability, he made the smaller wire of harder metal. After this change plaintiff's screen worked precisely as it had worked before. In so far as his invention has merit, its important elements were all embraced in the structure which plaintiff began making and selling in 1902. Consciously or unconsciously, what eminent counsel are trying to do is to bring forward all those elements and embody them with the patented improvement. That cannot be done. The sale of the old structure caused all its elements to pass to the public beyond plaintiff's power to recall.

We do not consider that this case lies close to the line; on the contrary, it lies well back in that field of nonpatentability whose boundary was first marked in Hotchkiss v. Greenwood, 11 How. 248, 13 L. Ed. 683, and has since been illustrated and more clearly defined in Hicks v. Kelsey, 18 Wall. 670, 21 L. Ed. 852; Union Hardware Co. v. Selchow (C. C.) 112 Fed. 1006; George Frost Co. v. Cohn (C. C.) 112 Fed. 1009; Drake Castle Pressed Steel Co. v. Brownell, 123 Fed. 86, 59 C. C. A. 216; Columbia Metal Box Co. v. Halper, 220 Fed. 912, 136 C. C. A. 478.

The decree is affirmed.

A. SCHRADER'S SON, Inc., v. PROTEX MFG. CO.

(District Court, N. D. Illinois, E. D. November 7, 1918.)

No. 1064.

PATENTS ⇐328—VALIDITY AND INFRINGEMENT—AUTOMOBILE TIRE PRESSURE GAGE.

Preliminary injunction granted against infringement of the Twitchell patent, No. 927,298, for an automobile tire pressure gage.

In Equity. Suit by A. Schrader's Son, Incorporated, against the Protex Manufacturing Company. On motion for preliminary injunction. Granted.

McGill & Maguire, of Washington, D. C., and Otto R. Barnett, of Chicago, Ill., for plaintiff.

Frank H. Drury, of Chicago, Ill., for defendant.

SANBORN, District Judge. This is a motion for temporary injunction to prevent infringement of the Twitchell patent, No. 927,298, issued July 6, 1909, on a gage for testing the pressure in automobile tires. This is the gage in general use, well known to the public. The nipple of the inner tube valve is screwed off. The gage has a slip over coupling and anvil to co-operate with the inner valve stem and open the valve, so that the pressure operates to compress the gage spring

and push out the cylinder beyond the top of the gage, on which the pressure may be read.

The motion for a temporary injunction should be granted. There is no question of the validity of the patent which has been several times adjudicated, and whose validity has been acquiesced in by the public almost universally. The sale of gages under the patent has been enormous, substantially as great as the sale of automobiles in this country. All the prior art set up by the defendant has been cited in the prior litigation on this patent. In that litigation 123 prior patents and 8 prior publications have been referred to. The Suiter English patent, upon which correspondence was had with the parties, was cited in prior litigation, and did not contain the slip-on feature, which is an essentially important element of the invention.

I have no hesitation in granting a temporary injunction.

THE OLGA.

(District Court, E. D. New York. December 12, 1918.)

1. ADMIRALTY ⊂=66—LIBEL—AMENDMENT.
   Where the libel of one-fourth interest in a steamer failed to show that libelant was the holder of the legal title, an amendment so showing should be allowed, where libelant asserted he intended to plead a legal title, and it appeared that in the event of dismissal libelant would have great difficulty in enforcing his rights.
2. ADMIRALTY ⊂=8—JURISDICTION—RELIEF TO MINORITY OWNER.
   In view of the protection which a court of admiralty will accord the rights of a minority owner in the event of a dispute as to the employment of the vessel, a court of admiralty has jurisdiction to protect the rights of such an owner, where the majority owners intend to sell the vessel, and may enjoin them from transferring title unless a bond be given that will insure the minority owner will receive his share of the proceeds.

In Admiralty. Libel by Emanuel Fostinis against the steamship Olga and others. On motion to vacate process against the steamer Olga. Motion denied.

John D. Stephanidis, of New York City (L. De Grove Potter and John M. Woolsey, both of New York City, of counsel), for libelant.

Bullowa & Bullowa, of New York City, for respondents.

GARVIN, District Judge. [1] This is a motion to vacate process against the steamship Olga. She has been libeled, and an application is now made in behalf of the owner to discharge her from the custody of the marshal. The libel sets forth that the libelant is the "true and lawful owner of one-fourth interest" in the Olga, and it is claimed in behalf of the agent for the boat, who appears specially, that such an allegation is an allegation of equitable ownership, in which event the court is without jurisdiction. The G. Reusens (D. C.) 23 Fed. 403.

On the argument of this motion the libelant claimed a legal title to one-fourth of the vessel, and asked that he be permitted to amend the libel, so as to set forth legal ownership, if there was any doubt

that such ownership had been alleged, stating that he had intended to plead a legal and not an equitable title. It seems to me that I should allow such an amendment in the interest of justice, rather than dismiss the action upon what would be at best a technicality, for in the event of a dismissal it is apparent that libelant would have the greatest difficulty in enforcing whatever rights he may have. The amendment is therefore allowed.

[2] But it is urged that, even if libelant has a legal title, the court has no jurisdiction because a sale of the vessel is involved, and The Eclipse, 135 U. S. 599, 10 Sup. Ct. 873, 34 L. Ed. 269, and The Ada, 250 Fed. 194, — C. C. A. —, are cited to sustain that contention. The former case was an action in which it was held that a court of admiralty has no jurisdiction to enforce a contract of sale and the latter holds that an action does not lie in admiralty to recover damages for breach of a contract of sale.

The case at bar seems to be analogous to the line of cases which hold that admiralty has jurisdiction (where there is a dispute between owners regarding the employment of a vessel) to require the majority owners to give a bond for the safe return of the vessel. Benedict's Admiralty, § 187. The admiralty court has frequently protected the interests of a minority owner. Tunno v. The Betsina, Fed. Cas. No. 14,236; The Emma B (D. C.) 140 Fed. 770.

I have been referred to no authority directly in point, but on principle it would seem that if an admiralty court has power to issue an injunction prohibiting majority owners from taking a vessel on a voyage contrary to the wish of a minority owner, unless they give a bond for its safe return, it has equal power to issue an injunction prohibiting owners from exercising other acts of ownership such as transferring title, unless a bond be given that, upon the transfer, the minority owner who objects to such transfer will receive his share of the proceeds.

Motion denied.

In re GOLDBERG.

(District Court, E. D. Pennsylvania. October, 1918.)

No. 6353.

BANKRUPTCY ⊜399(2)—JUDGMENT CREDITOR—WAIVER OF EXEMPTIONS.

Where, after execution is issued and levied on the personal property of the judgment debtor, a petition in bankruptcy is filed against him, and the debtor refuses to claim exemptions, waiving the same in favor of the judgment creditor, such creditor is entitled to receive payment in full out of the proceeds of the sale of the bankrupt's assets up to the amount of the exemptions.

In Bankruptcy. In the matter of Philip Goldberg, bankrupt. The petition of Harry Berman was granted by the referee. Upon certificate of review. Order of referee affirmed.

Edwin Fischer and Alfred Aarons, both of Philadelphia, Pa., for petitioner trustee.

J. Henry Spivak, of Philadelphia, Pa., for claimant.

THOMPSON, District Judge. The opinion and order of the referee are as follows:

The question submitted to me for decision by the petition of Harry Berman and the trustee's answer thereto is as follows:

Where a judgment creditor issues execution out of the state court and levies on personal property of the defendant, who, pending the sale under the said execution, has a petition in bankruptcy filed against him, and who subsequently fails or refuses to file any claim for exempt property, is the levying judgment creditor deprived of the lien of his execution, and hence of the right to receive payment in full out of the proceeds of the sale of the assets of the bankrupt estate thus previously levied upon up to the sum of $300, the amount of the debtor's exemption, which had been waived in favor of the said judgment creditor?

A similar question was considered by Referee Hoffman in the Matter of Charles J. Vautier, bankrupt, in bankruptcy, No. 5148, and decided in favor of the waiver judgment creditor. This decision of Referee Hoffman was affirmed by the District Court, and is in my judgment conclusive of the question raised before me, and accordingly this 24th day of September, 1918, upon consideration of the petition of Harry Berman, praying for an order on the receiver, now trustee, to pay to the petitioner out of the proceeds of the receiver's sale the sum of $300 to satisfy the lien of petitioner's execution on assets which came into the bankrupt estate, and upon consideration of the answer of the receiver, now trustee, to the said petition, and in accordance with the foregoing opinion, it is ordered that the prayer of the petition be granted, and that the receiver, now trustee, be and he is hereby authorized and directed to pay the said sum to the said petitioner forthwith.

The decision of Referee Hoffman in the Vautier Case (not reported), which was affirmed by this court, was based on the rule laid down by the Supreme Court in the case of Lockwood v. Exchange Bank, 190 U. S. 294, 23 Sup. Ct. 751, 47 L. Ed. 1061. It is contended by counsel for the trustee that the latter case was overruled by the Supreme Court in the case of Chicago, Burlington & Quincy Railroad v. Hall, 229 U. S. 511, 33 Sup. Ct. 885, 57 L. Ed. 1306. That the authority of Lockwood v. Exchange Bank is not disturbed is made apparent by the following excerpt from the concluding paragraph of the opinion of Mr. Justice Lamar in the case of Chicago, Burlington & Quincy Railroad v. Hall:

"The liens rendered void by section 67f are those obtained by legal proceedings within four months. The section does not, however, defeat rights in the exempt property acquired by contract or by waiver of the exemption. These may be enforced or foreclosed by judgments obtained, even after the petition in bankruptcy was filed, under the principle declared in Lockwood v. Exchange Bank, 190 U. S. 294 [23 Sup. Ct. 751, 47 L. Ed. 1061]."

This appears to be conclusive of the present controversy, and the order of the referee is affirmed, and the petition dismissed.

In re McGRAW.

(District Court, N. D. West Virginia. December 3, 1918.)

1. BANKRUPTCY ⟸81(1)—PETITION—SUFFICIENCY.
In involuntary proceedings, the petition must affirmatively and distinctly show the essential facts necessary to give the bankruptcy court jurisdiction.

2. PLEADING ⟸8(1)—PETITION—SUFFICIENCY—CONCLUSIONS.
In involuntary proceedings, general averments in the petition of legal conclusions are not sufficient.

3. BANKRUPTCY ⟸81(4)—PETITION—SUFFICIENCY.
In involuntary proceedings, averments of acts of bankruptcy in the language of the statute, unaccompanied by a statement of facts affirmatively showing them to exist, are insufficient.

4. BANKRUPTCY ⟸81(4)—PETITION—SUFFICIENCY.
In involuntary proceedings, the statement in the petition of the acts of bankruptcy should allege the specific facts relied on, with time, place, and circumstances, so that the alleged bankrupt may be distinctly apprised of what he is required to answer.

5. BANKRUPTCY ⟸81(4)—PETITION—SUFFICIENCY.
The allegation of acts of bankruptcy in a petition in involuntary proceedings must be based on something more than hearsay, rumors, or suspicion.

6. BANKRUPTCY ⟸56—ACTS OF BANKRUPTCY—ENUMERATION.
The various acts of bankruptcy which support a petition in involuntary proceedings enumerated.

7. BANKRUPTCY ⟸59—ACTS OF—SUFFERING CREDITOR TO OBTAIN PREFERENCE.
Under Bankruptcy Act, § 3, subd. a3 (Comp. St. 1916, § 9587), setting forth as an act of bankruptcy the suffering or permitting while insolvent any creditor to obtain a preference through legal proceedings, and not having, at least five days before a sale, etc., vacated such preference, an insolvent debtor does not commit an act of bankruptcy merely by inaction for four months after levy of an execution on his realty, but it must appear that he failed at least five days before the date fixed for sale to discharge or vacate the same, and such failure occurred in the four months period.

8. BANKRUPTCY ⟸81(4)—PETITION—SUFFICIENT.
An involuntary petition, alleging that the alleged bankrupt suffered creditors to obtain preferences by legal proceedings, *held* not to sufficiently allege acts of bankruptcy specified by Bankruptcy Act, § 3, subd. a3 (Comp. St. 1916, § 9587).

9. BANKRUPTCY ⟸81(4)—PETITION—SUFFICIENT.
An involuntary petition *held* insufficient, not showing that the judgments against the alleged bankrupt asserted to have been acts of bankruptcy were recovered in the four months period.

10. JUDGMENT ⟸784—LIEN—PRIORITY.
As a term of court in West Virginia may last a number of days or weeks, judgments rendered at various times during the term are presumed, as regards priority between themselves, to relate back to the first day of the term, and as liens they are equal, although the lien to be preserved, etc., must be docketed in accordance with Code W. Va. 1913, c. 139, § 6 (sec. 5098).

11. BANKRUPTCY ⟸81(4)—PETITION—SUFFICIENCY.
A petition in involuntary proceedings *held* insufficient in its allegation of acts of bankruptcy, failing to state specific facts, etc.

12. BANKRUPTCY ⟨⟩81(4)—PETITION—SUFFICIENCY.
An amended petition in involuntary proceedings, averring the alleged bankrupt suffered creditors to obtain preferences by legal proceedings, *held* insufficient to allege acts of bankruptcy specified by Bankruptcy Act, § 3, subd. a3 (Comp. St. 1916, § 9587).

13. BANKRUPTCY ⟨⟩81(4)—PETITION—SUFFICIENCY.
An involuntary petitioning, setting up alleged acts of bankruptcy concerning the sale of property, etc., *held* insufficient to show an act of bankruptcy.

14. BANKRUPTCY ⟨⟩59—ACTS OF—WHAT CONSTITUTES.
For a bankrupt to suffer sale of the property to satisfy a special and superior lien, such as a purchase-money lien, does not constitute an act of bankruptcy.

15. BANKRUPTCY ⟨⟩56—ACTS OF—WHAT CONSTITUTES.
Where no depletion of his estate occurs as result of the debtor's removal of his property from one place to another, such removal is not an act of bankruptcy of which creditors can complain.

16. BANKRUPTCY ⟨⟩81(4)—PETITION—SUFFICIENCY.
A petition in involuntary proceedings, which set up the debtor's removal of certain property as an act of bankruptcy, is insufficient, without allegations that the acts complained of occurred within four months of institution of the proceedings.

17. BANKRUPTCY ⟨⟩81(4)—PETITION—SUFFICIENCY.
A petition in involuntary proceedings, which set up as an act of bankruptcy the debtor's transfer to his sister of part of the royalty derived from a lease of coal lands, etc., *held* defective for failure to allege the transfer occurred within four months of the filing of the original petition.

18. BANKRUPTCY ⟨⟩81(4)—PETITION—SUFFICIENCY.
Allegations in a petition in involuntary proceedings that the alleged bankrupt paid depositors in a bank, etc., *held* insufficient to show an act of bankruptcy.

19. BANKRUPTCY ⟨⟩81(4)—PETITION—SUFFICIENCY.
Allegations in an amended petition in bankruptcy that, since the filing of the original petition, the alleged bankrupt suffered and permitted the circuit court in chancery causes to render a decree of sale of his real estate for liens, etc., *held* not to show an act of bankruptcy.

20. EXECUTION ⟨⟩21—SALE OF LANDS.
In West Virginia land cannot be sold under execution, but after execution has been returned nulla bona the judgment creditor may institute his suit in equity to sell real estate, and if such real estate will not rent for enough to in five years pay all liens and costs, it is the practice to appoint special commissioners to make sale, etc.

21. BANKRUPTCY ⟨⟩60—ACTS OF—WHAT CONSTITUTES.
The appointment of special commissioners to sell West Virginia lands of a judgment debtor, execution having been returned nulla bona, etc., *held* not to constitute an act of bankruptcy by the debtor, on the theory such appointment amounted to a general assignment, or applying for or permitting of appointment of a trustee or receiver.

22. BANKRUPTCY ⟨⟩84—PETITION—AMENDMENT.
A petition in involuntary proceedings may be amended, Order XI (89 Fed. vii, 32 C. C. A. xiv), providing for application for leave to amend; but the conditions under which amendments may be made, and the extent thereof, rest in the sound discretion of the court.

23. BANKRUPTCY ⟨⟩84—PETITION—AMENDMENT.
While the power of amendment is substantial, etc., *held* that, in view of Order XI (89 Fed. vii, 32 C. C. A. xiv), an amendment to an involun-

tary petition relating solely to the material facts respecting the acts of bankruptcy, and including charges of happenings since the filing of the original petition, should not be allowed.

In Bankruptcy. In the matter of John T. McGraw, alleged bankrupt. On motion of the alleged bankrupt to dismiss the original and amended petitions. Petitions and whole cause dismissed.

A. W. Burdett, of Grafton, W. Va., for petitioners.
John L. Hechmer, of Grafton, W. Va., for alleged bankrupt.

DAYTON, District Judge. Three creditors have filed an original and an amended and supplemental petition herein, seeking to have the defendant, McGraw, adjudged a bankrupt. He has appeared and moved the dismissal of these petitions, filing in writing a number of grounds in support thereof, material ones of which are: (1) That, as to the amended and supplemental petition, it cannot be considered properly in court, not having been filed upon written application made to the court, with notice thereof given to the defendant, in which application excuse is given for such amendment; and (2) that the acts of bankruptcy, charged in both the original and amended petitions, either (a) are not supported by sufficient allegations of fact, or (b) the facts as alleged in both petitions show, on their face, that the acts of bankruptcy charged are not so in law and fact.

[1-5] Involuntary proceedings in bankruptcy, being, in theory, prosecuted against the will of defendant, necessarily vary greatly from voluntary ones, as regards the allegations of their pleadings; therefore it has been settled by numerous precedents: (1) That the essential facts necessary to give the bankruptcy court jurisdiction in such cases must appear affirmatively and distinctly; (2) that general averments of legal conclusions are not sufficient; (3) nor are averments of the acts of bankruptcy in the language of the statute, unaccompanied by a statement of facts affirmatively and distinctly showing them to exist; (4) such statement should state the specific facts relied on, with time, place, and circumstances, so that the alleged bankrupt may be distinctly apprised of what he is required to answer; and (6) it must be based upon something more than hearsay, rumors, or suspicion. In re Plotke, 104 Fed. 964, 44 C. C. A. 282; Clark v. Henne & Meyer, 127 Fed. 288, 62 C. C. A. 172; In re Rosenblatt & Co., 193 Fed. 638, 113 C. C. A. 506; In re Bellah (D. C.) 116 Fed. 69; In re Mero (D. C.) 128 Fed. 630; In re Blumberg (D. C.) 133 Fed. 845; In re Pure Milk Co. (D. C.) 154 Fed. 682; In re Hallin (D. C.) 199 Fed. 806; In re Farthing (D. C.) 202 Fed. 557; In re Truitt (D. C.) 203 Fed. 550; In re Deer Creek Water Co. (D. C.) 205 Fed. 205.

[6-8] Preliminary to applying these rules to the charges of the petitions presented here, it is pertinent to call attention to the fact that the bankruptcy court is always limited in assuming jurisdiction, where adjudication is opposed, to a condition where the acts of bankruptcy have been committed within 4 months of the filing of the petition for adjudication; and, further, that the only acts warranting such adjudication, as provided by the statute, are: (1) A conveyance, trans-

fer, concealment, or removal of any part of his property, made or suffered to be made by the debtor, with intent to hinder, delay, or defraud his creditors, or any of them; (2) by transfer, when insolvent, by the debtor of any portion of his property to one or more of his creditors, with intent to prefer such creditor over his other creditors; (3) by suffering, while insolvent, any creditor to obtain a preference through legal proceedings, and not having, at least 5 days before a sale or final disposition of any property affected by such preference, vacated or discharged such preference; (4) by making a general assignment for benefit of creditors, or, being insolvent, applying for the appointment of a receiver or trustee for his property, or, by reason of such insolvency, the appointment and putting in charge of such receiver or trustee his property, under the laws of a state or territory of the United States; and (5) by reason of written admission of inability to pay his debts and willingness to be adjudged bankrupt on that ground. The original petition in this matter was filed on June 30, 1917, and the amended and supplemental one on November 19, 1917. In the original, the acts of bankruptcy charged, in the order therein stated, are: (a) A transfer within four months of a large amount of property to certain creditors with a design to give them preference over other creditors, based on the second one of the acts defined by the statute; (b) suffering certain creditors to obtain preferences through legal proceedings, the third act set forth in the statute; and (c) transferring, concealing, etc., a large portion of property, with intent to defraud, the first act of bankruptcy set forth in the statute.

In support of these charges the material facts set forth are:

(a) That at the January term of the circuit court of Taylor county, which term adjourned on March 8, 1917, the alleged bankrupt procured, suffered, and permitted one Anna Jarvis to obtain by default against him a judgment for the sum of $6,390, with interest from January 22, 1917, and $15.65 costs, and that such judgment was, on the 20th day of April, 1917, recorded in the lien docket of the county, remains in full force, has not been vacated or discharged, and creates a preference.

(b) That at the same January term, 1917, of said court, he suffered Fred W. Bartlett to obtain a judgment by default against him for $2,743.31, with interest from December 5, 1916, and costs, which judgment was duly recorded in the judgment lien docket on March 16, 1917; that the same constitutes a lien against his real estate, has not been vacated or discharged, and created a preference.

(c) That he has received a large amount of dividends, the amount unknown to petitioners, within 4 months of the filing of the petition, from the Grafton Coal & Coke Company, a corporation which amounts he has concealed and refused to pay to his creditors.

(d) "That he has other large income which has, within four months of the date of this petition, the amounts of which are unknown to petitioners, from royalties on coal leased by him, been paid to other parties unknown to petitioners, which has been procured, suffered, and permitted to be so paid by the said McGraw, and to parties unknown

to petitioners, with the intent to hinder, delay, and defraud his creditors."

The construction of section 3, subdivision a3, of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 546 [Comp. St. 1916, § 9587]), setting forth as an act of bankruptcy the suffering or permitting, while insolvent, any creditor to obtain a preference through legal proceedings, and not having, at least five days before a sale or final disposition of any property affected by such preference, vacated or discharged such preference, gave rise to contradictory decisions in the federal courts of the country. The conflict arose over this question: If an insolvent debtor suffered or permitted one of his creditors to secure a lien upon his real estate, by judgment or other legal proceeding, which lien was allowed to remain undischarged and unvacated until the lapse of 4 months was about to render it unassailable in bankruptcy, was this an act of bankruptcy? Such cases as In re Tupper (D. C.) 163 Fed. 766, and Folger v. Putnam, 194 Fed. 793, 114 C. C. A. 513, held it to be so. Such cases as In re Vasbinder (D. C.) 126 Fed. 417; In re Windt (D. C.) 177 Fed. 584, and In re Truitt (D. C.) 203 Fed. 550, held it not to be so. The question was finally certified to the Supreme Court, and there decided in Citizens' Bank v. Ravenna Bank, 234 U. S. 360, 34 Sup. Ct. 806, 58 L. Ed. 1352, that:

"An insolvent debtor does not commit an act of bankruptcy, rendering him subject to involuntary adjudication as a bankrupt under the Bankruptcy Act of 1898, merely by inaction for the period of 4 months after levy of an execution upon his real estate.

"All of the three elements specified in section 3a(3) of the Bankruptcy Act of 1898 must be present in order to constitute an act of bankruptcy within the meaning of that provision."

This finally settles the matter. The rendering of a judgment, therefore, can only constitute an act of bankruptcy when (a) the debtor is insolvent, (b) has within 4 months of the filing of the bankruptcy petition suffered and permitted it to be obtained, (c) upon which execution has issued, (d) been levied upon his property, (e) such property advertised for sale, and (f) he has failed, at least 5 days before the date fixed for sale, to discharge or vacate the same; and all these prerequisites must occur within 4 months of the filing of the petition.

In this case, this disposes of the alleged acts of bankruptcy based upon the rendition of the Jarvis and Bartlett judgments. It is not alleged that any executions have issued upon these judgments, been levied upon McGraw's property, with sale thereof advertised, and a failure to vacate and discharge 5 days before such sale.

[9, 10] Another fatal objection might, too, be set forth to the sufficiency of the allegations as to these judgments being suffered to be rendered within 4 months, or at least to one of them. Counsel apparently have assumed that the four months period within which they could be assailed runs from the date when they are recorded in the lien docket in the county court clerk's office. This is clearly wrong. The date from which the four months period begins to run is that of the day when the judgment is entered of record by the court having jurisdiction of the action.

Under the laws of West Virginia a term of a circuit court may run over a number of days or weeks. If it does, judgments rendered upon different days of such term against the same debtor, as regards their priority between themselves, are presumed to relate back to the first day of the term, and as liens are equal in priority, provided the cases were matured for trial before the term commenced, and did not mature after it commenced. No such judgment, however, is a lien on real estate as against a purchaser thereof for valuable consideration without notice, unless it be docketed in the county wherein such real estate is, either within 60 days next after the date of the judgment, or before a deed therefor to said purchaser is delivered for record to the clerk of the county court. Chapter 139, § 6, Code W. Va. (sec. 5098). The docketing of a judgment is merely for the purpose of preserving its lien, or, more accurately speaking, to give notice of its lien to prospective purchasers, who would otherwise be innocent of its existence; and even they must run the risk of such lien existing for 60 days after it has been rendered by a circuit court, for the creditor has that period given him by the statute within which to docket it. The lien dockets are kept by the clerks of the county courts, which have no judicial power to try cases and render judgments.

Here it is apparent that one of these judgments, the Jarvis one, was actually rendered January 22, 1917, more than 4 months before the petition herein was filed and as to the Bartlett one, it is alleged it was recovered at the same term; but the exact day is not disclosed, so as to enable us to determine whether it was likewise more than 4 months old or not.

[11] As to the allegations of fact in the last two paragraphs of this original petition, I am constrained to hold that they do not comply with several of the rules established by the precedents. The two are alike, and may be considered together, as seeking to establish either one or the other of the first two acts of bankruptcy as defined by the statute. In effect they charge: (a) That the alleged bankrupt had within 4 months received a large unknown amount of dividends from the Grafton Coal & Coke Company, which he has concealed and refused to pay to his creditors; and (b) has large incomes, unknown in amount, from royalties on coal leased by him, which he has allowed to be paid to unknown parties, with intent to hinder, delay, and defraud his creditors.

They fail, in that they do not state specific facts, such as time, place, and circumstance, so that the defendant may be distinctly apprised of what he is required to answer. The ruling in Re Rosenblatt & Co., 193 Fed. 638, 113 C. C. A. 506 (2d Cir.), is directly in point. It is there held:

"A general averment in an involuntary petition in bankruptcy that the alleged bankrupt within four months preceding the date of the filing of the petition committed an act of bankruptcy, in that, while insolvent, he transferred a part of his property to creditors with intent to prefer them, and transferred and concealed large sums of money and valuable securities with intent to defraud his creditors, and that the concealment was a continuous one, is too vague, and the petition is properly dismissed upon demurrer."

It clearly appears the allegations, so held to be too vague in that case, were less so than those here. See, also, In re Hallin, 199 Fed. 806, and authorities therein cited.

The original petition being demurrable, the next question presents itself in a twofold aspect: (a) How far its defects could be remedied by amendment; and (b) how far are they in fact remedied by the amended and supplemental petition filed here?

[12] In alleging material facts, in support of alleged acts of bankruptcy, it (1) reiterates the charges of the original petition as regards the rendition and existence of the Jarvis and Bartlett judgments, but does not allege that any executions have issued thereon, been levied on property, sale thereof directed, and failure to discharge at least 5 days before sale. It then charges that, since the filing of the original petition, and within 4 months of the filing of this amended and supplemental one, the Farmers' Bank of Clarksburg, in the circuit court of Harrison county, on May 9, 1917, has recovered a judgment, which has not been paid and its preference vacated and discharged. Here, too, there is no allegation of the issue of execution, levy on property, sale directed, or the failure to vacate the preference 5 days before the day of sale.

It is apparent, from what has been hereinbefore said, that these allegations of fact are not sufficient to establish acts of bankruptcy under the decision of the Supreme Court in Bank v. Bank, 234 U. S. 360, 34 Sup. Ct. 806, 58 L. Ed. 1352.

[13, 14] The next allegation of fact in effect is that McGraw, on the ——— day of June, 1917, purchased from Weekley, receiver of the Grafton Bank, what is known as the Grafton Bank property, at the price of $10,500; that petitioners "are informed, believe, and charge" that he paid $3,000 of the purchase price, took possession, expended a large sum in repairs, and has failed to comply with the terms of sale; that Weekley is now proceeding to readvertise and sell on December 1, 1917, and "has applied or will apply the cash payment thereon to McGraw's credit on judgments recovered by the Grafton Bank, thereby preferring said bank over petitioners and other creditors."

It seems to me this charge must be held insufficient for several reasons:

First. So far as allegations of the payment of the $3,000 on the purchase price of this bank property, and its application, made or to be made, to the bank's judgments, are concerned, they are made solely upon information and belief and are under the ban of the ruling in such cases as In re Blumberg (D. C.) 133 Fed. 845.

Second. It is not charged that the purchase of this bank property was made by McGraw by reason of any fraudulent collusion with Weekley, the receiver, to make it the method of preferring the bank, or in short with any purpose to hinder or delay or defraud his creditors. On the contrary, the reasonable presumption arises that such purchase was made openly by him, knowing that he was indebted, but regarding himself as solvent. The Bankruptcy Law does not warrant the assumption that one, indebted to an extent that may even-

tually amount to insolvency, is compelled to stop business, make no investments, and buy no property, but in effect stand still, and see if bankruptcy proceedings are instituted against him. He can go on increasing his estate by purchases of property, surely, unless such purchases are made with fraudulent design.

Third. We are wholly uninformed as to how old the bank's judgments were, or whether executions were outstanding at the time upon those judgments, which would constitute a lien upon the money paid in the purchase to its receiver. If so, it might be entirely legal for the receiver to apply it on such executions. Such application would not create a "preference" as against petitioners and other unsecured creditors. It is constantly to be borne in mind that the Bankruptcy Law does not, on general principles, undertake to fight the battle of lienholders, or to settle controversies arising solely between them. Its care is to protect and secure the rights of unsecured creditors.

Fourth. The resale of the property, while charged to have been advertised, was not within the 5-day limit before which a preference, if any existed, had to be vacated; and, above all, it was to be made for a purchase-money lien, secured, it is fair to assume, either by vendor's lien retained in the deed made by the receiver to McGraw for the property, or, which is more likely, by the retention of the legal title by the receiver. The suffering of such sale of property to satisfy such a special and superior lien does not constitute an act of bankruptcy in any event, under the principles enunciated by the Circuit Court of Appeals of this Circuit in Richmond Standard Steel Spike & Iron Co. v. Allen, 148 Fed. 657, 78 C. C. A. 389.

[15, 16] The next charge is to the effect that the alleged bankrupt is the owner of the Willard Hotel in Grafton and of a residence property in Oakland, Md., and has conveyed or removed a large part of his personal property, consisting of rugs, furniture, and other articles, from the hotel to such residence. The defects in this charge are: First, its allegations are made on information and belief solely; second, they are too vague and indefinite; third, no depletion of estate is charged or shown, and, where there is none, creditors cannot complain (Collier [11th Ed., 1917] p. 101); fourth, no allegation of such removal having been made within 4 months of the institution of this proceeding is made, and this alone is a vital objection.

[17] The sum and substance of the next charge is that McGraw leased some coal land to the Delmar Coal Company, from which he was to receive a minimum royalty of $250 per month, this back in 1911; that at some time not stated he transferred to his sister, Mrs Warder, the sum of $150 per month therefrom; and that she has, for the months of April, May, and June, 1917, each within 4 months of the filing of the original petition, been paid and received this $150 of transferred royalty by the company. When this transfer was made, as stated, is not alleged; but it is alleged:

"That said Delmar Coal Company, prior to the said 4 months, paid from month to month for a long period of time to the said Minnie McGraw Warder the said sum of $150 per month at the request, permission, and order of said McGraw, without consideration, and while he the said John T. McGraw, was so insolvent, with intent to hinder, delay, and defraud petitioners and other

creditors of McGraw. That the said Delmar Coal Company, since the filing of the original petition herein, at the request, permission, and order of said McGraw, and while so insolvent, continued to pay to said Minnie McGraw Warder the said sum of $150 per month from the royalties coming to said McGraw, with intent to hinder, delay, and defraud petitioners and other creditors of said McGraw."

From this it is fair to presume that years ago, long before petitioners' debts were incurred, and it may be in 1911, when the lease was made, McGraw, as alleged, "transferred and conveyed, or permitted the same to be transferred and conveyed, to his sister" an interest, to the extent of $150 per month, in this royalty, and that, in consequence, it has ever since been paid to her. The fact that the transfer or conveyance of this interest may have been based upon a consideration of love and affection only is immaterial here, as is also the fact that it has been carried out by payments made under it. That it may come within the ban of the Bankruptcy Act it must appear that the transfer or conveyance itself had been made within 4 months of the filing of the bankruptcy petition, and at the time so made was with the intent, on the part of McGraw, to hinder, delay, and defraud his creditors. It seems clear that neither of these conditions exist.

[18] The next charge is that McGraw, at various times and places, paid to certain depositors of the Grafton Bank large sums of money on their deposits, voluntarily and without value, amounts unknown and parties unknown, but petitioners "are informed, believe, and aver" that five named persons were depositors so paid. It is hardly necessary to point out that this charge, under the authorities cited, is entirely too vague and indefinite. It is based upon information and belief, and the essential details and data necessary to enable us to form any idea of the nature and reason for making such payments are wanting. No relation is shown to have existed between McGraw and this bank that would explain why he should undertake to pay its debts. It can hardly be presumed that any ordinarily sensible man would for no moving cause want to pay such debts, for which he was in no wise responsible. If McGraw did pay them, it is not disclosed whether he took assignments from the depositors so paid. If he did so, it is not disclosed whether or not the investment in such claims was a bad investment or otherwise. These debts due depositors were superior liens upon the bank's assets under the laws; in addition, a double liability upon the bank's stockholders exists to further secure them, and, while it is said the bank's doors were closed, it does not follow that the taking over of its debts due depositors was not a good investment for McGraw and his estate.

The next specification of fact reiterates the one contained in the original petition, to the effect that McGraw has been paid large dividends by the Grafton Coal & Coke Company. The only substantial differences between the two representations are (a) that in the original petition these payments are charged to have been "concealed," while in this amended one this charge of concealment is omitted; and (b) in this amended one a failure of application of these dividends to existing execution liens (not named) is charged.

In addition to what has been said hereinbefore touching this charge, I will only call attention to the case of Conway v. German, 166 Fed. 67, 91 C. C. A. 653, wherein the Circuit Court of Appeals for this circuit has clearly pointed out that general statements of this kind, without setting forth details and essential data, such as time, place, persons, and amounts involved in the transaction, are insufficient.

[19] Finally, it is set forth that since the filing of the original petition—that is, on August 4, 1917 (the certified copy of the decree filed shows it was rendered the 4th day of October, 1917)—the alleged bankrupt suffered and permitted, in three consolidated chancery causes named and described, the circuit court of Webster county to render a decree of sale of his real estate for liens amounting to over $600,000, appointed special commissioners to sell the same, of whom large and excessive bonds have been required; that such decree of sale does not include all of McGraw's real estate lying within the state; that petitioners "are informed, believe, and charge" that a great many of the lienors (naming four), since the filing of the original petition herein, have issued executions and docketed them, in Taylor county (where McGraw resides), thereby claiming liens upon his personal property; that the real estate of McGraw, they are informed and charge, will sell for more than enough to pay the debts decreed against it, and the personal estate should not be incumbered with said execution liens; that McGraw has a large amount of personal property placed as collateral security with various creditors, far in excess of the debts secured, the amount, however, not known (and to whom pledged not stated); that the bankrupt court alone can take jurisdiction and equitably settle the affairs of McGraw, and protect his common creditors, and, it is averred, if it does not take jurisdiction, and enjoin the sale of his real estate about to be sold, the common creditors will realize nothing, and will suffer great loss, if the state court proceedings are permitted to go on to a final sale, and "the said Geo. M. Weekley, receiver, be permitted to sell the said Grafton Bank property as advertised by him"; that McGraw should be required to answer, and show what stocks and bonds are owned by him, where situated, and whether or not the same are up as collateral with any of his creditors, and the amount of the debts for which the same are so held, by whom held, and such collaterally secured creditors should be enjoined from selling such collateral until proper proceedings can be taken in this bankrupt court.

A copy of the decree of sale is filed as an exhibit. It discloses that the state court, through its master, has ascertained and determined McGraw to be the owner of an immense amount of real estate, situate in eight different counties of the state, consisting of hundreds of town lots, large and small tracts of lands in fee, undivided interests in others, and coal and timber rights and interests, upon which more than $600,000 of liens, due to several hundred different persons, firms, and corporations, are existing and are decreed. How complete and accurate the work done is not for me to determine. It is apparent that the costs and expenses involved in the litigation resulting in this decree have been enormous. Petitioners believe the interests of com-

mon creditors, at least, would be promoted by this court taking charge of this immense and very greatly involved estate, and administering it in bankruptcy. I very much doubt it. Be that as it may, however, one thing is sure and certain. It cannot be so administered in this bankruptcy proceeding, against the protest of its owner, unless it affirmatively and definitely appears that he has within 4 months of the filing of the petition (I think the original one) committed one or other of the acts of bankruptcy defined by the statute. The "suffering" this decree to be rendered certainly constitutes no such act under the Supreme Court's ruling in the Citizens' Bank v. Ravenna Bank Case. No sale has been advertised under it, so far as disclosed. A stay of its operation was given to enable an appeal to be taken, but whether taken we are not informed by anything here appearing.

[20, 21] The fourth act of bankruptcy, that of making a general assignment, or applying for or suffering a receiver or trustee to be appointed, has not, in either of these petitions, been set forth and relied upon. If it had been, then a very interesting question, I think of first impression, might be raised, by claiming that the appointment of special commissioners in this decree was equivalent to and came within the meaning and intent of the statute making the appointment of a receiver or trustee an act of bankruptcy; in other words, that such special commissioner is, in the legal intendment of this act, a receiver or trustee. At first it seemed to me that this might be so, but a careful study of the question has led me to the contrary conclusion, especially when applied to legal conditions in this state. In West Virginia real estate cannot be sold under execution. After judgment has been obtained at law, and execution thereon has been returned nulla bona, the judgment creditor is permitted to institute his suit in equity (if no prior one for the same purpose has been instituted) to sell the debtor's real estate. In such equity suit the real estate is ascertained, with the state and condition of its title, the rental value thereof, and all liens thereon. If such real estate will not rent for enough in five years to pay all such liens and the costs, a sale thereof is ordered. Instead of directing the sheriff to make such sale, the usual practice is to appoint one or more special commissioners to make it and report to the court for confirmation. Such special commissioner never takes possession of the real estate, and he does not collect the rents, issues and profits thereof, as does a receiver or trustee. His duties are purely ministerial. His appointment is made by the court to make the sale alone. If, upon his report, the sale is confirmed, the court awards direct to the purchaser a writ of possession that alone judicially gives or warrants such purchaser to take possession. In short, such special commissioner is in effect only a substitute for the sheriff or other public officer required by law in other states to perform these duties, and cannot be held to be a receiver or trustee in the meaning of the Bankruptcy Act.

[22, 23] Counsel for McGraw, in addition to objections to inherent defects in the specifications themselves, strenuously insist that the amended and supplemental petition should be dismissed, because it was not filed by leave of the court, upon written application for

leave to do so, stating the cause of the error in the petition originally filed, and of which application the alleged bankrupt was to be given notice. In support of this contention counsel cite General Order XI (89 Fed. vii, 32 C. C. A. xiv), In re Brincat (D. C.) 233 Fed. 811, 815, and White et al. v. Bradley Timber Co. (D. C.) 116 Fed. 768.

These authorities fully support this view and seem to be based upon sound reason. However, that amendments can be made is clear. When, under what conditions, and to what extent, is subject to the sound discretion of the court (Armstrong v. Fernandez, 208 U. S. 324, 28 Sup. Ct. 419, 52 L. Ed. 514) and as usual, when matters are so subject, confusion has arisen as to what is an exercise of sound discretion in these matters of amendment. There can be no question that written or printed application must be made for leave to amend, in which shall be stated the error in the paper (petition) originally filed, because Order XI expressly so requires. It has been held, however, touching this order, that its purpose is to allow to be made corrections of errors, supply deficiencies, and remove uncertainties, but not practically to repel the legislative requirement that petitions in duplicate must be filed within the 4 months specified (In re Stevenson [D. C.] 94 Fed. 110); that "this power of amendment is substantial and conferred for effecting the broad purposes of the act, and is not confined to niceties of diction or other immaterial or merely formal matters. To hold that it does not embrace the insertion of material and essential averments at any stage of the proceedings before judgment would reduce it to a shadow." In re Mackey (D. C.) 110 Fed. 355, at page 362.

A careful examination of the numerous decisions of the federal courts, so far as I have been able to find them reported, has led me to the conclusion that the most satisfactory rule to determine for what purposes amendments may be made is set forth by the Circuit Court of Appeal for our own circuit in Millan v. Exchange Bank, 183 Fed. 753, 106 C. C. A. 327, where it is said:

"The law is well settled, however, that amendments relating to the number of the petitioning creditors, the amount and nature of their claims, to the occupation of the debtor, and to errors and deficiencies in the verification of the original petition can be made more than 4 months after the commission of the act of bankruptcy. When so made, they relate back to the date of the filing of the original petition. State Bank v. Haswell (8th Circuit) 23 Am. Bankr. Rep. 330, 174 Fed. 209, 98 C. C. A. 217; Ryan v. Hendricks (7th Circuit) 21 Am. Bankr. Rep. 570, 166 Fed. 94, 92 C. C. A. 78; In re Plymouth Cordage Co. (8th Circuit) 13 Am. Bankr. Rep. 665, 135 Fed. 1000, 68 C. C. A. 434; In re Bellah (D. C. Dist. of Del.) 8 Am. Bankr. Rep. 310, 116 Fed. 69."

If the statement of defects that can be cured by amendment set forth in this quotation was designed by the court to be inclusive of all, then this amended petition must inevitably be rejected, for that its amendments, sought to be made, come not within the list allowable. If, however, it is not designed to be inclusive of all allowable causes of amendment, it is sufficient to say the amended petition was not filed in accord with the requirements of Order XI, its allegations relate solely to the material facts relating to the acts of bankruptcy

essential to and the very foundation of the court's jurisdiction, including many charges of happenings since the original petition was filed, and jurisdiction thereby sought to be secured. It seems to me an attempt to amend to this extent goes too far. However, I have not based this decision of the motion to dismiss on this ground, and therefore further discussion is unnecessary.

I am constrained to the conclusion that both petitions, the whole cause, must be dismissed; and it will be so ordered.

PRIMOS CHEMICAL CO. v. FULTON STEEL CORPORATION.

(District Court, N. D. New York. December 2, 1918.)

1. COURTS ⇐266—FEDERAL COURTS—JURISDICTION.
Under Judicial Code, §§ 69–115 (Comp. St. 1916, §§ 1051–1106), and in view of section 1 (section 968), the jurisdiction of the several District Courts is coextensive with the boundaries of the judicial district, and extends no further, save as Congress has expressly extended it.

2. COURTS ⇐24—FEDERAL COURTS—JURISDICTION.
While jurisdiction of the person can be given by consent of the defendants, jurisdiction of the subject-matter cannot be conferred on any court, either by assumption of jurisdiction, or consent of the parties, or request of all of the parties.

3. COURTS ⇐24—FEDERAL COURTS—JURISDICTION.
When diversity of citizenship is the ground of federal jurisdiction, if diversity of citizenship does not in fact exist, there is an entire absence of jurisdiction, which cannot be waived by the parties, and the court will dismiss on its own motion.

4. COURTS ⇐276—FEDERAL COURTS—JURISDICTION.
Under Judicial Code, § 52 (Comp. St. 1916, § 1034), relating to where a state contains more than one federal district, etc., in suits not of a local nature, if there be but one defendant, he may waive being sued in the wrong district, but where there are two or more defendants residing in different districts, then to reach the defendants not residing in the district, suit must be brought as the statute directs, etc.

5. COURTS ⇐269—LEASES—NATURE OF PROPERTY THEREIN—"PERSONAL PROPERTY."
A lease of real estate for a term of years is "personal property," and is not property of a fixed nature or character, within Judicial Code, § 55 (Comp. St. 1916, § 1037), relating to district of suit in local actions where land or subject-matter of a fixed character lies partly in one district and partly in another.

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

6. RECEIVERS ⇐207—POWERS OF—EXTENT.
A receiver's power is only coextensive with that of the court which gave him his character, and cannot be asserted as a matter of right beyond the territorial jurisdiction of such court; so a receiver appointed by the District Court for the Southern District of New York has no power to take possession of property of the defendant in the Northern District, etc.

7. COURTS ⇐269 — FEDERAL COURTS — JURISDICTION — "PROPERTY OF FIXED CHARACTER OR NATURE."
Though a corporation which had its domicile and carried on its business in the Northern District of New York admitted the jurisdiction of

the District Court of the Southern District, wherein it had a small bank account and had leased offices, over a suit for the appointment of a receiver, *held*, that the District Court of the Southern District was without jurisdiction, under Judicial Code, § 55 (Comp. St. 1916, § 1037); the suit being of a local nature, and no property in that district being of a fixed character or nature.

8. COURTS ⊂⊃269—DOMICILE—PROPERTY OF A FIXED CHARACTER.
The defendant corporation *held* to have its domicile and property of a fixed character or nature wholly in the Northern District of New York, and none in the Southern District, where suit for the appointment of a receiver was begun, so the District Court of the Southern District could not take jurisdiction, under Judicial Code, § 55 (Comp. St. 1916, § 1037).

9. COURTS ⊂⊃269—APPOINTMENT OF RECEIVERS—"LOCAL ACTION."
A suit for the appointment of receivers to conserve and protect the assets of a corporation is one of a local nature, within Judicial Code, § 54 (Comp. St. 1916, § 1036), and under section 55 (section 1037) cannot be maintained in a district wherein the corporation was not domiciled and had no property of a fixed nature.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Local Action.]

10. COURTS ⊂⊃269—JURISDICTION—"PROPERTY OF A FIXED CHARACTER"—DEPOSITS.
Money deposited becomes the property of the bank, and the relation between the bank and depositor is simply that of debtor and creditor, so a deposit is not "property of a fixed character," within Judicial Code, § 55 (Comp. St. 1916, § 1037).

11. RECEIVERS ⊂⊃91—POWERS OF—LEASES.
Receivers of corporation are at liberty to occupy leased premises until they elect whether to retain or abandon; for if the lease is assignable, it may be sold like other personal property, and if not, the receivers may at their option abandon the same.

12. COURTS ⊂⊃264(1)—JURISDICTION—ANCILLARY JURISDICTION.
Where the District Court for the Southern District of New York was without jurisdiction of a suit, the District Court for the Northern District cannot rightfully exercise ancillary jurisdiction therein, for that presupposes jurisdiction in the Southern District.

13. MANDAMUS ⊂⊃31—COURTS—PROCEEDING WITH CAUSE.
A court can be compelled to act one way or the other in matters properly before it, for that is its duty; but it cannot be compelled to make a particular decision, when it has power or discretion to act otherwise.

14. COURTS ⊂⊃264(3)—JURISDICTION—RECEIVERS.
Where a court appointing a receiver had no jurisdiction, it cannot claim jurisdiction over property seized without the jurisdiction; so the fact receivers appointed by the District Court of the Southern District of New York have taken possession of property of the defendant in the Northern District does not give that court jurisdiction, where it exceeded its jurisdiction, etc., in appointing receivers, etc.

15. COURTS ⊂⊃264(1)—JURISDICTION—ANCILLARY JURISDICTION.
When want of jurisdiction of the court in the main suit appears, it is the duty of a court asked to exercise ancillary jurisdiction to raise the question itself, and to decline to act if the want of jurisdiction in that court appears.

In Equity. Application by the Primos Chemical Company for the appointment of receivers of the property of the Fulton Steel Corporation, as ancillary receivers, based on an ancillary bill, in which another creditor intervened, denying the jurisdiction of the District Court wherein the original suit was brought. Application denied.

This is an application by the Primos Chemical Company, the above-named complainant, a creditor of defendant, for the appointment of the three receivers named by the United States District Court in the Southern District of New York of all the property of defendant as ancillary receivers of the property of the defendant in the Northern District of New York. The application is based on an ancillary bill filed in the Northern District, which sets out the pendency of the action and the action of the court in the Southern District, and which allegations the plaintiff refuses, on request so to do, to eliminate from such bill filed in the Northern District.

Another creditor of the defendant has appeared herein by intervention, and has filed an answer denying all allegations of the ancillary bill filed in the Northern District which would give the District Court in the Southern District jurisdiction of the subject-matter of the suit, and denies jurisdiction in that court to entertain the suit and appoint receivers, and of this court to recognize that action or take any proceedings ancillary thereto, so far as property of the defendant in the Northern District of New York is concerned. The intervening creditor does not object to the court in the Northern District taking jurisdiction of an independent bill filed in that district by a proper party complainant asking for receivers, or to the appointment of receivers by this court in such an independent and primary action in the Northern District.

In the action commenced in the Southern District, as well as in the ancillary action brought in the Northern District, the defendant appears in person by its president, not by attorney, and files an answer as follows: "The defendant above named herein admits each and every allegation contained in the said bill of complaint and submits its right in the premises to the protection of the court. Fulton Steel Corporation, by Harry C. Beaver, President. Attest: Wm. M. Bailey, Vice President."

The answer of the intervener also sets up facts showing that the principal place of business of the defendant corporation is and always has been at Fulton, in the Northern District of New York, where all of its real estate and all of its property of a fixed nature or character is situated, and that it had none and has none in the Southern District.

The intervening creditor in the Northern District also files opposing affidavits, showing, if the allegations be true, that the Fulton Steel Corporation is a corporation of the state of New York, organized and doing business as a manufacturing corporation at the city of Fulton, Oswego county, N. Y., in the Northern District of New York, and that in its articles of incorporation its principal place of business is stated to be at Fulton aforesaid, and that in fact its principal place of business is and always has been at the city of Fulton, Northern District of New York, and that all its real property and all its property of a fixed nature or character and the greater part of its personal property was when the suit in the Southern District was instituted, and now is, in the Northern District of New York, and that such corporation had and has no real estate or property of a fixed character or nature in the Southern District of New York.

Wm. S. Elder, of Auburn, N. Y., for complainant.

Costello, Burden, Cooney & Walters and Chas. V. Byrne, all of Syracuse, N. Y., for intervening creditor.

RAY, District Judge (after stating the facts as above). The facts in this case are that a few years since the Fulton Steel Corporation was duly organized and incorporated under and pursuant to the laws of the state of New York as a manufacturing corporation for the purpose of manufacturing and selling certain steel products. Its articles of incorporation stated that its principal place of business was to be at Fulton, in Oswego county, N. Y., and at that city its principal place of business, active operations, and bookkeeping and offices have always been located and carried on. It became the owner of certain real es-

tate at Fulton, on which was and is its principal and only plant, being its manufacturing plant and offices and storage rooms. This plant, with buildings and machinery thereon, was and is worth from $350,000 to $500,000. In New York City there were, it is said, rented three small rooms in one of the large office buildings in that city, furnished with desks and chairs, and at which offices stock in the corporation was sold. The corporation kept a bank account in one of the banks of the city of New York, in which was deposited about $4,000 when the bill in the Southern District was filed.

This was and is the only property of the defendant corporation in the Southern District of New York when the bill was filed there. That was the only business of the corporation being carried on there. It was incidental and collateral to the business of the corporation, which it was organized to carry on and which it was conducting, and constituted no part of its manufacturing business or operations. The bill filed in the Southern District alleged the involved financial condition and difficulties of the corporation; its large indebtedness, which it was unable to meet; that a suit had been brought against it, and that others were threatened; and various other facts showing a necessity for the appointment of a receiver, not of the assets and small rented offices in the city of New York, but of the corporation and all its assets and property, of every name, everywhere, and the taking thereof by such receiver for the purpose of protecting and conserving such assets and property. It was not an action in personam, or to recover a personal judgment against the defendant, and did not purport to be such, but was and is what is known as an action to conserve assets, and one looking to the sale of all the property. This was the object of the action and such was the subject-matter involved. That bill was silent as to the location or situs of the property of the defendant corporation, except it stated that the defendant had *an* office in the city of New York.

Later, when the question of jurisdiction was raised, an amendment to that bill was filed, alleging that the bank account mentioned was in the city of New York, and that defendant had a lease for a term of years of the three offices mentioned. Another creditor intervened in that suit specially to raise the question of jurisdiction, and did raise it, and moved to dismiss on the ground of want of jurisdiction in the District Court of the Southern District of New York of the subject-matter of the suit. That motion has been denied on the grounds, as I read the memorandum of opinion, that an intervening creditor cannot raise the question, as defendant appeared and submitted to the jurisdiction, and that there was some property in the Southern District, to wit, the lease of the three rooms and the bank account, when the bill was filed, over which that court had and has jurisdiction, and hence that it has jurisdiction, not only of the defendant, but of the subject-matter of the suit. The learned judge who heard and decided the motion, and who wrote the memorandum referred to, seems to concede that the court in the Southern District had and has no jurisdiction over the property in the Northern District, but contends that by ancillary proceedings and the appointment of ancillary receivers in

the Northern District the whole property and subject-matter should, can, and will be brought in and acted upon in the Southern District. If this be so, then actions of a local nature and character occupy the same position, as to jurisdiction, as do actions in personam, substantially.

[1] Questions of jurisdiction in the United States courts are not free from perplexities. Article 3, § 1, of the Constitution provides that—

"The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."

Section 2 of the same article provides that—

"The judicial power shall extend to all cases, in law and equity * * * between citizens of different states," etc.

These are limitations on the judicial power. Pursuant to the authority thus conferred, Congress has established in each of the states of the United States one or more judicial districts (Judicial Code [Act March 3, 1911, c. 231] c. 5, §§ 69–115, 36 Stat. 1105–1130 [Comp. St. 1916, §§ 1051–1106]), and has also divided the United States into judicial circuits. The boundaries of these districts and circuits are defined. The Congress has also provided for the appointment of one or more District Judges in each of such judicial districts (chapter 1, § 1, Judicial Code [Comp. St. 1916, § 968]), and for the appointment of Circuit Judges in each of the judicial circuits. Each District Judge must be an actual bona fide resident of the district in and for which appointed. The jurisdiction of each of these District Courts is coextensive with the boundaries of the judicial district in and for which it is established or created, and extends no further, except in those cases where the Congress has expressly extended it. The Judicial Code points out these cases.

The District Judges so appointed cannot act as such and exercise their judicial powers and functions outside their respective districts, except in those cases specially provided for by acts of Congress, and these cases are pointed out in the Judicial Code. "The circuit court (now District Court) of each judicial district sits within and for that district, and its jurisdiction as a general rule is bounded by its local limits." Toland v. Sprague, 12 Pet. 300, 328 (9 L. Ed. 1093); Devoe Mfg. Co., Petitioner, 108 U. S. 401, 2 Sup. Ct. 894, 27 L. Ed. 764; Barrett v. United States, 169 U. S. 218, 221, 18 Sup. Ct. 327, 42 L. Ed. 723.

[2] There is a well-defined distinction between actions in personam and actions of a local character or nature, where the court and judgment or decree is to act upon specific real property or property of a fixed nature or character. There is such a thing as jurisdiction of the person which can be given by consent of the defendant, he waiving his right to be sued in a given district, and there is such a thing as jurisdiction of the subject-matter of the suit, which cannot be conferred on any court by either assumption of jurisdiction or by consent of the parties, or of either or any of them, or by request of all

the parties to the suit. Minnesota v. Northern Securities Co., 194 U. S. 48, 62, 24 Sup. Ct. 598, 48 L. Ed. 820; Mansfield, etc., v. Swan, 111 U. S. 379, 4 Sup. Ct. 510, 28 L. Ed. 462; Parker v. Ormsby, 141 U. S. 81, 11 Sup. Ct. 912, 35 L. Ed. 654.

[3] When diversity of citizenship is the ground of federal jurisdiction, if diversity of citizenship does not in fact exist, there is an entire absence of jurisdiction, which cannot be waived by the parties, and the court will dismiss of its own motion. Shaw v. Quincy, etc., 145 U. S. 444, 12 Sup. Ct. 935, 36 L. Ed. 768; Empire Coal Co. v. Empire Mining Co., 150 U. S. 163, 14 Sup. Ct. 66, 37 L. Ed. 1037.

[4] Section 52 (chapter 4) of the Judicial Code (Comp. St. 1916, § 1034) provides that—

"When a state contains more than one district [and New York contains four districts], every suit not of a local nature, in the District Court thereof, against a single defendant, inhabitant of such state, must be brought in the district where he resides; but if there are two or more defendants, residing in different districts of the state, it may be brought in either district, and a duplicate writ may be issued against the defendants, directed to the marshal of any other district in which any defendant resides."

This provision relates to suits and actions in personam, and excludes actions of a local nature. In suits not of a local nature, if there be but one defendant, he may waive being sued in the wrong district, or consent to being sued anywhere; but when there are two or more defendants, residing in different districts of the state, then to reach the defendants not residing in the district where the suit is brought it must be brought as the statute directs, unless the other defendants waive or consent.

[5-14] Section 54 of the Judicial Code (Comp. St. 1916, § 1036) provides for the bringing of a suit of a local nature when the defendant resides in a different district in the same state from that in which the suit is and must be brought, for suits of a local nature must be brought in the district in which the subject-matter of the suit is located or situated, and section 54 provides that in such case the plaintiff may have original and final process against the defendant in any district of the state in which such defendant resides.

Then comes section 55 of the Judicial Code (Comp. St. 1916, § 1037), which reads as follows:

"Any suit of a local nature, at law or in equity, where the land or other subject-matter of a fixed character lies partly in one district and partly in another, within the same state, may be brought in the District Court of either district; and the court in which it is brought shall have jurisdiction to hear and decide it, and to cause mesne or final process to be issued and executed, as fully as if the said subject-matter were wholly within the district for which such court is constituted."

Here we have a provision for the bringing of a suit of a local nature in either of two or more districts in the same state, and such right and jurisdiction is limited to cases where "the land or other subject-matter of a fixed character lies partly in one district and partly in another, within the same state." This means of course the land and buildings thereon which, as here, is the subject-matter of the suit, or, if there be no land, when the subject-matter is of a fixed character,

such as fixtures attached to real estate, or buildings or structures rightfully erected on land not owned by the party, and which may be removed by the party erecting them. In such a case the suit may be brought in either district of the state where such property—"subject-matter"—is in part situated. Leasehold interests in land are personal property. Eidman v. Baldwin, 206 Fed. 428, 430, 124 C. C. A. 310 (C. C. A., 2d Circuit). A lease of real estate for a term of years is personal property. Broadwell v. Banks (C. C.) 134 Fed. 470.

In 3 Pom. Eq. Jur. § 1318, it is said:

"Where the suit is strictly local, the subject-matter specific property, and the relief, when granted, such that it must act directly upon the subject-matter, and not upon the person of the defendant, the jurisdiction must be exercised in the state where the subject-matter is situated. Northern Indiana R. Co. v. Michigan Cent. R. Co., 15 How. 233, 242 [14 L. Ed. 674]."

In Baltimore Building & Loan Association v. Alderson, 90 Fed. 142, 32 C. C. A. 542, the case and holding of the court was as follows:

"A resident and citizen of Maryland, who was a stockholder in a West Virginia corporation, brought a suit in the federal court in West Virginia against the corporation for the appointment of a receiver for its property, which was situated in Maryland, with authority to complete and furnish an unfinished hotel building thereon, and to issue receiver's certificates therefor. Lienholders who were citizens of Maryland were made defendants, but in an amended bill only the corporation was named as defendant. A receiver was appointed, who completed the building, issuing receiver's certificates for the cost. The Maryland lienholders, on their application, were permitted to become parties and to prove their liens. Under a subsequent order the property was sold, and an order distributing the proceeds made, which gave the receiver's certificates priority. *Held*, that the lienholders were necessary parties to the suit, and being citizens of the same state as complainant, and the property being situated outside of its district, the court was without jurisdiction, and the entire proceedings were coram non judice and void."

That decision rests in fact on the proposition that the federal court in the district of West Virginia where the corporation was domiciled had no jurisdiction over the real property of such corporation situated in the state of Maryland and could not confer power on its receiver appointed in West Virginia to incumber that property by receiver's certificates. The court said:

"It is more questionable whether the court in this case could put its receiver in control of realty situate in another district. * * * But an order appointing a receiver of realty has no extraterritorial operation, and cannot affect the title to real property which is located beyond the jurisdiction of the court by which the order was made. See Schindelholz v. Cullum, 5 C. C. A. 301, 55 Fed. 885, and 12 U. S. App. 242. See, also, Booth v. Clark, 17 How. 322 [15 L. Ed. 164]. In the case before us a receiver was appointed solely to take charge of and manage realty in another district, notwithstanding the fact that certain indispensable parties were not within the jurisdiction of the court. An order for sale of the same realty was made; the property not being within the jurisdiction, and the parties not being legally present. The suit was of a local nature; its object being, as stated in the original bill, to have a receiver appointed to take charge of an hotel in Maryland, with authority to borrow money on receiver's certificates to complete and furnish it, and then to lease it to a tenant. The amended bill, filed after the issue of the receiver's certificates, states its object to be the continuance of the possession and charge of the hotel property by the receiver until the sale

asked for was had. The whole proceeding was coram non judice. The receiver was authorized to incumber property, outside of the judicial district of the court which appointed him, with debts declared to be prior to the vested liens; the holders of these liens not consenting, and not being within the jurisdiction of the court."

In Schindelholz v. Cullum, 55 Fed. 885, 889, 5 C. C. A. 293, 301, the court said:

"But an order appointing a receiver of realty has no extraterritorial operation, and cannot affect the title to real property which is located beyond the jurisdiction of the court by which the order was made. Booth v. Clark, 17 How. 322-328 [15 L. Ed. 164]. Such orders, therefore, only operate in personam, and upon those persons who are so related to the court, either as parties to the litigation, or by virtue of residence and citizenship, that they are bound to yield obedience to its orders."

In 1 Clark on Receivers, p. 78, § 53, the same is said.

In 34 Cyc. 484, it is said:

"And the rule, broadly stated, may be said to be that a receiver's power is only coextensive with that of the court which gave him his character, and cannot be asserted as a matter of right beyond the territorial jurisdiction of such court."

In Booth v. Clark, 17 How. 322, 328 (15 L. Ed. 164), it is held:

"An order appointing a receiver of realty has no extraterritorial operation, and cannot affect the title to real property which is located beyond the jurisdiction of the court by which the order was made."

This case of Booth v. Clark was expressly approved in Hale v. Allinson, 188 U. S. 56, 68, 23 Sup. Ct. 244, 47 L. Ed. 380, and again in Great Western M. & M. Co. v. Harris, 198 U. S. 561, 574, 576, 577, 25 Sup. Ct. 770, 49 L. Ed. 1163. In its opinion in the Harris Case the Supreme Court says:

"It will thus be seen that the decision in Booth v. Clark rests upon the principle that the receiver's right to sue in a foreign jurisdiction is not recognized upon principles of comity, and the court of his appointment can clothe him with no power to exercise his official duties beyond its jurisdiction. The ground of this conclusion is that every jurisdiction, in which it is sought by means of a receiver to subject property to the control of the court, has the right and power to determine for itself who the receiver shall be, and to make such distribution of the funds realized within its own jurisdiction as will protect the rights of local parties interested therein, and not permit a foreign court to prejudice the rights of local creditors by removing assets from the local jurisdiction without an order of the court or its approval as to the officer who shall act in the holding and distribution of the property recovered. * * * It is doubtless because of the doctrine therein declared that the practice has become general in the courts of the United States, where the property of a corporation is situated in more than one jurisdiction, to appoint ancillary receivers of the property in such separate jurisdictions. It is true that the ancillary receiverships are generally conducted in harmony with the court of original jurisdiction, but such receivers are appointed with a view of vesting control of property rights in the court in whose jurisdiction they are located. If the powers of a chancery receiver in the federal courts should be extended so as to authorize suits beyond the jurisdiction of the court appointing him, to recover property in foreign jurisdictions, such enlargement of authority should come from legislative and not judicial action."

In Northern Ind. R. Co. v. Mich. Cent. R. Co., 15 How. 233, 242 (14 L. Ed. 674), the court said:

"The jurisdiction of the Circuit Court of the United States is limited to controversies between citizens of different states, except in certain cases, and to the district in which it sits. In this case we shall consider the question of jurisdiction in regard to the district only. In all cases of contract, suit may be brought in the Circuit Court where the defendant may be found. If sued out of the district in which he lives, under the decisions he may object; but this is a privilege which he may waive. Wherever the jurisdiction of the person will enable the Circuit Court to give effect to its judgment or decree, jurisdiction may be exercised. But wherever the subject-matter in controversy is local, and lies beyond the limit of the district, no jurisdiction attaches to the Circuit Court, sitting within it. An action of ejectment cannot be maintained in the district of Michigan for land in any other district. Nor can an action of trespass quare clausum fregit be prosecuted, where the act complained of was not done in the district. Both of these actions are local in their character, and must be prosecuted where the process of the court can reach the locus in quo."

In the instant case the real property, plant, and business of the defendant corporation is not where the process or judgment of the court in the Southern District can reach it, for it is beyond its jurisdiction in the Northern District of New York. The District Court in the Southern District cannot take possession of and run that business and plant, for no part of it is in that district.

These cases settle beyond all controversy the proposition that the receivers appointed in the District Court in the Southern District of New York had no right or power to take possession of the property and business of the defendant corporation in the Northern District, or to execute and deliver receiver's certificates and make them a lien or charge on the property of such corporation situate in that district.

It is equally clear that the District Court in the Southern District of New York is not the court of main and principal jurisdiction. It will hardly be contended, I think, that a creditor, by going with the defendant, a corporation, and represented by its president, into a district where it does no business, such as it was organized to carry on at its domicile in another district in the same state, and where it has no property, except a small bank account, and where it rents two or three small offices for selling stock of the company, and there in the district foreign to its domicile, acting in concert with defendant, obtaining the appointment of a receiver, draws to the court of that district the main and controlling power and jurisdiction in administering the assets and affairs of the corporation, when it appears and cannot be denied (1) that the domicile of the defendant corporation was and is in such other district; (2) that at such domicile in such other district the main offices and place of business were and are located in fact and by the article of incorporation; (3) that in such other district all the real estate and personal property of the corporation, except a small bank account and a lease of three small office rooms, such property at the domicile aggregating in value from $300,000 to $500,000, was and is situated; and (4) that all its manufacturing, it being a manufacturing corporation, was and is carried on at such domicile in such other district.

This suit is one to conserve and protect the assets of the corporation and to protect all interests, and it would seem plain enough that such a suit is one of a local nature, as the avowed purpose of the bill is, through a receiver, to take hold of, protect, and preserve the assets, real and personal, carry on the business, and it may be dispose of same and distribute the proceeds to creditors and stockholders. The object of the action cannot be accomplished, unless the court takes the property into its custody and possession, and this it cannot do unless it has jurisdiction of it, power to take hold and manage it, and dispose of it, not merely direct the corporation in the matter as to its management and disposition. The court must operate on the property itself directly, and not by directing and coercing the defendant corporation. In V. & G. R. Co. v. Atlanta & F. R. Co. (C. C.) 49 Fed. 608, 15 L. R. A. 109, it was expressly held that such an action is one of a local nature. In Pomeroy's Equity Jurisprudence (3d Ed.) § 1318, it is said:

"On the other hand, where the suit is strictly local, the subject-matter is specific property, and the relief when granted is such that it must act directly upon the subject-matter, and not upon the person of the defendant, the jurisdiction must be exercised in the state where the subject-matter is situated."

Such is this case. On this subject, see Columbia River Packers' Ass'n v. McGowan, 219 Fed. 376, 377, 134 C. C. A. 461, where jurisdiction was sought to be sustained over property in another district and state on the ground the court had jurisdiction of the parties. The court held jurisdiction of the parties did not give jurisdiction of the subject-matter of the suit.

We come, then, to the remaining proposition: Was there any property of a fixed nature or character, within the meaning of the statute, in the Southern District of New York, where the suit was instituted, for, if not, there was no jurisdiction, as the suit could not be brought there by consent of defendant? That a bank account is property of a fixed nature or character cannot be claimed with any degree of plausibility. The money deposited becomes the property of the bank, and the relation between the bank and depositor is simply that of debtor and creditor. The bank in which the alleged $4,000 was deposited owed the defendant corporation that amount of money. The debt is a mere chose in action, and not property of a fixed character, within the meaning of the statute.

What of the lease of the three small rooms in one of the large office buildings of the city? On the appointment of receivers they are at liberty to take possession of rooms rented, and occupy until they shall determine whether to retain or abandon, or to abandon at once. They are under no obligation to retain and occupy. It is not even shown or alleged here that they could assign—that is, sell the lease. It is not shown it was a written lease. If assignable, such a lease can be sold like any other article of personal property, for it is personal property, as we have seen, and if not assignable, or whether assignable or not, it is optional with the receivers to abandon it. Sunflower Oil Co. v. Wilson, 142 U. S. 313, 322, 12 Sup. Ct. 235, 35 L. Ed. 1025; Quincy, etc., Railroad Co. v. Humphreys, 145 U. S. 82, 99, 12 Sup.

Ct. 787, 36 L. Ed. 632; 1 Clark on Law of Receivers, p. 597, § 521; Dietrich v. O'Brien, 122 Md. 482, 89 Atl. 717; Empire Distilling Co. v. McNulta, 77 Fed. 700, 23 C. C. A. 415; In re Mullings Clothing Co., 238 Fed. 58, 65, 151 C. C. A. 134, L. R. A. 1918A, 539; Intercontinental Rubber Co. v. Boston & M. R. R. (D. C.) 245 Fed. 127. The lease is a mere contract, which the receiver in equity cases may affirm or disaffirm. Penn Steel Co. v. N. Y. City Ry. Co., 198 Fed. 721, 728, 117 C. C. A. 503 (C. C. A., 2d Circuit), and cases cited in 1 Clark on Receivers, p. 597. I am unable to find any case, and am not pointed to any, where it is held that a lease of rooms is "property of a fixed nature or character." Property of a fixed character must be of the kind known as "personal property of an immovable character." 32 Cyc. 666, where it is said:

"To define personal property as consisting of movables is not, even in the sense of things personal, strictly accurate; for there may be personal property of an immovable character, such as growing crops, standing trees, sold, but not actually severed from the soil, and buildings and other structures affixed to the soil, but with the understanding that they may be removed."

In this case creditors with upwards of $100,000 of claims against the defendant corporation are protesting in this court, and challenging the jurisdiction of the United States District Court in the Southern District of New York to appoint receivers of and over the property of the defendant in the Northern District of New York, and take possession of, manage, and eventually sell same, and administer the proceeds, or to authorize receiver's certificates and make same a lien or a charge on such real property. These creditors claim and insist that the court in the Northern District of New York, where substantially all the property is situated, and where all of the real property and all the property of a fixed character is situated, and where the domicile of the corporation is, and where all the manufacturing business is being carried on, cannot and should not entertain or exercise any ancillary jurisdiction, treating the District Court in the Southern District of New York as a court of original and primary jurisdiction, and its orders of any validity whatsoever, and so merely ratify, or undertake to ratify, and approve and validate orders made in that district respecting the property in the Northern District and receiver's certificates issued under such orders.

These creditors insist that this court cannot under the circumstances validate such orders and that on a proper bill in equity it should exercise its own primary and independent jurisdiction over the subject-matter, and that if it does not it is refusing to perform its duty, exercise its jurisdiction, and is abrogating in favor of the District Court in the Southern District, a thing it cannot legally do. That course of exercising original jurisdiction this court has offered to pursue, and is willing to pursue, and regards it its duty to pursue, but is met by the proposition that, if it acts at all, it must exercise ancillary powers and jurisdiction only, and treat the court in the Southern District of New York as the court of principal and primary jurisdiction, and recognize the power and jurisdiction of that court to appoint receivers of the property in the Northern District, to manage it under direction of that court and authorize them to issue receiver's certificates (which

they have done) and make such certificates a charge and lien on such property in the Northern District.

It is also insisted that as the defendant corporation has voluntarily appeared in the suit brought in the Southern District and admitted all the allegations of the complaint, the question of jurisdiction and power of that court cannot be raised or questioned by other creditors, and that this court cannot take notice of the facts when brought to its attention; in other words, that it must exercise an ancillary jurisdiction only, and in a suit the subject-matter of which is wholly in the Northern District, for the reason the defendant corporation consented to be sued in the Southern District and has appeared and submitted to the jurisdiction. This, of course, assumes that the consent of the defendant gave jurisdiction to the court in the Southern District over a subject-matter not otherwise within its jurisdiction, but constituting a local action, and which subject-matter is wholly in the Northern District. This I do not understand to be the law. It is the duty of this court to exercise its power and jurisdiction, when it has jurisdiction and is properly called upon to act, and to exercise its discretion the one way or the other in discretionary matters. A court can be compelled to act the one way or the other in matters properly before it, for it is its duty so to do; but it cannot be compelled to make a particular or specific decision one way when it has power or discretion to act the other.

Phelps v. McDonald, 99 U. S. 298, 308, 25 L. Ed. 473, may be misleading, unless properly read in connection with the facts. That was a suit to compel the doing by defendant of a certain act with respect to certain property not within the jurisdiction of the court, and the court held that in such case the defendant, who was within the jurisdiction of the court, could be compelled to obey the order of the court respecting same. The syllabus properly expresses the breadth and effect of the decision. That was not an attempt by the court in a suit in equity to take possession of, hold, manage, and dispose of property, real and personal, which was beyond its jurisdiction for the benefit of creditors and stockholders, but to act on the person of the defendant. Such, also, are the cases of Philadelphia Co. v. Stimson, etc., 223 U. S. 605, 32 Sup. Ct. 340, 56 L. Ed. 570; and Stone v. United States, 167 U. S. 178, 17 Sup. Ct. 778, 42 L. Ed. 127. An action to restrain a trespass is quite different from an action to recover the value of timber.

In Picuet v. Swan, 5 Mason, 35, 40, Fed. Cas. No. 11134, Story, J., said:

"A court created within and for a particular territory is bounded in the exercise of its power by the limits of such territory. It matters not whether it be a kingdom, a state, a county, or a city, or other local district. If it be the former, it is necessarily bounded and limited by the sovereignty of the government itself, which cannot be extraterritorial; if the latter, then the judicial interpretation is that the sovereign has chosen to assign this special limit, short of his general authority. It was doubtless competent for Congress to have authorized original as well as final process to have issued from the Circuit Court and run into every state of the Union. But it has conferred no such general authority." We must, therefore, determine the territorial extent of the jurisdiction of the federal courts from the United States statutes and decisions.

And in that case, as in Johnson v. Gibson, 116 Ill. 294, 6 N. E. 205, and Tenth Nat. Bank v. Construction Co., 227 Pa. 354, 362, 76 Atl. 67, 136 Am. St. Rep. 884, it is expressly held that—

"When a court of equity attempts to act directly upon property, whether real or personal, by its decree, it is, in the absence of statutory regulation, essential to the power of the court to act that the property to be affected be within the territorial jurisdiction of the court."

And in Johnson v. Powers, 139 U. S. 156, 159, 11 Sup. Ct. 525, 526 (35 L. Ed. 112), it is held:

"A judgment in rem binds only the property within the control of the court which rendered it."

"Courts may not seize property without jurisdiction, and then claim jurisdiction over the property because it is in the possession of the court." Hawes v. First National Bank, 229 Fed. 51, 59, 143 C. C. A. 645, 653 (C. C. A., 8th Circuit).

And in that case it is also held that—

"Where a court appointing a receiver had no jurisdiction, it cannot claim jurisdiction over the property seized without jurisdiction and pay costs and expenses of the receivership therefrom."

Also held:

"That although no question of jurisdiction was raised by the parties, it was the duty of the court to take notice of the defect." 1 Clark on Receivers, § 70, p. 97.

The fact that the receivers appointed by the District Court of the Southern District of New York have taken actual possession of the plant, real estate, and personal property of the defendant corporation at Fulton, in the Northern District of New York, and are running the plant, does not give that court jurisdiction, or even possession of the property; nor does that fact require this court in the Northern District, or authorize it, to exercise ancillary jurisdiction. The court in the Northern District has full and complete jurisdiction notwithstanding, if it had such jurisdiction in the first instance, and the court in the Southern District did not. It is the same question, viz.: Was there property of a fixed character in the Southern District? The property is still within the Northern District of New York, where it always has been. No part of that property has been removed to the Southern District.

Lewis et al. v. American Naval Stores Co. (C. C.) 119 Fed. 391, decided in December, 1902, is relied on by the complainant in this suit; but the case presents no such questions as are involved here. In that case the defendant, American Naval Stores Company, was a corporation organized under and pursuant to the laws of the state of New Jersey, but it carried on no business in that state, and, so far as appears, had no property in that state. This corporation had complied with the laws of the state of Alabama to enable it to do business in that state, and had designated a person there on whom service of process could be made. The assets of the corporation consisted of real estate, part of which was situated in the Southern District of Alabama and the remainder in the Eastern District of Louisiana. This fact

alone gave to the District Court of either district jurisdiction of the subject-matter, as we have seen. It also had personal property in Florida, Illinois, Kentucky, and Alabama. D. R. Lewis, a citizen of North Carolina, and W. P. Lewis, a citizen of the Southern District of Alabama, on the 25th day of September, 1902, filed a bill in equity in the United States Circuit Court of the Southern District of Alabama, where a substantial part of the real estate of the corporation and some of its personal property were located, and asked a receiver. The defendant American Naval Stores Company appeared in that action and filed its answer, admitting the allegations of the complaint and consenting to the appointment of a receiver. Thus there was jurisdiction in that court of both the defendant and of the subject-matter of the suit. A receiver was appointed September 26, 1902, by one of the Circuit Judges, pursuant to the prayer of the bill, and such receiver duly qualified. On that day, September 26th, an ancillary bill in the same matter for the same relief was forwarded to be filed by the same plaintiffs against the same defendants in the Eastern District of Louisiana, where the balance of the property of a fixed character, real estate, was located, and an order was made assuming ancillary jurisdiction and appointing the same receiver, etc. This ancillary bill was filed September 29th. September 29 and October 3, 1902, similar ancillary bills were filed by the same plaintiffs in the United States District Courts for Mississippi, Kentucky, and Illinois, where personal property was located. In all these proceedings the defendant corporation appeared and answered, admitting the allegations of the complaint. The creditors of the defendant were all in Florida, Alabama, and Louisiana. The same receiver was appointed in the several ancillary suits as in the main suit in Alabama. September 26, 1902, one Pearce, a citizen of Alabama, filed a petition against such defendant corporation, also asking the appointment of a receiver, in the state court of Louisiana, and, service as required by the laws of that state having been made, a receiver was appointed by the state court of Louisiana, on the 27th day of October, 1902. On the 30th day of October, 1902, said Pearce filed a bill against the same defendant in the United States Circuit Court for the District of New Jersey. In that suit he described the proceedings in the other suits above mentioned, both in the state court of Louisiana and the several Circuit Courts of the United States, and the Circuit Court of the District of New Jersey appointed a receiver of the property of the defendant.

It is self-evident, I think, that the main and primary jurisdiction was in the United States District Court for the Southern District of Alabama. True, the jurisdiction of that court did not reach to real estate or property in other states or districts, and hence the necessity and propriety of the ancillary suits. The subsequent suit in the United States District Court of the District of New Jersey, where the corporation had no property and had not done any business, brought by Pearce, who had also brought suit in the state court of Louisiana, did not in any way affect that jurisdiction over the subject-matter situate in Alabama, or of the ancillary actions as to property in other states where commenced, there being property in each of such jurisdictions.

The subsequent suit at the actual place of incorporation and domicile of the defendant corporation did not and could not give that court jurisdiction over the real and personal property of the corporation situated in other jurisdictions, where the courts having jurisdiction of both the parties and subject-matter had taken actual possession of the property and were proceeding to administer it. The controversy arose between the receiver appointed by the District Court in Alabama and by the courts mentioned in other states, who in ancillary actions in those courts appointed the same receiver, and the receiver appointed by the state court in Louisiana and later by the District Court of New Jersey. It will be noted that the ancillary bill was filed in the United States District Court of Louisiana September 29, and the receiver appointed there and that the receiver in the state court of that state was not appointed until October 30, 1902. In the meantime the receiver appointed by the United States District Court in Louisiana had qualified and become entitled to the possession of the property in that state, so that it was legally in the custody of that court and lawfully so. The court held:

"The Alabama federal court first obtained jurisdiction by the filing of the bill and service of process, and by first appointing a receiver, and also by obtaining, through its receiver, actual possession of the property involved before the filing of the petition and service of process thereon in the state court. By the application, therefore, of any one of the rules stated, the Alabama federal court first acquired jurisdiction; and, having acquired jurisdiction of the controversy, and possession, through its receiver, of the property involved, the subsequent proceedings and decree in the state court conferred no authority or right on the receiver appointed by the latter court to take or obtain by suit the possession of the property. Gluck & B. Rec. (2d Ed.) 97."

This, of course, was right, and accords with all the decisions.

In the instant case, if it could be properly held that the District Court of the Southern District of New York had jurisdiction to appoint receivers of the real and personal property of the defendant corporation situated in the Northern District of New York, and authorize them to take possession of and incumber same by issuing receiver's certificates, that would end this controversy; for, while it might be necessary to take ancillary proceedings, the proceedings in the Northern District in their very nature would be ancillary to the primary suit and in aid of that court. The court in that district would have jurisdiction of the parties and of the subject-matter of the suit, and in such case "jurisdiction to hear and decide the suit and cause mesne or final process to be issued and executed as fully as if the said subject-matter were wholly within" that district. The difficulty is, as I view the case, that the District Court of the Southern District had and has no jurisdiction whatever over the property of the defendant in the Northern District, for the reason there was no real estate or other subject-matter of a fixed character belonging to the defendant in the Southern District, and hence the suit could not be brought there, even by consent of the defendant, it being of a local character, inasmuch as the property to be seized and acted upon was real and personal, that is, of a mixed character, and situated wholly in the Northern District. Section 55, Judicial Code.

If the District Court of the Southern District of New York had jurisdiction of this suit, that is, if "the land or other subject-matter (of the suit) of a fixed character" did lie partly in the Southern District, the remainder being concededly in the Northern District, I do not see any necessity for action by the court in the Northern District, for in such a case the suit—

"may be brought in the District Court of either district; and the court in which it is brought shall have jurisdiction to hear and decide it, and to cause mesne or final process to be issued and executed, as fully as if the said subject-matter were wholly within the district for which such court is constituted."

That is, the fact that such real estate or subject-matter of a fixed character exists and is situated partly in the one district and partly in another of the same state gives to the court of either district full power to hear, try, and determine the case and issue mesne or final process. This must mean that the court exercising jurisdiction has full power to make interlocutory orders and decrees, as well as final ones, in the case and respecting the property. Section 55 of the Judicial Code (Comp. St. 1916, § 1037) gives full and complete jurisdiction to either court in such case. This is the plain purpose of the section, which is but a re-enactment of section 742, R. S. U. S., which was enacted May 4, 1858.

It seems to me this matter may be summarized thus:

1. This is a local action; that is, "a suit of a local nature" in equity.

2. The land and subject-matter of a fixed character lies wholly in the Northern District of New York, and no part of it lies in the Southern District of New York.

3. A bank account or a lease of two or three rooms for subsidiary office purposes does not constitute a subject-matter of a fixed character, within the meaning of section 55, Judicial Code.

4. The domicile or residence of the defendant was and is in the Northern District of New York, where its actual business offices and books are.

5. The subject-matter of the action is real estate and personal estate, and jurisdiction of the subject-matter of the suit could not be given and was not given to the District Court in the Southern District by the appearance there and answer of the defendant admitting all the allegations of the complaint.

6. The District Court in the Southern District of New York had and has no jurisdiction of the subject-matter of the action.

7. The District Court of the Northern District of New York cannot lawfully exercise ancillary jurisdiction in that suit, as the exercise of ancillary jurisdiction presupposes jurisdiction in the Southern District.

8. When want of jurisdiction of the court in the main suit appears it is the duty of the court asked to exercise ancillary jurisdiction to raise the question itself and decline to act if want of jurisdiction in that court appears. Conklin v. United States Shipbuilding Co. (C. C.) 123 Fed. 913, 917.

[15] In that case Judge Putnam, of the First Circuit, was asked to exercise ancillary jurisdiction and confirm the appointment of a receiver, and he said (page 917):

"The first substantial question I have to consider is whether the Circuit Court for the District of New Jersey had jurisdiction in equity on the bill filed there."

Stewart v. Laberee, 185 Fed. 471, 109 C. C. A. 351, has nothing to do with the vital questions presented here. In that case a railroad corporation organized under and pursuant to the laws of the state of Washington constructed, owned, and operated a railroad in Alaska, and the railroad company owned and operated a construction company, which was also operated with its property in Alaska. An equity suit similar to the one here was brought in the District Court of the District of Alaska, and a receiver of all its property appointed by that court. The court had jurisdiction, not only of the parties, but of the subject-matter of the suit. The order appointing the receiver directed the officers of the companies to turn over to the receivers all the property of the companies, including bills, notes, accounts, and books. The defendant Laberee had been treasurer of the construction company in Alaska, and it was claimed he was indebted to it in the sum of $22,000. To recover this sum the receiver brought suit in the District Court of Alaska. Defendant pleaded that he had settled with the construction company by giving to it his notes for $6,000, and on the trial he produced notes to the company for $6,000, marked "Canceled," but at a date several months subsequent to the appointment of the receiver, and also a resolution of the board of trustees of the construction company, passed several months later, ratifying and approving the settlement of the notes for $6,000. This was the only evidence of authority to make the settlement, and there was no evidence the notes were ever delivered to the corporation, or that its manager had authority to make the settlement. This resolution of confirmation and ratification was passed at Seattle, Wash., where the company was incorporated.

The court held that the settlement, if made, was in violation of the rights of the railroad company and its creditors, and of the order appointing the receiver, which order required the notes, if in existence, to be turned over to the receiver, and that a finding by the trial court in Alaska that the alleged settlement, if made, was fraudulent and void, was warranted by the evidence. If the case is of any importance here, it is in that it holds the court in Alaska, where the companies were doing business, and where all the property was located, and where jurisdiction was obtained of both companies and also of their officers, had jurisdiction to appoint the receiver and require the delivery to him of the property, including the notes in question. This was, of course, true. That court had jurisdiction of the officer owing the debt, and he could not, after the receiver was appointed, go to the state of Washington and there settle a cause of action against him belonging to the corporation in violation of such order of the court.

The case of Horn v. Pere Marquette R. Co. (C. C.) 151 Fed. 626, has been cited as authority for the proposition that the District Court in the Southern District of New York has jurisdiction in the instant case, but, far from it, for it is a decision sustaining each proposition herein stated. That was a suit in equity concerning a railroad running through two districts of the same state, Michigan (see page 631), and the ob-

ject of the bill was the same as here. Judge Lurton held that the suit was one of a local nature, and cited East Tenn., etc., R. Co. v. Atlanta, etc., 49 Fed. 608, 15 L. R. A. 109, supra, and Goddard v. Mailler (C. C.) 80 Fed. 422 (see pages 632, 633); that diversity of citizenship existed, as Horn was not a citizen of Michigan (page 630); that the question of being sued in the right district was out of the way, as the defendant appeared voluntarily and answered, admitting the allegations of the complaint (page 630); that the bill was one to place a great system of going railway, whose lines covered each of the Michigan districts, in gremio legis, and have same preserved and operated, etc. (page 631); that is, that the property which was the subject of the suit was situated partly in one district and partly in another district of the same state, part in the district where the suit was brought, and hence the case was covered by and within the provisions of section 742, R. S. U. S., now incorporated into the Judicial Code as section 55, and hence the learned judge said:

"Horn's bill was undoubtedly one which might be filed in either of the Michigan districts."

And (see the same page) the judge also held that on such facts jurisdiction of both the person and subject-matter of the suit, which lay in two districts of the same state, existing ancillary bills were not necessary. The second subdivision of the syllabus may be misleading, if we assume it is implied that jurisdiction of the subject-matter in a local action is given when wholly without the district wherein the suit is brought, provided the defendant appears and answers. The case itself does not so hold or suggest.

City of Shelbyville, Ky., v. Glover, 184 Fed. 234, 237, 106 C. C. A. 376, is another case where the property, the subject of the action, was partly in one district and partly in another district of the same state, and the action was local in its nature.

This court holds that on the papers it appears conclusively that the suit is one of a local nature and character, and that all the land and subject-matter of the suit of a fixed character is located and situated wholly in the Northern District of New York, and does not lie partly in the Southern District of New York, and hence this court should not and cannot properly exercise ancillary jurisdiction; and, further, that if it be true that any part of the land or other subject-matter of the suit lies partly in the Southern District of New York there is no necessity for the exercise by this court of ancillary jurisdiction or power in the suit brought in that district, as in such case the court in the Southern District has full and complete power and jurisdiction over the parties and subject-matter of the suit.

This is an important matter. It involves hundreds of thousands of dollars and the title to real estate of great value. The court in the Northern District, as we have seen, cannot validate invalid orders made by the court in the Southern District, or validate invalid receiver's certificates by ancillary proceedings.

This court is also of the opinion that, as all creditors of the defendant corporation are invited by the ancillary bill to come in and become

parties to this suit, and have the right to come in, when they do come in and find the facts are such that there is no jurisdiction to proceed and take possession of the property and run the business, and do the things necessary to be done to carry on the suit and accomplish the purposes sought to be accomplished, they may present the facts to the court, and at least call upon it to exercise its judicial power in the premises and refuse to make orders it has no power to make. It cannot be that creditors holding over $100,000 in valid claims against this corporation, by the action of one creditor acting with the defendant, have been precluded from having a proper suit brought in the proper district and valid orders and decrees made, or from objecting to the making of invalid ancillary orders and decrees in a suit where no jurisdiction exists. If this property is to be possessed and the business continued, or the property incumbered, it should be done pursuant to valid orders and decrees, and if it is to be sold it should be sold pursuant to a valid decree, made by a court having jurisdiction to pronounce it.

This court is not informed of any case in the Supreme Court of the United States holding that in such a suit as this, or of this character, the question of the jurisdiction of the court over the subject-matter may not be raised and brought to the attention of the court at any time and by any interested party. Is it possible that creditors who come into this suit may not raise the question of diversity of citizenship and want of jurisdiction, should it be discovered that plaintiff is an actual resident and citizen of the state of New York? May they not inform the court of that fact? If the defendant has admitted that the plaintiff was a nonresident, *it* may be precluded from raising the question; but does that bar other interested parties or the court itself? This is not a question of jurisdiction over the debtor corporation—Fulton Steel Corporation. The defendant has submitted to the jurisdiction, as it had the power to do. It is a question of the jurisdiction of the court over the subject-matter, real property, which the statute does not confer on the court in the Southern District, and which no consent can confer.

Nor is this a question of the sufficiency of the bill of complaint to confer equitable jurisdiction in the proper court. It is all-sufficient in that respect. The objection goes to the right and power of the court in the Southern District to entertain the suit and adjudicate as to and respecting the subject-matter. On the facts stated it appears that Congress has not conferred the jurisdiction, and by not conferring it such jurisdiction is denied to that court. In Horn v. Pere Marquette R. Co., supra, Judge Lurton said it would lead to absurd consequences if, after the defendant had submitted to the jurisdiction of the court, other parties coming in might "reopen the matter of jurisdiction over the debtor corporation." This is, of course, true. The learned judge had taken great pains to show jurisdiction of the subject-matter. The right to be sued in a particular district or state is personal, and may be waived (Pollard v. Dwight, 4 Cranch, 421, 2 L. Ed. 666; St. Louis, etc., Railway v. McBride, 141 U. S. 131, 132, 11 Sup. Ct. 982, 35 L. Ed. 659); but jurisdiction over a subject-matter is not personal, and cannot be waived, or conferred by consent. So, if the question in an equi-

table suit be as to the sufficiency of the allegations to confer equitable jurisdiction, it must be raised at the earliest opportunity, as, "if a defendant in a suit in equity answers and submits to the jurisdiction of the court, it is too late for *him* to object that the plaintiff has a plain and adequate remedy at law." Brown v. Lake Sup. Iron Co., 134 U. S. 530, 536, 10 Sup. Ct. 604, 606 (33 L. Ed. 1021). In that case, in stating the rule, the court adds what is the law and what makes the true rule:

"The above rule must be taken with the qualification that it is competent for the court to grant the relief sought, and that it has jurisdiction of the subject-matter."

In Cincinnati Equipment Co. v. Degnan, 184 Fed. 834, 842, 107 C. C. A. 158, 167, the headnotes give the rule without the qualification stated, but in the case itself the judge who wrote the opinion says:

"True, as stated in Brown v. Lake Superior Iron Co., the subject-matter must be within the jurisdiction of the court."

And also:

"We are therefore constrained to hold, for the purposes of this case, that the court below through diversity of citizenship obtained jurisdiction, not only of the parties to the original suit, but also of a subject-matter equitable in its nature and embracing admitted facts sufficient to justify the appointment of the receiver."

This court must decline to grant any ancillary order in the suit which recognizes jurisdiction in the District Court of the Southern District over the subject-matter of the suit, situated as it is in the Northern District, as it has no power so to do. To make orders as a matter of comity, which this court would be glad to do, and willingly would do, were it a question of comity, and not of jurisdiction, would only involve the situation, delay action, precipitate litigation, add expense, and, in the opinion of the court, result in disaster to a corporation and its property, when it is and should be the desire of all concerned to conserve and rescue the corporation from its financial difficulties if possible—at least bring about a successful operation of the business while in the hands of the court, and secure a sale, if necessary, at a fair price, and a division of the proceeds, without unnecessary diminution, amongst the creditors and stockholders entitled thereto.

In re DRAG et al.

Petition of HOLMES & KELSEY CO.

(District Court, E. D. Michigan, N. D. October, 1918.)

No. 441.

1. CHATTEL MORTGAGES ⊜235—SETTLEMENT—DISCHARGE.
Whether the giving of a second chattel mortgage was accompanied by such a settlement of the previously existing indebtedness as to constitute payment thereof, and discharge the first, *held* a question of fact, to be determined in the light of all the circumstances surrounding the transactions and showing the intention of the parties.

2. CHATTEL MORTGAGES ⊜124—AFTER-ACQUIRED PROPERTY—INCLUSION.
It is the rule in Michigan that a chattel mortgage does not include after-acquired property, unless a provision to that effect is expressly included in its terms, or unless the property to which it is added is so mingled with it as not to be readily distinguishable therefrom, so, where the first mortgage including after-acquired property was discharged, such property was not embraced within the second mortgages as they did not expressly include the same.

3. CHATTEL MORTGAGES ⊜101—CONSTRUCTION—STATUTES APPLICABLE.
A chattel mortgage having been executed and performed within the state of Michigan, a bankruptcy court, in determining rights thereunder, will follow the decisions of the court of that state concerning the construction and effect of the instrument.

4. BANKRUPTCY ⊜293(4)—JURISDICTION.
Where a creditor, who claimed under its chattel mortgage exemptions to which the bankrupts were entitled out of the firm property, consented that the bankruptcy court might take possession of the property pending determination of its rights, *held* that, the bankruptcy court having properly acquired jurisdiction over such property, it might retain the same in order to determine the rights of the claimants.

5. BANKRUPTCY ⊜293(4)—JURISDICTION—CONSENT.
Where a creditor voluntarily submitted its claim to property to the jurisdiction of the bankruptcy court, and not only agreed that the referee might determine its right to the proceeds of the sale of the property, but voluntarily appeared and participated in the hearing before the referee, *held*, that it could not thereafter urge that the referee was without jurisdiction.

In Bankruptcy. In the matter of the bankruptcy of Ole Drag and Jacob Svang, doing business as copartners under the firm name of Drag & Svang. Petition by the Holmes & Kelsey Company for review of an order of the referee denying the right of petitioner to enforce a chattel mortgage against the exemptions of the bankrupts. Order affirmed.

I. S. Canfield, of Alpena, Mich., for petitioner.
L. G. Dafoe, of Alpena, Mich., for bankrupts.

TUTTLE, District Judge. This is a petition for review of an order of one of the referees in bankruptcy denying the right of the petitioner, the Holmes & Kelsey Company, which is one of the creditors of the bankruptcy partnership, to enforce a chattel mortgage

against the exemptions of the bankrupts, now in the custody of the bankruptcy court.

In 1900 a partnership by the name of Ole Drag & Co., the predecessor in interest of the bankrupts, gave to the petitioner a chattel mortgage for $700, covering the stock of merchandise and fixtures then in its store, and also after-acquired additions to such stock, to secure an existing indebtedness of about $250 and future advances of about $450. In 1901 the mortgagor sold its business to the bankrupts, partners trading under the name of Drag & Svang, who took over the stock mentioned, subject to said chattel mortgage, which they assumed. In 1902 a settlement was made between the bankrupts and petitioner, and a new note was executed for $800, representing the indebtedness then existing from bankrupts to petitioner, and a new chattel mortgage was given to secure such indebtedness. This mortgage covered the stock of goods and merchandise then owned by the mortgagor, but did not cover any after-acquired property, except future book accounts. Two years later another settlement was made between the parties and a bill of sale covering the stock of merchandise then owned by the bankrupts was given to the petitioner for the purpose of securing its indebtedness to the latter, which had then increased to the sum of $2,800. While this instrument was in form a bill of sale, it was in fact and in law a chattel mortgage. This mortgage did not cover any after-acquired property. During the next five years the bankrupts continued to purchase goods from the petitioner, making payments from time to time.

In 1909 a voluntary petition in bankruptcy was filed. Shortly prior to the filing of such petition in bankruptcy the petitioner herein commenced replevin proceedings in one of the state courts in the city of Alpena, where both it and the bankrupts were located, to obtain possession of the stock of goods then owned by the bankrupts, which petitioner claimed under its mortgages. Soon afterwards it consented that the bankruptcy court might take possession of these goods pending the determination of its rights therein. It is conceded that, as none of the mortgages were renewed as required by law, any rights of the mortgagees thereunder are limited to the bankrupts' statutory exemptions. The petitioner then expressed its willingness to have the property thus claimed sold with the assets of the bankrupt estate at the bankruptcy sale, with the understanding that the proceeds would be paid to the person found to be entitled thereto. On the day of the sale, and just prior thereto counsel for the petitioner filed a formal objection to the sale, which stated no grounds for such objection, and which was promptly overruled by the referee as being made too late, in view of the expenses incurred and the arrangements made for such sale in reliance upon the consent of the petitioner previously given. The sale was thereupon made, and the proceeds of the exemptions retained by the referee, pending a decision on the conflicting claims of petitioner and the bankrupts. Both parties consented to have the referee determine these claims, and testimony and arguments in support of the respective claims were submitted. The referee entered an order denying petitioner any rights in these exemptions or in their proceeds. The referee found that the first mort-

gage had been superseded by those given subsequently, that all of the merchandise belonging to the bankrupts at the time of the bankruptcy had been acquired after the giving of the last of said mortgages, and that there was no property then in existence subject to said mortgage. To review this ruling the present petition was filed.

[1] Whether the giving of the second and third chattel mortgage was accompanied by such a settlement of the previously existing indebtedness as to constitute a payment thereof, with the consequent discharge of the chattel mortgage given to secure such indebtedness, was a question of fact to be determined in the light of all the circumstances surrounding the transactions and showing the intention of the parties. Cadwell v. Pray, 41 Mich. 307, 2 N. W. 52; Brown v. Dunckel, 46 Mich. 29, 8 N. W. 537.

A careful examination of the record satisfies me that there was sufficient evidence to justify the finding of the referee to the effect that each mortgage was intended to secure a new indebtedness, supplanting the one previously existing. Each transaction constituted a settlement of the previous account between the parties. Hence the first mortgage, which was the only one covering after-acquired merchandise, was superseded and rendered inoperative by the giving of the subsequent mortgages.

[2] It is undisputed that at the time of the commencement of these proceedings none of the property located in the store of the bankrupts at the time of the execution of the last mortgage and covered by such mortgage was still in existence and owned by the bankrupts. As, therefore, the latter mortgage did not embrace any property to be acquired after the date of its execution, there was no property in possession of the bankrupts in 1909 subject to this mortgage. It is a well-settled rule in Michigan that such a mortgage does not cover after-acquired property, unless a provision to that effect is expressly included in its terms, or unless the property to which it is added is so mingled with it as not to be readily distinguishable therefrom. Fowler v. Hoffman, 31 Mich. 215; Dickey v. Waldo, 97 Mich. 255, 56 N. W. 608, 23 L. R. A. 449.

[3] This chattel mortgage having been executed and performed within the state of Michigan, this court will follow the decisions of the courts of that state concerning the construction and effect of such an instrument. Bryant v. Swofford Bros. Dry Goods Co., 214 U. S. 279, 29 Sup. Ct. 614, 53 L. Ed. 997; Title Guaranty & Surety Co. v. Witmire, 195 Fed. 41, 115 C. C. A. 43 (C. C. A. 6). There was, therefore, no error in the ruling of the referee with respect to the matter just considered, and the contentions to the contrary must be overruled.

[4] It is further urged by the petitioner that the referee was without jurisdiction to determine the conflicting claims to this exempt property, on the ground that the power of the bankruptcy court is limited to the setting aside for the bankrupts of their exemptions. It will be noted that this exempt property came into the possession of the bankruptcy court with the consent of the petitioner. It would seem, therefore, that, having acquired jurisdiction over such property, the bankruptcy court might properly retain such jurisdiction

in order to determine the rights of these adverse claimants thereto. Krippendorf v. Hyde, 110 U. S. 276, 4 Sup. Ct. 27, 28 L. Ed. 145; Lucius v. Cawthon-Coleman Co., 196 U. S. 149, 25 Sup. Ct. 214, 49 L. Ed. 425; In re National Grocer Co., 181 Fed. 34, 104 C. C. A. 47, 30 L. R. A. (N. S.) 982 (C. C. A. 6).

[5] Aside, however, from this question, the record clearly shows that the petitioner also voluntarily submitted its claims to this property to the jurisdiction of the bankrupcty court. It not only agreed that the referee might determine its rights to the proceeds of the sale thereof, but it voluntarily appeared and participated in the hearing before the referee concerning this very dispute between it and the bankrupts. It failed to raise the question of jurisdiction until after the decision of the referee adverse to it, and by its actions and language plainly indicated its consent to such jurisdiction. It therefore manifestly waived the right to afterwards urge such objection.

For the reasons stated, the order of the referee is affirmed.

THE DOROTHY.

THE ELM BRANCH.

(District Court, E. D. Virginia. December 19, 1918.)

COLLISION ⊂⊃75—STEAM AND SAILING VESSELS—NAVIGATING AT NIGHT.

A steamship navigating at night without lights *held* solely in fault for collision with a schooner, for failing to see the latter's lights until a mile distant, when she showed her own lights, and for continuing her course and speed after she observed that the schooner was wearing ship.

In Admiralty. Libel for collision by William C. Reid, managing owner of the American schooner Dorothy, against the British steamship Elm Branch, with cross-libel. Decree for libelant.

Hamilton Anderson, of New York City, and John W. Oast, Jr., of Norfolk, Va., for the Dorothy.

Hughes, Little & Seawell, of Norfolk, Va., for the Elm Branch.

WADDILL, District Judge. A few minutes after midnight of the 26th of June, 1917, a collision occurred between the schooner Dorothy and the British steamship Elm Branch, off the northwest coast of Haiti; the libelant, the Dorothy, describing the same as happening about 35 miles northerly of Mole St. Nicholas, and the cross-libelant, the Elm Branch, about 28 miles from Cape Maysi.

The Dorothy was a four-masted American schooner, on a voyage from Puerto Columbia to Monte Christo, light, to secure a cargo from the last-named port to New York. The Elm Branch was a large ocean-going steamship, on a voyage from the west coast of Africa, through the Panama Canal, via Kingston, to Norfolk, Va., for orders.

The Dorothy's case is that at the time of the collision the weather was clear, with a strong wind from east of north, and high seas running; that she was sailing on the port tack, and concluded, after carefully searching for vessels or lights in her vicinity, and finding none,

to wear ship by putting her helm hard aport, which caused her to make a rapid swing from port to starboard, and while under the influence of the strong wind and sea, and so swinging, a white light was suddenly flashed a mile away, nearly ahead; that shortly thereafter a red light was flashed; that the schooner, which was still swinging to starboard, continued to complete the maneuver, which was the only thing she could do to bring her into the wind. Meantime the steamship was swinging from her starboard to port; that shortly thereafter the vessels reached a nearly parallel course, and came together, the bluff of the starboard bow of the steamship colliding with the bluff of the port bow of the schooner, with great force, causing serious damage.

The Elm Branch's position is that, while steering northeast half east, with her lights darkened by order of the British admiralty, and because of a wireless warning that day received as to an enemy raider in that vicinity, she sighted the green light of a sailing vessel about two points on her port bow, approximately a mile distant; that she immediately switched on her lights, the positions of the two vessels then being that the schooner was showing the steamer her green light, and the steamship showing the schooner her red light; that the steamship's helm was immediately put hard astarboard, so that the ship was proceeding to port, the sailing vessel at the time being two points on the starboard bow of the steamship; that when about half a mile apart it was observed that the schooner was apparently wearing ship, and changing her course to starboard; that previous to the latter maneuver of the schooner the positions and courses of the two vessels avoided risk of collision; that, upon the schooner changing her course, the steamship's helm was kept hard astarboard in an endeavor to bring her round and clear; but the schooner, having jibed, bore down under press of sail, struck the steamship on the starboard, bumping alongside, and causing damage to both vessels.

The conflict in the testimony in this case is not very great; indeed, the parties are in agreement as to the essential facts bearing upon the merits of the controversy. The schooner admits that, upon observing the white light of the steamer as it was flashed about a mile away, she had departed from her port tack about two points; that she thereafter rapidly fell off under the effect of the wind and sea, which she says was the only thing she could do in the circumstances; that some half minute to a minute elapsed between observing the ship's white light and her red light, that the change from red to green was from two to three minutes, and the green light showed up about a minute and a half before the collision.

The steamship, on the other hand, admits seeing the green light of the schooner about two points on her port bow when a mile away; that, without abating her speed, she starboarded and went to port; that when the vessels were about half a mile apart the schooner showed her red light, and that she still kept her speed, with her wheel hard astarboard, until the vessels came in collision; also, that her lights were covered until she had seen the green light of the schooner about a mile away, when she suddenly switched the same on, and that she had not theretofore observed the lights of the schooner.

From these undisputed facts, the court has to determine the responsibility for the collision, which is not difficult, having regard to the rules of navigation properly governing the vessels in their then situation. The steamship was charged with the duty of avoiding as well as risk of collision as collision with the schooner. She had seen the green light of the schooner a mile away, and she should have done more, considering the condition of the weather and sea, than continue full speed ahead under hard astarboard helm. The fact that the lights of the ship were not exposed to the schooner until the vessels were a mile apart should have made her the more careful in her navigation. She was charged with knowledge of the fact that the schooner had been deprived of the opportunity of earlier observing the ship's lights. Under the international rules of navigation—article 2, §§ (a), (b), and (c)—her white light should have been observed at least five miles, and her colored lights at least two miles, away. The mere fact that the placing of the ship's helm to starboard, upon observing the schooner's green light, was a proper maneuver at the moment, would not warrant her in so doing, and continuing at full speed ahead. It so happened, although the schooner was showing her green light, which indicated she was going to port, that she had actually fallen off two points from the wind on the port tack, and was wearing ship with a view of going about, and rapidly changed her course from green to red, which tended to throw the vessels together, instead of apart, making the steamship's course cross that of the sailing vessel, unless the steamship again changed her course. This risk the steamship took, by continuing at full speed ahead under her starboard helm, failing to take into account the wind, weather, and sea conditions, and possible dangers and eccentricities of the two ships navigating, with the knowledge on her part of the ignorance of the schooner's navigators as to her presence.

The steamship is, moreover, at fault for continuing at full speed ahead under her starboard helm, after observing the change of course of the schooner, while wearing ship and jibing, changing her course from green to red; the red light having made its appearance when the vessels were half a mile apart. The steamship could at that time, in the judgment of the court, have avoided the collision by hard aporting her wheel, and not continuing to port under a starboard helm; and, in any event, if there was doubt about this, she should have sounded danger signals, slackened her speed, or stopped or reversed, and not have continued on her original course full speed ahead, and across the schooner's course. The latter maneuver should certainly not have continued after the schooner's red light showed up. The schooner had the right, if, in the judgment of her navigators, it was proper, to wear ship and change from the port tack at the time she did. There was nothing to indicate that any vessel was near. The Elm Branch admits that her lights were obscured at the time, and she should not escape responsibility, or call upon others to share her losses, by finding fault with the vessel for the collision, on the theory that the latter, having departed two points from her port tack, upon seeing the steamship's white light, ought to have returned to her

port tack. The schooner says it was impracticable to do other than what she did; that is, wear ship and continue on the starboard tack. At this juncture, to have the burdened vessel, charged with avoidance of risk of collision, continue her course and speed, and relieve the schooner, the privileged vessel, from obligation to keep her course and speed, and require her to change to another course, would be to impose on her a highly improper and most dangerous act, in positive violation of the plain maritime regulations governing the situation. To hold the schooner liable for this collision, or require her to share in the loss incurred thereby, would be to reverse the well-known rules of the road governing the navigation of steam and sail vessels, by placing the burden upon the sailing vessel, the privileged one, and not the steamship, the burdened one.

Further, the steamship cannot be said to be free from fault for failing to see the lights of the schooner earlier. The regulations prescribe that the lights shall be such as can be seen two miles away. The ship's lights were obscured, but the schooner's lights were properly set and burning brightly, and ought to have been seen by the steamship before getting within a mile of her; and the ship was charged, knowing that she herself was running without visible lights, with maintaining a specially vigilant lookout for other persons lawfully navigating those waters, in order that they might not be run into.

An exceedingly interesting and important legal question was presented in this case, both by exception of the schooner to the answer and cross-libel, and upon the introduction of testimony by the steamship, as to whether the ship was not relieved from conforming to the international rules of navigation, by reason of special instructions of the British admiralty, under which it is claimed she was navigating; and the further question was raised as to whether or not this defense could be interposed, and also whether the special orders of the British admiralty were sufficiently and legally proved, to permit them to be used as evidence in this case. In the view taken by the court, assuming, though not deciding, that the contentions of the ship regarding the effect of these special regulations are binding, and the proof offered sufficient, still it does not materially affect this case, as the liability of the steamship is indisputably established from its acts of omission and commission, had in connection with her navigation as hereinbefore stated, after the presence of the schooner became known, as well as for her failure to observe it earlier.

It follows that the steamship Elm Branch is solely responsible for the collision, and a decree so ascertaining will be entered on presentation.

BARNETT OIL & GAS CO. v. NEW MARTINSVILLE OIL CO.

(District Court, N. D. West Virginia. December 20, 1918.)

No. 43.

1. CONTRACTS ⟸94(5)—FRAUDULENT REPRESENTATIONS—PERSONS LIABLE.
The law will not permit one to defend his making false and fraudulent representations to secure a contract on the ground that his dupe ought not to have trusted him and believed his falsehoods.

2. CONTRACTS ⟸95(1)—VALIDITY OF CONSENT—DURESS.
What constitutes duress, under the more liberal modern views, depends upon the particular facts, and in each case the court, in the exercise of a sound discretion, must endeavor to determine the question in accord with right and justice.

3. MINES AND MINERALS ⟸64—CONTRACTS INDUCED BY FRAUD—RATIFICATION —DURESS.
A corporation, induced by fraudulent representations to contract for purchase of an oil lease at several times its value, and which in good faith made the same representations to purchasers of its stock, *held* not estopped by ratification, because it failed to repudiate the contract immediately on discovering the fraud, but made further payments, until by other purchases it brought its stock to the value represented and avoided insolvency, but to have acted under such duress as to render it inequitable to permit the seller to enforce the contract for more than the actual value of the property.

In Equity. Suit by the Barnett Oil & Gas Company against the New Martinsville Oil Company. Decree for complainant.

John A. Howard and Jas. M. Ritz, both of Wheeling, W. Va., for plaintiff.

Robert McV. Drane, of Piedmont, W. Va., Osman E. Swartz, of Fairmont, W. Va., and E. Bryan Templeman, of Clarksburg, W. Va., for defendant.

DAYTON, District Judge. This case has been submitted for final hearing after all the evidence has been taken in open court and time given counsel to file briefs. Such briefs have been filed, and they, as well as the ones filed in relation to the preliminary motions heretofore made in the cause, have been most carefully considered. I have already filed two memorandum opinions as to the disposition of these preliminary motions.

The contention arising in this case grows out of the sale made by the defendant to the plaintiff of an oil lease in Wetzel county, this state, known as the Morgan lease. The plaintiff claims that this sale was effected by and through the effort of W. T. Robinson. Plaintiff contends he was acting as the agent for defendant in effecting this sale. Defendant denies this agency. Plaintiff further contends that Robinson induced Barnett, acting as agent for and in its behalf, to make the contract of purchase by gross fraud and misrepresentation. The defendant denies this, and in addition insists that, if fraudulent and false misrepresentations were made by Robinson in securing the contract, afterwards, after it had been fully informed of such,

the plaintiff ratified it, secured additional contracts, in which the times of payment were changed and extended, instead of repudiating the contract promptly on discovery of its condition and value, and the falsity of Robinson's representations of it, whereby it is estopped from further remedy on account of such fraud and misrepresentation, if any there were.

There is no question as to the change of the terms and conditions of the contract after the plaintiff was informed of the true oil and gas yielding production from the wells situate on the lease. In fact, the whole character of the original contract was changed. This original contract bore date February 29, 1916. By its terms Barnett undertook for $350,000 to purchase all the capital stock of the defendant company, for which he was to pay $10,000 March 4, 1916, and $10,000 on Saturday of each week thereafter until the whole purchase price was paid. If a default of seven days was made in any payment, he was to forfeit all previous payments made to the New Martinsville Oil Company, and the stock certificates for the stock were to be returned to its stockholders, from whom they had been obtained. The stock certificates of defendant, indorsed in blank, so as to properly transfer them, were to be delivered to Robinson as trustee for the New Martinsville Oil Company, and he was to deposit them in the West Virginia Bank at Clarksburg in escrow, and in his name, to be turned over to Barnett only when all payments had been made. In the meantime, while the management and control of the property was to pass immediately to Barnett, no oil produced by the property was to be sold, except by consent, and if Barnett defaulted in any payments this oil was to belong and go to the New Martinsville Company, as well as all sums that had been paid. This contract was executed solely by J. W. Barnett, W. T. Robinson and A. R. Stallings.

On March 7th following it was modified by an agreement, signed only by the same three parties, to the effect that if Robinson and Stallings could not secure all the stock, but could deliver more than 60 per cent. of it, Barnett was to take and pay for the same at a proportionate rate of $350,000 for the whole. Barnett paid, under this contract, a total sum of $25,000. That Barnett was in fact acting for the plaintiff, the Barnett Oil & Gas Company, is not denied. He, C. W. Barnett, and L. M. Stephens were the leading organizers of that company, and it seems, immediately after this contract was signed, proceeded to advertise, in connection with Clark, a New York broker, its stock for sale, asserting and setting forth that it owned, among other property, this Morgan lease, having a settled daily production of 255 barrels of oil per day, and did sell enough thereof to realize the sum of $25,000, which was paid as above stated upon this contract.

It is claimed by plaintiff that these representations were made by Stephens and Clark, the broker, in good faith, upon the representations made by Robinson to Barnett and Stephens; that upon consultation with counsel they discovered and realized that they, under the contract, had in fact no direct right nor title whatever to this Morgan lease; that their purchase was solely that of the stock of the New

Martinsville corporation, and that by failure to meet the weekly payments this stock could be withdrawn and their payments forfeited; that for this to occur would involve them in disgrace, financial embarrassment, and possibly subject them to criminal prosecution. Howard, their attorney, undertook to relieve this grave and serious condition. He secured a meeting of the stockholders to be had on April 24, 1916, at which time an agreement was arrived at whereby the property, real and personal, of the defendant, instead of its stock, was to be transferred and sold to the plaintiff corporation, and this agreement was subsequently incorporated in a contract of sale under date of May 2, 1916, executed by the defendant corporation to the plaintiff, and secured by a deed of trust the same day upon the property, executed by the plaintiff company to Dyer, trustee. By these instruments, after allowing credits for payments made, and after assuming a balance of $34,600 due to Robinson and Stallings from the defendant for their services in making the sale, and a cash payment of over $40,000 was made, a balance of $255,400 was ascertained to be due from plaintiff and was secured by the deed of trust.

In the meantime the operation of the wells had been under the control of Culp as manager of the plaintiff, but the oil produced had been run into the pipe lines and the run tickets had been sent to McFarlane, the defendant's treasurer. Culp had reported to Barnett that he had been deceived in the producing capacity of the wells, but to what extent had not been set forth, and Barnett about this time disposed of his interests in plaintiff company, resigned his office of president and his directorship, and no investigation of the extent of the deception was made by him. The run tickets were asked for, at or about the time of this May meeting, of McFarlane, who promised to send them to plaintiff's attorney and subsequently he did send them. In September following still another meeting between representatives of the plaintiff and officers and stockholders of defendant was held at Cumberland, Md. At this meeting, it seems, the failure in production was quite vigorously discussed, and demands made for rescission or readjustment of the contract. The defendant refused any other settlement than one involving extension of time and modification of the number and amounts of payment, and the result was the release of the old deed of trust, the execution of a new one to secure a balance, $185,400, upon this Morgan lease and other property owned by plaintiff. This trust was executed October 1, 1916. It was expressly provided that none of the wells should be shot, except by consent of defendant.

In June (apparently the 19th), 1917, a conference was had between the attorneys and some of the officers of these companies, the result of which was that on the 22d a check was sent by plaintiff's treasurer for $5,000 to the attorney for the defendant, with a letter setting forth what its writer understood had been agreed upon, among other things that plaintiff should have permission to shoot any of the wells in such manner as good practice warranted, and was to be granted permission to surrender any of the Culp leases (covered by the deed of trust), other than the Morgan one, unproductive and causing outlay in the payment of rentals, and in case the debt in full was paid on or be-

fore October 1, 1917, a deduction of $40,000 of the contract price should be made. This proposition was rejected, and the defendant proceeded at once to cause advertisement of sale under the deed of trust to be made.

Thereupon this bill was filed, and upon notice and hearing had Circuit Judge Pritchard awarded a restraining order, afterwards continued by my order. The bill in effect charges that during all these 15 months from March, 1916, to June, 1917, when these proceedings were had, the plaintiff's officers were laboring under the oppressive fear of the disastrous results that would arise from litigation and exposure of the untrue representations made by them, in the sale of stock, solely by reason of their faith in Robinson and his misrepresentations; that the defendant and its officers knew this, and took advantage of it to enforce a fraudulently procured and grossly unjust and outrageous contract; that the wells never did have a settled production of 255 barrels per day, or more than a third of it; that not until November, 1916, did any opportunity offer for any relief from this embarrassing condition; that then certain of its officers, by purchase with their own funds, secured and transferred to their company additional properties which turned out to be valuable, and, at the time of filing the bill in July, 1917, had been so productive as to put the company upon a sound and substantial basis, so that it could, without fear, assert its determination to resist the defendant's oppressive demands.

The first question that arises is: Was Robinson acting as agent for the defendant company in this sale, and are it and its stockholders legally bound by his acts in that regard?

I cannot doubt it. It is not denied that these stockholders, with a very few exceptions, ratified the provision of the first contract that constituted him their trustee to receive from them their stock and place it in escrow in the bank at Clarksburg. They recognized their obligation to pay him and Stallings over $40,000 for their services in this behalf, and provided for its payment out of the purchase price that was to be paid for the property. They at no time, so far as the evidence discloses, during the months prior to the advertisement of the sale, denied his right to make on their behalf the sale, but, on the contrary, strenuously insisted upon its enforcement.

The second question, then is: Did he make the false representations charged in the bill as to the settled production of the property, which were relied on and constituted the moving cause of the contract's execution?

As to this I am not in doubt. It is fully testified to by Barnett, who at the time he testified was no longer concerned as stockholder in the Barnett Company. He testifies that, prior to the agreement, Robinson furnished a detailed written statement purporting to show the condition of each well on the lease and its producing capacity; that the aggregate of all exceeded 350 barrels daily; that some of this production was initial or "flush," and some what might be considered "settled," or fairly so; and that from this statement they figured that the fixed daily production could be reasonably estimated at 255 barrels, and that upon this basis the contract was made. This

paper was shown to Stephens, who has fully corroborated Barnett's evidence as to its substantial contents. Its unfortunate loss and the failure to produce it has been reasonably accounted for. There is no single word of contradiction of this evidence. I have heard these men testify. I have noted their demeanor on the stand. The impression of counsel for defendant that their evidence, on its face, was incredible, "a cock and bull story," was entirely foreign to me, as I saw them on the stand and heard them testify. On the contrary, they seemed to me to be fair-minded, frank, and sincere in their statements, to the extent that I felt compelled to concede their entire truthfulness. This conviction, after earnest reflection, is confirmed rather than weakened, for two reasons: First, because, as I have said, no word of denial was made by defendant. Robinson still lives. His evidence was procurable. It seems clear, if the defendant desired this evidence to be discredited, at least a basis therefor could have been secured by a denial of it by Robinson.

[1] But another thought arises in this connection. What possible motive could actuate two business men, well known in their respective communities, to pay or agree to pay so large a sum for a lease on some 200 acres, if it were their purpose to promote a "wild-cat" oil company stock scheme? What need had these men, if this was their purpose, to go outside the leases they already had in Wirt county, or why not buy up any number of larger leases, where wells had been drilled and exhausted, but whose production could as easily have been misrepresented? Nor to my mind does it discredit these men that they believed Robinson's representations and did not make a preliminary and exhaustive investigation before contracting. It is a common saying that honest men are generally the most credulous. It is common knowledge that great competition has existed here in our oil fields in securing productive oil leases. Such properties do not go begging for purchasers, and contracts for their purchase are generally made quickly. In this case, Barnett was a merchant, while Robinson was an expert oil operator. Barnett had been interested with Robinson in some other leases. It was not unnatural that Robinson's statements as to the productive value of this lease should be controlling, because he had been one of the original organizers of the New Martinsville Company, which owned only this one lease, and he had sold out, just before, his interest to Dyer and McFarlane at proportionately the excessive price he was seeking to secure Barnett to pay for the property. It may be, as suggested by counsel, that, in order to square himself with Dyer and McFarlane for the imposition upon them, he was seeking a greater imposition, for a $40,000 consideration added, upon Barnett and his company; but Barnett could not know this, and certain it is the law does not suffer another to defend his making fraudulent and false representations to secure a contract on the ground that his dupe ought not to have trusted him and believed his falsehoods.

[2, 3] But the third question that arises in this case, whether the ratification of this contract and purchase, after full knowledge of the fraud that had been perpetrated was disclosed to and known by plaintiff, estops it from relief in the premises, is far more perplexing

and difficult of determination. It goes without saying that the general rule has been established by an enormous number of cases that it is incumbent upon the deceived party in a contract procured by fraud and misrepresentation, upon ascertaining the truth, to promptly repudiate and seek its rescission. It is true, also, that this rule is subject to limitation and exception in rare instances. The counsel on both sides in their very able briefs have discussed these legal propositions and cited many authorities pro and con. I have made a long and weary examination of these authorities and an independent investigation on my own part, to ascertain whether under the decisions the facts here warrant any modification of this general rule. The grounds sought for such modification, as claimed by the plaintiff, may be summarized as follows: (a) That the misrepresentations were so great as to secure a wholly unjust and unconscionable contract; (b) that, being misled by these false and fraudulent representations, the officers and principal stockholders had unwittingly repeated them, for the purpose of securing stock subscriptions, and were in consequence in such condition as to suffer greatly in honor, business reputation, and to the extent of possible criminal prosecution; (c) that litigation at the time and before opportunity to retrieve by additional acquirement of property making the company solvent meant its entire financial destruction and ruin; (d) that defendant and its officers, knowing this duress and strain under which the plaintiff and its officers were laboring, took advantage thereof to enforce the contract knowing it to be unreasonable, unjust, and oppressive.

On this subject of duress, in U. S. v. Huckabee, 16 Wall. 431, 21 L. Ed. 457, it is said:

"Duress, it must be admitted, is a good defense to a deed, or any other written obligation, if it be proved that the instrument was procured by such means; nor is it necessary to show, in order to establish such a defense, that actual violence was used, because consent is the very essence of a contract, and if there be compulsion there is no binding consent, and it is well settled that moral compulsion, such as that produced by threats to take life or inflict great bodily harm, as well as that produced by imprisonment, is sufficient in legal contemplation to destroy free agency, without which there can be no contract, because in that state of the case there is no consent. Unlawful duress is a good defense to a contract, if it includes such degree of constraint or danger, either actually inflicted or threatened and impending, as is sufficient in apprehension or severity to overcome the mind and will of a person of ordinary firmness."

This ruling of the Supreme Court would seem to justify the statement made in the note to Hatter v. Greenlee, 26 Am. Dec. 374, that—

"This branch of the law may be considered to be in or to have just passed through a state of transition, the old and harsh doctrines of the common law of the time of Lord Coke, on the subject, everywhere giving way to more liberal views; more especially is this so upon this side of the Atlantic."

In another of these very admirable notes (covering 18 closely printed pages) to the case of Mayor of Baltimore v. Lefferman, 45 Am. Dec. 153, the subject is exhaustively treated, a vast number of authorities are cited, and an attempt is made to define wherein and upon what conditions the "more liberal views" held by the courts "upon this side of the Atlantic" are applicable. The result to my mind leads to

the very familiar conclusion that such application must, in the final analysis, depend upon the facts of each case, and that the chancellor or judge must be controlled by a sound discretion in each; that no hard and fast rule can be established; the effort must be to see the right and justice in the case and do it.

In this note it is said, upon authority of Moses v. Macfarlane, 2 Burr. 1009:

"The action for money had and received, which is the form in which a party must sue to recover back a payment which he has made by compulsion, is an equitable action, and it proceeds on equitable principles. It does not lie, therefore, unless the payment was made under circumstances rendering it inequitable and unjust to retain the money paid."

If this were the extent of the law's limitation, there would be little trouble in determining this case, for I think it is plainly apparent that this contract, originally, was procured to be executed by the fraudulent and false representations of Robinson, acting as agent for the defendant corporation and its stockholders, and for which, therefore, they should be held bound; that it was a grossly inequitable and unjust contract; and that plaintiff and its officers were induced, by the compelling fear of financial ruin to the company, loss of business standing and reputation to its officers and principal stockholders, and their possible criminal prosecution, to execute the after contracts ratifying it and make the further payments they made. But the writer goes on and says:

"There must be some culpability on the part of the defendant to enable the plaintiff to recover back money paid on the ground that the payment was involuntary. If the party receiving the payment acts in the supposed exercise of a legal right, using no coercion or unlawful measures to compel payment, but the other party pays the money under the compulsion of a third person, for whose acts the payee is in no way responsible, the action will not lie."

How shall we apply this limitation here? It cannot be said that the defendant corporation, its officers, or its stockholders were directly threatening either loss financially or of reputation or criminal prosecution. Nor were the persons to whom the stock of plaintiff had been sold. They were ignorant of the situation, and it was vital, it seemed to the plaintiff's officers, that they should remain so until they were able to change conditions. The situation in brief may be stated thus: While not threatening in any way these men with loss or prosecution, the defendant, through its agent, was responsible for the compelling fear that the purchasers of plaintiff's stock would cause it to suffer great loss, and its officers to be prosecuted, and instead of aiding them to escape from such embarrassing position, on the contrary, in a sense at least, used it as a means of securing the ratification of their unjust and oppressive contract.

Does the liberality of the law, in transition from the harsh rules laid down by the common law as enunciated by Lord Coke, go far enough in the application of its doctrine of duress to apply to such condition of affairs? I have found no decision exactly in point, and it would be entirely burdensome to attempt a discussion of the multitude of cases relating to the general principles. In addition to the many cit-

ed in the two notes I have referred to, others will be found cited in the notes to Adams v. Irving Nat. Bank, 6 L. R. A. 491, and to Shattuck v. Watson, 7 L. R. A. 551. An interesting case from Virginia will be found in Pilson, Trustee, v. Bushong, 29 Grat. 229. See, also, 1 Story, Eq. Jur. § 239.

Pomeroy in his Equity Jurisprudence (2d Ed.) § 948, says:

"Whenever one person is in the power of another, so that a free exercise of his judgment and will would be impossible, or even difficult, and whenever a person is in pecuniary necessity and distress, so that he would be likely to make an undue sacrifice, and advantage is taken of such condition to obtain from him a conveyance or contract which is unfair, made upon an inadequate consideration, and the like, even though there be no actual duress or threats, equity may relieve defensively or affirmatively."

A long and earnest study of this case has led me to doubt whether the law relating to duress relied upon by counsel can be applicable, except to a limited extent, in aid of another ground for relief now to be considered; and this for the reason that its principles seem to be confined to personal transactions, and not to corporate control and management. Be this as it may, I am constrained to the conclusion that the contract price for this property was an exorbitant one, possibly three times what it was worth, and it was secured to be paid by the false and fraudulent representations of defendant's agent; that its enforcement would be unjust and inequitable; that the ratifications of this contract were made by plaintiff and its officers when they were "in pecuniary necessity and distress," driven thereby "to make an undue sacrifice," and that defendant, knowing this condition, took an unfair advantage to secure them; that in consequence the plaintiff corporation, on its own behalf and on behalf of its innocent stockholders, who were no parties to the transaction, is entitled to some relief in this court of equity, under this principle set forth by Pomeroy and the cases cited by him and by many others.

What shall be the measure of this relief? It is not denied that the lease had some intrinsic value, and that the personal property conveyed in connection with it also had value, all of which plaintiff has secured under the contract. Whether such value could now be ascertained accurately may be questioned. If it could, it would be beyond the power of a court of equity to attempt to make a new contract for the parties, based upon the value of the property. I think it is only within its power to abate the purchase price to the extent that the defendant sold what it did not have, because it did not exist; but such abatement must be at the rate of value the parties contracted to pay for it, if it had existed. A very serious trouble here arises because of the anomalous character of the property. Oil and gas, in a sense, are sui generis. When dormant in mother earth, they are realty. When produced on top the ground, they become personalty. Archer, Oil and Gas, 558, and numerous cases there cited.

It is impossible to tell how much of this peculiar kind of realty exists under a given tract of land until by the drill and pump the quantity in personalty has been secured above ground. It is well settled that a failure of quantity of land sold is subject to abatement of purchase price any time, at least, before the purchase price per acre is

fully paid. It seems to me that this principle of abatement can well be applied here. It cannot be strictly accurate and satisfactory, because it cannot be applied to the number of acres of surface land embraced in the lease. It must be based here, it seems to me, upon the 255 barrels of settled production which Robinson represented it to be making. Here, too, complication springs in determining whether it had any "settled" production at all, as it is in evidence that its production ran down in less than two years to 3 barrels per day. As to this, however, I think Barnett took the risk of this occurring.

I therefore have reached this conclusion: First—That, if the defendant company elects, by answer filed within 10 days, to have the contract rescinded rather than the contract price abated, I will direct a decree to that effect and refer the cause to a master, to ascertain and report an accounting between the companies as to the oil obtained by the plaintiff, the money paid to and received by the defendant, and other matters arising as to the use and consumption of the personal property involved. If the defendant shall not so elect to rescind the contract, I will enter a decree abating the purchase price, basing it upon the difference between the misrepresented 255 barrel daily production and what was the actual daily production at the time the first contract was made. If parties cannot agree what this actual production was on that date, I will direct a master to ascertain the daily production for each of the 30 days just preceding the date of this contract, and ascertain the average for such number of days, and fix it as the actual daily production. This may be considered in a measure an arbitrary basis, but it is as nearly equitable as, I conceive, can be arrived at under the existing conditions.

PEOPLES v. PEOPLES BROS., Inc.

(District Court, E. D. Pennsylvania. December 12, 1918.)

No. 1647.

1. SUBROGATION ⟸1—NATURE OF RIGHT—SUPERIOR EQUITIES.
The right of subrogation rests upon purely equitable grounds, and will not be enforced against superior equities.

2. SUBROGATION ⟸28—SURETY OF CONTRACTOR—CONDITIONS OF BOND.
The surety on the bond of a contractor, conditioned for payment of claims for labor and material, which on the contractor's insolvency paid the amount of its obligation into court, which paid only 65 per cent of claims of creditors secured by the bond, on completion of the contract by a receiver, was not entitled by subrogation to the amount due thereon until claims for labor and materials were paid in full.

In Equity. Suit by David Peoples against Peoples Bros., Incorporated. On exceptions to report of special master. Sustained in part.

Horace M. Schell, of Philadelphia, Pa., for receiver.

Edward Hopkinson, Jr., of Philadelphia, Pa., for American Surety Co.

Murdoch Kendrick, of Philadelphia, Pa., for Massachusetts Bonding & Ins. Co.

J. Wilson Bayard, of Philadelphia, Pa., for American Bridge Co.

THOMPSON, District Judge. On October 29, 1915, the city of Philadelphia, hereinafter called the city, and the Pennsylvania Railroad Company, hereinafter called the railroad, entered into a contract with the defendant Peoples Bros., Incorporated, hereinafter called the contractor, for the construction of a bridge on Fifty-Fourth street over the tracks of the Philadelphia, Baltimore & Washington Railroad for the sum of $37,000, of which the city was to pay $22,000 and the railroad $15,000.

On the same day, in pursuance of the ordinances of councils, the contractor, as principal, and the Massachusetts Bonding & Insurance Company, hereinafter called the surety, as surety, executed and delivered to the city a penal bond in the sum of $11,100, conditioned upon the payment by the contractor of all claims for labor performed or material furnished in the performance of the said contract.

Upon a creditors' bill, Robert W. Finletter was, on December 10, 1916, appointed receiver of Peoples Bros., Incorporated. The contractor having failed in the performance of its contract for the Fifty-Fourth street bridge, the receiver completed its construction at a total cost of $1,479.94. Claims for material supplied to the contractor in the construction of the bridge have been proved in the sum of $15,946.28.

Upon petition of the surety presented May 11, 1917, leave of court being given, the amount of its liability, namely, $11,100, was paid into court on April 19, 1918. Upon completion of the contract by the receiver, there was due to the contractor by the city $5,184, and by the railroad $4,632. These amounts were paid by the city and the railroad to the receiver.

The surety, on February 16, 1917, presented a petition praying that the receiver be ordered to pay the balance due by the city and the railroad, less the amount expended by the receiver in the completion of the contract, to the surety, upon the ground that it was subrogated to the rights of the contractor in that fund.

The issues raised by the petition of the surety and the several answers thereto were referred to a special master. The master, after deducting from the amount paid into court by the surety, $11,100, the costs and master's fee, amounting to $781, awards the balance, $10,310, pro rata to the materialmen, subject, as appears by the record, but not set out in the master's report, to the clerk's poundage. The dividend amounts to 64.8 per cent. After deduction of the cost of completion of the contract in the respective proportions the city and railroad were liable for under its terms from the sums paid the receiver by them, respectively, there remains of the amount paid by the city to the receiver a balance of $4,310.84, and of the amount paid by the railroad a balance of $4,025.22. The master awards out of the balance of each of these funds an allowance to the receiver, for services in completing the contract, of $250, a fee to counsel for the receiver of $250, and a fee to the master of $250. He awards the balance of $3,560.84 of the fund received from the city to the surety, and the balance of $3,275.22 of the fund received from the railroad to the receiver for the general creditors.

Exceptions have been filed on behalf of the surety to the failure of the master to award to it the fund received from the railroad, and to the awards of allowances to the receiver for his services in completing the contract, of fees to counsel for the receiver, and of fees to the master out of the funds claimed by the surety. Exceptions have been filed on behalf of the receiver and the American Bridge Company, a claimant for material, to the award to the surety of the balance of the sum received from the city.

The learned master held, under the authority of Prairie State Bank v. United States, 164 U. S. 227, 17 Sup. Ct. 142, 41 L. Ed. 412, and Henningsen v. U. S. Fidelity & Guaranty Co., 208 U. S. 404, 28 Sup. Ct. 389, 52 L. Ed. 547, that a right of subrogation arose as to the reserved fund retained by the city and paid to the receiver, in favor of the surety, by reason of its having paid into court for the payment of claims of the materialmen the full amount of its liability under its bond. The master appears to have overlooked a very important distinction between the facts in the Prairie Bank Case and the Henningsen Case and those in the case at bar.

In the Prairie Bank Case the dispute was between the surety, which had entirely completed the contract, and the bank, which claimed under an assignment by a contractor all moneys due by the government to him. So far as appears, there were no other claimants against the fund.

In the Henningsen Case the dispute was between the surety and a bank which held a similar assignment. The surety company had paid the claimants for labor and material in full under the provisions of a penal bond given to the United States under the provisions of Act Aug. 13, 1894, c. 280, 28 Stat. 278, to secure the payment of claims for labor and material. So far as appears, there were no other claimants upon the fund.

There was no dispute in either case that the claims of those protected by the surety's bond were satisfied in full. There could therefore be no doubt of the application of the principle of subrogation, and the question was as between the equities of one claiming by subrogation arising when the bond was given and one claiming under a subsequent assignment of the fund. The very important fact was present in each of those cases, which is essential to one of the fundamental propositions upon which the right of subrogation rests, namely, that the claim of the creditor protected by the surety's bond had been fully satisfied, while in the case at bar the indebtedness of the contractor to the materialman protected by the bond given to the city is not fully satisfied by the payment into court of the amount of the surety's liability, but these creditors have received out of that fund but 65 per cent. of their claims, and if the fund paid to the receiver by the city is awarded to the surety it will be to their prejudice.

[1] "Subrogation is an equity called into existence for the purpose of enabling a party secondarily liable, but who has paid the debt, to reap the benefit of any securities or remedies which the creditors may hold as against the principal debtor and by the use of which the party paying may thus be made whole." Bispham's Equity (6th Ed.) p. 450.

It rests upon purely equitable grounds, and will not be enforced against superior equities. Unless the surety pays the debt in full, he is not entitled to subrogation, and until this is done the creditor will be left in full possession and control of the debt and the remedies for its enforcement.

It must not be enforced to the detriment of equal or superior equities existing in other parties, nor where its enforcement would operate to the prejudice or injury of the creditor, and cannot, therefore, be insisted upon until the creditor is fully paid and satisfied. Dering v. Earl of Winchelsea, 1 Leading Cases in Equity, 114; Kyner v. Kyner, 6 Watts (Pa.) 221; Bank v. Potius, 10 Watts (Pa.) 148; Hoover v. Epler, 52 Pa. 522; Allegheny National Bank's Appeal, 19 Wkly. Notes Cas. 78; Musgrave v. Dickson, 172 Pa. 629, 33 Atl. 705, 51 Am. St. Rep. 765.

[2] In the present case the creditors protected by the bond, namely, the materialmen, have not been paid in full. They are entitled as creditors of the contractor to look for payment to the fund paid by the city and the railroad to the receiver upon completion of the contract, and, until they are paid in full, the surety has no equity superior to theirs. The surety is merely a general creditor of Peoples Bros. to the extent of the amount which it paid into court, thus relieving the contractor, its principal, to that extent. It follows that the master properly awarded to the receiver the sum received from the railroad for the general creditors, but that he erred in awarding the sum received from the city to the surety. This sum should also have been awarded to the receiver for general creditors.

There is no apparent reason for allowances to the receiver for his services and fee to his counsel at this time. These claims may more properly be considered upon the final audit of the receiver's account.

The first, second, fifth, sixth, seventh, and eighth exceptions of the Massachusetts Bonding & Insurance Company are dismissed, and its third and fourth exceptions are sustained, in so far as they apply to the allowances to the receiver and his counsel for services and fee, respectively, without prejudice to the presentation of such claims at the audit of the receiver's accounts, and in all other respects the said exceptions are dismissed.

The first exception on behalf of the receiver is dismissed, as its application to the master's report is not apparent. The second exception is sustained. The third, fourth, fifth, and sixth exceptions are sustained, except in so far as they relate to the master's fee, and in that respect are overruled.

The exceptions filed on behalf of the American Bridge Company are sustained.

It is ordered that the awards made by the learned special master be modified, in accordance with this opinion, and in other respects the report be confirmed.

STANDARD FASHION CO. v. MAGRANE HOUSTON CO.*

(District Court, D. Massachusetts. March 9, 1918.)

1. SALES ⟸7—CONSTRUCTION OF CONTRACT—SALE OR AGENCY.
A contract by which defendant, a mercantile company, was in terms designated as agent for sale of complainant's patterns, but which required defendant to pay for the patterns when received at stated prices, with the privilege of returning those unsold each six months at a reduced price for exchange, *held* one of sale, and not of agency.

2. MONOPOLIES ⟸17(2)—CLAYTON ACT—RESTRICTION ON COMPETITION.
A contract for the sale of patterns to a retail store for a term of years, during which it agreed to buy and keep on hand a certain quantity at all times, and "not to sell or permit to be sold on its premises during the term of the contract any other make of patterns and not to sell Standard patterns, except at label prices," *held* illegal and void, as in violation of Clayton Act, § 3 (Comp. St. 1916, § 8835c).

In Equity. Suit by the Standard Fashion Company against the Magrane Houston Company. Decree for defendant.

Storey, Thorndike, Palmer & Dodge, of Boston, Mass., for plaintiff.

James W. Sullivan, of Lynn, Mass., for defendant.

JOHNSON, Circuit Judge. November 25, 1914, the plaintiff entered into a contract with the defendant, containing, among others, the following provisions:

"The first party hereof grants to second party an agency for the sale of Standard patterns for their store in the city of Boston, state of Massachusetts, for a term of two years from date hereof, and from term to term thereafter until this agreement is terminated, as hereinafter provided, and agrees to sell and deliver f. o. b. New York or at its branch office in Boston, Mass., to second party, Standard patterns, at a discount of 50 per cent. from retail prices, and advertising matter at the prices and on the conditions named on the reverse side hereof; also such other publications as may be issued by first party at regular agents' rates; to allow second party to return discarded patterns semiannually between January 15th and February 15th, and July 15th and August 15th, in exchange, at nine-tenths cost, for other patterns to be shipped at the time of return or thereafter, but not in exchange for other goods than patterns. Patterns returned for exchange must have been purchased by second party from first party direct, and must be delivered in good order to first party at its general office in New York."

In consideration of the above the second party agreed to purchase a certain number of Standard fashion sheets and handy catalogues per annum and to pay transportation charges on same, and on all goods ordered or returned, and to purchase and keep on hand at all times, except during periods of exchange, $1,000 value in Standard patterns, at the net invoice prices, and to pay first party for the first order of pattern stock $500, thirty days after shipment of the same, it being agreed that the balance of the purchase price, $500, should remain unpaid as a standing credit during the continuance of the agreement and become due and payable at its termination, upon which sum the second party agreed to pay interest at the rate of 3 per cent. per annum on January 15th of each year, and to pay for all other

*Judgment affirmed, 251 Fed. 559.

purchases on or before the 15th day of the month succeeding the date of shipment.

The second party also agreed—

"not to sell or permit to be sold on its premises during the term of the contract any other make of patterns, and not to sell Standard patterns except at label prices."

The contract contained this provision in regard to its termination:

"Either party desirous of terminating this agreement must give the other party 3 months' notice in writing within 30 days after the expiration of any contract period, as above specified, the agency to continue regularly during such three months."

No notice of its desire to terminate the contract was given by the defendant to the plaintiff within 30 days after the expiration of the first period of 2 years after the date of the contract; but on April 7, 1917, it gave to the plaintiff notice in writing of its decision to terminate the sale of Standard patterns in 3 months from the date of the notice, and about the 1st of July, 1917, discontinued the sale of the Standard patterns and placed on sale in its store patterns made by the McCall Company.

In its bill the plaintiff prays that the defendant may be enjoined until February 25, 1919, the earliest date at which it claims the contract can be terminated—

"from advertising, selling or distributing the patterns, periodicals, catalogues and other literature or printed matter of said McCall Company or any pattern manufacturer other than the plaintiff, and from using its store, business, agents, clerks, parties or connections to further advance the interests of the said McCall Company or any other pattern manufacturer other than the plaintiff, and from permitting to be sold at said store during the term of said contract, and until the aforesaid date, any make of patterns other than those of the plaintiff."

The plaintiff also asks to be awarded "such damages as may be ascertainable."

The defendant claims:

(1) That the contract was terminated on July 7, 1917, by the notice given by it on April 7, 1917.

(2) That the contract is one for sale and that, because it contains the negative covenant "not to sell or permit to be sold on the premises of second party during the term of the contract any other make of patterns," it is in violation of Act Oct. 15, 1914, c. 323, § 3, 38 Stat. 731 (Comp. St. 1916, § 8835c), known as the Clayton Act.

[1, 2] I find that the defendant did not give notice of its desire to terminate the contract in accordance with its provisions, and that it would continue in force until terminated as therein provided, unless it can be successfully attacked by the defendant as unlawful under section 3 of the Clayton Act, which is as follows:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any territory thereof or the District of Columbia or any insular possession

or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

If an agency only were created by the contract in question it is clear that the provisions of this act would not apply, because by its terms it is made applicable only to leases, sales or contracts for sale. Although the plaintiff, by the terms of the contract, grants to the defendant an agency for the sale of Standard patterns, the court will search beneath the language employed to discover the real nature of the contract and will place its own construction upon it without reference to its characterization by the parties themselves.

The plaintiff in fact agreed to sell and deliver to the defendant—

"Standard patterns at a discount of 50 per cent. from retail prices and advertising matter at the prices and on the conditions named * * * also such other publications as may be issued by first party at regular agents' rates."

All transportation charges and expenses of sale were to be paid by the defendant. No accounting by the defendant to the plaintiff was required. While the defendant had the right to return discarded patterns between January 15th and February 15th, and between July 15th and August 15th in each year, and could receive in exchange nine-tenths of their cost in other patterns, there is nothing in the contract to compel it to make the exchange, and patterns which are returned for exchange must have been purchased by the second party from first party direct.

One-half the contract price to be paid for the first order of patterns was entered upon the books of the plaintiff company as an obligation which the defendant was to pay at the termination of the contract, and upon which it agreed to pay interest yearly. No condition was to be performed by the defendant before the title to the patterns delivered would vest in it, and the fact that the defendant could return discarded or unsold patterns in no way prevented the title to the patterns from vesting absolutely in the defendant. While the defendant agreed to return unsold patterns at the termination of the contract, yet this right of return was evidently inserted for its benefit rather than to insure the return of patterns to the plaintiff, for the contract provides:

"That neglect to return the pattern stock within two weeks after expiration of three months notice shall relieve first party from all obligation to redeem the same."

That it was the intent and understanding of the parties to the contract that this return of unsold patterns constituted a repurchase by the plaintiff, plainly appears from the typewritten section which appears upon the back of the contract, by which it is provided that in case the premises of the defendant company or a substantial part

of the same should be sold, the defendant company should have the privilege of terminating the contract, and "may" then deliver its stock of patterns to the plaintiff "for repurchase under the repurchase clause of this contract."

It will be noted that the defendant is not compelled by this provision to return its unsold stock, but that it "may deliver" the same to the plaintiff "for repurchase." The purpose of the whole contract is plainly to sell patterns at a reduced rate to the defendant on the condition that it will resell at the retail prices fixed by the plaintiff, and also refrain from selling the goods of any other pattern manufacturer. The credit extended for one-half the purchase price of the original order for patterns is intended to serve the purpose of holding the defendant to its contract.

The reports of the judiciary committees of the House of Representatives and the Senate accompanying the Clayton Act were introduced in evidence for the purpose of showing that it was not the intent of Congress to include "exclusive agencies" within the scope of the act. They contain this statement relative to the purpose of the act:

> "It not only does not prohibit or forbid exclusive agencies, but on the contrary it in no way whatsoever relates to agencies, properly so termed."

It will be noticed that the committees were very careful to state that only "agencies, properly so termed," are excluded from the provisions of the act.

I do not think the contract establishes an agency, "properly so termed," although it is made to assume this aspect in some of its features, but that it is a contract for sale; and in this view I find support in the recent opinion of the Supreme Court in Straus et al. v. Victor Talking Machine Co., 243 U. S. 490, 37 Sup. Ct. 412, 61 L. Ed. 866, L. R. A. 1917E, 1196, Ann. Cas. 1918A, 955, and of Circuit Judge Knappen in Ford Motor Co. v. Union Motor Sales Co. et al., 244 Fed. 156, 156 C. C. A. 584.

Counsel for the plaintiff relies upon Wilcox & Gibbs Co. v. Ewing, 141 U. S. 627, 12 Sup. Ct. 94, 35 L. Ed. 882, as decisive of the question whether the contract was one of agency or one for sale; but admitting under the authority of this case that the defendant was created an agent for certain purposes, it is also nevertheless true that the contract contained an agreement for an absolute sale of patterns and the plaintiff's publications to the defendant as its agent.

If the contract is one for sale, is it unlawful under the Clayton Act because its effect "may be to substantially lessen competition or tend to create a monopoly"?

Neither the Supreme Court nor any other court of last resort has yet passed upon section 3 of the Clayton Act.

The cases from state courts that have been cited by the plaintiff were all decided before the passage of the Clayton Act and all dealt with the construction of a state statute, and therefore afford no assistance in the construction of a statute which is declared to be supplemental to the Sherman Act (Act July 2, 1890, c. 647, 26 Stat. 209), after a construction had been placed by the Supreme Court upon

that act by which the restraint of trade prohibited by it was declared to be an unreasonable restraint.

In Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co., 227 Fed. 46, 141 C. C. A. 594, the court had under consideration section 2 of the Clayton Act, which deals with discriminations between different purchasers in the sales of commodities and makes such discriminations unlawful—

"where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

The last clause of the section, however, provides:

"That nothing herein contained shall prevent persons engaged in selling goods * * * from selecting their own customers in bona fide transactions and not in restraint of trade."

The court there held that it was not unlawful for the Cream of Wheat Company to refuse to sell its product to retailers and confine its sales exclusively to wholesalers, and held that "neither the Sherman Act, nor any decision of the Supreme Court construing the same, nor the Clayton Act, has changed the law in this particular," and found it unnecessary to go into a consideration of the Clayton Act, which was discussed by District Judge Hough when the case was before him, and whose opinion in 224 Fed. 566, is cited upon the brief of counsel for the plaintiff.

In Motion Picture Patents Co. v. Universal Film Manufacturing Co., 235 Fed. 398, 148 C. C. A. 660, it was claimed in the Circuit Court that the contract there under consideration was unlawful because in violation of section 3 of the Clayton Act, and Judge Hand said:

"If the prohibitions of the Clayton Act mean anything at all, this case falls within them, and the restrictions as to use of films other than complainant's with the projecting machines are therefore void.

"Indeed, the report of the Judiciary Committee of the House concerning the Clayton Act shows that its purpose is to reach the film monopoly."

When the case reached the Supreme Court, however, it was decided upon other grounds, the court stating its conclusion as follows (243 U. S. 502, 517, 37 Sup. Ct. 416, 421 [61 L. Ed. 871, L. R. A. 1917E, 1187, Ann. Cas. 1918A, 959]):

"Our conclusion renders it unnecessary to make the application of this statute to the case at bar which the Circuit Court of Appeals made of it; but it must be accepted by us as a most persuasive expression of the public policy of our country with respect to the question before us."

In the dissenting opinion of Mr. Justice Holmes he also "leaves on one side the question of the effect of the Clayton Act."

In Coca-Cola Co. v. J. G. Butler & Sons (D. C.) 229 Fed. 224, Judge Trieber found that the refusal of the Coca-Cola Company to sell its syrup for bottling to other than its licensed bottlers and permit such parties to use its trade-mark in connection with the bottled product was not a violation of the Clayton Act, in view of the possibility of adulteration and the hardship to the manufacturer in maintaining

such supervision over the bottling as it deemed necessary if required to sell to every intending purchaser.

In Pictorial Review Co. v. Curtis Publishing Co., 255 Fed. 206, decided June 23, 1917, Judge Hand found that the Curtis Publishing Company had established a system for the promotion of the sale of its publications by forming a "league of Curtis salesmen," and that a restriction in its contract with district agents or wholesalers of the defendant's publications that they should not sell to the Curtis newsboys publications other than those of the defendant without first obtaining the defendant's approval, was not in violation of the Clayton Act; but his decision was placed upon the ground that the league of newsboys had been formed by the Curtis Company through its "ingenuity, labor and capital," and that the complainant was attempting to secure a preliminary injunction in order that it might avail itself of the plaintiff's system for the sale of its own publication, and that in making this attempt the complainant is itself engaging in unfair trade. He intimates in the following language, however, what his opinion might be if nothing but a sale were involved:

"If nothing but a sale were involved, I might support plaintiff's contention that defendant has violated the Clayton Act by preventing these wholesale dealers from selling the Pictorial Review through subdealers and boys."

In United States v. United Shoe Machinery Co. (D. C.) 234 Fed. 127, 150, District Judge Trieber, after having quoted part of the opinion of the Supreme Court in the Standard Oil Company Case, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734, discusses the Clayton Act as follows:

"On the other hand, the act now under consideration, instead of using the generic words of the Sherman Act, in plain and unequivocal language states what acts shall be unlawful, if they 'substantially lessen competition or tend to create a monopoly.' This being the case, the presumption is, not that Congress intended that the construction of the Sherman Act should control, but, on the contrary, that it should not control. Had Congress intended that the construction placed upon the Sherman Anti-Trust Act in those cases should apply to the Clayton Act, it would have used the same or like generic words, instead of defining what acts shall be unlawful, if the natural result of such acts tends to substantially lessen competition or create a monopoly in any line of commerce. * * *

"Evidently Congress was not satisfied to only prohibit actual lessening of competition, or monopolizing, but to make it unlawful for any person to do those acts, which may put it in his power to do so."

The Clayton Act is entitled:

"An act to supplement existing laws against unlawful restraints and monopolies and for other purposes."

The report of the Senate committee of the judiciary upon the bill contains the following statement of its purpose:

"Broadly stated the bill in its treatment of unlawful restraints and monopolies seeks to prohibit and make unlawful certain trade practices, which as a rule singly and in themselves are not covered by the act of July 2, 1890, or other existing anti-trust acts, and thus by making these practices illegal, to arrest the creation of trusts, conspiracies and monopolies in their incipiency and before consummation."

While the Clayton Act reaffirms the general terms of the Sherman Act as construed by the United States Supreme Court in the Standard Oil Company Case, supra, and American Tobacco Company Case, 221 U. S. 106, 31 Sup. Ct. 632, 55 L. Ed. 663, it goes further and deals in specific terms with certain acts and practices which are declared by it to be unlawful if their effect may be "to substantially lessen competition or tend to create a monopoly."

The court is not to inquire into the wisdom of such legislation, and in Standard Manufacturing Co. v. United States, 226 U. S. 20, 49, 33 Sup. Ct. 9, 57 L. Ed. 107, its duty is clearly stated by Mr. Justice McKenna:

"The law is its own measure of right and wrong, and what it permits, or forbids, and the judgment of the courts cannot be set up against it in a supposed accommodation of its policy with the good intentions of parties, and it may be, of some good results."

I am satisfied with the reasoning of Judge Trieber that Congress, with the full knowledge of the construction which had been placed upon the Sherman Act by the Supreme Court, did not intend that the same construction should be placed upon the specific terms of the Clayton Act; for it chose to define the lessening of competition which it declared to be unlawful, and to do this used the word "substantially" to make it apparent that a real, as opposed to an imaginary or fanciful lessening of competition, was intended.

Doubtless a substantial lessening of competition would amount to an unreasonable restraint of trade; but I do not think it is the duty of the court to find this before it can pronounce a contract unlawful, the effect of which it has found may be to "substantially lessen competition." The reports of the committees of both houses of Congress, as well as the legislative history of the bill, show the intent of Congress to protect the public from practices which it believed to be inimical to the public good by preventing these practices from being put in operation.

I think, therefore, it is the duty of the court to determine whether or not the contract has provided means for a real or substantial lessening of competition, irrespective of what use has been or is being made of these means.

By the use of the word "may" the intent is manifest to deal with the potential evil which a contract may contain, and to make the attempt to substantially lessen competition unlawful.

The contract must be considered as part of a widely extended system and a conclusion reached as to the legality of the system. There are in the United States and Canada about 52,000 so-called pattern agencies, and of these the plaintiff and two other companies allied with it through a common holding company control about 20,000, with all of whom a contract like the one we are considering is in force.

The contract by its terms destroys all competition in the sale of patterns and establishes a complete monopoly in the territory which it covers—a large retail dry goods store at the corner of Temple Place and Washington street, in the center of the dry goods district of a large city.

The plaintiff has made a contract containing a like negative covenant with R. H. White Company, whose store is nearly opposite the defendant's store upon Washington street, both of which stores the plaintiff claims are very desirable locations for the sale of its patterns, because goods are sold there from the piece for the manufacture of women's and children's clothing by use of patterns.

If the plaintiff could make a contract like the one under consideration with all the proprietors of retail dry goods stores in this district, it would have a complete monopoly of the sale of patterns in it, and there is nothing in the contract to prevent it doing this, or even covering the whole state of Massachusetts or the whole country. If there were but one dry goods store in a village and the plaintiff could make this contract with the proprietor of that store, it would secure a practical monopoly of the pattern business in that village.

I am of the opinion that the negative covenant in the contract is prohibited by the Clayton Act, and therefore that the bill should be dismissed, with costs to the defendant.

A decree in accordance with the above may be submitted.

UNITED STATES v. FUNG SAM WING et al.

(District Court, N. D. California, First Division. March 21, 1918.)

No. 5896.

1. ALIENS ⟸27—CHINESE EXCLUSION ACT—PREINVESTIGATION OF CLAIM OF CHINESE PERSON TO BE MERCHANT.
   Under the Chinese Exclusion Acts (Comp. St. 1916, § 4324), the Department of Labor was authorized to promulgate its rule for the investigation, in advance of his departure, of the claimed mercantile status of a Chinese person desiring to go abroad temporarily, and to require such person to furnish with his application the names of two witnesses able to testify that for one year preceding proposed departure the applicant had been engaged in mercantile pursuit named, so the securing of approval of the application of one not entitled would work a fraud on the government.
2. CONSPIRACY ⟸33—TO DEFRAUD GOVERNMENT.
   A conspiracy to secure the approval of the application of a Chinese person, desiring temporarily to go abroad, for preinvestigation of his claimed mercantile status, when he is not entitled to the same, is a violation of Criminal Code, § 37 (Comp. St. 1916, § 10201), denouncing conspiracies to defraud the government.
3. CONSPIRACY ⟸43(10)—CHINESE PERSONS—OFFENSES—INDICTMENT.
   An indictment alleging that defendants conspired to secure the approval of the application of a Chinese person desiring to go abroad for preinvestigation of his claimed mercantile status *held*, in view of the requirement of the rule of the Department of Labor that application should be made 30 days before proposed departure, and the Chinese Exclusion Acts (Comp. St. 1916, § 4324), to be insufficient, as it merely alleged defendants knew the applicant had not been a merchant for one year before his application.

Fung Sam Wing, alias Sam Fong, and others, were indicted, charged with conspiracy to defraud the United States by securing from the Commissioner of Immigration, etc., approval of the application of

Fung Sam Wing for preinvestigation of his claim that he was a domiciled merchant. On demurrer to the indictment. Sustained.

John W. Preston, U. S. Atty., and Casper A. Ornbaun, Asst. U. S. Atty., both of San Francisco, Cal.

John T. Thornton and Heim Goldman, both of San Francisco, Cal., for defendants.

DOOLING, District Judge. The defendants are charged with a conspiracy to defraud the United States by securing from the Commissioner of Immigration at Angel Island for Fung Sam Wing, a Chinese person, claiming to be a merchant domiciled in this country, the approval of the application of said Fung Sam Wing, pursuant to the provisions of rule 15 of the Department of Labor, governing the admission of Chinese, for the preinvestigation of his claim that he was such domiciled merchant, with the intent that said application should, when approved, enable the said Fung Sam Wing to go abroad and return to the United States without difficulty, because of his approved status as such domiciled merchant.

The indictment further avers that a lawfully domiciled Chinese merchant, within the meaning of the Chinese Exclusion Laws (Act Nov. 3, 1893, c. 14, § 2, 28 Stat. 8 [Comp. St. 1916, § 4324]), is a Chinese person who, for at least one year immediately preceding the date of the application for a preinvestigation of his status, had been engaged in the occupation of a merchant and had not performed any manual labor, except such as was necessary in the conduct of his business as such merchant. It is then averred that the said Fung Sam Wing was not, as defendants well knew, a lawfully domiciled merchant, within the meaning of the Chinese Exclusion Laws, at the time of his said application; that is to say, a Chinese person who had been engaged, for a least one year immediately preceding the date of the said application, in the occupation of a merchant, and had not performed any manual labor, except such as was necessary in the conduct of his said occupation. The indictment then charges the commission of certain overt acts in furtherance of the conspiracy.

[1, 2] The Chinese Exclusion Law provides that the term "merchant," as employed therein, shall have the following meaning and none other:

"A merchant is a person engaged in buying and selling merchandise, at a fixed place of business, which business is conducted in his name, and who during the time he claims to be engaged as a merchant, does not engage in the performance of any manual labor, except such as is necessary * * * as such merchant."

Here is found no mention of the continuance of this status for a year or any other period. The same act, however, declares (the declaration following immediately the language quoted):

"Where an application is made by a Chinaman for entrance into the United States on the ground that he was formerly engaged in this country as a merchant, he shall establish by the testimony of two credible witnesses, other than Chinese, the fact that he conducted such business as hereinbefore defined for at least one year before his departure from the United States,

and that during such year he was not engaged in the performance of any manual labor, except such as was necessary in the conduct of his business as such merchant, and in default of such proof shall be refused landing."

The act also authorizes the Department of Labor to make such rules and regulations, not inconsistent with the laws of the land, as it may deem necessary and proper to carry the laws into effect.

Pursuant to this authority, and in order to avoid delay in securing admission upon the return of a Chinese merchant to this country, the Department of Labor promulgated rule 15, providing for the investigation in advance of his departure of the claimed mercantile status of a Chinese person who desires to go abroad temporarily. This rule provides that such person may make application upon a prescribed form for such investigation, which application must be filed at least 30 days prior to the date of proposed departure.

In the application must be furnished the names and addresses of two (or more) credible witnesses other than Chinese, who are able and willing to testify of their own knowledge that for at least one year immediately preceding the date of proposed departure, the applicant has been engaged exclusively in the pursuit named by him. The officer to whom the application is made shall examine the applicant, such witnesses as he shall produce, and such other witnesses as may be necessary.

If the officers are satisfied that the applicant is such Chinese merchant as is entitled to leave the country and return, the application is approved in writing, and upon the production of such approved application, when the applicant returns from abroad, he shall in the language of the rule "be promptly admitted without further examination or investigation."

I have no doubt that the rule is one which the Department of Labor has the power to make under the law, and that the securing of an approved application by one not entitled thereto would be a fraud upon the government. It would also be an offense under section 37 of the Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1096 [Comp. St. 1916, § 10201]) for two or more persons to conspire to defraud the government by fraudulently securing such an approval for one not entitled to it. So that the offense attempted to be charged here is one that might well be committed. It does not seem to me, however, that the present indictment states an offense, if we bear in mind the provisions of the act and the rule above cited.

[3] The act requires of a returning merchant proof that he was such for at least one year immediately preceding his departure. The rule, based thereon, requires the naming of at least two witnesses by the applicant for preinvestigation, who will testify that he was a merchant for at least one year immediately preceding the date of proposed departure. This application must be filed at least 30 days prior to the date of the proposed departure.

The indictment, however, charges that the conspiracy was to secure the approval of an application fraudulently, because the applicant had not been a merchant for one year preceding the date of his application, and that the witnesses well knew that he had not been a

merchant as defined by the statute for a period of one year immediately prior to the date of his application. But this fact might well be true, and still no fraud committed or attempted, as neither the law nor the rule requires proof of the existence of the mercantile status for a year prior to the date of the application, but for a year prior to the date of the proposed departure, which by the very terms of the rule must be at least 30 days subsequent to the date of the application.

Of course, the portion of the indictment charging the forming and existence of the conspiracy is not aided by the statement of the commission of the overt acts.

The demurrer to the indictment will therefore be sustained.

In re SOLOMON & JOHNSON.

(District Court, E. D. Michigan, N. D. October, 1918.)

No. 438.

1. COURTS ⟸366(19)—EXEMPTIONS—WHAT LAW GOVERNS.
   Under Bankruptcy Act July 1, 1898, § 6 (Comp. St. § 9590), providing that exemptions allowed to bankrupts by the state laws shall not be affected, the bankruptcy court, in determining the nature and amount of the exemptions to which the bankrupts are entitled, will follow and adopt the laws of the state of the bankrupts' residence.

2. EXEMPTIONS ⟸61—PARTNERS—RIGHT TO.
   Under Comp. Laws Mich. 1897, § 10322, and before the enactment of the Uniform Partnership Act, each partner was entitled to exemptions out of the partnership assets to the same extent and in the same manner as if he were carrying on business as an individual.

3. EXEMPTIONS ⟸61—PARTNERS—RIGHT TO EXEMPTIONS.
   Where Michigan partners were entitled to exemptions in the partnership assets, under Comp. Laws Mich. 1897, § 10322, the right of the partners to exemptions cannot be denied on the theory that one of the partners had drawn from the firm assets a larger share than he was entitled to, for the other partner was not objecting, and creditors could not urge such objections.

4. BANKRUPTCY ⟸398(3)—EXEMPTIONS—SALE.
   Where each partner was entitled to exemptions in the stock owned by the partnership, *held*, that the partners' sale of the exemptions before bankruptcy was valid, and the purchaser was entitled to enforce his rights in the bankruptcy proceedings.

In Bankruptcy. In the matter of Solomon & Johnson, bankrupts. Petition to review an order of the referee refusing to set aside to the petitioner, as assignee of the bankrupt, certain exemptions. Order set aside, and cause remanded for further proceedings.

I. S. Canfield, or Alpena, Mich., for petitioner.
Lewis J. Weadock, of Bay City, Mich., for objecting creditors.

TUTTLE, District Judge. This is a petition to review an order of the referee in bankruptcy refusing to set aside to the petitioner, as assignee of the bankrupts, certain exemptions, on the ground that

such bankrupts were not entitled thereto as against creditors of the partnership.

The bankrupts were copartners engaged in the grocery business at Alpena, Mich., under the firm name of Solomon & Johnson. One of the partners contributed a larger amount of cash than the other, although they agreed to share equally in the profits; the superior experience and knowledge of one of the partners being considered as the equivalent of the difference in the money actually invested. It was agreed that each partner should draw a certain amount each week as living expenses, and it is the claim of the trustee, which was upheld by the referee, that both partners had, at the time of the filing of the involuntary petition in bankruptcy, drawn from the partnership funds more than they were entitled to draw under the partnership agreement. Shortly before bankruptcy the partners sold their exemptions to the petitioner herein for the sum of $200 each, and this purchaser is seeking to recover the proceeds of the sale of the exempt property.

This sale was made by the bankruptcy court with the consent of the parties interested, and with the understanding that any rights of the purchaser to the exempt property should be transferred to the proceeds thereof. The referee denied the right of one of the partners to any exemptions, and materially reduced the exemptions allowed to the other partner, on the ground that such partners had drawn out more than their proper shares of the partnership assets before the filing of the petition in bankruptcy, and that, therefore, as against creditors, their right to exemptions should be to that extent diminished. The correctness of this ruling is the matter involved on this petition to review.

[1] The meritorious question presented is whether a member of a bankrupt Michigan partnership, who has drawn from the partnership assets more than his share as between himself and his copartner is thereby deprived of the right to claim the full amount of the exemptions provided by the Michigan statute, as against creditors of the bankrupt partnership.

Section 6 of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 548 [Comp. St. § 9590]) is as follows:

"This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time of the filing of the petition in the state wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition."

In determining the nature and amount of the exemptions to which these bankrupts are entitled, this court will follow and adopt the Michigan statute and the decisions of the Michigan Supreme Court construing and applying such statute. Holden v. Stratton, 198 U. S. 202, 25 Sup. Ct. 656, 49 L. Ed. 1018; In re National Grocer Co., 181 Fed. 34, 104 C. C. A. 47 (C. C. A. 6), 30 L. R. A. (N. S.) 982; In re Baker, 182 Fed. 392, 104 C. C. A. 602 (C. C. A. 6).

[2, 3] The Michigan statute on the subject of exemptions in force at the time of the filing of the petition in bankruptcy herein was sec-

tion 10322 of the Michigan Compiled Laws of 1897, which provided, among other things, that—

"The following property shall be exempt from levy and sale under any execution, or upon any other final process of a court: * * * The tools, implements, materials, stock * * * to enable any person to carry on the profession, trade, occupation or business in which he is wholly or principally engaged, not exceeding in value $250."

While in many, if not most, states, it is held that the members of a partnership are not entitled to exemptions in the partnership assets, in Michigan at the time in question, and before the enactment of the Uniform Partnership Act (Pub. Acts 1917,.Mich. No. 72) now in force, the rule was otherwise, and it was settled that each partner was entitled to his exemptions in partnership property to the same extent and in the same manner as if he were carrying on business as an individual. Skinner v. Shannon, 44 Mich. 86, 6 N. W. 108, 38 Am. St. Rep. 232; Waite v. Mathews, 50 Mich. 392, 15 N. W. 524; McCoy v. Brennan, 61 Mich. 366, 28 N. W. 129, 1 Am. St. Rep. 589.

Each of these partners, therefore, was entitled to claim his exemptions in the stock of merchandise owned by this bankrupt partnership. It does not appear that the partners individually were adjudicated bankrupts, or that the property owned by them as individuals has been brought into the possession or under the jurisdiction of the bankruptcy court. Neither partner is complaining of any of the acts of the other nor seeking any accounting as between the members of this partnership. Only the creditors of the partnership are denying the rights of the partners to claim their statutory exemptions, and this solely on the ground that to allow such exemptions will enable each of such partners to draw from the firm assets a larger share than that to which he is entitled under the partnership agreement. It seems clear that these creditors are not in a position to make any such objection. Each of these partners was entitled to the same exemptions in the partnership stock as that allowed to an individual person. His right thereto as against creditors of the partnership is not affected by equities existing between himself and his copartner, any more than the right of an individual to such exemptions is affected by equities existing between himself and third persons. In both cases, the right to the statutory exemptions is an absolute and fixed privilege afforded by the state. The purpose of the exemption is not only to protect every debtor from total destitution, but also to protect the public from the resultant necessity of providing for him as a public charge. The right of an individual to the exemptions prescribed by the statute does not depend upon the extent or character of his indebtedness or his obligations to other persons; nor does the right of a partner to such exemptions depend upon the question whether he has drawn out from the partnership more than his proper share. McCoy v. Brennan, supra.

[4] As each partner was entitled to his exemptions in the stock of merchandise owned by the partnership, the sale thereof to the petitioner was rightfully made and the latter is entitled to enforce his rights as purchaser in the bankruptcy proceedings. In re National Grocer Co., supra.

I am clearly of the opinion that the referee erred in the respect indicated. The order complained of will be set aside, and the cause remanded for further proceedings in conformity with the terms of this opinion.

In re CHAMBERS.

(District Court, N. D. Iowa, E. D., at Dubuque. January 2, 1919.)

No. 977.

BANKRUPTCY ⊂=200(4)* — LIENS — JUDGMENTS RECOVERED WITHIN FOUR MONTHS.

Under Bankruptcy Act July 1, 1898, § 67f (Comp. St. 1916, § 9651), providing that judgments obtained against an insolvent within four months of the filing of a petition in bankruptcy against him shall be deemed void, a judgment recovered by an Iowa landlord the day before the tenant filed a voluntary petition in bankruptcy is not entitled to priority over a chattel mortgage given and recorded some 20 months prior to the bankruptcy, regardless of the landlord's right to a lien under Code Iowa, § 2992.

In Bankruptcy. In the matter of Milton O. Chambers, bankrupt. Petition of the Commercial Trust & Savings Bank of Charles City for review of an order of the referee denying its claim to priority under a chattel mortgage, and allowing a judgment of Mrs. Margaret E. Gladwin as a lien prior and superior thereto. Order reversed, and matter referred back to the referee for further proceedings.

Submitted on petition of the Commercial Trust & Savings Bank of Charles City (called the petitioner) for review of an order of the referee denying its claim to priority under a chattel mortgage upon certain property of the bankrupt, made and recorded in the proper county more than four months prior to the adjudication in bankruptcy, and allowing a judgment of Mrs. Margaret E. Gladwin, recovered in the district court of Floyd county, Iowa, January 15, 1917, against the bankrupt, as a lien upon the property covered by the petitioner's mortgage, as prior and superior thereto.

J. C. Campbell, of Charles City, Iowa, for petitioner.
J. H. Lloyd, of Charles City, Iowa, for claimant.

REED, District Judge. The adjudication in bankruptcy was upon the voluntary petition of the bankrupt, prepared and signed January 12, 1917, filed and adjudicated January 16, 1917; the schedules of his assets and liabilities showing that he was then insolvent.

February 2, 1917, the petitioner filed its claim against the bankrupt estate, based upon a promissory note of the bankrupt dated March 15, 1915, for $1,661, due in two years, with interest, for money loaned to the bankrupt, secured by a chattel mortgage of the same date upon certain horses, cattle, and other live stock, which property, it is recited in the mortgage, "is free and clear of all claims and liens of every kind whatsoever," which mortgage was duly filed and recorded in the proper record in Floyd county, Iowa, where the property was

then situated, on March 17, 1915, two days after the mortgage was made, and asked that its claim be established and allowed as a prior lien on the property covered by its said mortgage.

January 12, 1917, the date the petition in bankruptcy was prepared and signed, Mrs. Gladwin, a sister of the bankrupt, who will be called the claimant, filed in the district court of Floyd county, Iowa, a petition to recover from the bankrupt some $450, alleged to be rent due her from him for certain land described in the petition, which she alleged was verbally leased by her to the bankrupt in December, 1914, for two years from March 1, 1915, and claimed a landlord's lien therefor under the Iowa Code (section 2992), and an attachment enforcing the same upon the property covered by the petitioner's mortgage, alleging that such property was used upon the land so leased by her to the bankrupt, during the term of such lease. Such action was commenced by Mr. Lloyd as her attorney, who was also attorney for the bankrupt in procuring the adjudication in bankruptcy. No notice or summons of the petition so filed was served upon the bankrupt; nor was the petitioner, whose mortgage was then of record in Floyd county, made a party to the suit, and it was never served with notice thereof. On the same day, January 12, 1917, Mr. Lloyd, as attorney for the claimant, procured from the bankrupt a writing, duly signed by him, admitting the debt and amount thereof as claimed by the claimant, filed the same in the state court as an appearance therein, consenting to the jurisdiction of the state court to entertain the suit at that term, though the term had actually commenced at the time required by law, some days before, and a judgment by default was entered against the bankrupt on January 15, 1917, for the amount claimed by the claimant, and a landlord's writ of attachment was issued and levied by the sheriff of Floyd county upon the property covered by the petitioner's mortgage, which property was later sold under such attachment, and the proceeds arising therefrom brought into the court of bankruptcy in this proceeding.

January 22, 1917, the claimant filed, or caused to be filed, in this proceeding a claim based upon her judgment so recovered in the state court for $474.90, and asked that it be allowed and established as a prior lien for rent upon the property covered by the petitioner's mortgage, and that petitioner's claim be denied as a claim or lien upon the property so covered by its mortgage. The referee allowed the claim as prayed by the claimant, and denied the claim of the petitioner under its mortgage.

Such in brief is a statement of the facts as shown by the record, so far as deemed material, which are not disputed, except that both parties claim the prior right to the property covered by petitioner's mortgage.

To the claim of Mrs. Gladwin is attached a letter of attorney by the claimant, appointing J. H. Lloyd as her attorney in fact, to act for and represent her in the bankruptcy proceeding.

To such claim the petitioner objected for the reasons, among others: (1) That the judgment upon which the claim is based was fraudulently procured and entered in the district court of Floyd county

within four months immediately preceding the adjudication in bankruptcy, without notice to the petitioner, and is of no effect against it; (2) that said judgment is invalid as a lien upon or claim against the bankrupt estate, under section 67 of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 564 [Comp. St. 1916, § 9651]). That section provides:

"Sec. 67f. That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same. * * *"

See Collier on Bankruptcy, p. 1084 et seq. (11th Ed.).

Under this section all attachments and other liens recovered in any legal proceedings against the bankrupt within four months immediately preceding the adjudication in bankruptcy are annulled, and the property affected by any such lien is wholly discharged therefrom. Clarke v. Larramore, 188 U. S. 486, 23 Sup. Ct. 363, 47 L. Ed. 555; Chi., B. & Q. R. Co. v. Hall, 229 U. S. 511, 33 Sup. Ct. 885, 57 L. Ed. 1306; In re Richards, 96 Fed. 935, 37 C. C. A. 634; In re Forbes, 186 Fed. 79, 108 C. C. A. 191; Cook v. Robinson, 194 Fed. 785, 114 C. C. A. 505; In re United Motor Chicago Co., 220 Fed. 772, 136 C. C. A. 378; Stone-Ordean-Wells Co. v. Mark, 227 Fed. 975, 142 C. C. A. 433; In re Southern Arizona Smelting Co., 231 Fed. 87, 145 C. C. A. 275. And see Casady & Co. v. Hartzell et al., 171 Iowa, 325, 151 N. W. 97.

As the claimant relies alone upon the judgment of the state court as establishing her lien upon the property covered by the petitioner's mortgage, as prior thereto, the objection of the petitioner challenges the validity of her claim at its foundation.

That the Iowa statute (Code, § 2992) gives a landlord a lien upon all crops grown upon the leased premises, and other personal property of the tenant, not exempt from execution, that has been used upon such premises during the term of the lease, if properly established, is not and cannot be successfully challenged; but whether or not the judgment of a state court establishing such a lien against a bankrupt alone only one day before his adjudication, without service or summons upon him, but upon his voluntary appearance and consent to the judgment and lien of the landlord, is valid as against a good-faith mortgagee of certain property of the bankrupt, duly made and recorded nearly two years before the adjudication, who has had no opportunity to challenge or contest such lien, is quite another question, and especially a judgment recovered under the circumstances shown by this record.

The objection of the petitioner to the judgment of this claimant so recovered may not strictly reach to the question of the validity of a landlord's lien, regardless of the attachment or decree establishing the same; but that question is not raised in this proceeding, and need not be considered.

In Chi., B. & Q. R. Co. v. Hall, 229 U. S., above, it is said of section 67f of the Bankruptcy Act·

"Barring exceptional cases, which are especially provided for, the policy of the [Bankruptcy] Act is to fix a four months period in which a creditor cannot obtain an advantage over other creditors nor a lien against the debtor's property. 'All liens obtained by legal proceedings' within that period are declared to be null and void."

As the finding and order of the referee is based wholly upon the judgment of the state court, which judgment is annulled by section 67 of the Bankruptcy Act, the order of the referee must be and is reversed, and the matters referred back to the referee for further proceedings not inconsistent with the views herein expressed.

It is ordered accordingly.

THE ST. CHARLES.

THE MONT CENIS.

(District Court, E. D. Virginia. December 19, 1918.)

SALVAGE ⇐30—RESCUE OF STRANDED STEAMSHIP—COMPENSATION.

The steamship Mont Cenis, with a cargo of iron and valued at $2,000,000, in September 1917, on a voyage from New York to Marseilles, stranded near the Mediterranean coast of Spain, and in answer to her calls the steamer St. Charles, part of a convoy to Marseilles, valued at $500,000, contrary to orders, came to her assistance and within three hours released her without danger. The St. Charles later rejoined her convoy. Being in the submarine zone, quick passage was desirable for both vessels. *Held*, that the St. Charles was entitled to a salvage award of $15,000.

In Admiralty. Suit for salvage by the Maru Navigation Company, owner of the steamship St. Charles, against the steamship Mont Cenis. Decree for libelant.

Butler, Wyckoff & Campbell, of New York City, and Mr. Loomis and Hughes & Vandeventer, of Norfolk, Va., for libelant.

Kirlin, Woolsey & Hickox and Mark W. Maclay, Jr., all of New York City, and Edward R. Baird, Jr., of Norfolk, Va., for respondent.

Loyall, Taylor & White, of Norfolk, Va., for crew of the St. Charles.

WADDILL, District Judge. About 6 o'clock on the morning of August 26, 1917, the Mont Cenis, a large ocean-going steamship, proceeding to Marseilles, France, from New York, laden with steel, stranded on the Mediterranean coast of Spain, some 2½ miles off Villaricos, and within the 3-mile territorial limits of Spain. The St. Charles was an old steamer, en route to Genoa, Italy, and formed part of a convoy of several ships bound to Marseilles, and was valued at $500,000. The Mont Cenis was under requisition by the French government, which tended to reduce her market value at the time, but she was appraised at about $2,000,000.

The two ships left Gibraltar at approximately the same time, on the 25th of August, 1917, and when about a half day's journey out, some 150 miles from the place of grounding, a submarine was sighted, which quickly submerged. The Mont Cenis was equipped with a gun

mounted on her stern. While thus proceeding, the Mont Cenis stranded, and remained so from 6:30 in the morning until 9. She had been unable to secure assistance until the St. Charles responded to her call for help. The latter ship came alongside shortly after 9 o'clock, planted anchors, and made fast to the Mont Cenis, and pulled her off the bar shortly before 12 o'clock. The total time consumed in this part of the service was less than 3 hours, and the time of actual pulling did not exceed 15 minutes. The wind was moderate, the sea smooth, and good weather conditions, generally favorable to the successful completion of the service, prevailed. No particular skill was required, nor hazard nor danger incurred. The St. Charles, in making fast to the Monte Cenis, collided with her, and in attempting to clear herself, her hawser pulled out from the lug on the stern of the ship, and, becoming taut, raked along her rail, taking off a great part of the rail and poop deck, and, before the cable could be gotten clear, it caught in, and entwined itself in her propeller. This, however, was later cleared, and, aside from the injury to the rail and poop deck, no special harm resulted from the ships coming together. Their colliding was doubtless because of the existence of an unknown current, which could have been avoided, if its presence had been known to the navigators of the St. Charles.

The libelant laid much stress upon the presence of submarines, as evidenced by the one mentioned above. The court does not consider there was any danger from the one seen, or anything to indicate that others were present, at and about the time of the collision. It is a fact that those waters were in the submarine zone, through which it was desirable vessels should pass quickly, though it was not likely much danger would happen to vessels navigating as close inshore as the Mont Cenis was. The place of stranding, also, was, by reason of the shifting sands of the beach, an undesirable place for navigation, and dangerous to vessels stranding there.

After the Mont Cenis was released, each vessel continued its journey, the St. Charles first rendering every assistance necessary and required, and she overtook and joined her convoy at 12 o'clock the next day, the time when she left her convoy the day before, to the time of overtaking it, being some 26 hours, and no actual time was lost by either vessel in reaching her destination.

The services rendered by the St. Charles were entirely salvage. They were rendered promptly and intelligently; the St. Charles leaving her convoy contrary to orders to perform the same. They were valuable to the salved ship, and considerately rendered when she had not been able to procure other assistance, and it was important alike to both vessels that they should be detained as short a time as possible.

Taking into consideration all the circumstances of the case, the large values involved, the urgency of the service, and the promptness with which it was performed, an award of $15,000 would be fair to the St. Charles; and a decree to that effect will be entered, upon presentation.

In re PFLEIGER.

(District Court, S. D. New York. December 10, 1918. On Further Hearing, December 17, 1918.)

1. ALIENS ⇐61—NATURALIZATION—GERMAN SUBJECTS.
An Alsatian born before the cession of Alsace to Germany, who was a child at that time, and whose parents remained, and hence became German subjects, is not entitled to admission to citizenship under Naturalization Act June 29, 1906, § 4, par. 11, as added and amended by Act May 9, 1918, § 1 (Comp. St. 1918, § 4352), except by consent of the President as therein provided.

On Further Hearing.

2. ALIENS ⇐68—NATURALIZATION—ALIEN ENEMIES.
Under the proviso in Naturalization Act June 29, 1906, § 4, par. 11, as added and amended by Act May 9, 1918, § 1 (Comp. St. 1918, § 4352), that aliens classed therein as alien enemies may be admitted to citizenship by consent of the President, where such consent is procured, no notice of the application is required to be given to the Department of Labor.

On application of Paul Pfleiger for naturalization. Granted.

Henry C. Quinby, of New York City, for petitioner.

The Chief Naturalization Examiner, for the United States.

LEARNED HAND, District Judge. [1] This case presents the case of an application for naturalization by an Alsatian born before the cession of Alsace to Germany, but at that time a child. His parents did not remove to France in accordance with the provisions of the treaty between France and Germany, and by the cession to Germany they became subjects of the German emperor. This change in their allegiance was effected regardless of their will, and was the result of the enforced consent of their sovereign at that time. Regardless of the personal feelings of the Alsatians, their status became so established, and they must be treated as German subjects until there has been some change in status which can be recognized by our courts.

The petitioner is entitled to relief under the third proviso of paragraph 11 as added to section 4 of Act June 29, 1906, c. 3592, 34 Stat. 596, by Act May 9, 1918, c. 69, § 1 (Comp. St. 1918, § 4352), upon consent granted by the President, but it seems to me unquestionable that this is his only remedy. I shall therefore decline to act upon the present petition until peace has been declared.

Hearing adjourned sine die.

On Further Hearing.

[2] Upon rehearing it appears that this applicant has now procured the consent of the Department of Justice, acting with the authority of the President, to his admission. The Department of Labor suggests in opposition that no notice has been given to it as required under the first proviso to the eleventh paragraph of section 4 of the

Naturalization Act, as amended. It is, however, an error to suppose that such a notice is necessary in cases of Germans where the declaration was made after April 6, 1915. In such cases the President alone may grant consent to the naturalization of an alien enemy under the third proviso of that section, and the inquiry precedent to that consent must be conducted by the Department of Justice. As the Department of Labor has no duties to perform respecting such cases, it is obviously unnecessary that notice should be given to it, and, indeed, to give such notice might presuppose the possibility of a decision by the Department of Labor different from the Department of Justice, an untoward result. The words in the third proviso, "foregoing exemption," mean the condition or exception set forth in the body of the eleventh paragraph, beginning with the words "unless he made," etc. The first proviso is attached both grammatically and in its meaning to this condition, but to nothing more. The third proviso reaches all cases within the general prohibition of the eleventh paragraph, except those included within the condition or exemption, but it does not reach those which are within the exclusive purview of the Department of Labor.

There is, therefore, no need to give notice to the Department of Labor of applications made by alien enemies upon declarations made after April 6, 1915, if they be Germans, or December 7, 1915, if they be Austrians. The petitioner will therefore be admitted.

ATCHISON, T. & S. F. RY. CO. v. WEEKS et al.

(Circuit Court of Appeals, Fifth Circuit. December 20, 1918.)

No. 3226.

RAILROADS ⊂=33(2)—FOREIGN CORPORATIONS—LIABILITY TO SUITS—DOING BUSINESS IN STATE.

A foreign railroad company, not undertaking to do within the state any of those things for which it is incorporated, although having managers in the state who direct its operations in other states, employing only the clerical force necessary for that purpose and using the mails and interstate telegraphs in transmitting orders, is not to be regarded as doing that character of business which renders it subject to personal judgment in the courts of the state for a tort committed in another state.

Appeal from the United States District Court for the Western District of Texas; William R. Smith, Judge.

Suit by the Atchison, Topeka & Santa Fé Railway Company against J. F. Weeks and others. Decree for defendants, and complainant appeals. Reversed.

For opinion below, see 248 Fed. 970.

A. H. Culwell, of El Paso, Tex., and J. W. Terry, of Galveston, Tex. (Terry, Cavin & Mills, of Galveston, Tex., Turney Culwell, Holliday & Pollard, of El Paso, Tex., and Robert Dunlap, of Chicago, Ill., on the brief), for appellant.

George E. Wallace, of El Paso, Tex. (Weeks & Owen, of El Paso, Tex., on the brief), for appellees.

Before PARDEE, WALKER, and BATTS, Circuit Judges.

BATTS, Circuit Judge. The suit was by appellant to restrain collection of a judgment by default of a court of Texas upon a cause of action arising in tort in California. The pertinent facts are:

The appellant company, not a Texas corporation, has lines of railroad in a number of states, including Oklahoma, New Mexico, and Arizona. It has no line in the state of Texas. It formerly operated a line into El Paso, Tex., under a lease. The Railroad Commission not giving its necessary approval, the lease was not renewed. It has no permit to do business within the state, and has complied with none of the laws with reference to the doing of business by foreign corporations. It is incorporated to operate a railroad, and could not secure a permit to do business within the state. R. J. Parker, upon whom service was had, is the general manager of the appellant's Western lines. He directs the operation of the appellant's railroads by letters and telegrams to its officers and agents from his office at Amarillo, Tex. He is chief operating officer of the Pan Handle & Santa Fé Railway Company, and is required to maintain his office, as such, under the laws of the state of Texas, at Amarillo. As a matter of convenience, he directs from that point the operations of the Western lines of the appellant, the lines lying outside the state, but connecting at the state line with the Pan Handle & Santa Fé. Appellant's general superintend-

ent, trainmaster, general foreman, and mechanical superintendent are also at Amarillo. These officers maintain their residences at that place, and assist in directing the operation outside of the state of appellant's lines under their jurisdiction. The general manager and other officers have the necessary clerical force at Amarillo. Appellant does not own and maintain a railway extending to Amarillo, and does not maintain any local agent at that place, or have any office or agency there, or elsewhere in the state, except as stated. The principal offices of appellant are not in Texas.

The holding of the trial judge that jurisdiction over appellant could not be based on the relations between it and the Pan Handle & Santa Fé Railway Company is sustained by Peterson v. C., R. I. & P. Ry. Co., 205 U. S. 364, 27 Sup. Ct. 513, 51 L. Ed. 841. The matter for determination is the validity of a judgment by default upon service of citation upon R. J. Parker, manager.

A suit for damages for personal injuries is a transitory action, cognizable in the courts of any state in which the defendant may be found. A corporation, foreign to a state, may so subject itself to the jurisdiction of the state as to place itself, with reference to such an action, in the same position as an individual. This may result from the establishment in the state of the main office of the corporation, and the discharge there of the principal corporate functions, or from doing business therein in such a way and to such an extent that it will be held to be present within the state. With reference to the proposition last made, in the case of People's Tobacco Co. v. American Tobacco Co., 246 U. S. 79, 38 Sup. Ct. 233, 62 L. Ed. 587, Ann. Cas. 1918C, 537, it is said:

"The general rule deducible from all our decisions is that the business must be of such nature and character as to warrant the inference that the corporation has subjected itself to the local jurisdiction, and is by its duly authorized officers or agents, present within the state or district where service is attempted."

In connection with this rule it is said: "Each case depends upon its own facts." When such a statement may be made, a doubt arises as to whether that which is spoken of as a rule has been properly characterized.

While the formulated legal principles are too indefinite to be very useful, the adjudicated cases indicate the judicial trend. In the case of Peterson v. Chicago, Rock Island & Pacific Ry. Co., 205 U. S. 364, 27 Sup. Ct. 513, 51 L. Ed. 841, it was held that the fact that the defendant railroad company owned stock in the local subsidiary company, that its officers were the officers of the subsidiary company, and that the lines of the local company connected with its lines, did not bring it "into the state in the sense of transacting its own business there."

It is also established that the continued practice of advertising its wares in a state, and the maintenance of a staff of soliciting agents, does not subject a corporation to the local jurisdiction for the purpose of service of process (Green v. C., B. & Q. Ry. Co., 205 U. S. 530, 27 Sup. Ct. 595, 51 L. Ed. 916); although, if the agents have authority

to receive payment and checks or drafts on behalf of the company, and to take notes payable and collectible at banks in the state, it is doing business in such a way as to subject it to process (International Harvester Co. v. Kentucky, 234 U. S. 579, 34 Sup. Ct. 944, 58 L. Ed. 1479).

It is well established that, when acting under the laws of the state with reference to foreign corporations, such a corporation secures a permit, and designates agents upon whom service may be had, it subjects itself, in all respects, to the jurisdiction of the courts of the state as to any business covered by its permit; but it is doubted if such designation of an agent for service constitutes a subjection of the corporation to the courts of the state with reference to business or transactions outside the state, and not within the permit. By making application for the permit to do business, and receiving it, the corporation clearly defines the extent to which it subjects itself to the state jurisdiction. This limitation would no longer be applicable if it acted beyond the permit given. The residence within the state of the governing officers of the corporation does not constitute presence of corporation.

The doing of business which is entirely incidental to the main business, especially if it be interstate in its character, will not evidence an intention of the corporation to subject itself to the local laws. This may extend even to the maintenance of offices within the state, and the employment of such clerical help as may be necessary, without having such effect. Green v. C., B. & Q. Ry. Co., 205 U. S. 530, 27 Sup. Ct. 595, 51 L. Ed. 916.

In determining whether appellant has subjected itself generally to the jurisdiction of the Texas courts, may be considered:

(1) The business of the Atchison, Topeka & Santa Fé Railway Company is the operation of a railroad. It had no authority to operate a railroad in the state of Texas. It could acquire no such authority. The laws specifically inhibit the operation of a railroad within the state by a corporation not chartered by the state.

(2) It made no effort to secure a permit to do business as a foreign corporation, and made no effort to comply with the laws relative to foreign corporations. When it ceased to do business through the operation of a leased line, the state authorities would not permit a renewal of the lease. The state has taken no steps to compel compliance by the company with the laws affecting foreign corporations.

(3) The general manager and other officers of the corporation had their offices at Amarillo, Tex. From that point they directed the operation of the railroad outside the state. The power which they exercised had all its effect outside the state. That which was done by them in the state was not unimportant, but was purely incidental to the business for which the company was chartered, and which was conducted exclusively in other states. These incidental duties were performed by transactions interstate in their character, all orders being transmitted across the state line.

(4) The principal corporate functions of the corporation were performed at its general offices in another state by its controlling officers.

(5) The employment and payment of clerks at Amarillo could have

no effect not resulting from the employment and payment of officers. In the cases of Green v. C., B. & Q. Ry. Co., and People's Tobacco Co. v. American Tobacco Co. there were local employés and clerks hired and paid, and who worked within the state.

(6) The appellant corporation had no permit from the state of Texas to do the character of business which was done, nor was there any law which would have required or authorized the issuance of such permit. That which was done was within the rights of the corporation and of the persons who represented the corporation, as citizens of the United States. The state of Texas could not have prevented the doing of that which was done, and could not have regulated the manner in which it was done, and had no right to impose any burdens or duties or obligations or incidental liabilities as the result of that which was done.

(7) There are no facts evidencing an intention on the part of the railway company to subject itself to suit within the state of Texas on a cause of action arising outside the state, or with reference to any matter or thing other than the conduct of its offices at Amarillo. There is no fact evidencing an intention on the part of the railway company to transfer its citizenship and its corporate existence from the state of its incorporation to the state of Texas.

The conclusion is reached that, where a corporation is not undertaking to do within the state any of those things which it is incorporated to do, the only business done within the state being by managers who give direction for the operation of the business of the corporation in other states, using only the necessary clerical force to that end, and utilizing the United States mails and interstate transportation in the conveyance of directions, the corporation is not to be regarded as doing that character of business which would be equivalent to the presence within the state of the corporation, and which would be the essential basis for a personal judgment against the corporation within the state for a tort committed in another state.

It is recognized that the correctness of the conclusion is not free from substantial doubt. It can be insisted that the negative of the proposition is supported by the authorities. Such rulings as have been made in the state of Texas are contrary to the conclusion reached, though the Supreme Court has not passed upon the matter. Railway Co. v. Chisholm (Tex. Civ. App.) 180 S. W. 58. Basing his ruling largely upon Washington & Va. Ry Co. v. Real Estate Co., 238 U. S. 185, 35 Sup. Ct. 818, 59 L. Ed. 1262, the trial judge, in an able opinion, has forcibly presented the opposite view. The following cases, and a number of state cases, may be cited in support of his judgment: St. L. S. W. Ry. Co. v. Alexander, 227 U. S. 218, 33 Sup. Ct. 245, 57 L. Ed. 486, Ann. Cas. 1915B, 77; A., T. & S. F. Ry. Co. v. Sowers, 213 U. S. 55, 29 Sup. Ct. 397, 53 L. Ed. 695; Western Life Indemnity Co. v. Rupp, 235 U. S. 261, 35 Sup. Ct. 37, 59 L. Ed. 220.

It is believed, however, that the weight of authority from the governing court sustains the conclusion herein reached. In the case of People's Tobacco Co. v. American Tobacco Co., supra, the Supreme Court denied the jurisdiction of the state court, although at that time

the company was selling goods in Louisiana, where the service was had, to jobbers, and sending its drummers into that state to solicit orders of the retail trade, the charges being made by the jobbers against the retailers, and it was also carrying out a decree of dissolution under the Sherman Anti-Trust Act (Act July 2, 1890, c. 647, 26 Stat. 209).

The case of P. & R. R. R. Co. v. McKibbin, 243 U. S. 264, 37 Sup. Ct. 280, 61 L. Ed. 710, was instituted by McKibbin in the Southern District of New York; service being had on the president of the company while passing through New York. McKibbin was a brakeman in one of the New Jersey freight yards of the defendant, a Pennsylvania corporation. No part of the railway line was located in New York. It sent into that state, however, loaded freight cars, which were returned by connecting lines; tickets were issued in New York, good over the connecting lines and that of plaintiff in error. At various places on the terminal ferry at New York are signs bearing the name "Philadelphia & Reading," "P. & R.," or "Reading," and in the New York telephone directory are the words: "Phila. & Reading Ry. Ft. W. 23d St. Chelsea, 6550." The Supreme Court held that the company was not doing business in New York under such circumstances as to give the courts of New York jurisdiction to render a personal judgment.

In Toledo R. & L. Co. v. Hill, 244 U. S. 49, 37 Sup. Ct. 591, 61 L. Ed. 982, suit was filed in a New York court to recover on bonds issued by the Toledo Company, an Ohio corporation. Service was had upon the directors and vice president of the company residing in New York. The corporation had issued its bonds and secured them by mortgage; the United States Mortgage & Trust Company of New York being trustee. They were delivered to that company to be certified, and they were subject to registry and became due and payable at the office of the company in New York, where the semiannual interest was also payable. Prior to 1909, when the company defaulted, the bonds and coupons were paid at the office of the commercial firm in New York representing the company for that purpose. It was held that the company was not doing business in New York in the sense which would authorize a personal judgment in the courts of that State.

In Green v. C., B. & Q. Ry. Co., 205 U. S. 530, 27 Sup. Ct. 595, 51 L. Ed. 916, the plaintiff brought an action in a United States Circuit Court of Pennsylvania to recover damages for personal injuries in Colorado. The eastern point of the defendant's line of railroad was Chicago, the track extending westward. It was incorporated to carry freight and passengers, and to operate a railroad for that purpose. To solicit freight and passenger traffic, the person upon whom service was had was employed at Philadelphia, where he rented an office, and where he was advertised as district freight and passenger agent. Clerks were employed under him, and reports were made to him by traveling freight and passenger agents, who acted under his direction. The court says:

"Its validity [the service] depends upon whether the corporation was doing business in that district in such a manner and to such an extent as to warrant the inference that through its agents it was present there. * * * With-

out undertaking to formulate any general rule defining what transactions will constitute 'doing business,' in the sense that liability to service is incurred, we think that this is not enough to bring the defendant within the district so that process can be served upon him."

This case would seem to amply warrant the conclusion reached herein. Many additional cases, which seem to support the conclusion reached, include Goldey v. Morning News, 156 U. S. 519, 15 Sup. Ct. 559, 39 L. Ed. 517; Conley v. Mathieson Alkali Works, 190 U. S. 406, 23 Sup. Ct. 728, 47 L. Ed. 1113; Peterson v. C., R. I. & P. Ry. Co., 205 U. S. 364, 27 Sup. Ct. 513, 51 L. Ed. 841.

When the law is so doubtful in its terms or its application, there can be no impropriety in considering in its development the public policy involved. As applicable to railroad corporations, the recognition of a right to sue for damages for injuries in any place other than in the state of the injury is of very questionable policy. While the rule may be justified as to an individual on account of the ease with which the right to recover might otherwise be defeated, no such reason exists as to a railroad, whose residence and business are permanently localized. Manifestly, there are many advantages in trying such a case where the cause of action arises. The law of the cause of action is the law of the place. It may be assumed that the courts of the state can more satisfactorily administer the laws of the state than can the courts of any other state. The expense incident to a trial would usually be materially less at the place of the tort than elsewhere. The imposition upon a state of the expense of maintaining courts to try causes in which the state has no interest would be difficult to justify. The maintenance of the judicial machinery involves no light burden. Many of the states, including Texas, have been unable to provide adequate machinery. No good reason could probably be made to appear why her overworked courts should be compelled to carry any part of the burdens of other states. Considerations of this character are manifestly more for the legislative than the judicial department, but they cannot be entirely ignored when the weights of two opinions are so nearly equal.

The judgment is reversed; the cause is remanded, with instructions to enter a decree in favor of the appellant, perpetually enjoining the defendant, as prayed in the bill.

Reversed.

FLOWERS v. BUSH & WITHERSPOON CO.

(Circuit Court of Appeals, Fifth Circuit. December 17, 1918.)

No. 3248.

1. EVIDENCE ⟸151(1)—WITNESSES ⟸240(4)—EXAMINATION—LEADING QUESTIONS.
   It was proper to refuse to allow defendant as a witness to answer a leading question calling for undisclosed state of mind of defendant upon a subject-matter which was vital to the case and upon which it was impossible to contradict him.
2. GAMING ⟸12—GAMING CONTRACTS.
   The uncommunicated intention of either party to a contract for the sale of cotton for future delivery, that no cotton was to be actually delivered, will not establish the gaming character of the transaction, and it must appear that the parties mutually, either expressly or impliedly, understood no delivery was to be made or accepted.
3. EVIDENCE ⟸134—SIMILAR TRANSACTIONS—INTENT—GAMING CONTRACTS.
   In an action for breach of a contract to sell cotton for future delivery, which defendant contended was a gaming contract, in that no actual delivery was contemplated, evidence that similar contracts were settled on a monetary basis by payment of difference between contract and market price, *held* inadmissible; such evidence not showing intent.
4. GAMING ⟸49(3)—CONTRACTS—EVIDENCE.
   In an action for breach of a contract for the future delivery of cotton, evidence *held* to warrant a finding that the contract was not a gaming contract.
5. PRINCIPAL AND AGENT ⟸119(1)—AUTHORITY OF AGENT—BURDEN OF PROOF.
   Defendant, who relied on the cancellation of a contract by plaintiff's agent, has the burden of proving the authority of the agent.
6. PRINCIPAL AND AGENT ⟸111(1)—AUTHORITY OF AGENT—SCOPE.
   Authority of an agent to make a contract does not imply authority to cancel it.
7. PRINCIPAL AND AGENT ⟸111(3)—AUTHORITY OF AGENT—SCOPE.
   That plaintiff's agent accepted settlement of one contract for the future delivery of cotton, on payment of the legal measure of damages after breach, does not establish the agent's authority to cancel another contract.
8. TRIAL ⟸48—EVIDENCE—EXCLUSION.
   Exclusion of evidence inadmissible for the purpose for which it was offered is proper, though evidence was admissible on another theory.

In Error to the District Court of the United States for the Western District of Texas; Duval West, Judge.

Action by the Bush & Witherspoon Company against Felix A. Flowers. There was a judgment for plaintiff, and defendant brings error. Affirmed.

L. T. Williams and N. B. Williams, both of Waco, Tex., for plaintiff in error.

J. D. Williamson, of Waco, Tex., for defendant in error.

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

GRUBB, District Judge. This was an action in the District Court for the breach of two contracts for the purchase and sale each of

100 bales of cotton for future delivery. The plaintiff in error, defendant in the District Court, was the seller, and defendant in error, plaintiff in the District Court, was the purchaser. The breach was alleged by the plaintiff to have consisted in the failure of the defendant to deliver the cotton, as called for by the two contracts. The defendant set up as a defense to the first contract (that of May 11, 1916) the Texas statute (articles 538 and 539, Penal Code), which prohibits the making of contracts where no actual delivery of the cotton is contemplated by the parties, and to the second contract (that of June 21, 1916) that it was canceled by the agent of the purchaser shortly after it was entered into by the parties. The District Judge directed a verdict for the plaintiff, under both of the contracts, for the amount of the differences between the contract prices and the market prices at the dates of the respective deliveries. The court held that there was no evidence that at the time of entering into the first contract the parties to it intended to enter into a wagering or gambling contract, and that there was no evidence that the plaintiff's agent, Hooper, who it was contended had agreed to the cancellation of the second contract at defendant's request, had any authority from the plaintiff to make such an agreement.

[1, 2] The plaintiff in error complains of the action of the District Judge in refusing to permit him as a witness in his own behalf to answer this question:

"Mr. Flowers, was it your intention, at the time you made the first contract with Mr. Hooper, that actual cotton was to be delivered?"

The grounds of objection were that the question was leading, and because the secret intention of one party, not expressed to the other, was immaterial. The witness would have answered, if permitted, that it was not his intention, at the time he made the first contract, to deliver actual cotton to the plaintiff. The District Court properly exercised its discretion in refusing to permit the witness, who was a party and solely interested in the result, to answer a question which suggested the answer desired by counsel, and which called for an undisclosed state of mind of the witness upon a subject-matter which was vital to the case, and upon which it was not possible to contradict him. It is not clear that the expected evidence was competent, had the question been properly framed. The issue was whether the parties to the trade, when it was made, contemplated that there was to be an actual future delivery of the cotton. Anything said or done by either party, brought home to the other party, which reflected his intention as to delivery, would undoubtedly be material. The offer did not go to this extent. The uncommunicated intention of either or both parties would fall short of showing a gambling transaction. It must have appeared that the parties, mutually, either expressly or impliedly understood that no delivery was to be made or accepted. Showing a secret intent upon the part of one was not even competent as a step to show such a mutual understanding.

[3] The plaintiff in error also complains of the District Judge's refusal to permit his witness, H. S. Hooper, to answer this question:

"You settled those contracts [referring to contracts with others similar to those with defendant] on a money basis, did you not?"

The witness, if permitted, would have answered that on some contracts made with plaintiff for the delivery of cotton in the fall of 1916, when the sellers did not deliver the cotton, they made settlements with plaintiff by paying the difference in money between the contract price and the market price at the time of delivery. Another question of the same purport went to specific instances. The offer went no further than to show that, in instances where the seller had breached his contract by failing to deliver, the right of action for such breaches had been liquidated, without suit, upon the basis of the legal measure of damage for such breaches. The evidence did not tend to illustrate the intent of the parties when the contract was made, and it is only the then intent not to make and receive delivery that the Texas statute inhibits. If the similar instances had shown an intent not to make and receive delivery, they might have served to illustrate the intent in the instant case; but they did not. They only tended to show what transpired long after the making of the trades, and not what was in the minds of the parties when they entered into the trades.

[4] The plaintiff in error also complains that a verdict was directed against it upon the first contract. We think the testimony of the plaintiff in error himself is convincing that he contemplated making deliveries under this contract, unless providentially hindered by storms or crop failure. His unwillingness to trade until assured by Hooper that he would be entitled to liquidate his contracts, in the event of such providential interference, on a money basis, only goes to show that deliveries were contemplated, barring such disasters. The language and conduct of the plaintiff in error are satisfying that he intended to deliver the cotton, and traded on the basis of his expected ability to procure the cotton for such delivery.

[5-8] The plaintiff in error lastly complains that the court directed a verdict against him upon the cause of action based on the second contract. As to this contract, the plaintiff in error set up its alleged cancellation by agreement between defendant in error's agent, Hooper, and himself, shortly after it was made. Hooper denied such agreement. The District Court determined the issue upon the ground that Hooper was not shown to have been authorized by defendant in error to cancel. The record very clearly shows that Hooper could only make contracts for defendant in error after having been specifically authorized in each instance. It also shows that Hooper did not make the contract sued on for his principal, unless delivery of an already signed paper evidencing it, to the plaintiff in error, is to be so considered. There is a conflict as to whether or not Bush made the contract over the telephone, but no evidence that Hooper made it, otherwise than as stated. There is no evidence of Hooper's authority to cancel, unless it is to be implied from the authority to make, or from his actually having made, the contract. Both failing to be shown, and the burden being on the plaintiff in error to show the authority of the agent, the defense fails. Nor does authority to make

a contract imply authority to cancel it. Ye Seng Co. v. Corbitt (D. C.) 9 Fed. 423.

Plaintiff in error, however, contends that, if the District Court had permitted the witness Hooper to answer as to his having settled with parties, who had breached other similar contracts for his principal, there would have been evidence of his authority to cancel. The distinction between authority to bind his principal by accepting for him the legal measure of damage after breach, and releasing the seller, before breach, gratuitously, is obvious. Again, the evidence excluded was not offered by the plaintiff in error in support of the authority of Hooper to cancel the second contract, but to support the plaintiff in error's contention that the first contract was a gambling transaction. The District Court could not be criticized for excluding it for the only purpose for which it was offered, because it is now contended it might have been material for another different and undisclosed purpose.

We think the court properly ruled on the questions of evidence, and properly directed a verdict for the plaintiff upon both contracts sued on, and the judgment is affirmed.

Affirmed.

UNITED STATES v. GREAT NORTHERN RY. CO.

(Circuit Court of Appeals, Ninth Circuit. December 2, 1918.)

No. 3165.

1. PUBLIC LANDS ⟸81(1)—RAILROAD GRANT—LAND SUBJECT TO SELECTION AS LIEU LAND.
   The right of a railroad company to select indemnity land on any public nonmineral land to which no adverse claim has attached at the time of selection does not extend to land then occupied by a qualified settler as a homestead, although, the land being unsurveyed, no filing has been made.
2. PUBLIC LANDS ⟸81(3)—SUIT TO ANNUL PATENT—LIEU LANDS.
   The proviso to Act March 2, 1896, § 1 (Comp. St. 1916, § 4901), that no suit shall be brought to recover lands patented in lieu of other lands lost by the grantee through failure of the government to withdraw the same from entry, is a curative provision, and does not apply to lands patented after its enactment.
3. PUBLIC LANDS ⟸120—SUIT TO CANCEL PATENTS—PARTIES.
   The United States may maintain a suit to cancel a patent to land erroneously issued, although the beneficial interest in the land has become vested in another.
4. COURTS ⟸356—FEDERAL COURTS—APPEAL—RECORD.
   A bill of exceptions is not required on appeal in equity cases, under equity rule 75 (198 Fed. xl, 115 C. C. A. xl), but only a condensed statement of the evidence, approved by the court or judge.

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

Suit in equity by the United States against the Great Northern Railway Company. Decree for defendant, and the United States appeals. Reversed.

Robert C. Saunders, U. S. Atty., and Ben L. Moore and Edwin H. Flick, Asst. U. S. Attys., all of Seattle, Wash.

F. V. Brown, F. G. Dorety, and R. J. Hagman, all of Seattle, Wash., for appellee.

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

WOLVERTON, District Judge. This is a suit to cancel a patent issued to the Great Northern Railway Company by the United States for the land in controversy, on the ground of alleged inadvertence and mistake of the Land Department in issuing the same. The land in question was selected in lieu of land which the St. Paul, Minneapolis & Manitoba Railway Company relinquished to the United States in pursuance of the Act of Congress of August 5, 1892, c. 382, 27 Stat. 390. The defendant is the successor in interest of the St. Paul, Minneapolis & Manitoba Railway Company. The lands subject to selection are described by the act as—

"nonmineral public lands, so classified as nonmineral at the time of actual government survey which has been or shall be made, of the United States not reserved and to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection lying within any state into or through which the railway owned by said railway company runs, to the extent of the lands so relinquished and released."

The St. Paul, Minneapolis & Manitoba Railway Company, under the act, was entitled to make selection from surveyed or unsurveyed lands; but, in case such selection was from unsurveyed lands, it was required to designate the lands with reasonable certainty, and was further required to file a new selection list describing the tracts selected according to survey within three months after the survey and plats thereof had been filed in the local land office. Selection was made by such railway company of the land in dispute May 5, 1902, and adjustment was made according to the public survey February 23, 1907; the plat of survey having been filed February 6, 1907. On April 13, 1908, patent was issued by the land office to the defendant herein as successor in interest to the St. Paul, Minneapolis & Manitoba Railway Company, and the legal title now stands in the name of the patentee.

[1] The evidence shows quite satisfactorily that one L. C. Thebo settled on the land in dispute some time prior to March, 1902, claiming it as a homestead, and continued to live there for 2 or 2½ years. Thebo was a native of Michigan, and was otherwise qualified to enter the land as a homestead. In 1904 Hugh H. Boggs settled on the same land, claiming it as a homestead, and continued to live there until August 18, 1906, when he sold his relinquishment to Edmund Magner, who entered the land at the land office as his homestead, and has continued to reside thereon and to claim and improve the same as such ever since. The record at the local land office shows that Magner entered the land February 6, 1907, alleging settlement April 18, 1904. The papers in the Magner application did not reach the General Land Office until after the issuance of the patent to the rail-

way company, and on June 1, 1909, the Commissioner rendered a decision adverse to Magner, on the ground that he did not allege settlement until August 18, 1904, which was subsequent to the railway company's selection. The action of the Commissioner was affirmed by the Department January 22, 1910. Magner was, however, notified that—

"If, as a matter of fact, the land was occupied by a settler at the time of the company's selection, an allegation to that effect, duly verified, would furnish the basis for a hearing to determine the actual status of the land at the time of its selection by the company."

The requisite papers having been filed, a hearing was ordered by the Commissioner, which was set by the local land office for January 9, 1911, and notice was given to the parties interested. The hearing resulted in a decision by the local officers favorable to Magner, and this was confirmed by the Commissioner May 12, 1911. On the same day demand was made upon the railway company for a reconveyance of the land to the government.

The basis of the suit is inadvertence and mistake on the part of the Land Department in issuing the patent to the railway company, when it is alleged that the land was at the time of the railway company's selection occupied by a qualified settler. This brings upon the record the question for consideration whether the selection was valid and should be sustained as against the claim of the settler, or in this case the claim of Magner, who has succeeded to the right of the settler. The question is not new, or one of first impression with the federal courts. Without attempting to trace the history of the judicial solution of the inquiry, it will suffice to refer to a few of the leading cases of the Supreme Court dealing with the subject.

Preliminarily, it should be stated that, both under the pre-emption law and under the homestead law, after the act of 1880, the right of the settler was initiated by settlement. St. Paul, Minn. & Man. Ry. Co. v. Donohue, 210 U. S. 21, 31, 28 Sup. Ct. 600, 52 L. Ed. 941. And it has been further held that, if either a pre-emption or homestead right had been initiated before lieu selection was made, the parcels to which the right attached were not subject to appropriation as indemnity lands. Osborn v. Froyseth, 216 U. S. 571, 577, 30 Sup. Ct. 420, 54 L. Ed. 619. The court, answering the contention that the mere fact that there was no record of the homestead claim when the lieu selections were made was enough to give efficacy to the selections, and to vest the legal title under the patent thereafter issued, said:

"If at that date this land was actually occupied by one qualified under the law, who had entered and settled thereon before that time, with the intent to claim it as a homestead, the land had ceased to be public land and as such subject to selection as lieu land."

In the Donohue Case, the court further specifically held that (quoting from the syllabus):

"Under the Land Grant Act of August 5, 1892 (27 Stat. 390, c. 382), the right of the railway company to select indemnity lands, nonmineral and not reserved, and to which no adverse right or claim had attached or been ini-

tiated, does not include land which had been entered in good faith by a homesteader at the time of the supplementary selection, and on a relinquishment being properly filed by the homesteader the land becomes open to settlement and the railway company is not entitled to the land under a selection filed prior to such relinquishment."

To the same effect is Osborn v. Froyseth, supra, wherein it is further said that:

"With respect to the 'lieu lands,' as they are called, the right was only a float, and attached to no specific tracts until the selection was actually made in the manner prescribed."

See, also, Sjoli v. Dreschel, 199 U. S. 564, 26 Sup. Ct. 154, 50 L. Ed. 311.

If, therefore, the Land Department issued the patent to the railway company, through inadvertence and mistake respecting the fact of its being entitled thereto, when in reality there was a qualified settler upon the land when selection and supplementary selection were made, the suit would lie to cancel the patent. The proof, as we have previously indicated, shows quite clearly that the land in dispute was so occupied by a qualified settler, and it follows that the railway company's selection never attached, and it was never entitled to the patent.

[2] It is, however, strenuously insisted that complainant's right of action is precluded by the Act of Congress of March 2, 1896, c. 39, § 1, 29 Stat. 42 (Comp. St. 1916, § 4901), wherein it is provided that—

"No suit shall be brought or maintained, nor shall recovery be had for lands or the value thereof, that were certified or patented in lieu of other lands covered by a grant which were lost or relinquished by the grantee in consequence of the failure of the government or its officers to withdraw the same from sale or entry."

This is a curative statute, rather than one of limitations, and, if it had prospective effect, the present case would come directly within its letter and spirit. It has been recently decided, however, by the Supreme Court, in the case of United States v. St. Paul, Minneapolis & Manitoba Railway Co., that it has no such effect. No. 75, October Term, 1917, 247 U. S. 310, 38 Sup. Ct. 525, 62 L. Ed. 1130. That case is analogous on its facts to the present case, and is, without question, controlling here. The holding of the court is that the proviso was not a bar to that suit, "brought to annul a patent applied for and issued long after its enactment." So was the patent in the suit at bar issued long after the enactment of the statute. The issuance was on April 13, 1908. It would be a work of supererogation for us to attempt to elaborate upon the exhaustive opinion of the Supreme Court, and we need but to refer to it for the reasoning upon which it is based.

[3] Some question has been made as to whether this is a suit for the benefit of Magner, or one in the right of the United States. Magner was not a party in any way, but was allowed in the course of the proceeding to appear by counsel and to adduce evidence touching settlement and occupation by himself and his predecessor. There was no intervention, however, and the suit proceeded as one by the

government only. Being the party entitled to the legal title, it had a legitimate right and was duly authorized to maintain the suit as it was instituted.

[4] The motion to strike what is termed the bill of exceptions is without merit. A statement of the evidence with the approval of the judge is all that is required in an equity cause, where an appeal is to be prosecuted. Federal Equity Rule 75 (198 Fed. xl, 115 C. C. A. xl). An approved statement of the evidence is really what was filed in the present case, and not a bill of exceptions.

The complainant being entitled to recover, the decree of the court below will be reversed, and one here entered in pursuance of the prayer of the bill.

WOODALL v. CLARK et al. (two cases).

MILLS v. HUNTINGTON DEVELOPMENT & GAS CO.

(Circuit Court of Appeals, Fourth Circuit. October 16, 1918.)

Nos. 1643–1645.

1. REMOVAL OF CAUSES ⊂=107(5)—REMAND—EFFECT OF PETITION.
Where the petition for removal of suits to cancel disclaimers to land alleged that the actual value of the property, exclusive of costs, etc., was in excess of $3,000, and such averments were not challenged, complainants' petition to remand must be denied; the petition for removal furnishing the basis of jurisdiction.

2. QUIETING TITLE ⊂=29—REMOVAL OF CLOUD FROM TITLE—LACHES.
Where complainants were at all times in possession of the land, their delay in beginning suit to set aside disclaimers to the land does not constitute laches, which will bar relief.

3. EQUITY ⊂=363—MOTION TO DISMISS—EFFECT.
A motion to dismiss a bill is in the nature of a demurrer, and for the purpose of the motion the allegations of the bill must be taken as true.

4. QUIETING TITLE ⊂=35(2)—BILL TO REMOVE CLOUD—SUFFICIENCY OF ALLEGATION.
Allegations, in a bill to set aside as clouds on their title disclaimers, as to minerals, *held* to sufficiently aver complainant's title to the minerals mentioned.

5. MINES AND MINERALS ⊂=55(2)—DISCLAIMERS—CONSTRUCTION.
In view of Code W. Va. 1913, c. 72, § 3 (sec. 3780), disclaimers of minerals in lands in West Virginia land *held* quitclaim deeds.

6. VENDOR AND PURCHASER ⊂=231(9)—BONA FIDE PURCHASERS—RECORD—DIRECTION.
Where the predecessors of the title of defendants, who claimed under disclaimers to the minerals in land, directed that such disclaimers be recorded in the release docket, such recordation is binding on them.

7. VENDOR AND PURCHASER ⊂=231(9)—BONA FIDE PURCHASER—CONSTRUCTIVE NOTICE.
Where disclaimers to the minerals in land were at the instance of those asserting title thereunder, recorded in the release docket, *held* that, under Code W. Va. 1913, c. 73, §§ 2, 7 (secs. 3805, 3810) and chapter 76, § 5 (sec. 3862), such disclaimers were not constructive notice to bona fide purchasers from the original owner, and the purchasers took as against those asserting title under the disclaimers.

Appeals from the District Court of the United States for the Southern District of West Virginia, at Huntington; Benjamin F. Keller, Judge.

Suits by T. J. Woodall and by Alonzo Woodall against Herbert L. Clark and another, trustees of the Lincoln County Land Association, a voluntary unincorporated association, and others, and by Oad Mills against the Huntington Development & Gas Company, a corporation, begun in the state court, and removed to the federal court. From decrees dismissing the suits, complainants appeal. Reversed and remanded, with instructions.

D. E. Wilkinson, of Hamlin, W. Va., for appellants.

Cary N. Davis and W. C. W. Renshaw, both of Huntington, W. Va. (Henry A. McCarthy, of Philadelphia, Pa., and Meek & Renshaw and Campbell, Brown & Davis, all of Huntington, W. Va., on the brief), for appellees.

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

PRITCHARD, Circuit Judge. In disposing of the three above-stated causes, the learned judge who heard the same, in referring to the nature of the suits, said:

"The above suits were instituted, in equity, in the circuit court of Lincoln county, W. Va., and later duly removed to this court. The matter is now before me upon motion to dismiss the bills of complaint, all three suits involve the same question, and the bills of complaint in each case are practically identical. Each seeks to have canceled, set aside, and held for naught, as a cloud upon their title, a certain paper writing, commonly called a 'disclaimer,' purporting to have been executed by one W. C. Wiley on the 3d day of June, 1887.

"The substantial and material allegations of the bills are as follows:

"That the plaintiffs are the owners in fee of the land involved in these proceedings, having obtained title thereto through mesne conveyances, tracing title to the commonwealth of Virginia; that the plaintiffs and their various predecessors in title have had open and notorious possession of said property and paramount title thereto, and have paid taxes thereon since the formation of Lincoln county and the grant from the commonwealth of Virginia; that the records of such title were destroyed by the fire which burned the Lincoln county courthouse in November, 1909, but that subsequently, by evidence taken before the commission of destroyed instruments, such instruments of title were readmitted to record; that some time after such fire there was also readmitted to record in a deed book of said county a paper writing, purporting to be a disclaimer, signed and sealed by one W. C. Wiley, a prior owner of said property, which said paper appears to have been recorded in said clerk's office in a certain release docket, some time prior to the recordation of plaintiffs' muniments of title, disclaiming all right, title, and interest in and to the property here in dispute, which said writing is in the words and figures following:

" 'Whereas, certain actions of ejectment are now pending in the District Court of the United States for the District of West Virginia, in favor of "Henry McFarlan and others against Louis Adkins and others," "John P. Yelverton and others against Louis Adkins and others," "John P. Yelverton and others against Jeremiah Witcher and others," "Gustavus A. Sacchi against James A. Holley and others," "Gustavus A. Sacchi against John M. Reese and others," and "Gustavus A. Sacchi against A. J. Barrett and others," for the recovery of a tract of land heretofore conveyed by Henry McFarlan and others, trustees of the Guyandotte Land Company, to Gustavus A. Sacchi, by deed bearing date on the 27th day of June, 1865, and recorded in the office of the recorder of Cabell county, in Book A (New Series), page 104; and,

" 'Whereas, William C. Wiley is in possession of and claiming title to a portion of said land, so sought to be recovered, and is desirous of settling any and all conflicting claims to lands so occupied and claimed by him:

" 'Now, therefore, the said Wiley in consideration of the premises, and being released from all litigation in relation to the land hereinafter described, and from liability for costs in relation to the lands sought to be recovered, as aforesaid, doth hereby disclaim all right, title, claim, demand, or interest in and to all and any land set out and described in said declaration in said action of ejectment, except, all that certain piece or parcel of land, situate, lying, and being in the county of Lincoln and state of West Virginia, on Sugar Camp branch of Middle fork, and being part of a survey made for B. E. & Harvey Barrett and St. C. Ballard on the 3rd day of November, 1849, for 1,400 acres; the tract herein excepted being 130 acres out of said survey, and more particularly described in a deed from J. V. Sweetland to the said Wiley, dated March 15, 1884, recorded in Deed Book F, page 318.

" 'But the said W. C. Wiley hereby disclaims all title or interest in all coal (except so much as shall be required for domestic purposes) and iron ore, hydro-carbon oils, salt brine, natural gas and all other minerals in, upon or under the said tract of land herein excepted, with the exclusive right to the said plaintiffs, and those claiming under them, for rights of way for tram, rail, and wagon roads through said land so excepted, and to dig for and mine coal, iron ore, bore for oil or natural gas, and the necessary conveniences on said land for storing oil and coal, and the transmission of the same by the best and most convenient means to market.

" 'And the said William C. Wiley further agrees that the plaintiffs in either of said actions may take judgment against him in ejectment, for the interest by him herein disclaimed, and to that end he empowers any attorney of said court to appear for him in either of said actions, and consent that such judgment be entered, and that this disclaimer be filed as part of the record in such cause.

" 'Given under my hand and seal this 23d day of June, 1887.

" 'W. C. Wiley. [Seal.]'

" 'State of West Virginia, Lincoln County—to wit:

" 'I, H. Hager, a Clerk Co. Ct. in and for said county, do hereby certify that ———, whose name is signed to the foregoing writing, bearing date the 22d day of June, 1887, this day acknowledged the same before me in my said county.

" 'Given under my hand this 22d day of June, 1887.

" 'H. Hager, Clerk.

" 'Clerk's Office County Court, Lincoln County, W. Va.

" 'This disclaimer was this day presented to me in my said office for record; thereupon the same, together with the certificate of acknowledgment thereon indorsed, is duly admitted to record in my said office this 12th July, 1887.

" 'H. Hager, Clerk.'

"Note.—The following indorsement was on the back of the above instrument: 'W. C. Wiley. Disclaimer. 130 A. Release Docket, page 168, 169, Ex. No. 38.'

"Note.—The following indorsement also appears:

" 'Clerk's Office of the County Court of Lincoln County, 14th day of March, 1911, to wit:

" 'The deed book containing the record of the foregoing deed and certificate of acknowledgment, and certificate of recordation thereof, having been lost by fire, consuming the records of said clerk's office, occurring on the 19th day of November, 1909, the foregoing deed or disclaimer was this day presented to me, the clerk of the said court, in the clerk's office aforesaid, for record anew. And thereupon, the said deed together with the certificate of acknowledgment, and certificate of recordation have, by me, been duly admitted to record anew in said clerk's office.

" 'Given under my hand this 14th day of March, 1911.

" 'W. C. Holstein,

" 'Clerk County Court of Lincoln County.

" 'Recorded in Deed Book No. 62, page 91.

" 'A true copy. Attest: 'Albert F. Black, Clerk,

" 'By ———, Deputy.'

"The certificate to this paper, it will be noted, omits the name of the maker thereof.

"It appears from the pleading before me that while this disclaimer was executed in connection with certain ejectment cases then pending, involving this property, it was never filed in such cases, but recorded in the county clerk's office of Lincoln county in a record book, commonly called a 'release docket'; that after the destruction of the courthouse of said county by fire, it was re-recorded and now is of record in a deed book of said county. It is this record which plaintiffs claim constitutes a 'cloud upon their title,' and which they seek to have set aside. In one of the above-styled suits, coercion is charged in connection with the signing of said so-called disclaimer, although this allegation is not substantiated by any supporting facts or allegations, and was not relied on in argument. The plaintiffs likewise embrace in their bill of complaint a naked allegation to the effect that the said paper was originally recorded in the release docket at the instance and by the direction of defendants.

"Defendants take the position that this paper is in reality and effect a quitclaim deed and divested W. C. Wiley of title to said property and vested title thereto in defendants, or their predecessors in title; furthermore, that this instrument duly signed, sealed and later recorded, estops Wiley or his successors in title from asserting title thereto."

In cases Nos. 1643 and 1644 there was a motion to remand, which motion was overruled, and the defendants filed written motions to dismiss the bills of complaint in each of the causes. A decree was entered dismissing them at the cost of plaintiffs, respectively, from which decree an appeal was taken to this court.

We will first dispose of what we conceive to be the first question involved in causes Nos. 1643 and 1644.

[1] It is contended by counsel for the appellant that they should have been remanded to the state court upon the ground that it appears from an inspection of the bills filed therein that the matter in dispute in each was of less value than $3,000. Among other things it is alleged in the defendants' petition that the value of the matter in dispute in this action "exceeds the sum or value of $3,000 exclusive of interest and cost." It has been repeatedly held that the removal of a case from a state court is based upon the petition for removal and that the averments of jurisdictional facts contained therein are to be taken as prima facie proof. In the case of Kessinger v. Hinkhouse (C. C.) 27 Fed. 883, the first sentence of the first syllabus is as follows:

"On a motion to remand a cause to the state court from which it was removed, the petition for removal is the basis of jurisdiction."

The following cases are very much in point: McDonald v. Flour Mills Co. (C. C.) 31 Fed. 577; Carlisle v. Sunset Telegraph & Telephone Co. (C. C.) 116 Fed. 896.

The plaintiff cannot base petition to remand upon an allegation made in a state court where, as in this instance, the petition for removal states in clear and concise language that the actual value of the property involved in this controversy is in excess of $3,000, exclusive of cost and interest.

In the case of Kessinger v. Hinkhouse, supra, the last sentence of the first syllabus says:

"* * * It is not in the province of the pleadings in the state court to state the grounds of jurisdiction in the United States Circuit Court. * * *"

The court in that case also said, among other things:

"* * * The allegation of the jurisdictional facts is quite foreign to the pleadings in the state court, and any averment of the facts giving jurisdiction here would be quite irrelevant and impertinent in the pleadings of the state court. The cause is removed upon the allegations and averments of fact as to the jurisdiction contained in the petition for removal. We must therefore, upon a motion to remand, accept the statement of the jurisdictional facts in the petition for removal as prima facie true. If they are not true, the party against whose consent the order of removal was made may contest them by a plea in abatement to the jurisdiction. Clarkhuff v. Wisconsin, I. & N. R. Co. [C. C.] 26 Fed. 465."

As we have stated, the jurisdictional facts averred in the petition for removal constitute the basis of jurisdiction, in other words, the filing of the proper petition for removal eo instanti deprives the state court of jurisdiction and vests the United States court with jurisdiction. That court, to all intent and purposes, has absolute control over the matters in controversy and if the plaintiff desires to remand the same the burden is upon him to introduce proof sufficient to remove that burden in order to divest the federal court of its jurisdiction. Therefore, in this instance, plaintiff must challenge the averments contained in the petition for removal either by plea in abatement, answer, or denial in the nature of a plea to jurisdiction, and even the filing of the plea in abatement, answer, or denial in the nature of a plea to jurisdiction will not avail plaintiff, unless he supports the issue thus raised by evidence taken by the court.

In the case of Clarkhuff v. Wisconsin, I. & N. R. Co. (C. C.) 26 Fed. 465, the court, among other things, said:

"If the plaintiff in the state court desired to exclude the jurisdiction of the federal court, and if he could accomplish his purpose by mere pleading, he might in any imaginable case deprive his adversary of his constitutional and legal right of removal by alleging a fact to be true, having no foundation in truth. He might state the value of property involved to be less than $500, the contrary being the fact. He might allege untruly that his adversary is a citizen of the same state with himself. He might unite some mere nominal party as defendant with the real party in interest, falsely averring such nominal party to be a citizen of the same state with himself, and jointly concerned with the real party in the controversy. Thus might the plaintiff in the state court, by the simple process of pleading, without even the verification of his own affidavit, defeat the whole purpose of the removal act. It is manifest, therefore, that the party seeking the removal is at liberty to make averment against the facts as stated in the pleadings; and it is equally clear that the state court must receive the statement made in due form, and with proper verification by the petitioner for removal, as true prima facie, and proceed no further with the cause, but order the transfer of the case to the federal court. The cause comes here with the record thus made, and this court must primarily, by inspection of this record, determine whether or not the cause shall be remanded. Now, it is clear to my mind that, while the petition for removal must be received as true prima facie, and therefore as, upon the facts of the record, paramount to the pleadings filed in the state court, it cannot be taken in its turn as conclusive of the facts upon which the jurisdiction depends. If the petition for removal were taken as conclusive—if the party moving to remand were not at liberty to aver and show the jurisdictional facts to be contrary to the statement of them in the removal petition—he would be in his turn, in this court, completely at the mercy of his adversary."

The averments contained in the petition for removal being sufficient to vest the court below with jurisdiction, and the plaintiff hav-

ing failed to put in issue the averments of the petition, and also failed to offer any evidence in support of the same, it necessarily follows that nothing occurred in the court below to deprive it of the jurisdiction which it acquired in a regular and orderly manner.

From what we have said it also necessarily follows that the refusal of the court below to remand these causes to the state court was eminently proper.

[2] The next question that arises is as to whether the court below erred in sustaining the motions to dismiss all three causes.

As we have stated, the object of these suits is to cancel and set aside disclaimers executed by William C. Wiley (in cases Nos. 1643 and 1644) and Frances Holton (in case No. 1645). These disclaimers are identical except as to parties and property involved.

It is first insisted that:

"(1) The claim of the complainants is barred by laches, lapse of time and neglect. The disclaimer mentioned in the bill of complaint was recorded in the clerk's office of the County Court of Lincoln county on the 12th day of July, 1887."

This squarely presents the question as to whether the complainant's cause of action is barred by laches, lapse of time and neglect of the complainants. In these causes the complainant is in possession of the land in question and comes into a court of equity for the purpose of having cloud upon his title removed, and in doing so to settle the question of title against one who holds adversely to him and is out of possession. It is well settled that under such circumstances, no matter how long the delay, complainant cannot be charged with laches. In the case of Gunnison Gas & Water Co. v. Whitaker et al. (C. C.) 91 Fed. 191, Adams, District Judge, in disposing of this phase of the question, said:

"Until the defendants asserted some right adverse to the complainant, the complainant could confidently repose upon its undisturbed possession, notwithstanding the illegal transactions complained of. There was, therefore, no occasion to resort to a court of equity for the relief prayed for in this case. Certainly not, so far as relates to the restraining order against defendants, until they began proceedings, or threatened proceedings, to assert some right under the void deed of trust. So far, therefore, as the injunctive relief is concerned there can be no complaint on the ground of laches. It is held, in the case of Ruckman v. Cory, 129 U. S. 387, 9 Sup. Ct. 316 [32 L. Ed. 728], that laches cannot be imputed to one in the peaceable possession of land under an equitable title for delay in resorting to a court of equity for protection against the legal title, since possession is notice of his equitable rights, and he need assert them only when he finds occasion to do so."

In the case of Smith v. Burrus, 139 Ga. 10, 76 S. E. 362, the court in the second syllabus said:

"An owner of land, in possession of it, who resorts to a court of equity to cancel a forged deed as a cloud on his title, is not chargeable with laches, though as much as 10 or 11 years may have intervened since his discovery of the forged deed."

The case of Coal Company v. Doran, 142 U. S. 417, 12 Sup. Ct. 239, 35 L. Ed. 1063, is also very much in point, and in 8 A. & E. Enc.

of Law (2d Ed.) p. 124, a number of cases are cited to sustain this point.

Section 33 of Pomeroy's Equity Jurisprudence is as follows:

"A party in possession of land, who resorts to a court of equity to settle a question of title is not chargeable with laches, no matter how long his delay. Such a party is at liberty to wait until his title is attacked before he is obliged to act. The most frequent illustrations of this principle are found in suits by parties in possession to remove a cloud on title or to quiet title. Where, however, statutes permit such suits by parties out of possession, the doctrine of laches does apply, if the plaintiff is not in possession."

This rule is in harmony with common sense and fair dealing. The possession by the plaintiff was sufficient and complete notice to the defendants, and we think it is too late for them now to avail themselves of the defense that claimant's cause of action is barred by lapse of time.

[3, 4] However, it is further contended by counsel for the defendants in support of motion to dismiss that the allegations of the bills are not sufficient in law to show that complainants have title to the minerals mentioned in the disclaimers by adverse possession. It appears from the allegation of the bill that at the time the disclaimers were executed, in each instance plaintiff had chain of title in fee to the respective pieces of real estate, derived from the commonwealth of Virginia; also, that there has been a continuous, actual, adverse, open, and notorious possession of these respective tracts, under and by virtue of such chain since 1867 and since the grant of the real estate involved herein by the commonwealth of Virginia. Further, that any and all taxes charged and chargeable upon said real estate had been regularly paid while claiming under said chain of title, and that these plaintiffs and their predecessors had such possession of said real estate under their such chains of title and payment of taxes since the time of the execution of said disclaimer and until the time of the institution of these suits and at the time of the filing of the bills in these causes.

It is also alleged by plaintiffs that:

Said "disclaimer is a cloud upon the title to his said real estate, and that the said certificate of recordation of the same made by W. C. Holstein, clerk county court, Lincoln county, is false, misleading, and untrue, and tends to further cloud plaintiff's title to said real estate, and that for the reason hereinbefore set forth plaintiff is entitled to have said paper writing or disclaimer, and the said certificate of recordation thereof, set aside, canceled, and held for naught as a cloud upon the title of plaintiff to his said real estate hereinbefore mentioned and described."

We think that these allegations are full and complete, and that any objection thereto is without merit.

The allegations of the bill must be taken as true on the motion to dismiss. In other words, the motion to dismiss is in the nature of a demurrer. This being so, the question arises as to whether, under the plaintiffs' statement they are entitled to the relief demanded, there being no denial either by answer or otherwise to the material allegations made by the plaintiffs.

[5] The court below held that the paper writing or disclaimer is sufficient to divest W. C. Wiley of title to mineral underlying the real

estate in question and sufficient to vest title in defendant. In referring to this phase of the question the court said that the disclaimer "granted in no uncertain terms full mining rights and privileges." In other words, the court below held that the paper writing in question was equivalent to a deed and its provisions sufficient to transfer title from Wiley and to invest plaintiff with title to same, as we have said. This presents the question as to whether the disclaimer can be construed as a quitclaim deed, surrender, conveyance, release, or defeasance.

We are of the opinion that the instrument in question was in effect a quitclaim deed. In equity it was a contract by which the disclaimant said:

"I relinquish all interest in the land. You take it and do what you please with it as far as I am concerned."

In equity the disclaimant would be required to do anything necessary to make the instrument effective. This construction we think is in harmony with the provisions of section 3, chapter 72, of the Code of West Virginia (sec. 3780), which is as follows:

"Whenever, in any deed, there shall be used the words, 'The said grantor (or the said ———) releases to the said grantee (or the said ———) all his claims upon the said lands,' such deed shall be construed as if it set forth that the grantor (or releasor) hath remised, released, and forever quitted claim, and by these presents doth remise, release and forever quit claim unto the grantee (or releasee) his heirs and assigns, all right, title, and interest whatsoever, both at law, and in equity, in or to the lands and premises granted (or released) or intended so to be so that neither he nor his personal representative, his heirs or assigns, shall, at any time thereafter have, claim, challenge, or demand the said lands and premises, or any part thereof, in any manner whatever."

[6, 7] It is insisted that the recordation of this instrument in a release docket was insufficient to give constructive notice. It appears that this paper was recorded in a release docket at the instance of the predecessors in title of the defendants, therefore such recordation is binding upon them, they having given explicit instructions as to how the paper should be recorded and were content to receive the same with full knowledge as to where it had been recorded. It should be remembered, in this connection, that instruments of this character are required to be recorded in a particular book. The statute of West Virginia as found in Code W. Va. (C. E. Hogg) 1913, c. 73, §§ 2, 7, provides:

"Sec. 3805. The clerk of the county court of any county in which any deed, contract, power of attorney, or other writing is to be or may be recorded, shall admit the same to record in his office as to any person whose name is signed thereto, when it shall have been acknowledged by him or proved by two witnesses as to him, before such clerk of the county court."

"Sec. 3810. Every such writing when admitted to record shall, with all certificates of acknowledgment, and all plats, schedules and other papers thereto annexed or thereon indorsed, be recorded by, or under the direction of the clerk of the county court, in a well-bound book, to be carefully preserved."

The latter section is plain and clearly intended to make provision for classification of documents required to be recorded, so that one

engaged in abstracting titles to lands could, by inspecting the proper book, easily ascertain the complete history of the chain of title involved. If the statute had merely directed the recording, without specifying the particular book in which it should be recorded, then, under the authorities, the grantee could protect himself against subsequent purchasers for value by recording in any book; but when, as in this instance, the recording act requires the record to be made in a particular book, then the grantee cannot protect himself against subsequent purchasers for value, unless there is proper record in the book mentioned in the statute, and this is especially true when, in a case like the one now before this court, the grantee directs the wrong recording and receives the instrument back with a certificate of recordation in the wrong book.

It is also significant that chapter 76, § 5 (sec. 3862), which refers to release of liens, excludes all other papers from recordation therein. That section reads as follows:

"The clerk of the county court shall record and properly index all releases under this chapter and deeds of release admitted to record in his office, in a well-bound book *to be kept exclusively for the purpose*, and when any release or deed of release is recorded, he shall note the fact on the margin of the record or docket of the lien discharged thereby, with a reference to the book and page where the same is recorded." (Italics ours.)

Where the statute allows the record to be made in any book except one from which it is expressly excluded, recording in such excluded book is not notice to subsequent purchasers. This is precisely what occurred in the recordation of the instrument in question. To say that an improper recordation of this instrument was constructive notice would be in defiance of the rights of innocent purchasers and a complete disregard of any rule of construction of which we have knowledge. It would never occur to any lawyer or skilled abstractor to examine a release docket, after having found by an examination of the records wherein papers of this kind are required to be recorded that title was perfect. The provision which requires instruments of this character to be recorded is based upon the theory that the grantee, upon purchasing a tract of land, may be afforded an authentic record, showing the exact condition of the title to the property which he is about to purchase. Therefore, as we have said, papers of this kind are as a general rule required to be recorded in a certain book. Therefore, one having carefully examined that book and found perfect title, it would be absurd to say that grantee is bound by the recordation of the instrument in a book from which the recordation of instruments of this character are excluded.

For the reasons stated, we are of the opinion that the plaintiffs and those under whom they claim are innocent purchasers without notice and that the court below erred in dismissing these suits.

In view of what we have stated, we do not deem it necessary to enter into a discussion of the other assignments of error.

Therefore the decree of the lower court is reversed, with instructions for further proceedings in accordance with the views herein expressed.

Reversed.

STUMP et al. v. STURM et al.

(Circuit Court of Appeals, Fourth Circuit. October 1, 1918.)

No. 1570.

1. DEEDS ⟸196(1)—PRESUMPTION—CAPACITY OF GRANTOR.
The presumption of law is that the grantor in a deed was sane and competent to execute it at the time of its execution.

2. DEEDS ⟸68(3)—CAPACITY OF GRANTOR—OLD AGE.
Old age is not of itself sufficient evidence of incapacity to make a deed, and if the grantor, though enfeebled, is capable of knowing the nature, character and effect of his act, that is sufficient to sustain it.

3. DEEDS ⟸211(1)—CAPACITY OF GRANTOR—EVIDENCE.
The evidence of an officer taking the acknowledgment of a deed or of a person present at its execution is entitled to peculiar weight in considering the grantor's capacity.

4. DEEDS ⟸203—CAPACITY OF GRANTOR—TIME OF EXECUTION.
The time of the execution of a deed is the material or critical point of time to be considered on the inquiry as to the grantor's capacity.

5. DEEDS ⟸72(1)—VALIDITY—"UNDUE INFLUENCE."
Influence gained by kindness and affection will not be regarded as undue, if no imposition or fraud be practiced, but "undue influence," to avoid a deed, must be such as to override the grantor's will.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Undue Influence.]

6. DEEDS ⟸211(4)—VALIDITY—UNDUE INFLUENCE—EVIDENCE.
Evidence *held* insufficient to show that an aged grantor, who conveyed the bulk of his property to missionary societies was unduly influenced.

7. DEEDS ⟸211(1)—VALIDITY—CAPACITY.
Evidence *held* insufficient to show that an aged man who conveyed the bulk of his estate to missionary societies lacked capacity.

8. RELIGIOUS SOCIETIES ⟸4—"CHURCH OR RELIGIOUS DENOMINATION."
The home missionary society of a religious denomination *held* not a "church or religious denomination," within Const. W. Va. art. 6, § 47, declaring that no charter of incorporation shall be granted to any church or religious denomination.

9. RELIGIOUS SOCIETIES ⟸16—HOLDING OF REAL ESTATE.
As Code W. Va. 1913, c. 54, § 30 (sec. 2929), allows any foreign corporation to hold property in the state, unless otherwise expressly provided, *held* that a mission society incorporated in foreign state might hold property in West Virginia despite the constitutional and statutory restrictions on churches and religious denominations.

10. CORPORATIONS ⟸631—GRANT OF CHARTER—PROHIBITION AGAINST FOREIGN CORPORATIONS.
That a state does not provide for the granting of a charter to domestic corporations of certain character is not in the nature of a prohibition against foreign corporations created for such purpose.

11. RELIGIOUS SOCIETIES ⟸16—GIFTS—RIGHT TO ATTACK.
Only the state can attack a gift to a foreign religious corporation as in violation of the public policy of the state as enunciated in Const. W. Va. art. 6, § 47.

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

Bill by Drusa Sturm and others against John S. Stump and others. From a decree for complainants (239 Fed. 749), defendants appeal. Reversed and remanded, with instructions.

W. E. R. Byrne, of Charleston, W. Va., and O. E. Swartz, of Clarksburg, W. Va. (E. Bryan Templeman, of Clarksburg, W. Va., on the brief), for appellants.

R. F. Kidd, of Glenville, W. Va., and W. E. Haymond, of Sutton, W. Va. (Haymond & Fox and Alex. Dulin, all of Sutton, W. Va., and C. M. Bennett, of Glenville, W. Va., on the brief), for appellees.

Before PRITCHARD and WOODS, Circuit Judges, and McDOWELL, District Judge.

PRITCHARD, Circuit Judge. This is an appeal from the decree of the United States District Court for the Northern District of West Virginia, in a suit wherein Drusa Sturm et al. were complainants and John S. Stump et al. were defendants. The decree in question set aside a certain deed from Daniel Huffman to the American Baptist Home Mission Society, dated March 11, 1907, certain deed from Daniel Huffman to John S. Stump, dated September 20, 1909, and certain other deeds pertaining to the lands which are the subject-matter of the two conveyances in question. We will refer to the appellees as complainants hereinafter, and the appellants as defendants.

The complainants seek to set aside the conveyances in question on the ground that the grantor was mentally incapacitated to execute a valid deed for real estate, and insist that—

"At the time of the execution of the said two deeds, one to said society and the other to the said John S. Stump, the said John S. Stump particularly persuaded and unduly influenced the said Daniel Huffman to execute the same and each of them, and the said John S. Stump was present urging and procuring the said Daniel Huffman to execute said deeds, and because of the mental incapacity of the said Daniel Huffman and the influence aforesaid unduly exercised by the said John S. Stump upon him, the said supposed deeds were signed by the said Daniel Huffman," and because "the American Baptist Home Mission Society cannot accept conveyances of real estate in the state of West Virginia and could not at the date of said supposed deeds to it do so, or hold the same under the Constitution and laws of the state of West Virginia nor under the laws of the state of its creation."

It appears that Daniel Huffman died in Gilmer county in March, 1916, at the age of 94. He married prior to 1846, and his wife died in 1902. The children of his marriage were two daughters, one of whom, Drusa, married Charles Sturm, and is still living; the other married Cary Mollohan, and both she and her husband are dead, leaving children surviving them, Camden D. Mollohan, Josephone Mollohan, Losie Stump, and Darlie Bush. It further appears that Daniel Huffman was an industrious, frugal farmer and minister of the gospel of the Baptist Church, and accumulated a valuable estate, mostly realty, and worth approximately $50,000.

In November, 1910, the county court of Gilmer county adjudged him incompetent and appointed a committee to control his person and estate. It is insisted that on November 11, 1907, Huffman, "by deed, assumed to convey to the American Baptist Home Mission Society," a corporation of the state of New York, 384 acres, 532 acres, 100 acres, 100 acres, an undivided half in 10 acres, all the interest of the said Huffman in the oil and gas in 351 acres, all his interest in the

coal, oil and gas in 92 acres and 48 acres in Gilmer county; all the interest of the said Huffman in the oil and gas in 147 acres and 55 poles and 135 acres in Calhoun county and 66½ acres in Braxton county, in West Virginia. By the terms of this deed he reserved the use, possession and control of these properties, to take and have all rentals for oil and gas accruing from existing leases, to make other leases therefor and receive all rentals and profits therefrom for and during his life; and it is set forth that "this deed shall not take effect until after the death of said Huffman." The consideration for this conveyance, set forth on its face, is one dollar in hand paid, but in its closing paragraphs it sets forth a purpose on the part of Huffman, by will, to make specific legacies to certain natural persons, and stipulates that if the other estate of which he died seized proved insufficient to pay such legacies, then the grantee society should make good all such specific bequests or legacies, to the extent of not exceeding a maximum sum of $4,500; and to secure the fulfillment of this obligation a vendor's lien is retained.

On September 20, 1909, deceased executed another deed reciting the execution of the former deed to the Mission Society and setting forth that "a doubt has arisen whether or not the grantee in the deed aforesaid can take and hold real estate in the manner contemplated by the said deed," Huffman conveys the same land and oil, gas and coal interests to John S. Stump (who, it appears, was and is the state agent of the Mission Society) in consideration of $1 in hand paid "and other valuable considerations," to be by Stump "held, used and disposed of by him according to his own will and discretion, without right on the part of any one to call him to account for the said lands or interests in said lands, or any part thereof, except so far as necessary to make good the charges hereby created." The charges thereby created are then set forth to be the reservation of a life estate in the lands and interests, to receive the rents, issues and profits thereof for life, and to have any specific legacies bequeathed by the grantor in his will made good to the extent that the other property of which he may die seized fails to accomplish that purpose, up to a maximum sum of $4,500, to be paid by grantor's personal representative as soon as the deficit should be ascertained, and to secure such provision, vendor's lien is retained. This deed then closes with the clause:

"It is expressly understood between the parties hereto that this deed is not intended as a repudiation of the deed so made to the American Baptist Home Mission Society, and is only intended to pass title to the grantee herein in the event the first-mentioned deed shall be held to be void and to pass no title."

It further appears that on June 25, 1912, the Mission Society by deed conveyed to said John S. Stump all its right, title and interest in and to these lands, coal, oil and gas interests, in consideration of $1 in hand paid and his note for $10,000, upon condition that the grantee, Stump, should assume all the obligations, stipulations and agreements contained in Huffman's deed to the society; that interest on the $10,000 note should not begin to run until Huffman's death, after which the vendor's lien retained to secure it, upon default in payment,

might be enforced by sale of the lands but such proceeds of sale, whatever amounting to, should release and discharge the note in full. It is further stipulated in this deed that if the deed of November 11, 1907, to the society "shall, for any cause, be declared null and void by a court of the state of West Virginia, or of the United States, then and in that event" Stump shall "be released from any payment on account of the debt herein incurred, and said debt shall be deemed to be fully paid and discharged."

On April 11, 1916, immediately after Huffman's death, Stump and wife in consideration of the sum of $1 in hand paid, other valuable consideration acknowledged to have been received, and the assumption of payment of Stump's $10,000 note to the Missionary Society, conveyed all these lands and interests in coal, oil and gas to the Latin-American Improvement Association, Incorporated, a corporation formed under the provisions of the Business Corporation Law of New York by a certificate filed and recorded in the office of the secretary of state, in that state, on August 20, 1915.

Its certificate of incorporation sets forth the purpose of the corporation to be to acquire and improve real property, to sell and lease the same in any state in the United States, in Mexico or elsewhere. Its capital stock is limited to $1,000 of ten shares of the par value of $100, five of which are subscribed for by the five incorporators, one share each.

On the same day (11th April, 1916), it further appears that this Latin-American Improvement Association, Incorporated, executed to Stump a power of attorney, authorizing him to sell these lands and interests in lands, and collect the proceeds of sale, proceed at law and equity, employ counsel and do all things necessary to be done in the premises. For the purpose of assailing and having annulled the several conveyances and the power of attorney aforesaid, the surviving daughter and the children of Huffman's deceased daughter aforesaid, instituted this suit on May 13, 1916, in the circuit court of Gilmer county. The case was removed to the District Court upon the petitions of the American Baptist Home Mission Society and the Latin-American Improvement Association, Incorporated. The Mission Society and Improvement Company filed their joint and separate answer to the bill, and John S. Stump filed his answer thereto.

[1-7] First, we will consider the evidence upon which complainant relies to show that deeds in question should be set aside. Mr. W. E. Powell, the predecessor of John S. Stump as superintendent of the Home Mission Board in West Virginia, one of two individuals who, it is alleged, exercised undue influence upon the mind of the deceased, among other things wrote Huffman several letters. Such of the said letters as we deem material are as follows:

"Parkersburg, W. Va., Sept. 12, 1893.

"Rev. D. Huffman, Stumptown, W. Va.—My Dear Bro.: Your kind letter containing two checks, one for $102.93 for state and home missions, and the other for $2 for your J. & M. has come to hand. Please accept my sincere thanks for your promptness in this matter. I am sorry to see such a falling off. In 1891 your association gave $130.33; in 1892, $99.49; now only $89.38, a loss to our board of over $40 in two years. The indications now are that we are to have a debt of $800 to $1,000 as against $850 last year.

"If it is possible for you and Mrs. Huffman to do so, I hope you will send me a good personal gift any time before Oct. 5th. A good Baptist made his will last week. Has about $15,000 worth of property and remembered the Home Mission Society. I should be glad if you would deed a good farm to the American Baptist Home Mission Society—you keep and manage it as long as you live and turn over the rents each year if you wished to do so—My dear Bro. I hope you will remember both State and Home Missions, but as you cannot convey property by will for State Missions, but can for Home Missions, allow me to urge that you will not put this matter off. It will be too late soon. Please do soon what you wish to do along this line and let me know about it. Will come up to see you about it if necessary. Hope to see you at Charleston Oct. 10–13. With kindest regards to Mrs. Huffman, as well as yourself,

"I am yours truly, W. E. Powell."

"Parkersburg, W. Va., Jany. 6, 1894.

"Rev. Daniel Huffman, Stumptown, W. Va.: In answer to my letter to you some months since your wife sent me $10 for State Missions, and in it she said 'I have thought this might be my last opportunity to help in this good work.' Believing that both yourself and Mrs. Huffman, after providing for your children, will want to do a liberal part for the work of our dear Saviour, by leaving money or property by will, I inclose you an exact form of bequest as prepared by the Home Mission Society. Since our State Mission Board cannot receive and hold legacies under our W. Va. laws, you can will all to the Mission Society with the request that say, one-half, be for State Mission work in W. Va. Since life is so uncertain and as making a will does not in any way interfere with the use and control of your property, allow me to urge upon your prayerful attention, that you and Mrs. Huffman ask the Lord to direct you in this matter and that you make your will at the earliest day you can, and that you remember liberally the American Baptist Home Mission Society that has done so much for our beloved country and also for West Virginia Baptists. As soon as you decide about this matter I shall be glad to hear from you both. I am just getting over a long and hard siege of 'la grippe.' Praying that the Lord will bless you and guide you both with many years of useful work yet.

"I am yours truly, W. E. Powell.

"P. S.—I inclose 3 copies. Keep one and hand the others to persons who will likely be interested in this work and speak to them about it."

"Parkersburg, W. Va., Dec. 6, 1895.

"Rev. D. Huffman, Stumptown, W. Va.—Dear Bro.: I have some hope of getting $1,000 about the 18th and if so will be glad to let you have it. Please let me know at once if you will take it if I get it. I have been greatly disappointed in not getting this money sooner for you. If I should come up to see you about the 20th, will you be ready to close up your will and arrange for the legacy? Would it suit you to deed to the American Baptist Home Mission Society a farm or two? This might be better than to have it in a will that might be contested.

"Please let me hear from you.

"Yours very truly, W. E. Powell."

It will be observed that the first of these letters relates to certain checks sent by the deceased and his wife to the Mission Board, and also contains a reference to the fact that the amount sent from the Association to which deceased belonged for the years 1891–1892 showed a loss to the Board of over $40 in 2 years. He then suggests that the deceased and his wife send a gift any time prior to October 5th, and refers to the fact that a "good Baptist made his will last week." In the next letter Powell says, among other things:

"* * * Believing that both yourself and Mrs. Huffman, after providing for your children, will want to do a liberal part for the work of our dear

Saviour, by leaving money or property by will, I inclose you an exact form of bequest as prepared by the Home Mission Society."

Instead of showing that it was the purpose of Powell to influence the deceased to ignore the duty he owed to his children, he expressly says that "after providing for your children" he trusts he can see his way clear to do a liberal part for the mission work. He then refers to the good work that had been done in that section of the country, and further suggests that he would be glad to hear from him in regard to the matter.

Certainly these letters contain nothing that could be construed an attempt to exercise undue influence, but, on the other hand, indicate a purpose to cooperate with the deceased in doing what he might feel to be his duty as respects the mission cause.

The other letter relates to the same matter, and likewise contains no threat or inducement which could in any view of the case be construed as an attempt to have the deceased desist from that which he naturally desired to do, nor is there any suggestion contained therein, which, if adopted, would have been inconsistent with the desire and intention expressed by the deceased during his long and useful life.

We have also carefully considered the evidence which relates to the alleged improper conduct of John S. Stump, as respects this transaction. Stump, it appears, was also a minister of the Baptist Church and a nephew of the deceased.

The letters written by him were even more moderate than those written by Powell, and in the main relate to the condition of the mission work, its needs, etc. The first of these letters dated March 24, 1897, relates to a $500 note which according to a contract deceased had with a Mr. Thomas, would be due on April 15th. The writer, among other things, says he had arranged with Mr. Thomas to renew the old note and let it stand until they could secure the money to pay it.

In the letter of March 17, 1904, it is stated that the Home Mission Society would have a debt about the 31st of March of $48,000, then calls attention to the fact that the only way to prevent accumulation of this debt would be for the brethren to make extra contributions for the work during that month, but it contains no suggestion that it was even the duty of the deceased to contribute. The writer closes by saying:

"* * * During those three years the influx of foreigners has increased from about 500,000 to nearly 1,000,000 per year. In the face of this increasing need shall we lessen the mission force? It remains for the brethren to say. * * *"

These letters certainly contain no language calculated to unduly influence the deceased.

The letter of February 28, 1905, states that they were attempting to get up an endowment for four scholarships for high-grade men at Crozer Theological Seminary, the scholarships to be named in honor of four of the professors, and the only intimation as to what the deceased should or should not do is contained in the following statement:

"* * * I think that if you want to put some money into ministerial education this is as sure a place to have it used for only good men that I can

think of. * * * I hope you will want to have part with us in this movement."

The next letter, dated December 28, 1906, begins by saying:

"I inclose herewith the will which you asked me to send you."

If this letter means anything, it is that the deceased had requested him to send copy of will and that he had complied with the request.

The next letter, dated March 5, 1908, relates to what the writer terms the "Marshall note," to secure which the deceased had taken a deed of trust. The writer offers his services in the collection of same.

On September 20, 1909, Stump again writes his uncle, inclosing check for $25 to be credited to the William T. and Docia Marshall note, stating that they proposed to pay same at an early date, but if they failed to do so he would advertise and sell on deed of trust.

On December 27, 1909, he again writes his uncle, inclosing check for $25 to be credited to the William T. and Docia Marshall note.

The next letter was written on January 1, 1913, and is in the following language:

"Parkersburg, W. Va., Jan. 1, 1913.

"Rev. Daniel Huffman, Stumptown, W. Va.—My Dear Uncle: By some mistake you have been summoned to appear at Glenville on the 6th day of January to give testimony in a proceeding which I have started to prove that you were mentally competent to make the deeds you have made in the past. I am writing now to tell you that if you got such a summons it was a mistake for them to send it to you, and you don't need to come to Glenville on account of it. I should be very glad to have you there, but it would be out of the question for you to make that trip in the middle of the winter. It might result in your death.

"I hope you are as well as usual and trust you may get through the winter all right.

"Yours truly, John S. Stump."

The above-quoted letter shows that Stump was confident that by fair trial he could show that deceased had been improperly adjudged insane, and was of the opinion three years thereafter that he was in every sense of the word mentally competent at the time of the execution of the deeds.

In the letter of June 7, 1902, Stump reminds deceased of the fact that his name had been dropped from the list of subscribers to the Home Mission Monthly, and, further, if the deceased so desired, he would place his name back on the list.

On the 26th of June, 1902, Stump again writes his uncle that he had renewed his subscription to the Monthly, paying for same to the fall of 1904. He concludes this letter by saying that he regrets to hear of the loneliness of his uncle.

On the 15th of September, 1905, he again writes Huffman a letter in regard to one that his uncle had written him on the 12th instant, in which the deceased had expressed a desire to see Stump and the corresponding secretary of the Home Mission Society about matters of business.

There is nothing contained in these letters which could be construed as an attempt on the part of Stump to unduly influence his uncle.

The letter of Oct. ( ) 1905, addressed to his uncle, relates to land

situated in Faulkner county, Ark., stating that he had written the clerk of the court asking about liens, judgments, taxes, etc., that might be against the lands, and as to the advance in the price of real estate in that section, etc., telling him that he would report as soon as he received the desired information from the clerk. He expressed the opinion to Huffman that it would be a mistake to sell the lands at that time.

The letter of November 17, 1905, also relates to these lands, but contains nothing material to the question involved in this controversy.

On November 23, 1905, after obtaining information in regard to the Arkansas lands, Stump writes his uncle in regard to same, stating, among other things, that the tract contained 156.84 acres, instead of 160 acres, as called for in the deed, also that taxes for 1905 would be due January 1, 1906, and asks if he should find out what the taxes amounted to and pay them. Then he refers to a certain mortgage on the property, and further states that "there is no oil there, but there is supposed to be coal, and that there is talk of a railroad being built." He then asks his uncle if he desires him to close up this matter by having the mortgage canceled, and, among other things, says:

"* * * Inasmuch as you want this to go eventually to missions, I think if I were you I would deed this land to the Home Mission Society and let them close the matter out in any way they can, and relieve you of further worry or trouble about it. If you think you ought to do that, return the deed to me and I will have a deed made out and sent back to you to sign up. It seems to me that you could not afford to be worried about it for all there is involved."

There is nothing contained in any of the foregoing letters that evidences a purpose to unduly influence the deceased. Indeed the writer, among other things says:

"*Inasmuch as you want this to go eventually to missions* [italics ours], I think if I were you I would deed this land to the Home Mission Society and let them close out the matter," etc.

A number of other letters appear in the record, but in the main they relate to business transactions in which deceased was interested, and where John S. Stump, who had been given a power of attorney to act for him, was attempting to settle and adjust his business. The deceased received these letters from the date mentioned up to the 29th of August, 1910.

In a letter dated December 1, 1908, in referring to a debt said to have been due the deceased by a man by the name of Burns, Huffman is requested to release Burns from this debt; Stump stating in this letter that he thought it would be good policy to do so, and says further:

"* * * I don't want you to do it against your will, but I have given you the views of two of your friends and my own opinion for your consideration."

In referring to other matters further on in this letter the writer says:

"If you think I was not justifiable in making that proposition, please say so at once and I will withdraw it."

This letter tends to refute the contention that Stump was endeavoring to unduly influence his uncle.

It appears that the deceased was dissatisfied with Stump's management of what was known as the Clarksburg suit, and in writing his uncle says:

"If you want me to do so, I will return your power of attorney as soon as you have settled with Mr. Linn and Mr. Bassel, and leave the whole management of your business in your hands."

It seems Messrs. Linn and Bassel were attorneys for the deceased. This letter, instead of indicating a purpose to unduly influence Huffman, shows that Stump was willing to relinquish any power or authority he might have had under the power of attorney.

The other letters are very much of the same tenor, and show nothing to support the contention of the complainant that the deceased was unduly influenced in executing the deeds.

Among other things, there is the deposition of Levi Huffman, brother of the deceased, which was offered in evidence by the defendants. Levi Huffman testified that he was 73 years of age, and that he was present when the deed was executed by Daniel Huffman to the American Baptist Home Mission Society dated November 11, 1907. He was asked:

"Q. Were you present when directions were given for the preparation of that deed? I will modify that question by asking you if any directions were given for the preparation of said deed in your presence, and, if so, by whom? A. I was; Daniel Huffman gave the directions."

He was also asked as to who were present when the deed was executed, and if any one retired at the time it was executed. In reply to the last part of the question he said: "John S. Stump." He was then asked to state the substance of the conversation with Daniel Huffman at that time, and he answered as follows:

"A. Daniel Huffman was asked if it was a volition of his own that he of his own will and accord had executed this deed, he said it was."

Levi Huffman was then asked if the deceased at that time gave any reason as to why he executed the deed. Deceased replied to the question by saying that—

"He had always had a deep interest in the mission cause, and that he desired his estate to go for that purpose, giving as a reason that he was a child of missions, and that he was converted and united with the church under the ministry of a missionary."

Deceased was then asked (according to Levi Huffman's testimony) as to whether John S. Stump had used any undue influence in securing the execution of the deed, and in testifying as to his brother's reply said: "My recollection is John S. had not." He was then asked as to the mental condition of the deceased at the time of the execution of the deed, as indicated by his action and demeanor, and in reply said: "So far as I was able to judge his mental condition was good." He was then asked how long prior to the execution of the deed his brother had contemplated devoting any part of his means to Home Mission work, and in response testified as follows:

"A. In 1899 he expressed himself to me that it was his purpose and desire.

"Q. Where did he so express himself? A. First, at his own home; secondly, in journeying to the home of our brother-in-law, William Barr, likewise after our arrival at Barr's home.

"Q. What part of his property did he indicate that he intended to dispose of in such a manner? A. All of his real estate reserving the oil, gas, and coal.

"Q. What, if anything, was said by him at the time respecting a provision for his descendants? A. That he had given to them about as much as he intended them to have. I might be mistaken as to his reserving the oil, gas, and coal for all time, but possibly during his life; but he intended it all at his death to go into the hands of the Home Mission Society.

"Q. Did he ever afterwards tell you anything more on the same subject, if so, and where? A. In the year 1907 he also expressed a desire to turn his real estate over into the hands of the Home Mission Society. * * *

"Q. What influence was exerted to secure them? A. I am not aware that there was any.

"Q. Is it not a fact for the last ten years Daniel Huffman has insisted that his property belonged to the Lord and when he was through with it should go to Him without regard to his own children and heirs? A. You put the question too strong. He intended after he had given to his children what he intended them to have the remainder should go to the Lord or His cause, that was his statement to me. * * *

"Q. Who asked these questions of Daniel Huffman? A. It might have been Hines and Kelly.

Q. Why did Hines and Kelly ask these questions? A. How do I know? I want to make a statement. Mr. Hines and Kelly asked Daniel Huffman if any one had influenced him to make this deed, his answer to them was that if they knew as much about him as Brother Levi did that he couldn't be influenced to do a thing he did not want to do. * * *"

Rev. W. M. Hall, a Baptist minister, testified in regard to having seen the deceased at Petersburg, Va., in 1906. In regard to what occurred on this occasion he stated:

"After dinner he told me he had been in town seeing about his business, and then I don't know what brought the subject up, but he told me that he had decided to turn his property over to the missions; that he had been thinking for some time of writing to Mr. Stump about it, that he had decided to turn his property fully into the hands of the Mission Board and that they were to pay him interest or something to that effect. He said he wished to close it out in full, so that there would be no lawsuit after he was dead. I will change that a little—that he intended to give all that he expected his children to have to them while he lived and was going to deed the rest to the missions. I suppose the conversation lasted half an hour. * * *"

Rev. Hall also testified that he considered the deceased at that time an exceptionally strong man for his age and that he never saw any indication of mental weakness and never heard any one comment on it.

John S. Stout testified that he was a farmer, lived at Cedarville, Gilmer county, and was 57 years of age. He said, among other things, that on one occasion Daniel Huffman had told him that he had deeded property to the Home Mission Society and had heard some talk that his heirs were going to give him trouble in regard to the matter, but he stated that he—

"had given it to the Home Mission Society that the gospel might be carried to the world and that he had not done as much along that line as he would like to but the Lord had blessed him in giving him means and he had turned it over so that his brethren might carry on the work."

This was in the spring of 1908, according to witness' recollection.

R. G. Linn, a practicing lawyer, testified that from time to time he was the legal adviser of the deceased and that he frequently consulted him about legal matters. In response to the question as to Huffman's mental condition he said: "I believe it to be good." When asked as to the deceased being able to understand papers of that character he testified:

"* * * He asked me—the paper was read over to him carefully and he asked me to read again the boundaries, or part of them, for the purpose of determining for himself whether or not it respected the reservation that he had made in some former deed."

Linn was then asked:

"Q. From that conversation you had with him upon that day would you say that he did or did not understand what property he had and what property was embraced in that deed? A. Why I believe that he understood, and I believed at the time that he did."

Sylvester Stump was also introduced and stated that he was 72 years old and that he was a notary public in 1909, that he knew the deceased and was present when they were considering the matter of the deed to John S. Stump. He testified that Mr. Linn read one copy and gave the other to him to read to see if it was correct. He testified:

"After they got the deed signed I asked Mr. Huffman if he knew the contents of it. He says, 'Yes, I do,' and I certified his acknowledgment. From what I saw I thought Daniel Huffman's mental condition was good that day. Good as common. He was not excited. He talked intelligently. They talked the business they were interested in."

D. N. Connoly, a Baptist minister was introduced and testified that he had been acquainted with the deceased since "about 1894," having often met him at church and other places. Among other things he said:

"I also saw him in 1911 on Kanawha river near the mouth of Mill Run. I was preaching around there. When I first spoke to him he says, 'I don't recognize you,' and then he stopped a moment and says, 'I believe I know the voice; I believe it is Brother Connoly.' I said, 'Yes, it is Brother Connoly.' And then he remarked to me that he couldn't see clearly."

He also testified that he detected nothing wrong with his mental condition at that time.

A number of other witnesses were introduced, practically all of whom testified that the deceased was a man of strong mentality, and the most of them stated that they had heard him express a desire and purpose to give his property, after providing for his children, to the mission cause.

The test by which the validity of the disposition of property depends is whether the donor or devisor, at the time of execution of the deed, or will, knew what he was doing, the property of which he was making disposition, its relation to his estate, its effect upon his relatives to whom the property for which he was making conveyances would, upon his death, descend, and the use to which it was to be put. If these

conditions are found to exist the grantor is deemed to be competent and such deed, or will, should not be disturbed by the courts, in the absence of controlling evidence of undue or coercive influence over his mind and conduct at the time of the execution of the instrument.

In other words, if the deceased in this instance executed the deeds in question of his own volition and without being unduly influenced, so as to cause him to do that which he would not ordinarily have done under normal conditions, then and in that event this court, following a long line of decisions, would not be inclined to grant the relief sought by the complainants.

A careful consideration of the evidence discloses the fact that the deceased for the greater part of his life was considered a substantial farmer, possessing to an unusual degree those traits that give one success in life, to wit, energy, economy, good judgment, and uprightness in business dealings. It appears that he was a man of strong convictions, and this was especially true as to religious matters. The evidence further shows that he was not only a consistent member of the denomination to which he belonged, but that he spent much of his time in preaching the gospel and contributed to the cause in which he was so deeply interested; further, that for years prior to the execution of the deeds in question he contemplated making substantial contributions to the cause of missions before his death.

It is insisted that letters written by W. E. Powell and John S. Stump to the deceased were what might be termed "begging letters." An agent or agents of a Christian enterprise may properly appeal to those able and in sympathy with such enterprise for financial support. In this age of enlightenment the number of men of large means, as well as those of moderate means, who, from year to year, contribute to enterprises of this character, is rapidly increasing. Indeed, a majority of the educational institutions of this country, and certainly a majority of the religious institutions, are based upon endowments made by those who feel that it is their duty to dispose of their means by contributing to educational and religious institutions. These are laudable objects and it seems to us in a case like the one at bar, where one from his early manhood has spent his life in rendering Christian service, being imbued with a desire to not only preach the gospel to his own people, but to carry it to others, expressing at all times his purpose to make substantial contributions to the cause of missions, at a time when he was unquestionably in full possession of his mental and physical faculties and continued until his death to so express himself, tends strongly to show that what he did was not on account of undue influence, but was only the fulfillment of his long cherished and expressed desire.

It should be borne in mind that, in addition to what we have said as to the testimony offered, tending to establish the mental capacity of the deceased, that the court below found as a fact that the complainants had not established the mental incapacity of the deceased to execute the deeds in question. The court, in referring to this phase of the question, said:

"I think the evidence does rebut the contention of senile dementia or incapacity to convey. While he was 85 years old in 1907, and his memory was

failing, I do not doubt his ability then to understand to the full degree required by the law, as enunciated in Buckey v. Buckey, 38 W. Va. 168 [18 S. E. 383], and similar cases, the nature and effect of a contract of sale."

There are a number of cases bearing upon this subject, and in the case of Buckey v. Buckey, 38 W. Va. 168, 18 S. E. 383, the court announced the following:

"The presumption of law is that the grantor in a deed was sane and competent to execute it at the time of its execution.

"Old age is not of itself sufficient evidence of incapacity to make a deed.

"The evidence of an officer taking the acknowledgment to a deed, or of a person present at its execution, is entitled to peculiar weight in considering the grantor's capacity.

"The time of the execution of a deed is the material or critical point of time to be considered upon the inquiry as to the grantor's capacity.

"A grantor in a deed may be extremely old, his understanding, memory, and mind enfeebled and weakened by age, and his action occasionally strange and eccentric, and he may not be able to transact many affairs of life; yet if age has not rendered him imbecile, so that he does not know the nature and effect of the deed, this does not invalidate the deed. If he be capable, at the time, to know the nature, character, and effect of the particular act, that is sufficient to sustain it."

The rule announced in the above case was reaffirmed in a number of cases in West Virginia, as follows: Delaplain v. Grubb, 44 W. Va. 612, 30 S. E. 201, 67 Am. St. Rep. 788; Farnsworth v. Noffsinger, 46 W. Va. 410, 33 S. E. 246; Teter v. Teter, 59 W. Va. 449, 53 S. E. 779; Bade v. Feay, 63 W. Va. 166, 61 S. E. 348; Woodville v. Woodville, 63 W. Va. 286, 60 S. E. 140; Black v. Post, 67 W. Va. 253, 67 S. E. 1072; Barnett v. Breathouse, 77 W. Va. 514, 88 S. E. 1013.

The case of Mackall v. Mackall, 135 U. S. 172, 10 Sup. Ct. 707, 34 L. Ed. 84, in referring to this phase of the question says:

"Influence gained by kindness and affection will not be regarded as 'undue,' if no imposition or fraud be practiced, even though it induce the testator to make an unequal and unjust disposition of his property in favor of those who have contributed to his comfort and ministered to his wants, if such disposition is voluntarily made. Matter of Gleespin's Will, 26 N. J. Eq. 523. * * * Confidential relations existing between the testator and beneficiary do not alone furnish any presumption of undue influence. Lee v. Lee, 71 N. C. 139. Nor does the fact that the testator on his death-bed was surrounded by beneficiaries in his will. Bundy v. McKnight, 48 Ind. 502. * * * Nor that the testator, an old and helpless man, made his will in favor of a son who had for years cared for him and attended to his business affairs, his other children having forsaken him. Elliott's Will, 2 J. J. Marsh. 340; s. c. Redf. Am. Cas. on Wills, 434. * * * It would be a great reproach to the law if, in its jealous watchfulness over the freedom of testamentary disposition, it should deprive age and infirmity of the kindly ministrations of affection, or of the power of rewarding those who bestow them.

"Undue influence must destroy free agency. It is well settled that in order to avoid a will on the ground of undue influence, it must appear that the testator's free agency was destroyed, and that his will was overborne by excessive importunity, imposition or fraud, so that the will does not, in fact, express his wishes as to the disposition of his property, but those of the person exercising the influence."

In the case of Du Bose v. Kell, 90 S. C. 196, 71 S. E. 371, the Supreme Court said:

"To avoid a deed on the ground of undue influence, the evidence must show such an influence exerted on the grantor as to override his will and to make the act of executing the deed a mere mechanical performance by him of the design of the person exerting the influence, and undue influence may consist in any influence which is so far operative as to destroy free agency."

The whole subject of undue influence and mental competency is fully and elaborately discussed by Hawley, District Judge, in the authorities cited in President, etc., of Bowdoin College et al. v. Merritt et al. (C. C.) 75 Fed. 480. The discussion on this point is so full, and the citation of authorities so complete, that hardly anything can be added to it. The law on the subject is also admirably stated by Judge Sanborn in a Circuit Court of Appeals opinion. Sawyer v. White, 122 Fed. 223, 58 C. C. A. 587.

It is true that Daniel Huffman was forgetful in the latter part of his life, sometimes not knowing even those with whom he had acquaintance. There is also evidence that he was sometimes confused about the details of his business, such, for example, as whether notes had been paid—what he had done with some money which he had. But this confusion was always temporary, and he grasped and recognized the force of the evidence which was brought to him that he was mistaken as to his former views. Some of his neighbors testified that in their opinion, based on this confusion as to details of his business and the failure to recognize those whom he knew, that he was not of sound mind and incapable of making a valid deed. On the other hand, many who had intimate acquaintance with him, including two of his brothers, testified that he knew his property; that he had distinct purposes and ends in life, which were not irrational or fantastic, but, on the contrary, such as might well be entertained by an intelligent man. As we have stated those who were present at the time of the execution of the deed, including lawyers of the highest character, testified that he fully apprehended the nature of his property and the purport of the deed he was making, and aided in getting data for the preparation of the deed. The conclusion, therefore, of the District Judge that Huffman was not of unsound mind and had sufficient intelligence to fully realize what he was doing, is well sustained by the greater weight of the testimony.

There was no undue influence. It is true that several Baptist clergymen, deeply interested in the cause of missions, encouraged and solicited Huffman to carry out the purpose which he had formed, and not to delay it until it was too late. But there was not the slightest evidence that any pressure was brought to bear upon him. There is no evidence that he was told that the failure to make these deeds to carry out his design would affect his welfare in this world or the next. The only appeals made were that he should aid a good cause in pursuance of the design which he had expressed without any solicitation from anybody. When he went to make the deeds, Huffman himself requested his brothers to accompany him, and the papers were drawn by lawyers of high standing, after much discussion as to the form the transaction should take. Everything was done openly and above board. There was no necessity for effort to bring Huffman to a frame of mind which would conduce to the giving of his property to a missionary

cause. He had been in that frame of mind for years, and we can discover no effort to control his will in this regard. The most that can be said as to the influence upon him was that he was requested and solicited to carry out the design without delay. But even this request was not unduly insistent, for as soon as it was made he agreed to the suggestion.

In view of all the facts in this case we are of the opinion that the case at bar is far removed from the standard of proof required to set aside conveyance, even for undue influence, or incompetency, or both.

[8, 9] However, it is insisted by counsel for the complainant that the deeds of 1907 and 1909 are invalid, in that they are contrary to the laws and policy of the state of West Virginia; in other words, after assuming the invalidity of the deeds in question upon this ground, they then arrive at the conclusion that no title passed to the grantor thereunder.

The court below in referring to this phase of the question, among other things, said:

"Personally, my views have been in accord with those of counsel in this line of reasoning, as shown by the two opinions filed in Miller v. Ahrens (C. C.) 150 Fed. 644, and [Id. (C. C.)] 163 Fed. 870; but I hesitate, in view of the opinion rendered in Pulp & Paper Co. v. Miller, supra [176 Fed. 284, 100 C. C. A. 176] by the Circuit Court of Appeals for this circuit, to rely upon them in the decision of this case. * * *

"The conclusions I reach are these: I think these conveyances are direct violation of the statute of West Virginia, limiting the amount and the purposes for which church organizations may take real estate. If, however, the ruling in West Va. Pulp & Paper Co. v. Miller, supra, is held decisive that only the state can complain of this, I am fully convinced that they should be set aside, at the instance of these heirs, because of the undue influence that caused their execution, and decree to that effect may be entered."

The Constitution of West Virginia (article 6, § 47) says:

"No charter of incorporation shall be granted to any church or religious denomination. Provisions may be made by general laws for securing the title to church property, and for the sale and transfer thereof, so that it shall be held, used, or transferred for the purposes of such church or religious denomination."

Counsel for the complainants say that—

"The provision made by general law, under the last clause of the above section of the Constitution, is chapter 57 of the Code of West Virginia; and it provides that the circuit court of the county shall appoint trustees to hold church property, and section 7 of that chapter [sec. 3299] provides that such trustees may take and hold for the purposes mentioned in the first section of said chapter, not exceeding four acres of lands in an incorporated city, town or village, and not exceeding 60 acres out of such city, town or village."

"This chapter makes provision in relation to the conveyances of land which shall be made for use or benefit of any church, religious sect, society, congregation or denomination as a place of public worship or a burial place or as a residence for a minister and provides that the land shall be held for such purpose and no other."

"Our [complainants'] contention is that this statute has no relation to the subject under discussion in this case. A church of any denomination has the right, under this statute, made in pursuance of the Constitution to take and hold real estate for church purposes locally to the extent "provided in section 7, but this by no means authorizes the incorporation of a company to take the land for any purposes connected with the church or religious denomination."

The contention of the complainants is based upon the assumption that the American Baptist Home Mission Society is a "church or religious denomination," within the meaning of the section of the Constitution above quoted. We think there is a marked distinction between a "church or religious denomination" and a society or other organization acting as an auxiliary thereto.

In the case of Gilmer v. Stone, 120 U. S. 586, 7 Sup. Ct. 689, 30 L. Ed. 734, the Supreme Court passed upon the validity of a devise of several hundred acres of land situated in the state of Illinois, to be "equally divided between the Board of Foreign and the Board of Home Missions" of the Presbyterian church, both being New York corporations. The Illinois statute provides that "a congregation, formed for religious purposes," cannot purchase or hold land in excess of 10 acres. Among other things it appears that the corporate beneficiaries were formed—

"for the purpose of establishing and conducting Christian missions among the unevangelized of pagan nations and the general diffusion of Christianity, and to assist in sustaining the preaching of the gospel in feeble churches and congregations in connection with the Presbyterian Church in the United States, and generally to superintend the whole of the Home Missions in behalf of such church."

In that case the Supreme Court held that the Illinois statute was applicable to bodies formed for the purpose of religious worship and did not apply to these mission societies and the devise of land to them was allowed to stand. The Supreme Court in that case in referring to this point said:

"While these boards are important agencies in aid of the general religious work of the Presbyterian Church in the United States of America, neither of them is, in any proper sense, or in the meaning of the 35th section of the act of 1872, a church, congregation or society formed for the purpose of religious worship. The counsel for the plaintiff in error seem to lay stress upon the more general words, 'formed for religious purposes,' in the forty-second section of the act; but manifestly the other parts of the same section, and previous sections, show that the only corporations intended to be restricted in the ownership of land to ten acres, were those formed for the * * * commonly called benevolent or missionary societies. The reasons of public policy which restrict societies, formed for the purpose of religious worship, in their ownership of real estate, do not apply at all, or, if at all, only with diminished force, to corporations which have no ecclesiastical control of those engaged in religious worship, and cannot prescribe the forms of such worship, nor subject to ecclesiastical discipline those who fail to conform to the rules, usages, or orders of the religious society of which they are members."

In the case of Hamsher v. Hamsher, 132 Ill. 285, 23 N. E. 1125, 8 L. R. A. 558, there was a gift by will to the Young Men's Christian Association of Decatur, Ill., a corporation formed for the purpose of promoting, as shown by its charter, educational, humanitarian and charitable work, rather than religious worship. The Supreme Court of that state, in passing upon this question, among other things said:

"It does not appear that the Young Men's Christian Association of Decatur, Ill., exercises any ecclesiastical control over its members, or prescribes any form of worship for them, or subjects those who fail to conform to its rules to ecclesiastical discipline. Therefore a limitation upon the extent of

its ownership of real estate is not so imperatively demanded by those considerations of public policy which apply to corporations formed for the purpose of public worship. We are of the opinion that said association is not subject to the restriction contained in section 42 of the Corporation Act, and that the devise to it of a greater quantity of land than ten acres is not invalid. It follows that the appellant takes nothing as heir, and that his cross-bill was properly dismissed."

It is undoubtedly true that the Constitution of West Virginia prohibits the incorporation of any church or religious denomination, but we are of the opinion that this provision applies only to church or religious denominations and cannot be properly construed as applying to organizations of the character involved in this controversy, nor does it contain any inhibition against a foreign corporation created, among other things, for the purpose of taking and holding real estate. Under the provisions of section 30 of chapter 54 of the Code of West Virginia (sec. 2929) any foreign corporation may hold property in that state unless otherwise expressly provided.

In the case of Fritts v. Palmer, 132 U. S. 283, 10 Sup. Ct. 93, 33 L. Ed. 317, the Supreme Court said:

"The Constitution and laws of Colorado, it should be observed, do not prohibit foreign corporations altogether from purchasing or holding real estate within its limits. They do not declare absolutely or wholly void, as to all persons, and for every purpose, a conveyance of real estate to a foreign corporation which has not previously done what is required before it can rightfully carry on business in the state. Nor do they declare that the title to such property shall remain in the grantor, despite his conveyance. * * *

"If the Legislature had intended to declare that no title should pass under a conveyance to a foreign corporation purchasing real estate before it acquires the right to engage in business in the state, and that such a conveyance should be an absolute nullity as between the grantor and grantee, leaving the grantor to deal with the property as if he had never sold it, that intention would have been clearly manifested. * * *

"To the above cases may be added those holding that an alien may take by deed or devise and hold against any one but the sovereign until office found. Cross v. De Valle, 1 Wall. 1, 13 [17 L. Ed. 515]; Governeur v. Robertson, 11 Wheat. 332 [6 L. Ed. 488]; National Bank v. Matthews, 98 U. S. 621, 628 [25 L. Ed. 188]; Phillips v. Moore, 100 U. S. 208 [25 L. Ed. 603]. Also, those holding that the question whether a corporation, having capacity to purchase and hold real estate for certain defined purposes, or in certain quantities, has taken title to real estate for purposes not authorized by law, or in excess of the quantity permitted by its charter, concerns only the state within whose limits the property is situated. It cannot be raised collaterally by private persons unless there be something in the statute expressly or by necessary implication authorizing them to do so. Cowell v. Springs Company, 100 U. S. 55, 60 [25 L. Ed. 547]; Jones v. Habersham, 107 U. S. 174, 188 [2 Sup. Ct. 336, 27 L. Ed. 401]."

[10] We are further of the opinion that where a state does not provide for the granting of a charter to domestic corporations of certain character, such nonaction on its part is not in the nature of a prohibition against foreign corporations created for such purpose.

[11] We think the third proposition, that under the laws of West Virginia a foreign corporation will be deemed to have no corporate existence is untenable in the light of the cases decided by the Supreme Court of West Virginia, and those decided by the federal courts in cases arising upon gifts or grants made in West Virginia; also, this

principle has been announced by the Supreme Court of the state of Virginia, whose laws in many respects are similar to the provisions of the Constitution of West Virginia. In the case of West Virginia Pulp & Paper Co. v. Miller, 176 Fed. 284, 100 C. C. A. 176, the court in referring to this point said: There was a devise in trust of lands in West Virginia to a church incorporated under the laws of Maryland. In that case the corporate existence of the Maryland church was recognized by the court; it holding, among other things, that in the case of devise of land to a foreign church, such devise could only be called in question by the state. In that case the court said in point:

"Even if this were a devise of land to a foreign church, the state alone could complain. In the case of Church v. Arkle, 49 W. Va. 93, 38 S. E. 486, the court said: 'Where one leases a lot from the trustees of a church in an action of unlawful detainer against him by such trustees for the recovery of possession, he cannot set up that the church holds the lot in violation of section 1, c. 57, of the Code, limiting the ownership of real estate by a church to such as may be necessary as a place of public worship or burial place, or the residence of a minister. None but the state can attack such ownership as violating that statute.' Banks v. Poitiaux, 3 Rand. (Va.) 136, 15 Am. Dec. 706; Hanson v. Little Sisters of the Poor, 79 Md. 434, 32 Atl. 1052, 32 L. R. A. 293.

"Also in the case of Jones v. Habersham, 107 U. S. 174, 2 Sup. Ct. 336, 27 L. Ed. 401, the court, in referring to this question, said: 'But there are two conclusive answers to this argument: (1) Restrictions imposed by the charter of a corporation upon the amount of property that it may hold cannot be taken advantage of collaterally by private persons, but only in a direct proceeding by the state which created it. Runyan v. Coster, 14 Pet. 122, 131 [10 L. Ed. 382]; Smith v. Sheeley, 12 Wall. 358, 361 [20 L. Ed. 430]; Bogardus v. Trinity Church, 4 Sandf. Ch. (N. Y.) 633, 758; De Camp v. Dobbins, 29 N. J. Eq. 36; Davis v. Old Colony R. R. Co., 131 Mass. 258, 273 [41 Am. Rep. 221].'

"In the case of Julian v. Central Trust Co., 115 Fed. 956, 53 C. C. A. 438, it was insisted that the Southern Railway Company, being a corporation of the state of Virginia, could not hold railroad property in North Carolina, and, in referring to this phase of the question, the court, among other things, said: 'If the Southern Railway Company holds this property contrary to the will of the sovereign power of the state, it is for the state to interfere. No private individual can usurp its prerogative. Bank v. Matthews, 98 U. S. 628, 25 L. Ed. 188; Leazure v. Hillegas, 7 Serg. & R. (Pa.) 313.'

"In the case of Hickory Farm Oil Co. v. Buffalo, N. Y. & P. R. Co. (C. C.) 32 Fed. 22, the court said: 'The leading case in Pennsylvania on the subject of the effect of a conveyance of real estate to a corporation forbidden by law to "purchase and hold" the same is that of Leazure v. Hillegas, 7 Serg. & R. [Pa.] 313, in which it was held that such corporation might purchase and take title to the real estate; its title, however, like that of an alien, being defeasible at the pleasure of the commonwealth. That case and the later case of Goundie v. Water Co., 7 Pa. 233, settle the principle that the commonwealth alone can object to a want of capacity in a corporation to hold land.'"

The case of Mallett v. Simpson, 94 N. C. 37, 55 Am. Rep. 594, is to the same effect. Also, in the case of Ragan v. McElroy, 98 Mo. 349, 11 S. W. 735, the Supreme Court held that whether a corporation, in accepting deed to real estate, exceeded its powers, is a question which could only be raised by the state in direct attack.

In the case of Wilson v. Perry, 29 W. Va. 169, 1 S. E. 302, there was a bequest in trust to the Presbyterian Committee of Publication, a Virginia corporation, formed for "the dissemination of religious

truths" and the Supreme Court of that state upheld the gift. In the case of Ross v. Kiger, 42 Va. 402, 26 S. E. 193, a bequest to the "Mission Society of the Methodist Episcopal Church," a New York corporation, was sustained.

The following cases are very much in point and sustain the contention of the defendant: Chambers v. City of St. Louis, 29 Mo. 543; American Mortgage Co. v. Tennille, 87 Ga. 28, 13 S. E. 158, 12 L. R. A. 529; Union National Bank v. Matthews, 98 U. S. 621, 25 L. Ed. 188.

In the latter case, the Supreme Court, among other things said:

"Where a corporation is incompetent by its charter to take a title to real estate, a conveyance to it is not void, but only voidable, and the sovereign alone can object. It is valid until assailed in a direct proceeding instituted for that purpose."

After carefully considering the provisions of the West Virginia Constitution, in the light of the foregoing authorities, we are of the opinion that (a) the American Baptist Home Mission Society and the Latin-American Improvement Association, Incorporated, are not religious denominations within the meaning of the act; (b) that there is no provision in the West Virginia Constitution that inhibits a foreign corporation from holding property within that state; (c) that this court in the case of the West Virginia Pulp & Paper Co. v. Miller (supra), established the rule, in this circuit at least, that in a case like the one at bar the state alone can attack the validity of an instrument alleged to be in violation of the public policy of the state as annunciated in the Constitution.

In view of what we have said we are of the opinion that the court below was in error in holding the deeds in question to be invalid, therefore, the decree of the court below is reversed and the case will be remanded, with instructions for further proceedings in accordance with the views herein expressed.

Reversed.

CHAPIN-SACKS MFG. CO. v. HENDLER CREAMERY CO. et al.

HENDLER CREAMERY CO. et al. v. CHAPIN-SACKS MFG. CO.

(Circuit Court of Appeals, Fourth Circuit. October 10, 1918.)

Nos. 1584, 1620.

1. TRADE-MARKS AND TRADE-NAMES ⟸3(5)—CHARACTER OF WORD—QUALITY.
No words which in their ordinary signification, or in their trade signification, merely describe the quality of the article to which they are applied, can be exclusively appropriated as a trade-mark.

2. TRADE-MARKS AND TRADE-NAMES ⟸3(5)—"VELVET."
"Velvet," in its primary meaning, signifies cloth, substantial, soft, and smooth to the touch, and is used in a secondary sense as designating the qualities of consistency, softness, and smoothness; and hence the words, "The Velvet Kind," cannot be appropriated by a manufacturer of ice cream as a trade-mark for his product.

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

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

3. TRADE-MARKS AND TRADE-NAMES ⊂⊃45—REGISTRATION—PRESUMPTION.
The allowance of a trade-mark by the Patent Office furnishes a strong presumption of its validity; but a trade-mark in the words "The Velvet Kind," as applied to ice cream, being invalid, cannot be sustained because of the presumption.

4. TRADE-MARKS AND TRADE-NAMES ⊂⊃69—APPROPRIATION—INTENT TO DEFRAUD—INFERENCE.
Where defendants used words in which complainant had acquired a valid trade-mark, such use of itself evidenced an intention by defendants to defraud and palm off their product as that of complainant, although the inferences of fraud and unfair competition may be rebutted, in exemption of damages.

5. TRADE-MARKS AND TRADE-NAMES ⊂⊃67—UNFAIR COMPETITION—PROTECTION.
Even where there is no technical trade-mark, a dealer may acquire property rights in words not the subject of a trade-mark, which the courts will protect upon proof of unfair competition.

6. TRADE-MARKS AND TRADE-NAMES ⊂⊃78—UNFAIR COMPETITION—PROTECTION.
Where complainant built up an extensive trade in Washington, D. C., selling its ice cream under the descriptive words, "The Velvet Kind," that did not give complainant any right to exclude others from using such words in a place where it had not associated its ice cream with the designation, and defendant might adopt the words to describe its ice cream sold in Baltimore.

7. TRADE-MARKS AND TRADE-NAMES ⊂⊃86—ACTION—LACHES.
While mere delay or acquiescence cannot defeat the remedy by injunction in support of the legal right to a trade-mark, yet where complainant, which did not have a technical trade-mark in the words "the Velvet Kind," under which it sold its ice cream, abandoned a suit against defendant, who had begun selling ice cream in another city under the same name, such abandonment estopped complainant from obtaining a decree from profits.

8. TRADE-MARKS AND TRADE-NAMES ⊂⊃97—UNFAIR COMPETITION—RELIEF.
Where complainant had built up an extensive trade in ice cream under the name "The Velvet Kind" in one city, and defendant had appropriated that name for its ice cream, which it sold in another city, *held* that, on defendants beginning to sell ice cream in a third city in competition with complainant, it was bound to use the utmost good faith to distinguish its product from that of complainant, but should not be enjoined from entering territory in which the complainant had not established a market.

9. TRADE-MARKS AND TRADE-NAMES ⊂⊃97—UNFAIR COMPETITION—RELIEF.
Where complainant had built up an extensive trade in ice cream under the name "The Velvet Kind," a decree enjoining defendant from advertising its ice cream under that name, without the distinct statement that it is "not 'The Velvet Kind' made by" complainant, *held* not to afford the latter sufficient protection, as such an advertisement, without a statement that defendant's ice cream was inferior, would indicate that defendant was claiming to sell ice cream superior to that of complainant.

10. APPEAL AND ERROR ⊂⊃1171(3)—REVERSAL—COSTS.
While it is the general rule in equity that costs are in the discretion of the trial court, and that no appeal will lie upon a decree merely upon the ground of error in awarding costs, yet, where the decree is erroneous in any other respect, the appellate court may reverse or modify it with respect to cost.

Waddill, District Judge, dissenting in part.

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

Bill by the Chapin-Sacks Manufacturing Company against the Hendler Creamery Company and another. From the decree, which granted part of the relief sought (231 Fed. 550), both parties appeal. Modified.

Isaac Lobe Straus, of Chicago, Ill. (Walter A. Johnston, of Washington, D. C., on the brief), for plaintiff.

John Watson, Jr., of Baltimore, Md. (Vernon Cook, of Baltimore, Md., on the brief), for defendants.

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

WOODS, Circuit Judge. In these appeals two mixed questions of law and fact are to be decided: Were the words, "The Velvet Kind," applied to ice cream in 1905, so descriptive of quality that they could not be appropriated as a trade-mark by complainant, Chapin-Sacks Manufacturing Company?

Assuming that they were, did the use by the defendant Hendler, and his successor in business, Hendler Creamery Company, of the words, "The Velvet Kind," and of containers and wagons similar to those used by complainant, nevertheless amount to unfair competition —the unfair appropriation of the good will of the complainant and the reputation of its ice cream?

[1] The first question is not free from difficulty, but it must be answered in the affirmative. No words which in their ordinary signification or in their accepted trade signification merely describe quality in the article to which they are applied can be excluded by one trader from use by others and appropriated as a trade-mark. Manufacturing Co. v. Trainer, 101 U. S. 51, 25 L. Ed. 993; Lawrence Manufacturing Co. v. Tennessee Manufacturing Co., 138 U. S. 537, 11 Sup. Ct. 396, 34 L. Ed. 997.

[2] "Velvet," in its primary meaning signifies cloth, substantial, soft, and smooth, without distinct particles causing roughness to the touch. With this signification, "velvet" and "velvety" are applied descriptively in common speech to other articles; and in this secondary sense the words are used almost as commonly as in their primary sense. Perhaps no other words applied to ice cream so well describe the qualities of consistency, softness, and smoothness—the absence of roughness to the sensitive touch of the tongue produced by distinct particles of ice. The word "velvet" was in this sense becoming more markedly descriptive in 1905, when complainant commenced its business; real cream having so largely ceased to be the chief constituent of ice cream, and the volume of the ice cream business having so vastly increased. It is not denied that at least two or three manufacturers and dealers in different parts of the country had before 1905 used the word "velvet" or "velvet kind" as descriptive of quality in ice cream. After December, 1905, when complainant registered the words, "The Velvet Kind," in the Patent Office as a trade-mark, the words "velvet" and "velvet kind" were very extensively so used all over the country, apparently without any knowledge of complainant's effort to appropriate the terms. This last fact is not important, as

showing such prior appropriation by any dealer or dealers as to invalidate complainant's claim to a trade-mark by reason of prior appropriation. Its significance is that it shows a common conception and understanding of the words as distinctive of quality so general, and so valuable to the trade, that they could not be appropriated as a trade-mark by one dealer to the exclusion of all others. Indeed, we cannot help thinking complainant adopted the word "velvet" as a fit adjective to describe to the public the kind of cream it was making.

[3] The allowance of the trade-mark by the Patent Office, it is true, furnishes a strong presumption of its validity. In addition to this, the Patent Office registration of the words "velvet" and its derivatives, either alone or with other words, for such articles as candies, lotions, butter, oil, and cotton fabrics, also tends to support the claim of the complainant. No doubt, in registering these words as trade-marks, the Patent Office in these instances considered the words indirectly and remotely descriptive, without being actually so, thus applying the principle on which the word "Hygeia," conveying to those who happened to think of its derivation the idea of health or healthfulness, was held a good trade-mark for water in Consolidated Ice Co. v. Hygeia Distilled Water Co., 151 Fed. 10, 80 C. C. A. 506. But none of these registrations measures up to the case cited, and none of them, as we understand, has been subjected to judicial test. We think all presumptions from the action of the Patent Office are overcome by the great weight of the evidence and the common understanding that "velvet" and "velvet kind" describe, as hardly any other words could, the desirable qualities mentioned in ice cream.

[4] The second question must also be answered in the affirmative. If the complainant had acquired the right to the exclusive use of the words, "The Velvet Kind," as a trade-mark, their use by the defendants would be itself evidence of the intention to defraud and palm off their cream as that of the complainant. Lawrence M. Co. v. Tennessee M. Co., 138 U. S. 537, 549, 11 Sup. Ct. 396, 34 L. Ed. 997. In such case the inference of fraud and unfair competition might be rebutted in exemption of damages; but, in the absence of conduct by complainant amounting to estoppel, further violation of the right of property would nevertheless be restrained. Elgin W. Co. v. Illinois W. Co., 179 U. S. 665, 674, 21 Sup. Ct. 270, 45 L. Ed. 365.

[5] Even where there is no technical trade-mark, a dealer may acquire property rights which the courts will protect, upon proof of unfair competition by imitation of his distinctive words, marks, or other designations of his goods, or of his containers or other instrumentalities of trade. The principle is thus well expressed by Judge Lurton in Computing Scale Co. v. Standard Computing Scale Co., 118 Fed. 965, 55 C. C. A. 459:

"But when the word is incapable of becoming a valid trade-mark, because descriptive or geographical, yet has by use come to stand for a particular maker or vendor, its use by another in this secondary sense will be restrained as unfair and fraudulent competition, and its use in its primary or common sense confined in such a way as will prevent a probable deceit, by enabling one maker or vendor to sell his article as the product of another." Singer Mfg. Co. v. June Mfg. Co., 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118;

Elgin Nat. Watch Co. v. Illinois Watch Case Co., 179 U. S. 665, 21 Sup. Ct. 270, 45 L. Ed. 365.

[6] Complainant began to make and sell ice cream in the city of Washington under the name of "The Velvet Kind" in May, 1905, and in December of that year registered the words under the federal law as a trade-mark. Doubtless believing it had a valid trade-mark, it placed the words on its containers and wagons, and by extensive advertisements in newspapers, by electric signs, and the distinctive marks on containers and wagons, the words, "The Velvet Kind," were made to signify to the trade in Washington, Richmond, and the immediate vicinity of those cities a cream of known quality made and sold in large quantities by the complainant under that name. There can be no doubt that, at least in Washington, the complainant had, by advertisement, marks, and the general conduct of its business, so associated its ice cream with the words, "The Velvet Kind," that the sale of ice cream in that city by others under that name, with nothing to distinguish their cream from complainant's, would have been a fraud.

But that did not give complainant any right to the exclusion of the use by others of the descriptive words in any place where it had not associated its cream with the designation. Hanover Star M. Co. v. Metcalf, 240 U. S. 403, 36 Sup. Ct. 357, 60 L. Ed. 713; Theodore Rectanus Co. v. United Drug Co., 226 Fed. 545, 141 C. C. A. 301. It is true that, in the cases cited, the markets in which the complainant had not established their trade in flour and drugs were much more remote geographically than is Baltimore from Washington. But ice cream is not usually transported from one large city to another, and its sale and distribution is usually within the area in proximity to the place of manufacture. Considered with respect to the usual area of sale and distribution, Baltimore is as distinct and separate market for ice cream as the Alabama market is from a city in Ohio for flour or patent medicines. Complainant had no plant in Baltimore, and has never attempted to compete for the Baltimore trade, and therefore it had no right to restrain any one from the use of the words, "The Velvet Kind," in that city.

The defendant Hendler, living in Washington, attracted by the words, "The Velvet Kind," used by complainant, some time in 1905 went into business in Baltimore, copying the words, "The Velvet Kind," and imitating in a general way the marks and colors on the containers and wagons which the complainant used. He, and the Hendler Creamery Company, his successor, built up a large business in Baltimore. Since the complainant had no appreciable trade in Baltimore, and had not made the words, "The Velvet Kind," to denote its cream, the adoption of the words there by the defendants, though an imitation, was not in itself proof of a fraud or unfair competition.

[7] Even if the words, "The Velvet Kind," had been a valid trade-mark under the federal statute, we should be inclined to hold that the abandonment by the complainant of its suit against the defendants in the state court in Baltimore, its full knowledge that defendants were going forward incurring expense and labor in the promotion of sales in Baltimore under the name of "The Velvet Kind," and the com-

plainant's failure to make any effort for custom there, would be sufficient evidence of estoppel or waiver to prevent a decree for profits. But the complainant might nevertheless have been entitled to an injunction against the further invasion of its right; for the defendants' appropriation of the trade-mark in that case would have been piracy.

"The intentional use of another's trade-mark is a fraud; and when the excuse is that the owner permitted such use, that excuse is disposed of by affirmative action to put a stop to it. Persistence, then, in the use is not innocent, and the wrong is a continuing one, demanding restraint by judicial interposition when properly invoked. Mere delay or acquiescence cannot defeat the remedy by injunction in support of the legal right, unless it has been continued so long and under such circumstances as to defeat the right itself, * * * nor will the issue of an injunction against the infringement of a trade-mark be denied on the ground that mere procrastination in seeking redress for depradations had deprived the true proprietor of his legal right." Menendez v. Holt, 128 U. S. 514, 9 Sup. Ct. 143, 32 L. Ed. 526; Saxlehner v. Eisner & Mendelson Co., 179 U. S. 19, 21 Sup. Ct. 7, 45 L. Ed. 60.

[8] This is important in determining the present standing of the defendants in a court of equity; for in justice and good conscience the principle has at least a qualified application to a case of unfair competition where there is no trade-mark. Hendler received the idea of "The Velvet Kind," as a trade-mark, from the complainant. He, in common with complainant, believed that the words could be made a trade-mark, for he registered them as his trade-mark under state law. While the complainant was developing its business in Washington, Hendler took the words to Baltimore, and effectually anticipated any extension of the use of the supposed trade-mark words to the Baltimore market, which the complainant might afterwards have desired to make. Under these circumstances, equity will exact of the defendants the utmost good faith and diligence to distinguish their product from that of the complainant in the city of Annapolis or any other field of competition.

Hendler began to sell ice cream as "The Velvet Kind" to an Annapolis dealer in 1906; but his orders were small, and he did not by their extent, or by advertisement, or in any way, make the words, "The Velvet Kind," significant or of special value in the Annapolis market. In 1908, the complainant entered the Annapolis market, and by advertisement and distinctive containers and wagons made the words, "The Velvet Kind," signify to dealers a particular kind of ice cream of excellent quality made by it. Thus it built up in that market a large trade. Analysis of the somewhat conflicting testimony would not be valuable, but it leaves no doubt of the correctness of the conclusion of the District Court that in Annapolis the defendants, by adopting the words, "The Velvet Kind," made popular by complainant's efforts, and by the use of imitative containers and wagons, brought about confusion of their cream with that of the complainant, and that they profited by the confusion to complainant's loss. Especially did they avail themselves of these methods, and make them unfairly profitable, when the opportunity was furnished by complainant's increase in the price of its cream.

We think the decree of the District Court went too far in enjoining the defendants from entering territory in which the complainant

had not established a market for its cream under the designation of "The Velvet Kind."

[9] On the other hand, the decree of the District Court in another respect does not afford protection to the complainant. The defendants were enjoined from advertising and selling their cream in Annapolis and Laurel "without in immediate connection with said words 'The Velvet Kind' and in letters of the same character, style, and size, stating that their, the defendants', ice cream is not 'The Velvet Kind' made by the Chapin-Sacks Manufacturing Company of Washington, D. C." Advertisements and marks in this form, unless they contain a distinct statement of the fact that defendants' ice cream is inferior to that of the complainant, would indicate that the defendants were claiming to sell cream superior to that which the complainant was selling under the same designation.

[10] The general rule in equity is that costs are in the discretion of the trial court, and that no appeal will lie from a decree merely on the ground of error in awarding costs. But, where the decree is found to be erroneous in any other respect, the appellate court may reverse or modify the decree of the District Court with respect to costs in accordance with its own conclusions as to the equities of the case. This distinction is stated, and the numerous authorities supporting it are cited, in Gregg v. Metropolitan Trust Co., 124 Fed. 721, 732, 59 C. C. A. 637. We are so strongly impressed with the superior equities of the complainant in this case, and the necessity for the suit in order to protect its rights, that we think the entire costs should be paid by the defendants.

The decree will therefore embody these conclusions: (1) The words, "The Velvet Kind," applied to ice cream, being descriptive, are not valid as a trade-mark. (2) Advertisement and sale by the defendants of their ice cream in the city of Baltimore did not constitute unfair competition with the complainant. (3) The complainant has an established business for ice cream under the designation of "The Velvet Kind," indicated by its advertisements, its containers and wagons, in Washington, D. C., Richmond and Alexandria, Va., and Annapolis, Buckeyestown, Woodstock, and Frederick in the state of Maryland. (4) The defendants have been competing unfairly with the complainant in Annapolis and Laurel, in the state of Maryland. (5) The defendants should be enjoined from the advertisement and sale of ice cream under the designation, "The Velvet Kind," and from the use of containers, wagons, and other instrumentalities of the trade similar to those used by the complainant, in Washington, D. C., Richmond and Alexandria, Va., Annapolis, Laurel, Buckeyestown, Woodstock, and Frederick, in the state of Maryland, and all other places where the complainant has established the sale of its ice cream under the designation of "The Velvet Kind," until they shall submit to the District Court a plan of business which will satisfy the court that their cream will not be confused with that of the complainant, and will not in any wise unfairly affect complainant's business. (6) Complainant is entitled to an accounting as required by the District Court. (7) The un-

fair course of conduct pursued by the defendants requires that they pay the entire cost in the District Court and in this court.

Modified.

WADDILL, District Judge. I concur in the conclusions of the majority of the court, as stated in paragraphs 3, 4, 5, 6, and 7, and dissent from the conclusions in paragraphs 1 and 2, though I am strongly inclined to the view that the complainant, as between itself and the defendants, is not entitled to the relief prayed for, respecting the sale of its ice cream in the city of Baltimore, because of laches in the prosecution of its suit, if, in fact, it was not estopped by the dismissal of the suit instituted in the state court at Baltimore against the defendants to prevent them from infringing the complainant's trademark, and unfairly competing with it in its ice cream business; said defendants having duly appeared in said cause.

BROWN v. DENVER OMNIBUS & CAB CO. et al.

(Circuit Court of Appeals, Eighth Circuit. November 18, 1918.)

No. 5019.

1. APPEAL AND ERROR ⊜856(4)—REVIEW—DISMISSAL.
   Where a complaint was dismissed generally, without any reason being specified, the defendants are entitled to insist upon all the objections made below in order to sustain the judgment.
2. COURTS ⊜310—FEDERAL COURTS—JURISDICTION—DIVERSITY OF CITIZENSHIP.
   Where there was requisite diversity of citizenship between plaintiff and the principal defendant, that another party defendant was a citizen of the same state as plaintiff will not deprive the federal court of jurisdiction, unless such person was an indispensable party.
3. MORTGAGES ⊜10—TRUSTEES—RIGHTS.
   Since the enactment of the Colorado Public Trustee Act, there is no difference as to the interest conveyed by a trust deed to secure the payment of a debt as between real and personal property.
4. MORTGAGES ⊜427(2)—TRUSTEES—TRUSTEE FOR BONDHOLDER.
   The rule that in general courts can deal with bondholders only through their trustees is a rule of convenience, to facilitate the conduct of the suit, and is inapplicable where the trustee occupies a position prejudicial to the interest of the bondholders.
5. COURTS ⊜310—MORTGAGES ⊜427(2)—FEDERAL COURTS—FORECLOSURE—PARTIES.
   Where the trustee named in a mortgage securing bonds refused to act, the trustee is not an indispensable party defendant to a suit by a holder of bonds to foreclose the mortgage; hence, though the trustee and the bondholder were citizens of the same state, yet, as there was diversity of citizenship between the mortgagor and the bondholder, suit to foreclose might be brought in the federal court.
6. COURTS ⊜317—FEDERAL COURTS—JURISDICTION—REARRANGEMENT OF PARTIES.
   In determining whether the federal court has jurisdiction on the ground of diversity of citizenship, the court will align the parties according to their interest, so the trustee of a mortgage given to secure bonds will be treated as a plaintiff, if an indispensable party, and, though it was a citi-

zen of the same state as the bondholder who began suit, the federal court has jurisdiction; the mortgagor being a citizen of a different state.

7. COURTS ⊂=317—FEDERAL COURTS—DIVERSITY OF CITIZENSHIP—REARRANGEMENT OF PARTIES.
Where a bondholder, suing to foreclose a mortgage given to secure bonds, named the trustee, which had refused to act, a party defendant, *held*, that the omission of any prayer for judgment against the trustee warranted the federal court in treating the trustee as plaintiff, in determining whether there was requisite diversity of citizenship.

8. MORTGAGES ⊂=417—RIGHT TO FORECLOSE.
A complaint by a bondholder, seeking to foreclose a mortgage given to secure bonds, which alleged that the trustee had refused to act, that the mortgagor was in default, and that the holders of a majority in interest of the bonds had conspired to defraud other bondholders, and apply funds, properly applicable to payment of the bonds, to payment of unsecured indebtedness, *held* to state a cause of action for equitable relief, notwithstanding the mortgage provided for foreclosure only upon request of a majority of the bondholders.

9. MORTGAGES ⊂=414—PUBLIC POLICY—OUSTING COURTS OF JURISDICTION.
A provision, in a mortgage given to secure bonds, for foreclosure in event of default, upon request of a majority in interest of the bondholders, if precluding suit by a bondholder where a majority of the bondholders had conspired with the mortgagor to defraud, would be void as ousting the courts of jurisdiction.

10. MORTGAGES ⊂=401(2)—FORECLOSURE—STIPULATIONS.
A provision giving the majority in interest of the holders of bonds secured by a mortgage the option to declare the principal of the bonds due in event of default in interest does not prevent foreclosure for default in interest.

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

Suit by James H. Brown, for and on behalf of himself and all other holders of bonds who might come into the suit and contribute to the expenses, against the Denver Omnibus & Cab Company, a Wyoming corporation, and the Continental Trust Company. From a judgment dismissing the complaint, plaintiff appeals. Judgment as to the first-named defendant reversed, and case remanded, with instructions.

James H. Brown, of Denver, Colo., pro se.

William V. Hodges, of Denver, Colo. (D. Edgar Wilson, of Denver, Colo., on the brief), for appellee Denver Omnibus & Cab Co.

Thomas E. Watters, of Denver, Colo., for appellee Continental Trust Co.

Before SANBORN, CARLAND, and STONE, Circuit Judges.

CARLAND, Circuit Judge. The complaint of the appellant alleged: That the Cab Company was a citizen of Wyoming and the Trust Company and appellant were citizens of Colorado. That appellant commenced the action in behalf of himself and all other holders of bonds secured by the mortgage hereafter mentioned who should come into the suit and contribute to the costs and expenses thereof. That July 31, 1909, the Cab Company in order to secure the payment of the principal and interest of 800 sinking fund first mortgage 6

per cent. gold bonds to be issued by it, executed and delivered to the Trust Company as trustee a mortgage or deed of trust on the property described in the complaint, consisting of real and personal property. That said bonds were all certified and issued by the Trust Company in the aggregate sum of $250,000. That plaintiff was the owner of 52 of said bonds, of the par value of $500 each. That the bonds were to become due October 1, 1929, and draw interest at 6 per cent. per annum, payable quarterly. That the Cab Company failed to pay the interest on the bonds which became due and payable July 1, 1916, October 1, 1916, January 1, 1917, April 1, 1917, and July 1, 1917. That on divers and sundry occasions within six months prior to the commencement of the action, and more than six months subsequent to said default in the matter of interest, the appellant, on behalf of himself and all other bondholders of the same class similarly situated, had made repeated requests, verbally as well as in writing, that said Trust Company act under said mortgage for the collection of said interest and the protection and enforcement of the lien of said mortgage. That said Trust Company made no objection to the requests that were verbal on account of said requests not being in writing, but wholly refused to act in any manner for the purpose of collecting said interest or to protect the lien of the mortgage. That John M. Kuykendall was the president and general manager of the Cab Company and together with Anna his wife, owned a majority of its stock; that John W. Springer was a stockholder, director, and at different times had held the office of president and vice president of the Trust Company, and now was in the general control and management thereof. That said Trust Company did a banking business, and the Cab Company, commencing July 1, 1910, became and was a borrower of the Trust Company to the extent of $70,000. That the Trust Company, pretending to act under the trust deed, but in fact wholly in violation thereof, certified and issued for a nominal consideration $100,000 par value of bonds of the Cab Company purporting on their face to be secured by said trust deed, in excess of the $250,000 in bonds above mentioned. That said Trust Company retained of said spurious bonds $85,000 par value as collateral security for the indebtedness of the Cab Company to said trustee. That the trust deed provided that, if any bonds should be lawfully issued by said Cab Company in addition to the said $250,000 par value, the proceeds thereof, together with 15 per cent. upon the amount issued to be furnished and supplied by the Cab Company from its earnings, should be invested in improvements, betterments, or other property, which improvements, betterments, or other property should become as fully subject to the terms, conditions, and covenants of the mortgage or trust deed as though expressly incorporated therein. That said 15 per cent. was not furnished by the Cab Company, nor was any of the proceeds of said spurious bonds invested in improvements, betterments, or other property of said Cab Company. That in April, 1913, the Trust Company sold its banking business, including the indebtedness of the Cab Company, together with the collateral securing the same to the Interstate Trust Company, the appellee Trust Company guaranteeing the payment thereof. That pretending to

act under a provision of the deed of trust on February 7, 1911, the Trust Company released from the lien of the trust deed property of the reasonable value of $55,000, and received therefor 25,000 shares of the common and 30,000 shares of the preferred stock of the Seeing Denver Company. That instead of holding said stock in trust for the benefit of the bondholders under the deed of trust, the Trust Company, in collusion with the Cab Company, permitted the latter to pledge said stock as collateral security for the unsecured indebtedness of the Cab Company. That by reason of this transaction $55,000 in value of the property covered by the trust deed was wholly lost to the bondholders. That the indebtedness of the Cab Company for the following years was about as follows:

Years.	Bills Payable.	Bonds.
1912	$132,074.00	$290,700.00
1913	124,799.00	290,700.00
1914	110,132.00	305,300.00
1915	104,203.00	305,300.00

That $250,000 of said bonded indebtedness represents the valid bonds issued under the trust deed. That, commencing about the year 1911, the Cab Company became indebted to the Denver National Bank in the sum of $15,000, which was subsequently increased to $23,850 and is a part of the bills payable above mentioned. That said bank was given of the bonds of said company, $19,200 par value, as collateral security for the indebtedness of the Cab Company. That one Harry C. James, a stockholder, director, and vice president of said bank, was also a creditor of the Cab Company, either personally or as an agent and representative of said bank, in an amount aggregating the sum of $12,500. That said James was also a stockholder of the Cab Company and also a bondholder in the sum of $5,200; that W. C. Bradbury claimed to be the owner of $7,000 par value of said spurious bond issue and also was a stockholder of the Cab Company and the owner of $10,300 par value of said valid bond issue. That one David G. Miller was a stockholder of the Cab Company and owned $10,000 par value of either the valid or spurious bond issue. That Frank L. Woodward was a large stockholder of the Cab Company and the owner of $35,700 par value of its bonds. That on or about the year 1912, John M. Kuykendall, in control of a majority of the stock of the Cab Company, caused and procured the said James, Bradbury, Miller, Springer, in control of the Trust Company, Woodward, and other holders of the valid and spurious issue of bonds of the Cab Company, to make a loan from and out of their said several personal holdings of the bonds, to be pledged as collateral to secure the different bills payable creditors of the said Cab Company, thereby making said bondholders general and unsecured creditors of the Cab Company for the face or other value of said bonds. That in the trust deed the Cab Company covenanted and agreed that it would in every year beginning with the 1st day of October, 1912, up to and including the 1st day of October, 1919, pay to the trustee not less than $10,000 in gold coin or its equivalent, to be applied by the trustee to the retirement of the bonds secured by said trust deed from and after

October 1, 1919. That at no time whatsoever did the Cab Company perform said covenant and agreement or in any manner provide a sinking fund for the payment of said bonds. The complaint also contained the following allegations:

"That in total and in entire disregard of their said legal and equitable obligations, so to do, as aforesaid, the said the Denver National Bank, Harry C. James, W. C. Bradbury, David G. Miller, Frank L. Woodward, and a number of other persons comprising the said bond-loaning unsecured creditors of said Cab Company, whose names to this [plaintiff] are unknown, did conspire and co-operate and confederate themselves together to cause and procure, and did and have ever since on or about the month of October, A. D. 1912, caused and procured the said Cab Company to commit a breach of its covenants and agreements aforesaid, in the aforesaid mortgage, so that the said Cab Company has and did and ever since said last date is diverting and misapplying any and all surplus of its earnings over and above the amount of its regular running expenses to the payment of the principal and interest of the said bills payable, and of the indebtedness for which the bonds of the aforesaid bond-loaning creditors of said Cab Company were and are pledged, instead of applying such surplus from said earnings to the payment of said first and prior lien of the interest upon said lawful bond issue, and to the creation and maintenance of the aforesaid sinking fund, as required by said Cab Company's said bond and mortgage contract, and thereafter to the upbuilding of the equipment of said Cab Company, and also have and did, during all the times aforesaid, conspire, co-operate, and confederate themselves together as aforesaid to and did cause and procure the said Trust Company to commit breaches of its said duties and obligations to this plaintiff and all other lawful bondholders for whom he sues herein, by failing, neglecting, and refusing to act or to exercise any of the powers or authority aforesaid, conferred upon it under the said mortgage, for the security, protection, and benefit of plaintiff and other lawful bondholders, or any of them, notwithstanding the default of the said Cab Company, concerning the creation of the said sinking fund and the said defaults in the payment of interest and coupons upon the said lawful bond issue."

"That this plaintiff has not any personal knowledge of the amount of the said earnings of said Cab Company that have been so wrongfully, illegally, and fraudulently misapplied and diverted from application and creation of the said sinking fund and the payment of interest in default by said Cab Company, but is informed and believes, and charges the fact to be, that there has been upwards of about forty-five thousand ($45,000) dollars out of the said earnings of the said Cab Company, since the 1st day of October, A. D. 1912, misappropriated and diverted from said first mortgage lien, under and in execution of the conspiracy aforesaid, and through the wrongful, illegal, and fraudulent acts and doings of the said conspirators and confederates in the manipulation of defendant Cab Company and of its assets and earnings, and by the said Trust Company, and each of them, and by their presidents and chief managing officers, Messrs. Kuykendall and Springer, and each of them, all done to the great and irreparable wrong, injury, and loss of the plaintiff and other lawful bondholders of his class; that having in view the large amount of the said bills payable indebtedness and other indebtedness of said Cab Company, which as plaintiff is informed and believes, and so charges the fact to be, amounts outside of and in excess of the amount of its regular monthly running expenses to about $150,000, plaintiff verily believes and fears that unless this honorable court shall give him the aid of its equitable process by injunction and by restraining order, and the equitable remedy or a receiver, to collect, conserve, and apply the earnings of said defendant Cab Company to the payment of interest upon the said lawful bond issue, and the creation of said sinking fund, for the payment of the principal of the same; that his bonds and coupons and those of all other holders of lawful bonds and coupons of the said lawful bond issue will be irreparably damaged and injured, and the same rendered entirely valueless."

"That the said defendant Cab Company was and is insolvent and unable to keep or make good any of its covenants and agreements, to protect the said

mortgaged estate from liens by attachment or garnishment, or judgment, or otherwise, at the suit of its creditors, whether secured or unsecured, and that all of the said earnings of the said mortgaged estate, and of the said mortgaged franchises of said Cab Company, were and are and will be until the appointment of a receiver herein, subject to be taken by attachment, or garnishment, or upon execution upon any judgment, at the suit of any creditor who sees fit to proceed by attachment against said defendant Cab Company."

"And plaintiff avers that, at all times in this complaint mentioned, the said Cab Company was and still is in the full, absolute, and undisputed possession of all that remains of said mortgaged estate, and is in the constant receipt of all the said earnings, and that the said defendant Trust Company is not in possession of the said mortgaged estate or earnings aforesaid; that by reason of the aforesaid wrongdoing and breaches of trust, so as aforesaid done and committed, by the said defendant Trust Company, and the part its said chief stockholder, president, and managing head is taking in the aforesaid conspiracy, it is unwilling and unable to take any action or steps whatsoever, as it ought, in equity and good conscience to do to protect each and every bondholder of the said valid bond issue, against the said spurious bond issue and the holders thereof, or to recover the said fifty-five thousand (55,000) shares of the Seeing Denver stock without subjecting itself to liability in heavy damages, to wit, to the amount of the par value of said bonds and the stock, namely, about one hundred fifty-five thousand ($155,000) dollars, and that by reason of the embarrassed condition of the said defendant Trust Company and its conflicting interests in the premises, and its part and the part of its said president in said conspiracy, and its aforesaid adverse interest to this plaintiff and all other bondholders of the said valid bond issue of said defendant Cab Company, for whom he sues, it has forfeited all right to any further trust and confidence in the premises and forfeited its right to longer act as a trustee in the said mortgage and that your plaintiff was and is entitled to proceed as for a performance of said mortgage contract in all respects, without the action or intervention in the premises of the said trustee, the said defendant Trust Company, on account of its involved and conflicting interests adverse to the interest of said plaintiff and all other bondholders of the said valid bond issue of said defendant Cab Company, for whom he sues."

"Plaintiff further alleges that he joins as a codefendant herein said the Continental Trust Company, as trustee, only because said Trust Company is named in said deed of trust as trustee, and that it has in no manner whatsoever, at any time, taken upon itself the execution of a or any of said trusts, provided for in the said trust deed, but, on the contrary, has at all times failed, neglected, and refused to do so. * * *

"That at no time whatsoever, in this complaint mentioned, has the said defendant Trust Company, as trustee, ever entered into or taken possession under said trust deed of any of the said mortgaged franchises, property, or estate of said defendant Cab Company or any part thereof, but, on the contrary; refuses so to do, and refuses to take any action to receive, collect, conserve, or in any manner protect or enforce the said mortgage lien of said mortgage contract, so given by said Cab Company upon its said franchises, property, and earnings, notwithstanding said defendant Cab Company has been for long over six (6) months in default, as hereinbefore alleged, both in the creation of said sinking fund, and in the payment of said interest and of the coupons representing the same.

"And said plaintiff, for and on behalf of himself and all other said bondholders, for whom he sues, hereby expressly reserves and excepts out of and from issue, trial, and determination in this action any and all actions, causes of actions, and suits, legal and equitable, by this plaintiff and others, as such bondholders, existing against said defendant Trust Company, either as trustee or personally, for and on account of any breach of duty or wrong done by said defendant Trust Company, as trustee, in the course of its said trusteeship, intending in this action only to bind said trustee so far as the court shall decree herein, in the recovery, restoration, conservation, protection, and collection of said mortgaged estate trust fund, and said past earnings, agreeable to the terms of said mortgage contract, and as might have otherwise been done by said defendant Trust Company but for its helpless

condition, as aforesaid; but this reservation shall not be taken or construed as in any manner preventing the said receiver, or this plaintiff, if authorized by the court herein, as prayed, from maintaining separate and distinct action or actions against said Trust Company, for the recovery of said mortgage estate, trust fund, and past earnings, or redress of any wrongs committed by it, deemed proper and necessary to recovery and fully restore said mortgage trust fund and security."

[1] The complaint prayed for no judgment against the Trust Company, but did pray for an injunction and receiver to protect the rights of the bondholders, and for a foreclosure of the mortgage for interest and for general relief. The Cab Company and the Trust Company each filed a motion to dismiss the complaint, only two grounds of which are insisted upon here, namely, that the complaint did not state facts sufficient to constitute a valid cause of action in equity and that there was no diversity of citizenship; the Trust Company being a citizen of Colorado, of which state the plaintiff was also a citizen. The trial court dismissed the complaint generally, without specifying the reason therefor. The appellees, however, would be entitled here to insist upon the same objections that they made below in order to sustain the judgment. Dowd v. United Mine Workers of America, 235 Fed. 1, 148 C. C. A. 495.

[2] The question of the jurisdiction of the court below as a federal court will first be considered. In order to oust the court below of jurisdiction the Trust Company must have been an indispensable party, without whose presence before the court a final decree could not be made, without either affecting its interest, or leaving the controversy in such a condition that its final determination might be wholly inconsistent with equity and good conscience. Minnesota v. Northern Securities Co., 184 U. S. 236, 22 Sup. Ct. 308, 46 L. Ed. 499; Hawes v. First National Bank, 229 Fed. 51, 143 C. C. A. 645, and cases cited; United States v. Bean, County Treasurer, 253 Fed. 1, —— C. C. A. ——. The appellant, by the frame of his complaint and the nature of the relief asked for, could and did largely affect the question as to whether or not the Trust Company was an indispensable party. Storey's Equity Pleading (9th Ed.) §§ 127, 139, 214. The complaint not only specifically disclaimed any relief against the Trust Company, but the prayer asked relief only against the Cab Company. It thus appears that, so far as appellant could control the matter, the Trust Company was not an indispensable party. There remains the further question, however, as to whether, notwithstanding the wishes of appellant, could the court grant the relief prayed for against the Cab Company without affecting some interest of the Trust Company or leaving the controversy in such a condition that its final determination might be wholly inconsistent with equity and good conscience. The Trust Company has never taken possession of the mortgaged property and has no estate or interest therein except as trustee of the mortgage lien. Section 280, Colo. Code Ann. (Courtright); Session Laws Colo. 1894, p. 50, § 1.

[3-5] We do not understand that, since the enactment of the Public Trustee Act (1894), there is any difference as to the interest conveyed by a trust deed to secure the payment of a debt as between real

and personal property. An injunction against the Cab Company could not affect the Trust Company, so as to make it an indispensable party. Injunctions within the sphere of their operation bind all persons having knowledge thereof, whether parties to the action or not. A receiver of the mortgaged property could not affect any interest of the Trust Company, except its right to take possession of the mortgaged property, and according to the complaint it has refused to act in any manner in that behalf. A foreclosure, if that shall be finally found necessary, would affect no interest of the trustee, but would simply be the performance of a duty which the trustee refused to perform. When everything is said, the only interest in the controversy which the Trust Company has is the right itself to enforce the provisions of the trust deed, and it has this right in this very action, if it shall choose to do so. We do not think it is an indispensable party. The rule that, in general, courts can deal with bondholders only through their trustee, is a rule of convenience, to facilitate the conduct of the suit, and must give way whenever the trustee occupies a position prejudicial to the interest of the bondholders. Lake St. E. R. Co. v. Ziegler, 99 Fed. 114, 39 C. C. A. 431; Lowenthal v. Georgia Coast & P. R. Co. (D. C.) 233 Fed. 1010; Farmers' Loan & Trust Co. v. N. P. R. R. (C. C.) 66 Fed. 174; Jones on Corporate Bonds, 338.

[6, 7] However, upon the question of jurisdiction, this court will align the parties according to their interest; therefore, if the Trust Company is an indispensable party and wishes to remain so, we must align it with the appellant as plaintiff, where its duty also places it. Georgia Coast & P. R. Co. v. Lowenthal, 238 Fed. 795, 151 C. C. A. 645; Lindauer v. Compania et al., 247 Fed. 428, 159 C. C. A. 482.

The fact that no relief is asked against the Trust Company in this suit brings the case within Hamer v. New York Railways Co., 244 U. S. 267, 37 Sup. Ct. 511, 61 L. Ed. 1125. The omission of any prayer for judgment against the Trust Company shows that properly it is to be treated as a plaintiff in the case. Steele v. Culver, 211 U. S. 26–29, 29 Sup. Ct. 9, 53 L. Ed. 74; Dawson v. Columbia Avenue Trust Co., 197 U. S. 178, 25 Sup. Ct. 420, 49 L. Ed. 713. We therefore are of the opinion that the District Court had jurisdiction.

[8-10] Coming to the objection that the complaint does not state facts sufficient for equitable relief, we may say generally that the case presented is one where a bondholder owning $26,000 par value of the bonds of the Cab Company secured by the trust deed set forth in the complaint, suing for himself and all other bondholders similarly situated, alleges that the Cab Company is insolvent, has defaulted in the payment of interest, has refused to provide for a sinking fund, as it agreed to do in the trust deed, is misapplying its net earnings to the payment of unsecured indebtedness, has sold a portion of the mortgaged property and misapplied the proceeds thereof, has entered into a conspiracy with general creditors to defraud the plaintiff and other bondholders, has conspired with the Trust Company to issue $100,000 par value of the bonds of the Cab Company without consideration other than nominal, said bonds purporting to be secured by said trust deed, and that said conspiracy has been carried out and

the bonds delivered as collateral to general creditors. If this does not present a case for equitable relief, it would be hard to find one.

"It has been well said that whatever fraud creates equity will destroy. Its remedies and procedures for the circumvention of schemes and devices to cheat and defraud keep pace with the genius of the inventors of them." Monmouth Inv. Co. v. Means, 151 Fed. 159, 164, 80 C. C. A. 527, 532.

The mortgage covered "tolls, freight, incomes, rents, issues, and profits." It also provided that, if the Cab Company should default as to any of its covenants and legal proceedings were had, a receiver was a matter of right. We understand that the bondholders as a general proposition cannot control the disposition of the net earnings of the Cab Company until they have been impounded; but it is one of the objects of this suit to impound them, and the Cab Company covenanted to create a sinking fund from its earnings for the payment of its bonds.

As we understand the argument of counsel for appellee, it is this: There may be a cause of action stated, but such action must be brought by the Trust Company, and not even by it until the terms of the trust deed authorizing such a suit have been complied with. The general capacity of appellant to sue, the trustee having refused to do so, was in no wise challenged by the motion to dismiss, as a demurrer for want of equity, and that is what the motion to dismiss amounted to, so far as the ground now being considered is concerned, would not raise that question. As the right of appellant to sue under the restrictions of the trust deed, however, has been argued, under the point that the complaint is bad for want of equity, without objection, and as the question may arise hereafter, we will consider this point. The restriction is contained in paragraph 55 of the mortgage and reads as follows:

"It is further expressly agreed and made binding upon each and every holder of the bonds hereby secured that no proceeding of any nature or description, at law or in equity, shall be taken by any bondholder upon said bonds, or the coupons thereto attached, or either or any of them, or to foreclose the equity of redemption under this instrument, or to procure a sale of the property covered hereby, independently of the trustee or its successors or successors in trust, except after a request shall have been made to the trustee in the manner and form as herein provided, and after the trustee shall have been tendered adequate indemnity as herein provided, and also until after a refusal of the trustee to comply, or a failure of the trustee for a period of three months after such request to comply therewith according to the provisions of this instrument."

The trust deed provided that if default should be made in the payment of interest upon the bonds, and said default should continue for a period of six months, the principal of the bonds should become due and payable at the election of a majority in amount of the bondholders and that the trustee, when requested in writing by said bondholders, should declare the principal of the bonds due and payable. It also provided that in case default was made in payment of the interest on said bonds, or in case default should be made in the performance of any of the covenants of the Cab Company, and such defaults or either of them should continue for a period of six months

thereafter, the trustee might, and if requested in writing so to do by a majority in interest of the bondholders, and upon receiving indemnity satisfactory to it, should personally, by its attorney or agent enter into and upon all and singular the mortgaged property and operate the business of the Cab Company, applying the net revenue to the payment of the interest due upon said bonds. The trust deed also provided that in case any default should be made by the Cab Company as above specified, which should continue for a period of six months thereafter, it should be lawful for the trustee, after entry as above stated, or without entry, to foreclose said trust deed by judicial intervention or legal proceedings. According, therefore, to the terms of the trust deed, in order that a bondholder should have the right to commence an action independent of the trustee, a request to the trustee to act must be given by a majority in interest of the bondholders, and this request must be in writing, if it was desired that the principal of the bonds should become due and payable, or if it was desired that the trustee take possession, and also, in the latter case, indemnity satisfactory to the trustee must be given, and the failure of the trustee to act after request must have existed for three months. The condition precedent that a majority in interest of the bondholders should request the trustee to act before a bondholder can sue cannot be insisted upon to prevent the appellant from bringing this action, as the law will not require a vain or impossible thing to be done. Under the allegations of the complaint, a majority in interest of the bondholders have conspired with the Cab Company to absorb all the net earnings in the payment of unsecured indebtedness due said bondholders and the Trust Company. In such a condition of affairs, when might we expect a majority of the bondholders to request the trustee to act? Mercantile Tr. Co. v. Lamoille Val. R. Co., 17 Fed. Cas. 25; Brooks v. Vermont Cent. R. Co., 4 Fed. Cas. 308, 310–312; Clay v. Selah Va. Irr. Co., 14 Wash. 543, 45 Pac. 141; Lowenthal v. Georgia Coast & P. R. Co. (D. C.) 233 Fed. 1010.

The restrictive clause hereinbefore quoted, if held to prevent the appellant to institute this action, in view of the allegations of the complaint is void as ousting the jurisdiction of the courts. Toler v. East Tenn. Va. Ga. Ry. Co. (C. C.) 67 Fed. 168; Guarantee, Trust & Safe Deposit Co. v. Green Cove Springs & M. R. Co., 139 U. S. 143, 11 Sup. Ct. 512, 35 L. Ed. 116; Railway Co. v. Fosdick, 106 U. S. 47, 27 L. Ed. 47; Morgan L. & T. Ry. & Steamship Co. v. Tex. Cent. Ry. Co., 137 U. S. 171, 11 Sup. Ct. 61, 34 L. Ed. 625; Alexander v. Central R. Co., 3 Dill. 487, Fed. Cas. No. 166; Credit Co. v. Ark. Cent. R. Co. (C. C.) 15 Fed. 46; Farmers' Loan & Trust Co. v. Winona & S. W. R. Co. (C. C.) 59 Fed. 957; Mercantile Trust Co. v. M., K. & T. Ry. (C. C.) 36 Fed. 221, 1 L. R. A. 397.

The provision giving the majority in interest the option to declare the principal of the bonds due does not prevent a foreclosure for interest. Alexander v. Central R. R. of Iowa, supra; Beekman v. Hudson River West Shore Ry. Co. (C. C.) 35 Fed. 3–11; Farmers' L. & T. Co. v. Chicago & A. Ry. Co. (C. C.) 27 Fed. 146.

"The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies

at the foundation of orderly government." Chambers v. Baltimore & Ohio R. R., 207 U. S. 142, 28 Sup. Ct. 34, 52 L. Ed. 143.

We have examined the cases cited by appellees' counsel on the binding force of these restrictive clauses in mortgages and deeds of trust, and find them either inapplicable or opposed to the settled law in the federal courts. The result is that we hold that the District Court had jurisdiction and that the complaint stated a cause of action against the Cab Company. The judgment below as to it is therefore reversed, and the case remanded, with instructions to overrule the Cab Company's motion to dismiss, and allow it to answer the complaint within a time to be fixed, if it shall be so advised; and it is so ordered. In regard to the Trust Company, as the appellant in his complaint disclaims any right to relief in this action against it, the judgment of dismissal is affirmed, on the ground that as to it the complaint does not state a cause of action in equity.

UNITED STATES v. BOARD OF COM'RS OF OSAGE COUNTY, OKL., et al.

(Circuit Court of Appeals, Eighth Circuit. November 21, 1918.)

No. 5052.

1. APPEAL AND ERROR ⊂⊃854(5)—REVIEW—AFFIRMANCE.
   Where defendants moved to dismiss on several grounds, the judgment of dismissal may be sustained on any of the grounds made in the motion to dismiss.
2. INDIANS ⊂⊃27(1)—SUIT BY UNITED STATES—ADEQUATE REMEDY AT LAW.
   Act Okl. March 10, 1909 (Comp. Laws 1909, § 7616; Rev. Laws 1910, § 7367; Sess. Laws 1910–11, c. 152) and Act Okl. March 11, 1915 (Laws 1915, c. 107), afford a plain, speedy, and adequate remedy to property owners complaining of the erroneous assessment of taxes; so, no relief having been sought pursuant to the statutes, the United States, as guardian of Indian allottees, cannot maintain a suit in equity to enjoin sale of allotted lands for delinquent state and county taxes.
3. UNITED STATES ⊂⊃124—SUITS BY —EQUITY JURISDICTION.
   The United States have no more rights, so far as equitable jurisdiction is concerned, than private citizens.

Appeal from the District Court of the United States for the Western District of Oklahoma; John H. Cotteral, Judge.

Suit by the United States against the Board of Commissioners of Osage County, Okl., and others. From a decree dismissing the bill, complainant appeals. Affirmed.

John A. Fain, U. S. Atty., of Lawton, Okl. (Joseph W. Howell, of Washington, D. C., on the brief), for the United States.

Preston A. Shinn, of Pawhuska, Okl. (Corbett Cornett, of Pawhuska, Okl., on the brief), for appellees.

Before SANBORN, CARLAND, and STONE, Circuit Judges.

CARLAND, Circuit Judge. The United States, as guardian of certain Osage Indian allottees, brought this suit against appellees to en-

join them from selling certain lands described in the complaint for delinquent state and county taxes assessed and levied for the years 1910 to 1917. The taxes so levied were alleged to be illegal for the reason that the assessments upon which they were levied were arbitrary, grossly excessive, discriminatory, and unfair; also that the lands of the Osages were systematically overvalued, and the lands of other taxpayers systematically undervalued. The appellees filed a motion to dismiss on the following grounds:

"(1) There is no proper party plaintiff.
"(2) The said bill of complaint shows on its face that the court is without jurisdiction thereof.
"(3) There is no federal question involved, and therefore the court is without jurisdiction.
"(4) The said bill of complaint does not state a cause in equity.
"(5) The plaintiff, and each and all of the Indians upon whose behalf this suit is brought, have a plain, speedy, adequate, and complete remedy at law."

[1] The court sustained the motion and dismissed the complaint upon the ground that the lands involved were by Act of Congress approved June 28, 1906, c. 3572, 34 Stat. 539, declared subject to taxation, and the plaintiff had no interest in said lands or authority to contest the taxes thereon or the sale of said lands for unpaid taxes. In order to sustain the judgment of dismissal appellees may rely here upon any of the grounds made in their motion to dismiss. Dowd v. United Mine Workers of America et al., 235 Fed. 1, 148 C. C. A. 495.

[2] The fifth ground above stated is insisted upon here to sustain the judgment of dismissal. If this ground is well taken, we have no authority to consider the other points urged. It is our opinion that the United States, or the Indians whom they represent, had a plain, adequate, and complete remedy at law under the statutes of Oklahoma. A law of Oklahoma effective March 10, 1909 (Compiled Laws Okl. 1909, p. 1526), provided:

"Said board [of equalization] shall meet on the third Monday of April of said year to examine the assessment rolls of such township, cities or towns, and to hear all complaints of persons who shall feel aggrieved by their assessment, and to correct, equalize and adjust the assessments therein by increasing or decreasing individual assessments or the aggregate assessments of such city, town, village or township, and if necessary they may require a reassessment of any or all the property therein, such correction, equalization, adjustment or reassessment, shall be for the purpose of causing the same to be assessed at its fair cash value as herein defined and decision of said board shall be final as to individual assessment unless an appeal is taken to the board of county commissioners on or before the first Monday in June next following."

July 17, 1910, said law was amended so as to provide for appeals from the board of county commissioners to the county court of the county in which the land was located. Said law also provided that the board of equalization should hold a session on the first Monday of June each year—

"for the purpose of equalizing, correcting and adjusting the assessment rolls in their county between the different townships by increasing or decreasing the aggregate assessed value of the property or any class thereof, in any or all of them to conform to the fair cash value thereof as herein defined: Provided, that the county board of equalization may for the purpose of having the assess-

ment of any city, town, village or township corrected, order a reassessment of any or all of the property therein." Compiled Laws of 1909, p. 1526; also Rev. Laws of 1910, § 7367.

Said law further provided as follows:

"The proceedings before the board of equalization and appeals therefrom shall be the sole method by which assessments or equalizations shall be corrected or taxes abated. Equitable remedies shall be resorted to only where the aggrieved party has no taxable property within the tax district of which complaint is made." Rev. Laws 1910, § 7370.

Thereafter a law effective June 10, 1911, provided as follows:

"The county equalization board shall meet at the county seat, and shall hold a session commencing on the first Monday in June of each year for the purpose of equalizing taxes over the county, notice of which shall be given at least ten days prior thereto in some newspaper of general circulation in the county. * * * Any person who may think himself aggrieved by the assessment of his property shall have the right to appear before the board for the purpose of having the assessment of his property adjusted. Complaints against the assessment shall be determined by the board in a summary manner, and the assessor's lists shall be corrected and adjusted accordingly: Provided, that an appeal may be taken from the final action of said board as provided by law. Said board shall have the authority to raise, lower and adjust individual assessments, fixing the same as the fair cash value of the property; to add omitted property and to cancel assessments of property not taxable. * * *" Session Laws of 1910–11, p. 334, § 11, effective June 10, 1911.

"The board of county commissioners of each county may hear and determine allegations of erroneous assessments or mistakes or differences in the description or value of land or other property, at any session of said board, before the taxes shall have been paid, on application of any person or persons who shall, by affidavit, show good cause for not having attended the meeting of the county board of equalization, for the purpose of correcting such error, difference or mistake, and wherein a lot of land or portion thereof, or any other property, has been assessed to any one person, firm or corporation who or which did not own the same, or property exempt from taxation has been assessed, or which has been doubly or erroneously assessed, the board of county commissioners shall have power, and it shall be their duty to correct all such assessments, and if any such taxes, so erroneously assessed shall have been paid, the same shall be a valid charge against the county and shall be refunded by the board of county commissioners. * * *" Section 14 of the Act next above mentioned.

A law effective March 11, 1915, provided as follows:

"Any taxpayer feeling aggrieved at the assessment as made by the assessor, or the equalization as made by the county board of equalization, may, during the session of said board, or, if the same is closed, within ten days after the first Monday in June, file with said assessor as secretary of said board, a written complaint specifying his grievances and the pertinent facts in relation thereto in ordinary and concise language and without repetition, in such manner as to enable a person of common understanding to know what is intended; and said board shall be authorized and empowered to take evidence pertinent to said complaint and for that purpose is authorized to compel the attendance of witnesses and the production of books and papers by subpœna and to correct or adjust the same, as may seem just. And the stenographer of the county court is directed, at the request of the board, or taxpayer, to take shorthand notes of such testimony and to transcribe such complaint and evidence, and a full transcript of the action of the board thereon and file the same with his certificate as to its accuracy in the district court, the filing of which transcript shall complete said appeal, which shall, in due course, be examined and reviewed by said court and affirmed, modified or annulled as justice shall demand," etc. Session Laws 1915, § 2, p. 176.

"This act shall be construed to give remedies and rights in addition to those of appeal heretofore given by statute, but the remedies of resort to the boards and appeal therefrom shall be the sole remedies for the correction of assessments or equalization." Session Laws 1915, § 5, p. 177.

"In all cases where the illegality of the tax is alleged to arise by reason of some action from which the laws provide no appeal, the aggrieved person shall pay the full amount of the taxes at the time and in the manner provided by law, and shall give notice to the officer collecting the taxes, showing the grounds of complaint and that suit will be brought against the officer for recovery of them. It shall be the duty of such collecting officer to hold such taxes separate and apart from all other taxes collected by him, for a period of thirty days, and if within such time summons shall be served upon such officer in a suit for recovery of such taxes, the officer shall further hold such taxes until the final determination of such suit. All such suits shall be brought in the court having jurisdiction thereof, and they shall have precedence therein," etc. Session Laws 1915, § 7, p. 178.

The Supreme Court of the state of Oklahoma, in Board of Commissioners of Canadian County v. Tinklepaugh, 49 Okl. 440, 152 Pac. 1119, decided that the law of 1910 (section 7370) provided a speedy and adequate remedy for inequality or injustice in assessments or equalization and provided the sole method by which assessments or equalizations could be corrected. See, also, Board of Commissioners of Garfield County v. Field (Okl.) 162 Pac. 733.

We are clearly of the opinion that the United States and the individual Indians whose property was taxed had during the whole eight years that the taxes were imposed a plain, speedy, and adequate remedy at law. Section 267 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1163), formerly section 723 of the Revised Statutes of the United States (Comp. St. 1916, § 1244), prohibits us from taking jurisdiction in equity where a plain, adequate, and complete remedy may be had at law. Such remedies as are provided by the statutes of Oklahoma above quoted have been held plain, adequate, and complete. Indiana Manufacturing Co. v. Koehne, 188 U. S. 681, 23 Sup. Ct. 452, 47 L. Ed. 651; Singer Sewing Machine Co. v. Benedict, 229 U. S. 481, 33 Sup. Ct. 942, 57 L. Ed. 1288; Stanley v. Supervisors of Albany, 122 U. S. 535, 7 Sup. Ct. 1234, 30 L. Ed. 1000; McDougal v. Mudge et al., 233 Fed. 235, 147 C. C. A. 241; McLaughlin et al. v. St. Louis Southwestern Ry., 232 Fed. 579, 146 C. C. A. 537; Smith v. Douglas County et al., 242 Fed. 897, 155 C. C. A. 482.

[3] The United States have no more rights, so far as equitable jurisdiction is concerned, than private citizens. United States v. Stinson, 197 U. S. 200, 204, 205, 25 Sup. Ct. 426, 49 L. Ed. 724; United States v. Detroit Timber & Lumber Co., 131 Fed. 668, 677, 67 C. C. A. 1, 10; United States v. Debell, 227 Fed. 775, 779, 142 C. C. A. 284; United States v. Chandler-Dunbar Water Power Co., 152 Fed. 25, 81 C. C. A. 221; United States v. Midway Northern Oil Co. (D. C.) 232 Fed. 619, 631; State of Iowa v. Carr, 191 Fed. 257, 266, 112 C. C. A. 477, and authorities there cited.

The judgment of the court below is therefore affirmed, upon the ground that there was an adequate remedy at law during the years mentioned to correct the errors of which complaint is made.

PUGET SOUND NAVIGATION CO. v. CANYON LUMBER CO. et al.

(Circuit Court of Appeals, Ninth Circuit. December 2, 1918.)

No. 3177.

COLLISION ⊂=61—STEAMER AND MEETING TOW—EXCESSIVE SPEED IN FOG.

A collision between a scow in tow and a meeting steamer, moving at a speed of 15 miles in a fog, *held* due to the fault of the steamer, because of her speed and her attempt to cross the scow's towline after having safely passed her tug.

Appeal from the District Court of the United States for the Western District of Washington, Northern Division; Jeremiah Neterer, Judge.

Suit in admiralty for collision by the Canyon Lumber Company and others against the Puget Sound Navigation Company, owner of the steamer Indianapolis. Decree for libelants, and respondent appeals. Affirmed.

Ira Bronson, J. S. Robinson, H. B. Jones, and Bronson, Robinson & Jones, all of Seattle, Wash., for appellant.

H. H. A. Hastings and Livingston B. Stedman, both of Seattle, Wash., for appellees Canyon Lumber Co. and Port Blakely Mill Co.

Roy L. Cadwallader, of Seattle, Wash., for appellees Smith.

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

WOLVERTON, District Judge. On the morning of October 20, 1916, the tug Klickitat, having in tow the scow Dorothy D, laden with lumber belonging to the Port Blakely Mill Company, was on her way from Port Blakely to Pier No. 2 at Seattle. While navigating in a fog, steaming out from Seattle, the Indianapolis, a steam vessel owned by the Puget Sound Navigation Company, plying between Seattle and Tacoma, collided with the scow, damaging it and throwing its cargo into the bay. Libel was instituted against the Puget Sound Navigation Company, and damages were awarded as prayed, from which decree this appeal is prosecuted.

But brief reference to the testimony need be made. The Klickitat left Port Blakely in the morning about 20 minutes to 5. It had the scow Dorothy D in tow, with a line 300 feet in length. Two floats, consisting of rafts of boom sticks, were also in tow behind the Dorothy D. These floats were probably 80 feet each in length, and arranged one just behind the other, the first held close to the scow. The weather was clear, and the Klickitat headed on a straight course to Pier 2, making allowance for the swing of the tide. The tug ran about halfway between the buoy and Duwamish Head, some distance out from Seattle. The course was taken, as it generally was, to keep out of the roadstead, as the steamers usually passed outside or to the north of the buoy. The master of the tug relates that, when he got abreast of the buoy, the weather began to get foggy, and he commenced to blow his signal, one long and two short whistles, at intervals of about 30 seconds; that, after passing the buoy some little time, he heard a boat

whistling somewhere in the fog ahead, heard her blow several whistles, and suddenly the Indianapolis appeared in view, coming out of the fog, 300 or 400 feet distant, and in a few seconds she was directly abreast of the tug, going very fast, seemingly at full speed; that immediately on emerging from the fog the Indianapolis blew two whistles, signifying her intention to pass to the tug's starboard, and the tug answered with like signal, assenting thereto; that the boat passed within 30 feet of the tug, starboard to starboard, on across the tug's towline 200 feet or more in the rear, and struck the scow head on about 6 feet from its port forward corner, splitting off a section extending back about 72 feet; that the Klickitat was running a little less than 4 miles per hour, and did not stop its engines or slow down after hearing the fog signals from the Indianapolis, until it was seen that the latter vessel was going to collide with the scow. The master of the tug further says that, when he first saw the boat, she was bearing down on the tug from her starboard bow, exactly over the tug's port, and that the tug pulled over to port to get out of her way, and kept on going.

The master of the Indianapolis relates that he left the Colman dock, which is to the north of Pier 2, at 7 a. m.; that his boat steamed into the bay, coming down to about Pier 2 in making the turn, and got on her course at 7:04, the fog being "pretty thick"; that she had proceeded about a mile when she met the tug, and was at the time running 15 miles per hour, practically her full speed, and was blowing her small fog whistle; that the collision happened around 7:07 or 7:08 o'clock. The first intimation the master had that another boat was ahead was three short toots of a whistle, which he took for a towing whistle, whereupon he stopped his engines. He testifies that he then blew a fog signal, and got no response, but heard the exhaust from a gas boat (the tug) practically right ahead of him; that he saw the tug on his starboard bow, and blew a starboard passing whistle, which the tug did not answer; that, when his boat struck the scow, her engines had been reversed 6, 7, or 8 seconds. The mate of the Indianapolis, who was at the time on the starboard side of the upper deck, heard a gas boat somewhere ahead giving whistles, heard it once, and then heard the exhaust a little on the starboard bow, "mostly ahead, nearly right ahead." Then shortly afterwards, perhaps a minute, he saw the tug "right down on the starboard side" abreast of where he was standing. He reported to the captain that there was a scow in tow. According to the engineer, the vessel's engines were backing at the time of the collision, and had been for about half a minute, but she had not lost her headway. The stop signal was given him probably a minute before the signal to back.

Counsel for the Indianapolis frankly admit that she was in fault, in consideration of article 16 of the Rules of Navigation (Act Aug. 19, 1890, c. 802, § 1, 26 Stat. 326 [Comp. St. 1916, § 7854]), but ardently insist that the tug should share the damages, in view of the requirements of the same rule. While it may be true that the tug did not literally observe the latter clause of the rule, in not stopping her engines on hearing the fog signals of the Indianapolis, yet it is question-

able whether she did not observe it so far as the circumstances of the case would admit. She was running at a very moderate speed, and the stopping of her engines would have allowed the tow to encroach upon her. We do not say, however, that the circumstances excused her from a strict observance of the rule.

But, laying this aside, the Indianapolis appears to have been grossly at fault in another particular, which occurred after the danger of collision from the approach of the vessels to each other through the fog had been obviated. The Indianapolis, observing the tug while some 300 or 400 feet away, gave the signal for passing to the starboard of the tug, which we believe was assented to, and the maneuver was made accordingly. The two vessels passed safely, but quite close to each other. It further appears that the Indianapolis then attempted to cross the towline of the tug. If it was practicable to clear the tug, it was also practicable to clear the scow to its starboard, and that course should have been adopted. The Indianapolis was running at full speed, a high rate of 15 miles per hour, through the fog, and the stopping of the engines when the tug's fog signal was heard checked her but slightly, for she was still running at a high rate when she passed the tug. If she had continued her course on a port swing, with the scow still 300 feet in the rear, there cannot be the least doubt that she would have cleared the tow also to the latter's starboard by a safe margin. The reversing of the engines of the Indianapolis when in near approach to the tow but added to the danger of collision, because the effect was to throw the ship to starboard, when its course should have continued to port to make the clearance. The Thielbek, 241 Fed. 209, 216, 154 C. C. A. 129.

We think the Indianapolis was grossly at fault in attempting, while running at a high rate of speed, to cross the towline of the tug, and in not continuing her course, to port, and thereby clearing the tow.

Decree affirmed, with costs to appellees.

THE WESTCHESTER.

(Circuit Court of Appeals, Second Circuit. November 13, 1918.)

No. 29.

1. TOWAGE ⊂=11(1)—BREAKING OF PROPELLER SHAFT—NEGLIGENCE.
   The unexplained breaking of the propeller shaft of a tug in charge of a tow cannot be deemed an inevitable accident, merely because a piece was found broken out of the propeller, but the break must be deemed the result of the fault of the tug.
2. TOWAGE ⊂=12(1)—TOWS—NEGLIGENCE.
   For a tow in charge of a tug to be without an anchor is a fault of the tow.
3. TOWAGE ⊂=12(2)—ACCIDENT—DIVISION OF DAMAGES.
   Where a tow was at fault, because not equipped with an anchor, and the tug was at fault and liable for the breaking of the propeller shaft, and it could not be said with reasonable certainty that the stranding of the tow could have been avoided, had it been equipped with an anchor, *held*, that damages should be divided.

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4. TOWAGE ⊂⊃13—SURVEY OF VESSEL—NOTICE.
Possible claimants, such as the owner of a tow, should be notified of a survey of a tug, whose propeller shaft broke and allowed the tow to be stranded.

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

Libel by James Dwyer and others against the steam tug Westchester, her engines, etc., claimed by the Red Star Towing & Transportation Company. From a decree for claimant, respondents appeal. Reversed and remanded, with instructions to award libelant half damages.

Libelants' boat Sinclair, loaded, was in tow of the Westchester bound from the Harlem River to West Farms when the tug became disabled by the breaking of her propeller shaft in the bushing. This occurred between Mill Rock and Ward's Island shortly before 10 a. m. The stage of the tide does not appear. The disaster left the tow helpless and the Sinclair had no anchor. The Westchester dropped her anchor, but the hawser parted. The drifting barge grounded on the Hog's Back, receiving injuries to recover for which this action was brought. Investigation after accident showed a small piece broken out of the Westchester's propeller. The break in the shaft was clean and no flaw was discovered. In the normal operation of machinery no especially hard wear would have been put on the shaft at the place where it broke. The tug's engine was about 20 years old, the shaft was 4½ inches in diameter, which is heavier than ordinary for vessels of this class, and had been in use for a considerable number of years, but there is no evidence showing its exact age. The record shows that the Westchester was maintained in good condition, but it does not appear when the propeller shaft had last been overhauled or inspected. The tug broke down in a channel way about 800 feet wide, containing not over 30 feet of water. A survey was held on the tug, but no notice of the holding thereof was given to the libelant, although it was known that damage had occurred. The District Court dismissed the libel on the ground of inevitable accident, and libelant took this appeal.

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

Burlingham, Veeder, Masten & Fearey, of New York City (Chauncey I. Clark, of New York City, of counsel), for appellee.

Before WARD, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [1] From the fact that a piece was found broken out of the tug's propeller it is argued that she must have struck a submerged log or other similar obstacle; but there is no evidence on that point, and we cannot infer such an obstruction from the mere chipping of the propeller blade. Nor is there any evidence to show that a shock insufficient to materially injure the propeller should have broken a good shaft. We cannot concur with the finding of the court below that this case is an instance of inevitable accident. It is enough to refer to our judgment in Re Reichert Towing Line, 251 Fed. 214, —— C. C. A. ——, decided since the decree appealed from was entered. The facts now before us are much less favorable to the tug than were those which we found insufficient in the decision just cited.

[2, 3] It was, however, a plain fault in the Sinclair to be without

an anchor (The Sunnyside, 251 Fed. 271, —— C. C. A. ——), and we discover no excuse for its absence; but if an anchor had been on board, and had been used, it cannot be said with reasonable certainty that stranding would have been avoided.

The tide must have been of considerable strength, for the tug's cable parted; anchors are habitually carried at the bow, and the Sinclair was being towed stern first; instant action was necessary, the available time short, and whether under such circumstances the maneuver could have been successfully performed is doubtful.

To sustain the result, if not the reasoning, below, The M. E. Luckenbach (D. C.) 200 Fed. 630, affirmed 214 Fed. 571, 131 C. C. A. 177, is pressed upon us. It is true in one sense that here, as there, "concurrent faults"—i. e. negligent acts contemporaneously operating to produce injury—do not exist. But the word relied upon, "concurrent," must be taken as synonymous with "contributing," and in both The Luckenbach and The Sunnyside, supra, it was found as matter of fact that, despite a fault which put a tow adrift, there would have been no resulting injury, had it not been for a new and independent piece of negligence; therefore the wrongdoer first in point of time was held not responsible, although not innocent.

Here we infer negligence (i. e., unseaworthiness) in the tug from the unexplained breaking of her shaft, and find negligence admitted by the barge's admission of no anchor. When faults are thus shown, all the guilty, if their fault could have caused the injury, must, to escape liability, affirmatively show that they did not, in point of fact, cause the same. The Madison, 250 Fed. 852, —— C. C. A. ——. Neither party has borne that burden, in this case; therefore the damages and costs below should be divided.

[4] The procedure of claimants in giving no notice to libelant of the survey on the Westchester is objectionable and inexplicable, if it was expected to use that survey as a piece of evidence. The importance of surveys in maritime litigation has often been recognized. The Mason, 249 Fed. 721, —— C. C. A. ——. But, to say the least, it greatly diminishes the value of any survey considered as documentary evidence, and (even if the surveyors are called as witnesses) creates an air of unfairness about the whole proceeding, to exclude therefrom any known person who may claim against the injured res or have suit brought against him by reason of that injury. The matter is not important in this cause; it is mentioned because it is very important in proper admiralty practice.

For the foregoing reasons the decree is reversed, with the costs of this court, and the cause remanded, with instructions to award libelant half damages; the costs below to be divided.

THE BOUKER NO. 2.

(Circuit Court of Appeals, Second Circuit. November 13, 1918.)

No. 51.

1. COLLISION ⟸107—SPECIAL CIRCUMSTANCES—RULES.
A steamer, backing out of her slip, preparatory to getting on her definite course, is governed by the special circumstance rule (article 27 of June 7, 1897 [Comp. St. § 7901]), and not the starboard hand rule.
2. COLLISION ⟸102, 144—FAULT—LIABILITY—DIVISION OF DAMAGES.
A tug, which backed from her slip without giving the usual warning signal, *held* at fault for a collision with another tug, while the second tug was also at fault for coming down too close to the line of piers, and hence damages for the resulting collision should be divided; it appearing that the failure of the vessels to maintain lookouts was immaterial, as neither could have seen the other in time to have avoided the collision.

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

Libel by Thomas Flannery against the steam tug Bouker No. 2, her engines, etc., claimed by the Bouker Contracting Company. From a decree for libelant, claimant appeals. Reversed and remanded, with directions to enter decree for half damages.

Park & Mattison, of New York City (Samuel Park, of New York City, of counsel), for appellant.

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

Before WARD, HOUGH, and MANTON, Circuit Judges.

WARD, Circuit Judge. July 28, 1915, a little after 3 p. m., the tide running flood and the weather clear, the tug Bouker No. 2, backing out of the slip between Piers 22 and 23 on the Brooklyn side of the East River came into collision with the tug Thomas A. Quigley, bound down the river to the slip between Piers 23 and 24; the fantail of the Bouker striking the port side of the Quigley. The District Judge for the Eastern District of New York found the Bouker solely at fault, and this is an appeal from his decision.

[1] He fell into one plain error in supposing that the starboard hand rule applied to the Bouker, saying:

"The ordinary rule requiring boats to pass port to port, the starboard hand rule as to boats upon crossing courses, and the rules as to indication of intended navigation by whistle signals, all make it apparent that if the Bouker backed out at high speed, so as to come in collision while the Quigley was passing down the river and still maintaining about that same distance from the piers, responsibility would rest upon the Bouker. * * * The starboard hand rule would control the movements of the Bouker, if she was intending to back out into the river a sufficient distance to place her upon a crossing course, and that intention should be indicated by a whistle signal, for the protection of any boat which might properly be approaching. But if the Bouker was intending to turn up the East River, and thus to observe the port to port passing rule with any boat coming down, the burden was upon the Bouker to approach the corner at such a rate of speed as not to come in collision with any boat which might be

properly along the Brooklyn shore at that point. The Bouker must therefore he held responsible primarily in this case."

The rule does not apply to a steamer backing preparatory to getting on her definite course, whether it be up or down the river. The situation of steamers maneuvering to get on their definite courses is covered by the special circumstance rule. Article 27, Act June 7, 1897, c. 4, § 1, 30 Stat. 102 (Comp. St. § 7901). This was flatly decided by the Supreme Court in the case of The Servia and The Noordland, 149 U. S. 144, 156, 13 Sup. Ct. 877, 37 L. Ed. 681, which we have consistently followed. See our own cases: The John Rugge, 234 Fed. 861, 148 C. C. A. 459; The William A. Jamison, 241 Fed. 950, 154 C. C. A. 586.

[2] Pier 22 is covered within a short distance of the end, so that a tug backing out would not be seen until nearly out of the slip by one coming down the river, nor would she any sooner see the tug coming down. It is quite evident to us that the collision was unavoidable when the tugs did see each other. Although the Bouker was backing out slowly, and immediately put her engines full speed ahead, and the Quigley blew a signal of one blast of her whistle, an alarm, and hard-aported, the tugs came together. The judge found that the Bouker did not blow the usual slip whistle, and we accept his finding on this point, which puts her at fault; but we think the Quigley was also at fault for coming down too close to the line of the piers, in violation of the maritime requirements of ordinary prudence. It is not necessary to decide whether the East River statute (chapter 410, § 757, Laws 1882) applies to the locality. If the Quigley had been out, as her witnesses say, from 200 to 300 feet from the line of the piers, she could easily have avoided the Bouker by porting, so easily that she could hardly have escaped sole liability. The District Judge also found the Bouker at fault for want of a lookout at the stern. The absence of a lookout forward on the Quigley is admitted. However, we think the absence of lookouts, or of vigilant lookouts, had nothing whatever to do with the collision. The vessels were first visible to each other when too near to go clear. The Bouker is at fault for not advising the Quigley of her movements by the usual slip whistle, and the Quigley for coming down at full speed too close to the line of the piers.

The decree is reversed, with costs, and the cause remanded to the District Court, with instructions to enter the usual decree for half damages.

ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS v. SMITH.

(Circuit Court of Appeals, Fifth Circuit. December 20, 1918.)

No. 3239.

1. COMMERCE ⟸27(2)—SAFETY APPLIANCE ACT—RAILROADS SUBJECT TO ACT.
A railroad company, having its line wholly in Texas and incorporated therein as required by the state law, but which, with its connections, constitutes part of the interstate system of railroads, is subject to the provisions of the Safety Appliance Act March 2, 1893 (Comp. St. §§ 8605–8612).

2. COMMERCE ⟸27(3)—RAILROADS—SAFETY APPLIANCE ACT.
A railroad company subject to the provisions of Safety Appliance Act March 2, 1893 (Comp. St. §§ 8605–8612) is liable for an injury to an employé resulting from violation of that act, regardless of whether the particular car not properly equipped was at the time employed in interstate commerce.

In Error to the District Court of the United States for the Western District of Texas; Duval West, Judge.

Action by Frank Smith against the St. Louis Southwestern Railway Company of Texas. Judgment for plaintiff, and defendant brings error. Affirmed.

S. P. Ross and Sam R. Scott, both of Waco, Tex., for plaintiff in error.

A. L. Curtis, of Belton, Tex., and Winbourn Pearce, of Temple, Tex., for defendant in error.

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

BATTS, Circuit Judge. [1] Defendant in error, plaintiff below, alleged injuries resulting from a failure of defendant railway company to comply with the Safety Appliance Act of Congress (Act March 2, 1893, c. 196, 27 Stat. 531 [Comp. St. §§ 8605–8612]). Issue is made as to the applicability of the act. If the company's line was an interstate highway, and as such used in interstate commerce, the company is liable for injuries resulting from a failure to furnish the character of equipment required by the act. It was agreed by the parties:

> That at all times mentioned in plaintiff's petition, and for many years previous thereto, the St. Louis Southwestern Railway Company was a Texas corporation, with its line extending from Texarkana, Tex., to Waco, Tex., so far as this suit is concerned. That as such railroad, in the operation of its business as a common carrier, it handled and hauled over its line interstate commerce when tendered to it for that purpose. It is not agreed, however, that the particular car in question, or any car in connection with the train in which it was moving, was carrying interstate commerce at the time of the plaintiff's injury; and it is not agreed that plaintiff was employed by the defendant in interstate commerce at that time.

[2] The plaintiff in error, as all railroad companies in Texas (with exceptions), is a Texas corporation, with authority to connect at the

state line with other railroads. These railroads within the state are connected up with the other railroads of the country, and constitute with them the interstate system of railroads, upon which the bulk of the interstate transportation is conducted. Possibly the stipulation quoted above is not as broad as the facts judicially known, but enough appears from the agreement to establish the interstate character of the defendant company's line. That the particular cars, not properly equipped, may not have been at the time engaged in interstate commerce, is immaterial. Southern Ry. Co. v. United States, 222 U. S. 20, 32 Sup. Ct. 2, 56 L. Ed. 72; T. & P. Ry. Co. v. Rigsby, 241 U. S. 33, 36 Sup. Ct. 482, 60 L. Ed. 874.

The charge of the court, together with special charges given at the request of defendant, fully and correctly gives the applicable law.

The judgment is affirmed.

S. STERNAU & CO., Inc., v. GEORGE BORGFELDT & CO.

(District Court, S. D. New York. December 18, 1918.)

1. PATENTS ⟸35—EVIDENCE OF INVENTION—COMMERCIAL SUCCESS.
Where commercial success may be accounted for on other grounds, and the patent in suit plays either no part or an inferior part in attaining such success, a court must be cautious in giving it weight in aid of the patent, or a broad construction of its claims.

2. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—ALCOHOL LAMP.
The Ball patents, No. 1,222,571, for a container, and No. 1,237,453, for a combined lamp and stand, both relating to lamps for burning solid alcohol *held* void for lack of invention; also *held* not infringed, if conceded validity.

In Equity. Suit by S. Sternau & Co., Incorporated, against George Borgfeldt & Co., for infringement of the Ball patents, Nos. 1,222,571 and 1,237,453. Decree for defendant.

J. Edgar Bull and John Robert Taylor, both of New York City, for plaintiff.

Briesen & Schrenk, of New York City (Hans v. Briesen and Fred A. Klein, both of New York City, of counsel), for defendant.

MAYER, District Judge. The importance of the controversy, in respect of the patents in suit, lies in the remarkable commercial progress in the sale of containers and stands for solid alcohol. The patent features of the case are simple enough, and, but for an attractive commercial field, would probably invoke little attention. This commercial progress, however, properly requires a careful consideration of the subject-matter so that it may be understood that the result in this case is not arrived at merely because, on first glance, the patents are simple.

Plaintiff and defendant sell solidified alcohol to the public in convenient containers, which are fitted into or engaged with stands. These cans or containers are extensively used by the public for cooking or heating purposes, and thus furnish a small, compact, and

inexpensive means for those of the public who, for one purpose or another, wish to avoid the employment of more expensive or elaborate heating devices.

Prior to the time plaintiff embarked on this line of business, solid alcohol was well known as a fuel, certainly as far back as 1898. About 1901–1903, one Rossmann imported from abroad solid alcohol and a stove therefor, and attempted to exploit these articles commercially, but was not successful. The information as to his efforts is not sufficiently full to determine why he failed. His failure may have been due to lack of capital, or to an imperfect device, or to the fact that the public had not as yet become educated to the use of solid alcohol.

In April, 1913, a concern known as the Lava Heater Manufacturing Company placed upon the market a patent heater together with a solid alcohol. A substantial sum of money was spent for advertising this product, and in the fall of 1913 the business was taken over by the Ellenem Company upon a royalty basis. This last-named company manufactured and sold the heater and fuel, and conducted a substantial advertising and publicity campaign. The heater remained on the market from the spring of 1913 until the summer of 1915. Shortly after the Lava heater was introduced commercially, a device, with accompanying outfit, known as the "Home and Camp Cooker," was placed on the market in 1913 or 1914 by a concern which originally acted as sales agent for the Lava heater. Plaintiff entered the field in 1914, and soon captured the market as against the Lava heater and the "Home and Camp Cooker" device. Plaintiff first put out a single outfit, comprising a collapsible wire stand, a plain round can of solid alcohol, and a small tin boiler. This outfit sold for 50 cents. From this starting point plaintiff has developed its business to an extraordinary extent.

In examining, however, the history of plaintiff's efforts, it must be noted that while the plaintiff was still using plain cans—that is to say, cans without grooves—it sold well over a million of such cans. For a new venture, the plaintiff's solid alcohol business was a success practically from the start, and while the business of plaintiff has grown substantially as time has gone on and progress has been contemporaneous with changes in the form in which its solid alcohol was marketed, yet the case is not one where it can be said that plaintiff's commercial success has necessarily been due to the later device or form in which this solid alcohol has been placed before the public.

[1] From the evidence it is apparent that Mr. Sternau and Mr. Strassburger, of plaintiff company, were men of marked business ability. They appreciated the possibilities of solid alcohol, and, through competent manufacturing methods and able salesmanship, have made their goods known practically throughout the country. The rule that commercial success will be resorted to as an aid in resolving doubt as to patentability, and also will be considered in connection with a liberal or narrow construction of claims, has been constantly growing in favor. When availed of in cases of simple invention, the rule often proves of value; but in every case it is vital that

the court must be satisfied that the commercial success can be directly traced to the employment of the device of the patent. It may very well be that extensive and good advertising and good salesmanship may contribute to the result, and yet not prevent the conclusion that the commercial success is due to the exploitation of articles made under the patent in suit. Where, however, the commercial success may be well accounted for on other grounds, and the patent in suit plays either no part or an inferior part in attaining such success, then the court must be cautious not to be misled by what might seem prima facie to be commercial utility.

If, for the purpose of illustration, plaintiff's ability in marketing the goods and the education of the public to the use of solid alcohol were laid aside, yet in this case the large previous success in marketing a comparatively new article with the plain or ungrooved containers negatives the idea that commercial success can be resorted to either in aid of the patent or of a broad interpretation of the claims.

We come, thus, to a consideration of the patents for what they set forth in the grant, tested, in addition, by the disclosures of the prior art.

The groove patent:

"This invention," the patentee stated, "relates to improvements in containers or stoves for containing and burning solid fuel and has for its objects:

"First. To combine a stove and container, said container being adapted to be used in different situations with stands or supports.

"Second. To reduce the expense of manufacture.

"Third. To prevent leakage due to expansion or contraction of the contents of the lamp."

And he claimed:

"As a new article of manufacture, a container adapted to carry a fuel and to be detachably secured to a suitable holder to constitute therewith a lamp, said container being formed of a material and constructed to resist damage thereof by heat, and a cover for normally inclosing the contents of the container, adapted to be opened to expose a flame opening, the body of the container being contoured to present approximately longitudinally disposed internal and external relatively raised and depressed portions, adapted to allow for expansion and contraction and constituting in part holder engaging means."

The testimony excludes the argument that there is any merit in the provision in reference to the adaptation "to allow for expansion and contraction." Simply stated, then, what the patent is for is a series of grooves whose purpose is to engage in safe and locking manner with a stand.

It may very well be that to make such grooves in suitable manner requires the skill of a capable mechanic or artisan in the course of actual manufacture; but, obviously, patentability is not concerned with skill of that character. It seems to me hardly necessary to resort to the prior art to hold that the depression in a container taking the form of a groove, does not involve inventive thought. Once the desire is presented to fit an article to another, it is, in my opinion, a very natural and easy step for a man to conclude to make grooves so positioned that they will fit with the device sought to be engaged.

Indeed, I gather from the testimony of Mr. Ball, the alleged inventor, who is skilled in arts having to do with small appliances, that he found no great difficulty in solving what is called a problem. It is sufficient to refer to Eichelkraut, No. 1,050,113, and Hamm, No. 1,079,124, to demonstrate how little possibility there was of invention, if, indeed, it can be said that invention may be predicated upon a patent of this character. In any event, the very most to which plaintiff would be entitled would be the precise groove found in its container, and that precise groove is not infringed. I think, however, it is desirable not to be doubtful on the point, and therefore I hold the patent void for lack of invention.

The combination patent:

"My invention," the patentee stated, "relates to a collapsible stand and a lamp supported thereby, and has for its objects to produce a device whereby—

"First. The lamp will be prevented from turning in the stand.

"Second. The stand will be prevented from being collapsed when the lamp is in position; and

"Third. The lamp will always be properly seated in the stand."

And he claimed:

"1. A lamp comprising a body with contracted parts perpendicular to its base in several places, in combination with a stand having a plurality of pivoted legs engaging with such contracted parts, whereby said stand is prevented from collapsing by the engagement of the legs with such contracted parts. * * *

"3. A lamp of cylindrical shape having a plurality of vertical grooves in its exterior surface, in combination with a stand having members extending above the lamp and provided with inwardly projecting portions so separated that there is a separating space less than the greatest diameter of the lamp and of greater diameter than the diameter of the lamp at the bases of the grooves, whereby when the lamp and stand are assembled said portion will engage with the bottom of the lamp and prevent proper positioning of the lamp until the grooves and inwardly projecting portions are brought into alinement."

Before considering the question of patentability, it may be pointed out that defendant's grooved can, in combination with defendant's stand, admittedly does not infringe, nor can infringement be charged against defendant's grooved can, when used with the so-called Nelson stand, which plaintiff formerly used.

Prior to the applications for the patents in suit, plaintiff was manufacturing and successfully selling stands of the type shown in the Nelson patent, No. 1,096,185, granted May 12, 1914, which consisted of the identical stand shown in the combination patent here under consideration. Nelson provided, inter alia:

"When in place, the lamp will rest upon the base *1* and will be encompassed by three legs, the curved middle portions of the legs engaging with the body of the lamp."

The alleged inventor, Ball, therefore, must be presumed to have had before him the Nelson stand, with the information as to the location of the engaging point to be utilized when a container would be placed in the stand.

The patent to Eichelkraut, No. 1,050,113, granted January 14, 1913, was for a portable and collapsible stand for spirit stoves. Ei-

chelkraut had pointed out that the can should be provided with grooves adapted to fit over the edges of the stand members *a* and *b*. (See lines 65 et seq. of Eichelkraut patent.)

The appropriate relation of a groove container with a stand such as Nelson disclosed, could, in my opinion, be worked out by a man skilled in the art, even though the Eichelkraut patent had never existed. Plaintiff insists that Ball—

"was the first to make a collapsible stand and container in which the container is the sole means of locking the legs of the stand against collapsing and in which it is absolutely impossible to use the container for heating purposes without locking the legs against collapsing."

While it may be said that the present so-called Sternau can and stands accomplished this result in an admirable way, yet the thought was practically and fully exemplified in the combination of the Nelson stand with a plain ungrooved can.

The fact that the Ball combination patent may work out so as to produce a better device does not impart to the Ball patent the high character of invention. Other patents, perhaps, might be referred to; but I think enough of the prior art has been mentioned to satisfy the requirements of the case.

I have passed by the question of double patenting, because unnecessary to consider, in view of the conclusion as to the question of patentability.

It is of some materiality in the case that, as the Sternau stands are now constructed, it would be impossible for the public to utilize, in Sternau stands, plain cans containing solid alcohol bought from other manufacturers. The effect is really to delimit the use by the public of solid alcohol put up in the ordinary and well-known way.

Before invention can be accorded to this combination patent in such circumstances, it must be entirely clear that the inventive thought is present, and expressed and duly claimed. It is immaterial that, as one of the results, the defendant may enter more fully into competition with plaintiff, especially in respect of what are known in the trade as the refills, viz. the cans containing the solid alcohol.

The case really belongs, not in the domain of the patent law, but in the broad field of competitive business. So far as the devices here employed are concerned, the battle for supremacy must be won, not with the powerful aid of patent control, but by superiority of product and business ability in competitive effort for the favor and patronage of the public.

As thus the combination patent is held void for want of invention, the bill is dismissed, with costs.

LUTEN v. ALLEN et al.

(District Court, D. Kansas, First Division. February 27, 1918.)

No. 196-N.

1. PATENTS ⟸313—SUITS FOR INFRINGEMENT—DISMISSAL OF BILL.
When, from facts of which a court must take judicial notice, a claimed invention is not patentable, or when want of invention is apparent on the face of the patent, a bill for infringement based thereon must be dismissed.

2. EVIDENCE ⟸5(1), 9—SUITS FOR INFRINGEMENT—JUDICIAL NOTICE.
In an infringement suit, the court will take judicial notice of (1) all matters of general scientific knowledge; (2) all matters in common use, and all matters of common knowledge; (3) such mechanical devices as are of common knowledge among all; and (4) the nature of a patented invention.

3. PATENTS ⟸328—INVENTION—METHOD OF REINFORCING CONCRETE BRIDGES.
The Luten patent, No. 818,386, for method of reinforcing concrete arches in bridges, *held* void for lack of invention, as disclosing merely a change of place of old elements in combination, producing perhaps a better, but not a new, result, and involving only the ordinary skill of the mechanic.

In Equity. Suit by Daniel B. Luten against Arthur E. Allen, William S. Fulton, and Arthur E. Allen and William S. Fulton, partners doing business as Allen & Fulton. On motion to dismiss bill. Motion granted.

Vermilion, Evans, Carey & Lilliston, of Wichita, Kan., for complainant.

S. M. Brewster, Atty. Gen., S. N. Hawkes, Asst. Atty. Gen., and Robert Garver, Co. Atty., of Topeka, Kan., for respondent.

POLLOCK, District Judge. This is a suit by Daniel B. Luten to restrain the infringement of one of his many letters patent procured on the method of reinforcing concrete work employed in the construction of bridges, culverts, etc., and for an accounting. The letters patent involved in this suit are numbered 818,386, issued April 17, 1906. While the patent contains seven claims in all, but two of said claims, numbered 1 and 7, are involved in this controversy. These claims read as follows:

"1. An arch having imbedded therein a plurality of tension members passing alternately across the rib, said members being low at the crown and high at the haunches, and each of said members passing across the rib at different longitudinal points from the others, substantially as described."

"7. An arch having imbedded therein rods, bars, or other tension members in two or more series, following one face of the arch rib, thence across and following the other face of the rib; the points of crossing for the different series being angularly or laterally displaced with respect to each other, substantially as described."

The structure alleged to be an infringement of these claims was a bridge erected by defendants for Shawnee county, this state, known as "Joss Bridge," over Vassar creek, in said county.

Defendants have appeared, and move to dismiss the bill for want

of equity appearing on the face of the record, arising out of the averments of the bill itself, together with the exhibits attached thereto or filed therewith, coupled with the information gained from that common knowledge of which courts will take judicial notice.

As this is but one of the many suits instituted in this court by plaintiff on patents involving like or similar matters, I am aided by voluminous printed briefs covering the entire range of the subject-matter. The sole controversy here presented is: Does the bill show the claims of the patent invalid for want of invention at the times the patent was applied for and issued?

It is to be noted from a reading, both claims of the patent involved pertain to the manner of reinforcing a concrete arch employed in the structure. The employment of arches of all kinds and natures for the purpose of thereby strengthening suspended portions of structures in compression was well known by all men and successfully used by the ancients, and at all times since. This is not disputed. Hence, nothing whatever new or novel in the employment of materials in construction or formation of an arch for the purpose of carrying weight in suspension is or can be claimed by plaintiff.

Again, the use of concrete as a building material was well known in the art of building ages before the adoption or use by plaintiff in his work of building done under his patents. Hence, nothing can be claimed by plaintiff as new or original in the quality of concrete, the ease with which it separates on low tension, or its ability to withstand extreme compression.

Again, the practice of employing in all forms steel or other metal rods, bars, strands, ropes, strips, woven mats, etc., in the reinforcement of concrete used in buildings of all kinds and character, for the purpose of preventing its separation when subjected to a pulling or tension force, was also well known to the trade and in the art of building long before the same was conceived or employed by plaintiff.

The only question here presented is this: Was the idea of the plaintiff in the employment of the form of a well-known figure (an arch) in the work of bridge construction, in the doing of which work a well-known and well-understood combination of materials, concrete in conjunction with reinforcing steel rods, an original and patentable method of construction arising solely from the fact the manner of the use made of the materials in combination produced a stronger structure, hence the better adapted to the purpose of carrying a load, including its own weight, than was the manner of combination of said materials by others long before employed in the work?

Now, I take it all matters of general scientific knowledge, such as arise out of the science of mathematics, the operation of natural laws, and other such matters, are comprehended within that class of facts of which courts will take judicial cognizance, when attention is thereto directed. From which it follows, if it may be said the claims in the patent here in controversy are invalid for want of invention, the court should sustain the motion to dismiss the bill, and obviate the necessity of incurring the expense and performing the labor of taking

proofs. Brown et al. v. Piper, 91 U. S. 37, 23 L. Ed. 200; Slawson v. Grand Street R. R. Co., 107 U. S. 649, 2 Sup. Ct. 663, 27 L. Ed. 576.

Hence, the decision of the motion presented involves two questions: (1) Of what do courts take judicial knowledge? (2) What constitutes invention, in such sense as to uphold a claim of patent?

[1] When these questions are answered, and the answers are applied to the claims of the patent in controversy, such application must determine the question raised by the motion; for it is quite well settled, when from the facts of which a court must take judicial notice a claimed invention is not patentable, a bill based on such patent must be dismissed, or, when want of invention is apparent on the face of the letters patent granted, the patent must be declared void and nonenforceable, notwithstanding the fact of its having been granted. Slawson v. Grand Street R. R. Co., supra; Torrent Co. v. Rodgers, 112 U. S. 659, 5 Sup. Ct. 501, 28 L. Ed. 872; Kaolatype Engraving Co. v. Hoke (C. C.) 30 Fed. 444; West v. Rae (C. C.) 33 Fed. 45.

[2] Now, it seems from authority courts will take judicial notice of the following, among other matters: (1) All matters of general scientific knowledge (Brown et al. v. Piper, supra; Slawson v. Grand Street R. R. Co., supra); (2) of all matters in common use and all matters of common knowledge (King v. Gallun, 109 U. S. 99, 3 Sup. Ct. 85, 27 L. Ed. 870; Terhune v. Phillips, 99 U. S. 592, 25 L. Ed. 293); (3) of such mechanical devices as are of common knowledge among all (Aron v. Manhattan Ry. Co. [C. C.] 26 Fed. 314; Knapp v. Benedict [C. C.] 26 Fed. 627); (4) of the nature of a patented invention (Kaolatype Engraving Co. v. Hoke, supra; Slawson v. Grand Street R. R. Co., supra).

Mr. Robinson in his work on Patents (section 77), says:

"Every invention contains two elements: (1) An idea conceived by the inventor; (2) an application of that idea to the production of a practical result. Neither of these elements is alone sufficient. An unapplied idea is not an invention. The application of an idea, not original with the person who applied it, is not an invention. The inventive act in reality consists of two acts—one mental, the conception of an idea; the other manual, the reduction of that idea to practice."

In Fuller v. Yentzer, 94 U. S. 288, 24 L. Ed. 103, Mr. Justice Clifford, delivering the opinion of the court, says:

"Valid letters patent undoubtedly may be granted for an invention which consists entirely in a new combination of old elements or ingredients, provided it appears that the new combination of the ingredients produces a new and useful result."

In Smith v. Nichols, 88 U. S. (21 Wall.) 112, 22 L. Ed. 566, it is said:

"A mere carrying forward, or new or more extended application, of the original thought, a change only in form, proportions, or degree, the substitution of equivalents, doing substantially the same thing in the same way, by substantially the same means, with better results, is not such invention as will sustain a patent."

In Penn. Railroad v. Locomotive Truck Co., 110 U. S. 490, 4 Sup. Ct. 220, 28 L. Ed. 222, it is said:

"The application of an old process or machine to a similar or analogous subject, with no change in the manner of application, and no result substantially distinct in its nature, will not sustain a patent, even if the new form of result has not before been contemplated."

In Phillips v. Detroit, 111 U. S. 604, 4 Sup. Ct. 580, 28 L. Ed. 532, it is said:

"No invention was required for the construction of the pavement described in the patent, and that it demanded only ordinary mechanical skill and judgment, and but a small degree of either."

In Reckendorfer v. Faber, 92 U. S. 347, 23 L. Ed. 719, it is said:

"The law requires more than a change of form, or juxtaposition of parts, or of the external arrangement of things, or of the order in which they are used, to give patentability."

In Hollister v. Benedict Manufacturing Co., 113 U. S. 59, 5 Sup. Ct. 717, 28 L. Ed. 901, it is said:

"All that remains to constitute the invention seems to us not to spring from that intuitive faculty of the mind, put forth in the search for new results, or new methods, creating what had not before existed, or bringing to light what lay hidden from vision, but, on the other hand, to be the suggestion of that common experience, which arose spontaneously and by a necessity of human reasoning, in the minds of those who had become acquainted with the circumstances with which they had to deal."

In Wollensak v. Sargent, 151 U. S. 221, 14 Sup. Ct. 291, 38 L. Ed. 137, it is said:

"The novelty must be a novelty in the means or mechanical device, and not in the use to which the combination is put."

In Spirella Co. v. Nubone Corset Co., 216 Fed. 898, 133 C. C. A. 102, it is said:

"The simple carrying forward of the old idea, and doing what has been done before in substantially the same way, but with possible better results, is a change not involving invention." Richards v. Chase Elevator Co., 158 U. S. 299, 15 Sup. Ct. 831, 39 L. Ed. 991; Neureuther v. Mineral Point Zinc Co., 179 Fed. 850, 103 C. C. A. 336.

In Siemund v. Enderlin (D. C.) 206 Fed. 283, it is said:

"Nor can it be held that an arrangement of the parts of a device (described in prior patents and used for a purpose and in a way shown in those patents, but, coupled with the skill of the operator, made to be effective only under certain conditions, which will produce results desirable under certain circumstances) can be patentable as a new invention, when the earlier patents show both an understanding of the possibility of these results, the existence of such an arrangement of parts and of the conditions produced, together with an understanding of what is necessary for a skilled operator to get these results, even though the reason assigned, or the explanation of the cause of the results themselves, be mistakenly stated and attributed to incorrect factors or parts in doing the work. * * * Nor is mere adjustment patentable."

In American Laundry M. Mfg. Co. v. Troy Laundry M. Co. (C. C.) 171 Fed. 870:

"If ordinary mechanical skill is adequate to make the selection and union, or combination, and no new idea is involved in the process, there is no patentable invention, however great the improvement."

[3] Now, is the question presented as to the best method or manner of placing steel bars or rods in reinforcing concrete arch, to give it strength to support weight, one capable of being definitely and certainly solved by the application thereto of well-known scientific principles, or must such question be worked out from experimental tests, involving many changes in manner and form of employment, until a happy (the best) form is chanced upon or discovered by the creative power of the mind, as contradistinguished from its ability to understand well-known and settled scientific principles?

From a study of the authorities I am of the opinion all the claims of the patent involved in this case disclose is a mere change of place of old elements in combination, producing perhaps a better, but in no sense a new, result; further, that any mechanic of ordinary skill in the doing of the work would have developed the method employed from out his understanding of such matters and in dealing with them. If this be true, as has been seen from the authorities above cited, the claims to the patent in dispute are invalid, and confer no monopoly of right in use upon the plaintiff, and the motion to dismiss must be sustained.

It is so ordered.

LUTEN v. YOUNG et al.

(District Court, D. Kansas, First Division. February 27, 1918.)

No. 197–N.

PATENTS ⇐328—INVENTION—METHOD OF REINFORCING CONCRETE BRIDGES. The Luten patent, No. 853,203, for method of reinforcing concrete arches in bridges, *held* void for lack of invention.

In Equity. Suit by Daniel B. Luten against Joseph W. Young and others. On motion to dismiss bill. Motion granted.

Vermilion, Evans, Carey & Lilliston, of Wichita, Kan., for complainant.

S. M. Brewster, Atty. Gen., S. N. Hawkes, Asst. Atty. Gen., and Robert Garver, Co. Atty., of Topeka, Kan., for respondents.

POLLOCK, District Judge. This is a suit brought for the infringement of patent and accounting. The letters patent involved in this suit are No. 853,203, applied for May 17, 1902, issued May 7, 1907.

The claims involved in this patent are Nos. 1 and 12. The alleged infringement consists in the erection by defendants, doing business as the Leavenworth Bridge Company, for Shawnee county, this state, of a concrete bridge known as the "Poor Farm bridge," and another bridge, known as "East Fourth Street bridge," in said county. Defendants have moved to dismiss the bill for want of equity.

I have examined the briefs and arguments filed in this case, and find there is involved precisely the same principles considered and determined in case No. 196–N on the records of this court, wherein the

present plaintiff is plaintiff and Arthur E. Allen et al. are defendants. 254 Fed. 587.

For the reasons expressed in the memorandum opinion filed in that case, the motion in the present case is likewise sustained.

It is so ordered.

FROMONT v. ÆOLIAN CO.

(District Court, S. D. New York. November 27, 1918.)

No. 14-349.

COPYRIGHTS ⊂⊃77—INFRINGEMENT—OWNER OF PREMISES WHEREIN INFRINGEMENT OCCURS.

Where defendant leased or agreed to permit another to use a concert hall in its possession, *held* that, though defendant a few days before the performance was advised not to permit, without the consent of plaintiff or his agent, the rendition of certain copyrighted music, defendant is not liable as an infringer because its lessee's artist performed the copyrighted music, etc.; defendant having no interest in the concert other than the hire of the hall.

In Equity. Bill by Eugene Fromont against the Æolian Company. Bill dismissed.

Melville H. Cane, of New York City, for plaintiff.

George D. Beattys, of New York City, for defendant.

MAYER, District Judge. The suit is the usual infringement suit, brought by the plaintiff, a French publisher of music and a resident and citizen of the republic of France, against the defendant, the Æolian Company, a Connecticut corporation. There were two other defendants, but plaintiff and those defendants arranged the controversy prior to the trial of this suit, and the suit was discontinued as to them.

Briefly stated, it appears that the Æolian Company on May 10, 1917, entered into a written agreement or lease with Antonia Sawyer, Incorporated, by the terms of which the Æolian Company, as lessor, let, and Antonia Sawyer, Incorporated, as lessee, hired, the use of the Æolian concert hall, which is leased and controlled by the Æolian Company; this hall being located in the borough of Manhattan. The lease was for 3½ hours commencing at 1:30 o'clock and terminating at 5 o'clock on October 13, 1917, and provided that the premises were to be used by Antonia Sawyer, Incorporated, for the sole purpose of giving a public piano recital by Rosita Renard at a rental specified in the lease or agreement, which rental was paid by Antonia Sawyer, Incorporated, to the Æolian Company. After May 10, 1917, and shortly prior to October 13, 1917, plaintiff by his agent notified the Æolian Company in writing of the copyright of two musical compositions known as "Prelude" and "Claire de la Lune," and advised the Æolian Company not to allow the performances thereof on October 13, 1917, at Æolian Hall, and by Rosita

Renard, presumably acting on behalf of Antonia Sawyer, Incorporated, without the permission or consent of the plaintiff or his representative.

It is stipulated that the Æolian Company, at the time when the lease was executed, had no knowledge that Rosita Renard was to perform any copyrighted works of the plaintiff, and, briefly stated, had no business relations of any kind or description with and control over the pianist, Rosita Renard, or any other person engaged or employed in the contemplated concert; and it is further stipulated that the Æolian Company did not derive any profit whatever from the performance, except the amount agreed upon, as above stated, as rental of the concert hall. When October 13, 1917, came, a public concert for profit was given at Æolian Hall by Antonia Sawyer, Incorporated, at which Rosita Renard, the pianist, played and performed the two copyrighted works above referred to, namely "Prelude" and "Claire De Lune," without authority or consent of plaintiff or his agent or representative. Prior to the concert tickets were put on public sale by Antonia Sawyer, Incorporated, at the concert hall and elsewhere, and were sold to the public, who attended the concert in considerable numbers.

From the foregoing it appears that the defendant, the Æolian Company, had no relation whatever to the performance, except that prior to any knowledge as to a claim in respect of a copyright the Æolian Company had entered into a lease of the premises for part of the afternoon of October 13th with Antonia Sawyer, Incorporated. At the time that the notice was given to the Æolian Company, that company was under a binding contract with Antonia Sawyer, Incorporated, to let the premises in question at the date and for the period above set forth. The theory of the suit is that the Æolian Company became a coinfringer. It is perfectly plain that the Æolian Company was not an infringer in the original sense. The infringers, if such they are, were Antonia Sawyer, Incorporated, and possibly the pianist, Rosita Renard.

Plaintiff asks this court to hold, under such circumstances, that the owner of a building, or a room, who has had no connection whatever with the performance of a copyrighted work, other than to let the said premises without any notice or knowledge, shall be held as an infringer. Of course, if, as in at least one English case, the owner of the premises had arranged for the infringing production, and was to receive profit therefrom, the situation would be quite different. If this court were to sustain the view advanced by the plaintiff, it might well result in the owners of buildings, such as the defendant owns, or buildings such as are occupied by hotels and restaurants and department stores, in being held as co-infringers merely because, either by permission or contract arrangement, performances are had where some performer, without any prior agreement with the owner of the building, publicly performed some copyrighted work. It is matter of common knowledge that entertainments of all kinds are given, not merely in theaters or other regular places of amusement, but in hotels, and assembly rooms, department stores,

and open grounds, such as the stadium and the Polo Grounds, and other large fields adapted for the giving of concerts or pageants.

It is significant, although, of course, not controlling, that there is not to be found in the reports of American cases any case which has dealt with a cause of action similar to that here urged. To hold the defendant liable would, in my view, be to stretch both the purpose and the provisions of the Copyright Law (Act March 4, 1909, c. 320, 35 Stat. 1075 [Comp. St. § 9517 et seq.]) far beyond even the imagination of the Legislature. While unquestionably this exceedingly useful statute was passed primarily to protect authors, composers, and artists of various kinds, and to secure for them the reward of their labors, yet the act is constructed in such a manner as to safeguard the public against financial loss and damage unexpectedly and unwittingly incurred. Thus all of the preliminary provisions as to copyrighting are surrounded with great care. The notice of copyright must be given in a particular way, as the statute points out. The provisions as to damages and penalties are carefully set forth and guarded.

Viewing the act and its purpose, it seems to me that a defendant cannot be called a coinfringer who is in no sense an inducing party to the infringement, who derives no profit from the infringement, excepting in the very remote way in which it is urged that this defendant landlord derived profit here; and where, as here, a defendant enters into an ordinary everyday business contract, without any knowledge whatever of a threatened infringement, and thus becomes bound under the contract, it seems to me that the construction contended for by plaintiff would result in visiting upon innocent landlords a penalty which the statute never contemplated.

I think I have already stated that plaintiff notified the defendant of the threatened infringement, said notice having been given to the defendant a few days before October 13, 1917; but it will be remembered that at that time the outstanding agreement to let the premises had been long in existence, for, as above pointed out, this agreement was made between the Æolian Company and Antonia Sawyer, Incorporated, in May, 1917.

For the reasons thus outlined, and more, which can be amplified, if necessary, the bill is dismissed, with costs.

PITKIN-HOLDSWORTH WORSTED CO. v. MEISLIN.

(District Court, E. D. New York. December 12, 1918.)

SALES ⇐89—CONTRACT—MODIFICATION.

Defendant *held* on the evidence not to have agreed to a modification as to price of a contract for yarn to be manufactured for him by plaintiff.

At Law. Action by the Pitkin-Holdsworth Worsted Company against Aaron Meislin, doing business under the trade-name of the Chester Knitting Works. Trial by court, and judgment for plaintiff.

Frederick S. Duncan, of New York City, for plaintiff.

Maurice Kaufman, of Brooklyn (Jacob L. Holtzmann, of New York City, of counsel), for defendant.

GARVIN, District Judge. The action has been tried by the court without a jury, by consent. Plaintiff and defendant made two contracts, which will be known as the contract of February 19, 1915, and the contract of February 20, 1915, respectively. The contract of February 19th provided for the sale by plaintiff to defendant of 5,000 pounds of yarn at 93½ cents per pound. The contract of February 20th was for 5,000 pounds of yarn of a different weight at 97½ cents per pound.

On March 16, 1916, plaintiff wrote defendant the following letter:

"The Pitkin-Holdsworth Worsted Co.,

"Manufacturers of Worsted Yarns.

"Passaic, N. J., Mar. 16, 1916.

"Chester Knitting Works, Brooklyn, N. Y.—Dear Sir: After having talked with you on the telephone this morning, we went very carefully into the matters connected with your contract with us, and at the present writing we have little to say that is different from what we have already said in our numerous letters to you. We refer you first to the letters written under dates of Sept. 17 and 23, 1915; particularly do we call your attention to our letter of Sept. 23d. Your contract was placed with us Feb. 19, 1915, for 5,000 pounds of yarn. As far back as Aug. 10 and 19, 1915, we advised you to specify against this contract, which you did not do until dyeing conditions got worse. Since the date your contract was entered, Feb. 19, 1915, the price of dyeing Navy has advanced to 22 cents. We saw these conditions coming and for that reason urged instructions from you. Inasmuch as the war has caused these rapid advances and has placed us in a most unusual position, we are not now disposed to supply your yarn at a time when there would be so great a loss to us, as we are absolutely not to blame.

"The proposition we now make to you is to some extent stated in our letter of Sept. 17th, the difference being that to-day you will have to pay 17 cents per pound additional; in other words, if you will pay us $1.10 per pound for 2/18's dyed yarn we will ship you the balance of this contract of Feb. 19, 1915, as quickly as possible. The yarn is actually worth $1.25 per pound dyed, and you are therefore saving 15¢ on every pound. In writing you this way we wish you to understand we are not making any unusual requests, as other customers of ours have volunteered willingly to pay the advanced charge for dyeing.

"Upon carefully considering this subject we feel sure that you will instruct us to make delivery to you on this basis.

"Very truly yours, The Pitkin-Holdsworth Worsted Co.,

"P/D. [Signed] H. L. Pitkin, Treasurer."

To which on March 17, 1916, defendant made the following reply:

"Chester Knitting Works,

"Manufacturers of a Complete Line of Sweater Coats,

"88–92 Junius Street.

"All orders accepted subject to our ability to get yarns dyed, and also to advance in price if cost of dyeing increases.

"Brooklyn, N. Y., Mar. 17, '16.

"Pitkin-Holdsworth Worsted Co., Passaic, New Jersey—Gentlemen: We are in receipt of your letter of the 16th inst., the contents of which surprises us very much, for you are entirely unjustified in your statements. The fact is that we have some yarn specified as far back as April, which has not been delivered to date. Furthermore, upon looking up our specifications given to the end of August, we find there is quite some yarn undelivered. So you can readily see that we were justified in not sending in additional specifications, when we did not receive that which we had specified.

"You will also recall that it was not the fault of the dye conditions that we did not receive our yarn, for the yarn had not even been sent to the dyers. We called up your dyers several times and they never had any order for us from you. So the fact is that you did not have the yarn to be dyed. However, we will not argue over this now, as we have decided to compromise with you, not because you are right, but because we realize the position you are in and are willing to meet you part way.

"We have four thousand pounds still on order with you and would agree to take this in at $1.05, half in 2/30 and half in 2/20, as per the following specifications:

1000 lb. 2/30 Maroon
1000 " " Cardinal
1600 " 2/20 Maroon
400 " " Cardinal

"We believe this proposition will meet with your entire satisfaction and would ask you to confirm same by return mail.

"We would at the same time inquire whether you would accept an additional order from us for five thousand pounds of worsted 2/30 in maroon and cardinal at $1.25 per pound, also a few thousand pounds in either light or dark Oxford.

"We would appreciate the courtesy of a prompt response, as we would like to know whether or not you are in a position to accept this additional order.

"Thanking you in advance for the courtesy, we beg to remain very respectfully yours,

"AM/RP Chester Knitting Works.

"P. S.—We trust that upon receipt of this letter you will make a prompt shipment to the dyers against our old order, which we assure you will be appreciated."

On March 18, 1916, plaintiff wrote defendant the following letter:

"The Pitkin-Holdsworth Worsted Co.,

"Manufacturers of Worsted Yarns.

"Passaic, N. J., March 18, 1916.

"Chester Knitting Works, Brooklyn, N. Y.—Dear Sirs: In reply to yours of the 17th: We are sorry you did not appreciate the offer we made you was very much to your advantage to accept, and we do not now change our ideas. In fact, even since writing you the price of dyeing has advanced 2¢ pr lb. If you care for us to proceed making yarns for you on basis of $1.10 pr lb., for 2/18's and 2/20's, and 4¢ pr lb. additional for 2/28's, 5¢ pr lb. additional for 2/30's, although we would state that it will be impossible for us to make any 2/28's or 2/30's yarn for a long while, we upon hearing from you will proceed to make the yarn. All yarns to be billed at dyer's weights, and accepted by you at said weights.

"Regarding a new order: We are not at the present moment accepting orders from any one, as we have all the business we can take care of for the next five months.

"Yours truly, The Pitkin-Holdsworth Worsted Co.,
"HLP/C [Signed] H. L. Pitkin, Treasurer."

These letters refer only to the contract of February 19th, and do not indicate an intention on the part of defendant to modify the terms of the contract of February 20th. His conduct throughout, on the contrary, shows that he at all times insisted that plaintiff must carry out the latter contract according to its terms, for on March 21, 1918, plaintiff sent him a printed form of contract, which he was asked to sign and return, and which contained: "Above specifications completes all the orders for your account." If defendant had signed as requested, this might have been construed as a cancellation of the second order. He refused, and distinctly stated that it was not at all satisfactory.

It is true that some time later he made a payment on account of shipments under the second contract at the increased price; but it is claimed that this was by inadvertence, and there is not sufficient proof to indicate that he thereby intended to modify the terms of the contract in question.

It has been stipulated that, if the court finds that the second contract was modified, there is due plaintiff $3,249.93. If there was no modification, there is due $2,441.44. The latter sum was tendered before suit was begun.

Judgment will therefore be entered against defendant for $2,441.44, without interest, and without costs.

HENRY L. DOHERTY & CO. v. TOLEDO RYS. & LIGHT CO. et al.

(District Court, N. D. Ohio, W. D. August 2, 1918.)

No. 86.

1. COURTS ⇐37(3)—JURISDICTION—PERSONS ENTITLED TO QUESTION.
Where a city voluntarily intervened in a suit against a street railway, and a quasi receivership was undertaken upon the city's demand for relief, *held*, that the city was not in a position to question the jurisdiction of the court to restrain alleged illegal action by the city with respect to fares charged.

2. STREET RAILROADS ⇐24(10)—FRANCHISE—USE OF STREETS WITHOUT.
A street railroad, operating without a franchise, is not a trespasser, and it has the right to make reasonable use of the streets in the proper conduct of its business, until it is forbidden to continue by the city authorities, who may impose as an alternative to ejection reasonable conditions.

3. STREET RAILROADS ⇐24(10)—FRANCHISE—USE OF STREETS.
The power of a city to require a street railroad company, which was operating without a franchise, to remove from the streets, cannot be questioned in the courts.

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4. STREET RAILROADS ⊂=24(10)—USE OF STREETS—JUDICIAL INQUIRY.
Whether conditions as to the use of streets, imposed by a city upon a street railroad company operating without a franchise, are fair and reasonable, is a subject of judicial inquiry.

5. COURTS ⊂=282(3)—FEDERAL COURTS—JURISDICTION.
The federal court has jurisdiction of a suit wherein it was asserted the conditions as to use of streets by franchiseless street railroad company were so unreasonable as to work a deprivation of property without due process, in violation of Const. U. S. Amend. 14.

6. STREET RAILROADS ⊂=24(10)—OPERATING WITHOUT FRANCHISE—FARES—RIGHT TO CHARGE.
Where a street railroad company is operating without a franchise, and not bound by any contract stipulation, it has a right to demand for its service from time to time a rate of fare which will secure to it reimbursement for its expenditures properly incurred, plus a fair return on the property employed in performing the service.

7. CONSTITUTIONAL LAW ⊂=298(2)—DUE PROCESS OF LAW—DEPRIVATION OF PROPERTY.
While it is for the public authorities in the first instance to regulate the rates to be charged by a quasi public service corporation, such as a street railroad, yet if the rates do not secure, in addition to a reimbursement of operating expenses, a reasonable or fair return on the actual value of the plant, enforcement will be a violation of the constitutional inhibition against the taking of property withoue due process of law.

8. CONSTITUTIONAL LAW ⊂=298(2)—DUE PROCESS OF LAW—DEPRIVATION OF PROPERTY—"FAIR RETURN."
The fair return to which a street railroad company is entitled upon the value of its property is that rate per cent. actually received, in the absence of special contract, in the community where the service is rendered.

9. CONSTITUTIONAL LAW ⊂=298(2)—DUE PROCESS OF LAW—DEPRIVATION OF PROPERTY—"FAIR RETURN."
Where the corporation performs a service obviously necessary and indispensable to the well-being of the community, the capital of the company upon which the fair return is to be computed should be the fair and reasonable value of the property used in such service, valued as the equipment of a going concern.

10. CARRIERS ⊂=18(1)—RATES—JUDICIAL REVIEW.
The primary duty of regulating and fixing the rates to be charged by a quasi public service corporation, as a street railway, is upon the city authorities, and the jurisdiction of the courts is limited to a determination whether the rates are reasonable.

11. CARRIERS ⊂=18(6)—RELIEF—ENJOINING OF FUTURE ACTION.
The proof of the inadequacy of a street car fare rate proposed by a city may be so clear and convincing that the courts are warranted in enjoining its imposition in advance of putting it in operation.

12. STREET RAILROADS ⊂=24(10)—DUTY TO RENDER SERVICE—CORPORATION WITHOUT FRANCHISE.
A street railroad company, operating without a franchise from the city, has the right to cease at once its service and take up its tracks.

13. STREET RAILROADS ⊂=24(10)—FRANCHISES—CONDITIONS.
Where a street railroad company was operating without a franchise, the act of the council in imposing conditions which the company refused to accept does not ipso facto require the company to leave the streets.

14. CARRIERS ⊂=18(6)—FARE CHARGED—INJUNCTION.
Where the authorities of the city of Toledo proposed to take action to compel the Toledo Railways & Light Company, which was operating

without a franchise, to sell 11 tickets for 50 cents, *held*, that such action, under the circumstances, would work a confiscation of the company's property, and so would be enjoined in advance; the company being entitled to charge for its service a sum which would give a fair return.

In Equity. Bill by Henry L. Doherty & Co. against the Toledo Railways & Light Company and others, in which the City of Toledo became a party by its voluntary intervention. On petition by the Toledo Railways & Light Company for an injunction. Temporary injunction issued.

The Toledo Railways & Light Company, operating all the street railways of the city of Toledo, is a consolidation of several independent companies. The lines were governed by a number of separate franchises expiring at different dates. Some of the lines were permitted by their franchises to charge 25 cents for six tickets and others 50 cents for eleven tickets; 5 cents being the cash fare with free transfers. Franchises for some of the most important lines expired in 1910, and those of others, practically disintegrating the system, ran out March 27, 1914. Since this date street railway operations have been without a franchise, nor has the city attempted to prescribe conditions for the use of the streets, except as hereafter noted. For several years there had been intense agitation in the city over the franchise question, and a strong public sentiment had been created against the company. A temporary settlement of controversies was effected in 1911 or 1912 by the company conceding a fare of five tickets for 15 cents during two specified hours in the morning and two hours in the evening, with 5 cents in cash at all times, and six tickets for 25 cents for other hours, with free transfers. This arrangement, which was the fruit of an informal agreement, was operative until April, 1916. In 1913 the council passed an ordinance imposing a street rental of $250 per day on the lines on which the franchises had expired. A suit testing this matter was early brought in the state court, where it has remained without progress for five or six years. In 1913 a New York partnership, H. L. Doherty & Co., took over the management of the company. The municipal election of 1913 resulted in a defeat for the entire city administration, not, however, upon the street car issue, as all of the candidates for executive and legislative offices in the city were known to be unfriendly to a franchise for the street car company which provided a greater rate of fare than three cents. At the time of the election, Cornell Schreiber was city solicitor, and was defeated as a candidate for mayor on a platform hostile to the street car company. Immediately after the election, although the entire council and every city officer was to leave office within two months, and although the company had important franchises which were operative for nearly three months after new city officials came in, an ordinance passed the council at one sitting under suspension of the rules and was immediately signed by the mayor, providing that, in addition to the $250 per day street rental, the company should carry passengers for three cents after March 27th, with a condition that the operation of the cars after that date should be deemed an acceptance by the company of the terms of the ordinance. There was no alternative provision in this ordinance that, in default of compliance with its provisions, the company should cease running its cars, but the city solicitor was directed to go into an appropriate court to obtain an order enforcing it. This ordinance is generally known as the Schreiber ordinance, after its author. In January following, Doherty & Co., having obtained a judgment against the street railway company which was unsatisfied on execution because of prior liens, filed a creditors' bill in this court. This bill, among other allegations, raised the question of the confiscatory character of the Schreiber ordinance, alleging that an attempt to meet it would be to destroy the equity of redemption in the company. The new city administration indicated that it would enforce the ordinance, although no attempt had been made to get an order of enforcement as the ordinance provided. This situation led to an application in March, 1914, for a temporary injunction against the city of Toledo, upon the

hearing of which it was shown that the city had secured an exhaustive examination of the railway company's affairs by a well-known auditing company of its own selection, and that shortly prior to the passage of the so-called Schreiber ordinance the auditor had filed with the city an illuminating report plainly showing that a three-cent fare was impossible, and that, in addition, the head of the auditing company had written a personal letter to the mayor advising him in the most emphatic terms that a three-cent ordinance would be clearly confiscatory; all this information being in the hands of the city officers, including the then city solicitor, Schreiber, author of the ordinance, before the ordinance was drafted. The evidence on the hearing of the application for a temporary injunction showed that the city officers were proposing to enforce the ordinance by placing policemen on the cars to compel the acceptance of three-cent fares. Pending the court proceedings, the company at a great loss to itself instructed its conductors to permit every passenger to ride free who insisted on riding for three cents, and before the court had a fair opportunity to act 9,000,000 passengers availed themselves of this free transportation. A temporary injunction was thereupon issued in that case, which is, in fact, the same case now before the court; this present issue being between cross-complainants. The case still pending, in April, 1916, the company's platform operatives struck for higher wages, leaving the city without street car service for about two weeks. At this juncture the city of Toledo filed an amended cross-complaint to support an application concurrently made for the appointment of a receiver for the street railway company and to compel the company to resume and maintain its service. Issues thus arising were heard. The application for a receiver was not finally passed upon, nor was it withdrawn; but, as a modus vivendi, the company was ordered to suspend the three-cent hours and was permitted to charge its ordinary fare at such times, one half of the increased receipts to go towards defraying the expense of an increase in wages for its platform men and the other half to be delivered to a custodian appointed by the court to be disbursed in the purchase of additional equipment in the shape of new cars to improve the service; the city acquiescing in this as a temporary arrangement to terminate the strike, but not withdrawing its application for a receivership. At the municipal election of 1917, no further progress having been had in the pending case, and nothing having been accomplished by way of placing the street railway company under franchise, Mr. Schreiber, the city solicitor who prepared the so-called Schreiber ordinance in 1914, was elected mayor, not, however, on any issue involving the street railway matters. In the spring of 1918 the company was threatened with a walkout of its employés, having the effect of a strike, because of its inability to again increase wages on its current income. Prolonged negotiations were had between the company and representatives of the men and Mayor Schreiber. Again the city employed an accountant of its own selection to determine the relation of the company's income at its present rates of fare, 5 cents cash, six tickets for 25 cents, with free transfers, and a raise of wages, equivalent to 6 cents per hour, which all parties conceded the men should have. On the company's insistence that the facts and the accountant's report showed that it should be permitted to charge at least 5 cents straight for adult fares, with 1 cent additional for transfers, thus abolishing six tickets for a quarter and free transfers, the mayor issued what the company construed to be an ultimatum that, so far as he could influence the situation, a greater raise of fare than eleven tickets for 50 cents, with free transfers, would not be permitted, and that, if the company should suffer a strike or be unable to maintain its lines on that basis, he, the mayor, would see that the cars would run nevertheless. At this juncture the street railway company filed in the pending case an amended answer and cross-complaint, setting up the new facts and the mayor's position, and asking that the city be enjoined from interfering with its proposed raise of rates to 5 cents straight, with 1 cent for transfer. The application came on for hearing, the city's objection to the jurisdiction of the court was overruled, testimony was heard; the company producing, not only its own books, but the report of the city's special accountant, to sustain its claim that it must have the additional income indicated in order to raise wages, and thus avoid a walkout, to the disruption of its service. The court found that under

present conditions the company, to maintain its service, was under the necessity of increasing wages by at least 6 cents per hour, and that to meet such increased expense there was a present necessity of increasing fares as the company demanded, and that the mayor's ultimate rate was inadequate. It was also found that the company was justified in its construction of the mayor's attitude as a threat to use extraordinary measures to maintain street car service at his maximum rate of eleven tickets for 50 cents, with free transfers, and that he would interpose a veto to any legislation by the council more favorable to the company. By the charter of the city eleven votes are required from the sixteen councilmen to override a veto. A temporary injunction restraining the city from interfering with the rate of 5 cents straight and 1 cent for transfers was issued; the injunction, however, by its terms providing that it should not be construed to interfere in the slightest degree with the city's power to legislate respecting the conditions of street railway operation, including fare regulation.

Chas. A. Frueauff, of New York City, and Tracy, Chapman & Welles, of Toledo, Ohio, for plaintiff.

Rathbun Fuller, of Toledo, Ohio, for defendant Toledo Rys. & Light Co.

Ralph Emery and Cornell Schreiber, both of Toledo, Ohio, for defendant city of Toledo.

KILLITS, District Judge (after stating the facts as above). [1] The city of Toledo has been a party to this cause for more than two years. The issue raised when the case began has long since disappeared. The original complainant, for want of prosecution, long ago lost its right to the relief demanded in the complaint. The present controversy is between cross-complaining defendants, each of which has been in the case for some time; the city by its voluntary intervention. For more than two years certain interests of the defendant street railway company have been under the control of the court through a quasi receivership, which was undertaken upon the city's demand for relief. In addition, the city has pending in this court in this case a demand against the company to recover certain money damages. Therefore the city is in no position to question this court's jurisdiction to determine in this case the varying issues arising from time to time between it and the company. This record, however, leaves the court a sphere of action insufficient to relieve the company in the present situation without the formulation of a new issue, which has been attempted in the street railway's second amendment and second supplement to its amended cross-complaint. We have no doubt of the right of the street railway company to present this live question in this case, although to one accustomed to the reformed practice in the state courts it might seem that a new action had better have been instituted.

[2] Although the Toledo Railways & Light Company has been operating in Toledo for more than four years without a franchise, it nevertheless has the right to make reasonable use of the streets in the proper conduct of its business, until it is forbidden to continue by positive action of the city authorities, who may impose, as an alternative to ejection, reasonable conditions of use. City of Detroit v. Detroit United Railway, 172 Mich. 136, 137 N. W. 645. It is therefore no trespasser,

for the city authorities have not hitherto acted, either to eject it or to impose reasonable conditions of use.

[3] Because there is no contractual relation between it and the city of Toledo (that is, it has no franchise), the power of the city over it is limited to the pursuit of one of the two alternatives above suggested, namely, to order the company off the streets, or to prescribe terms of use which meet the law. The right of the city to eject the company from the streets cannot be questioned in any court. That would be the exercise of a public policy, the decision of which is delegated exclusively to the council.

[4, 5] Whether or not conditions of use imposed by the city authorities upon this franchiseless and privately operated public utility are fair and reasonable, provided they are not accepted by the company, is a subject of judicial inquiry (Reagan v. Farmers' Loan & Trust Company, 154 U. S. 362, 397, 14 Sup. Ct. 1047, 38 L. Ed. 1014), and within the jurisdiction of this court, because of the provisions of the Fourteenth Amendment of the Constitution of the United States (City of Cincinnati v. Cincinnati & Hamilton Traction Co., 245 U. S. 446, 38 Sup. Ct. 153, 62 L. Ed. 389, decided January 7, 1918; City and County of Denver v. Denver Union Water Co., 246 U. S. 178, 38 Sup. Ct. 278, 62 L. Ed. 649, decided March 4, 1918).

[6] When a public utility corporation is operating without a franchise, and, consequently, is not bound by any contract stipulation therefor, which is the case here, it has the right to demand for its service from time to time a rate of fare which will secure to it reimbursement for its expenditures properly incurred in rendering the service, plus a fair return upon the valuation of the plant actually employed in performing the service. Minnesota Rate Cases, 230 U. S. 352, 433, 434, 33 Sup. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18, and cases therein cited, and the recent decisions of the Supreme Court of the United States above referred to.

[7-9] It is for the public authorities, in the first instance, to regulate the rates to be charged for the service of such a corporation (Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77; Spring Valley Water Works v. Shottler, 110 U. S. 347, 4 Sup. Ct. 48, 28 L. Ed. 173; Reagan v. Farmers' Loan & T. Co., 154 U. S. 362, 397, 14 Sup. Ct. 1047, 38 L. Ed. 1014); but if such rates do not secure, in addition to a reimbursement of operating expenses, a reasonable or fair return on the actual value of the plant, to enforce them by the public authorities would be to violate the constitutional prohibition against taking property without due process of law (Brymer v. Butler Water Company, 179 Pa. 231, 36 Atl. 249, 36 L. R. A. 260). To the same effect are the decisions of the Supreme Court just referred to and many earlier decisions. The "fair return" to which the company is entitled upon the value of its plant is that rate per cent. actually received in the absence of special contract in the community where the service is rendered (Denver Case, above); and where the corporation performs a service obviously necessary and indispensable to the well-being of the community, the capital of the company upon which the "fair return" is to be computed should be the fair and reasonable value of the plant of the corporation engaged

in such service valued as the equipment of a going concern (Denver Case). In the Denver Case the Supreme Court found that 6 per cent. was the proper percentage, because of the same conditions respecting use of money prevailing in Denver which exist also in Toledo, wherefore we should take that rate per cent. as equally the one appropriate here.

It follows from the foregoing that there is no obscurity as to the rights of the company, or as to the limitations of the city's power of action, or as to the duty of the court when its authority is invoked by either party. The law is definitely and finally settled. The court can do nothing more than to refuse any relief to the street railroad company if the council tells it to get off the streets. It can do nothing less than to tell the city that it must allow to be collected a compensation for service which meets the conditions above established, so long as it permits the railroad to operate at all. There is no third course which the court can take, unless the parties agree.

[10] Primarily the duty of fixing regulations (including rates of fare) for street occupancy is upon the city authorities; it is only when the city in that behalf acts unreasonably, or fails to act at all, that the court has any function. The court cannot fix rates of fare to which the city is bound against its consent. Its power is nothing more than to say whether or not a particular condition of street occupancy, such as the fare to be charged, is reasonable, and if it finds such condition to be unreasonable, and a substantial interference with the constitutional rights of the company, the court may set such condition aside. If the city does not act, or until the city acts, the company, of its own motion and without the city's approval, may establish rates to which the public must conform, and to protect which it may appeal to a court. It has the same right to fix the price at which it will sell its service as the merchant has to put a price on his goods, and until the company's price is revised, legally, by the city or in judicial proceedings, it must be met by the car rider, if he would ride at all.

This is the bald situation in Toledo, a situation which is the logical and necessary result of a failure to agree upon a franchise contract. The city has narrowed its range of control by permitting the franchise to expire. What it might do in enforcing a franchise contract, it cannot do itself now, and has no right to ask the same of a court. Now, the city is hampered by economic conditions which it absolutely must regard in order to act lawfully. If the city council should now undertake its privilege and duty to fix rates and regulations for street car service, it must make such conditions conform to the economic burdens now borne by the company; otherwise, its action would be subject to overthrow by the courts on constitutional grounds. This is the compelling force of all judicial action on the subject. This power of the court has for a corollary the authority to say, when its jurisdiction is involved, whether a rate demanded by the company shall stand until the city acts. Lawful action thereon thereafter taken by the city would supersede the court's decree, which, obviously, would have but a temporary office. It is unreasonable to say that the city, by neglecting its obvious duty, could compel the company to leave so embarrassing a

question open, to be subject of contention at the pleasure of any car rider.

[11-14] It ought to be clear to every understanding mind that it is the present burden of expense upon the franchiseless corporation which persons receiving the benefit of its service should be compelled to bear at any one period. The inconvenient consequence of this principle is that a fluctuation of rates of fare is theoretically possible according as the expense of furnishing the service rises or falls with the fluctuation in the cost of labor and materials, for the operating company must bear the burdens as well as the advantages of its franchiseless condition, and has as clear a duty to reduce the fare when expenses fall as it has a right to increase when expenses rise. Public convenience and every demand of plain common sense, therefore, suggests that in times such as these, when prices and expenses are so extraordinarily liquid, when materials indispensable for operation, maintenance, and repair are extraordinarily high, and when high living expenses of the laboring man compel him to ask for higher wages, some principle of accommodation should be agreed upon, with reasonable conditions and concessions, propounded and accepted in a reasonable spirit on both sides, in negotiations between the city and the company.

On the motion for temporary injunction, two queries are before the court for answer: First, is the rate of fare which the company asserts it must now charge the rate which, in all probability, it has the right to ask, for the time being, in order to secure the return to which the authorities above cited say it is entitled? and, second, do the facts indicate a probable cause for asking this court to protect it in its demand? We are hearing a motion for a temporary injunction, decision of which involves the exercise of a discretion as the probabilities appear. We take up the questions in this apparently illogical order because, if the company shows a compelling probability that it should have what it demands, the fact that the city, charged by law with the duty of first passing upon those demands, deliberately ignored the plain force of the facts upon which the company relies, has some influence in determining whether or not the court should act. Official arbitrariness is not an infrequent cause of official oppression, and its presence is frequently an augury that rights which should be officially protected may be officially neglected, or even invaded.

The court is very strongly impressed by the testimony heard that the rate of fare which the company demands is necessary, at present, at least, if the company is to receive what the law says it should have. This is not the occasion when it should be determined what the fair valuation of the company's investment in its street car service is. We have no full data on which a judgment on that question can be definitely predicated. This much is entirely clear, however: That the valuation upon which what the Supreme Court calls a fair return should be calculated is probably very much more than $8,000,000. Taking it at this figure, however, which the testimony indicates to be an estimate much below the minimum even, the company is lawfully entitled to a rate of fare which will meet its current expenses and provide for it a return above mere operating expenses of at least

$480,000 annually. It seems certain that the very best that can be said for the city, under any circumstances, is to say this; and it is the clear indication of the evidence before us that a fare of five cents, with a one-cent charge for transfer, will, under present circumstances, not pay the company's operating expenses enhanced by an increase of wages, and even this surplus. Indeed, the city, if we may judge from the character of its argument to the court, is not seriously combating this proposition. It does not argue anywhere in its brief that this rate is exorbitant. All the city now contends for is to try some lower rate of fare by way of experiment, and see what the result will be, although all the evidence before this court indicates most clearly that the mayor's proposition of eleven tickets for fifty cents, with free transfers, will not meet what is due the company.

We are unable to see any right in the mayor to ask the company to submit to an experiment which present conditions show will be a losing one. From his testimony, and the arguments submitted in behalf of the city, it does not appear that he had any confidence that this rate was adequate; for he says that, in fixing upon it, he was moved by the theory that the car rider, the car men and the car company each must sacrifice something in the present emergency. But the mayor of Toledo has no right to demand of this franchiseless company that it render service to the city at a sacrifice, nor has he the right to say to the employés of the company that they must work for less wages than their services are fairly worth. He ignores the fact that it is no sacrifice for the car riders of the city to pay any rate of fare which is what the service to them actually costs, and the economic truths that they should pay what the service to them costs, that the car men are entitled to a reasonable wage, and that the car company is entitled to a compensation which will allow it to live. No one has the right, whether an official or not, to ask either the car men or the car company to make "sacrifices" that the car riders may get service at less than cost, and, of course, the court can listen to no such proposition as that to support an insistence that an inadequate rate should be imposed.

The Supreme Court of the United States in one of the cases cited by the city (Wilcox v. Consolidated Gas Company, 212 U. S. 19–41, 29 Sup. Ct. 192, 53 L. Ed. 382, 48 L. R. A. [N. S.] 1134, 15 Ann. Cas. 1034), as well as in another case in the same volume (Knoxville v. Water Company, 212 U. S. 1, 29 Sup. Ct. 148, 53 L. Ed. 371), recognizes that the proof of the inadequacy of a rate proposed by the city may be so clear and convincing that a federal court is warranted in enjoining its imposition in advance of putting it in operation. That is the state of the evidence here on the question of the necessity of the company's rate. The evidence comes from reliable sources, the most important being the city's own out-of-town expert. For the purpose of the motion, then, for a temporary injunction, we find no difficulty in holding that it is probably necessary for the company to charge the rate demanded.

Is the second support of the motion made in the evidence? Does the evidence suggest a probable cause for the intervention of this court to restrain oppressive action on part of the city or its officers? To an-

swer this question the court is justified from the evidence in definitely concluding that the company was in a serious predicament when its application for a temporary restraining order was made. While it was not threatened with a technical strike, which, under the rules of the labor organization to which most of these trainmen belonged, seems to have been impossible, yet it was confronted with a situation the probable outcome of which seemed to be so serious a retirement of its operatives from its service that the combined effect would be that of a disastrous strike. The company quickly recognized that its men were justified as individuals in leaving its service because of the inadequacy of compensation which they received, and it is very clear to this court that it was not only the moral duty of the company to materially increase compensation to its trainmen, but it was as strongly the moral duty of the community to indorse the company's action in that behalf; it was plain that, unless the company did in fact increase its expense of operation very materially through an increase in wages, its service would be crippled, not only to its own loss, but to the very serious loss of the community itself.

But, to meet the morally just demands of its men, concededly the company must enhance its revenue. The mayor recognized that fact, for he proposed to indorse an increase of fares, and, upon the question of how to meet the serious emergency confronting the company, the only disagreement between it and the city authorities was as to the extent the increase should go. The company, not being controlled by franchise limitations, was not obliged to consult the city in fixing fare. As a matter of courtesy, or expediency, or both, it did invoke the city's co-operation, only to meet an ultimatum from the mayor which amounted to a threat. Of course, the mayor did not formulate his threat in definitely concise and unmistakable language; but that his attitude was one of hostility to the company, conveying a definite impression that he would go to any length possible to compel the company to meet his ultimatum, however embarrassing that would be, no moderately acute mind can fail to conclude from the testimony and evidence in this record. He plainly intimated that he would stand irrevocably upon the proposition of a maximum fare of eleven tickets for fifty cents, to the end of vetoing any legislation more favorable to the company than that. The mayor, through his veto power, is able to nullify five-sixteenths of the legislative authority of the city.

With the history of this controversy as it is in this record, to which we shall hereafter allude briefly, it would be a credulous person indeed who would assume it to be possible to get 11 councilmen to override the mayor's veto of an ordinance fixing fares at more than the mayor's figure, if, indeed, the council could be induced to pass any ordinance at all. In addition to the threat of a veto, if the counsel should act beyond the mayor's limit, the company was given to know that if it got into deep trouble with its employés, and gave thereby the mayor any excuse to appeal to some other authority to secure unembarrassed street car service, such excuse would be promptly accepted. Substantially, as the evidence shows, the mayor of the city, upon whom, with the council, rested just as great a responsibility for the settlement

of the difficulties in which this public utility was involved as upon the latter's managers, was in the attitude of saying to this company:

"Act against our arbitrary will at the peril of some proceeding instituted in the name of the city, which will result in taking from you the management of your company."

It is difficult to understand just what Mayor Schreiber meant when he said with vehemence to the representatives of the men and to the company, in effect, that, whatever might be the outcome of the controversy between the company and its employés, the street cars would run. It is inconceivable that he intended to use the power of the city to compel the dissatisfied employés to remain on the cars, and it is equally inconceivable that he intended any other action of a character friendly to the company. To assume that he would do anything more than he was most obviously compelled to do by way of helping the company would be to ignore the official record he has made in the past of hostility to it, of which the testimony concerning his present attitude as mayor gives no indication of repentance. Of course, it is not to be assumed that he had in mind anything that would be void of the color of legal justification. There is nothing, however, is this case to assure this court that he would have approached the executive problems confronting him in a spirit other than hostile toward the company, had the company's troubles resulted in its inability to maintain service. Of course, whatever he proposed to do was under color of his office, which fact meets the contention that the company's complaint is against individuals, and not against the city.

Some significance, as indicating the character of the mayor's appreciation of his responsibilities, may be attached to this paragraph in the city's answer, which is subscribed by Mr. Schreiber himself as one of the counsel for the city:

"This defendant [the city of Toledo] denies that the same [the operation of city street car system] is a vital necessity to the citizens and residents of said city, and denies that any interruption in the operation of the street car system of said company would work great and irreparable harm to said company, or to the citizens and residents of the city of Toledo as a whole, or to the interest of the United States."

We must assume that the mayor means here what he says, and therefore it is justifiable to think that this formal expression of his idea, deliberately placed in the city's defense to the present issue, indicates the degree of serious consideration he would give to a matter affecting the street car company and its public service. This averment in the answer suggests either a judgment on the part of the chief executive concerning the relationship to the city of its only organized means of intercommunication with which there must be an almost unanimous disagreement on the part of those who are alive to the city's welfare, or a hostility to the street car company so contemptuous and besetting as to render impossible to him a fair consideration of its problems. Whatever may be the reason for this remarkable statement, it serves to interpret the mayor's attitude toward the company's problems, and justifies an impression that a full measure of proper appreciation of them, and of the importance of a solution of them, with equal regard

to the company's rights and the city's service, is not now to be expected in the executive office.

We prefer to believe that, if once the question were put up to the mayor, he would do something to keep transportation going at all hazards, and that the remarkable statement above quoted justifies a feeling, only, that in so doing he might be substantially inconsiderate of the plain rights of the company. Whatever may have been in his mind when he said emphatically that under any circumstances the street cars would run, it seems that it must have been one or both of two ideas of extraordinary procedure, rather than that which the law, as well as common sense, plainly indicates to be the proper method, namely, a harmonious co-operation between the company and the city, through official action in which the uppermost thought would be the securing of justice both to the car riders and the company, and whereby the latter might maintain its system under reasonable and fair regulations, and the former would pay for the service what its rendition reasonably costs. He may have thought, in the event of the failure of the company to maintain full service, to invoke the assistance of a state court. In fact, many things in evidence suggest that that was in his mind. Probably, with the record here as the city itself has allowed it to be made and to remain, such a course would have resulted in a conflict of courts, in which the advantage would be with the federal court; but even a futile attempt of this sort is capable of involving the company in embarrassment, to prevent which a court of equity might interfere.

Although the company has the right to cease at once its service and take up its tracks (Cleveland Street Railway Company v. City of Cleveland, 204 U. S. 116, 27 Sup. Ct. 202, 51 L. Ed. 399), it is probable that the national emergency would impel presidential seizing of the street car system for operation, to protect war industries, and the mayor might have had this course in mind also, and to apply to the federal executive to that end. This action, which the company could not well oppose, would obviously be detrimental to its interests, provided that it wanted to maintain its system itself, and assuming that, if a fair treatment under the law were accorded to it by the city, it could carry on its service. An attempt in this way, by the city's action under these circumstances, to take the management of the system away from the company, might call for the intervention of a court of equity.

Neither of these courses could be invoked by the mayor without contravening the constitutional rights of the company, unless the company, because of its own deficiency of resource, was in default of its duty to the public. The city officials cannot be permitted to maneuver and jockey questions affecting the company with which they should deal fairly and impartially and fully, and then, because their official neglect, or worse, brings the company into unmerited embarrassment, seize upon that situation as an excuse to take away from it the control of its affairs. Courts are not so impotent as to be incapable of furnishing relief against such a situation. Whether or not the mayor's attitude was seriously threatening can only be cor-

rectly estimated by recourse to the history of the prolonged street car controversy, to Mr. Schreiber's previous relationship to that controversy here, and with reference to the sensitive condition of public sentiment on the part of a great portion of the citizenship using the street car service.

Four years have not yet passed since the company found itself compelled to carry millions of passengers free, because the present mayor of Toledo had been one city official to assure the car-riding public that three cents was a rate so entirely adequate as to be almost sacred, and that to demand more was to attempt extortion, and because the then city officials were indicating official protection to the dupes of the three-cent propaganda should the latter "stand on their rights" to ride for a rate which the city, later, confessed to be palpably confiscatory. The court cannot be obtuse to the impression that there remains yet enough of this unreasonable sentiment to add almost an intolerable burden to the company, if it should attempt to exercise its plain rights, unsupported, even if not definitely antagonized, by the mayor. With the author of the Schreiber three-cent ordinance and the measure demanding $250 per day street rental in the mayor's chair, fulminating an ultimatum that a rate must be adhered to as impracticable now as three-cent fare was in 1913, it is not to be wondered that the company feared that its rights were to be disregarded by the city, and that it was at the peril of some action under color of office which, at the least, would appeal to the imagination of that portion of the public which may yet feel, as it has been wrongly educated to feel, that antagonizing the street railway company is the highest form of official service, and which would, consequently, embarrass the company precisely as it was unfairly dealt with by the city four years ago.

This court is prepared to say that there is power in a court of equity to enjoin acts, lawful even, by the mayor of Toledo, the results of which would work inequity to the street railway company; that it can by its decree confine the parties to this case to that orderly procedure in the determination of their relations to each other which the law clearly points out. The city of Toledo is in this case, and has been for more than two years, with an application to the court for the security of an unembarrassed street car service in the city of Toledo, and with that application still pending, and the city here in that attitude, we do not propose to let its representatives in this emergency be free to take any extraordinary steps which will surely and necessarily embarrass the company in the performance of its plain duty to serve the public. However the mayor might act, whatever was in his mind when he said that the street cars would run in any event, no action he could take but would be within the condemnation of a court of equity, as a plain invasion of the equities of the company, unless it was either the securing by legislation from the council that which would permit the company to serve the public and at the same time to live as a business proposition or a direction to get off the streets.

We do not propose to permit an order to run out of this court which will restrain the city authorities of Toledo from the perform-

ance of any legitimate function in connection with this company. No order which we can issue can have any vitality which interferes with the city's prerogatives in that respect, but the city is limited to but one of the two courses of action hitherto indicated. Failing to get from the city any reasonable proposition of adjustment in this emergency, the company exercised its plain right to fix the figure at which it could for the time being meet the cost of its service, enhanced by the just demands of its men for increased compensation. All that the court can do is to preserve the status which the company has created, if upon investigation it appears that that is reasonable, leaving the city free to exercise all the wisdom, judgment, and moral courage which abides in its officiary in the settlement of terms which the company can accept.

It is not the law, although so stated in the brief of the city, that the council may prescribe conditions which, if unacceptable to the company, involve, ipso facto, a duty upon the company to abandon its service and leave the streets. The responsibility of determining whether the public of Toledo shall be served with a street car system or not cannot be so sidestepped by the city's officiary. In the hearing four years ago, this court decided, respecting the so-called Schreiber ordinance, that the company could reject unreasonable terms, and at the same time continue its service with the expectation of getting proper compensation, notwithstanding the hostile attitude of the city, until the city affirmatively directed the company to leave the streets as an alternative to the acceptance of unreasonable terms, and that holding finds itself amply justified by the recent decisions of the Supreme Court elsewhere referred to, particularly the case of Cincinnati v. Cincinnati & Hamilton Traction Company. So the temporary injunction which the court proposes to grant here will leave the city absolutely unhampered to legislate upon the subject which has been neglected for so many years. It will likewise, of course, leave the company free to apply to the court for relief against unreasonable legislation, unless the city authorities are brave enough to couple with unreasonable provisions of its legislation a specific alternative that the company must accept them or quit the streets.

It is not conceded, notwithstanding the brief of the city, "that the court cannot enjoin legislative action, and it is equally clear that the court cannot judge in advance that certain legislative action, if taken, would be void." While we are not attempting here to enjoin legislative action—just the contrary, we are trying to encourage it—yet it has been adjudicated that in extreme cases, and this is surely one, that may be done. Clearly foreshadowed legislative action of the city of Kalamazoo was enjoined by Judge Denison in Knickerbocker Trust Company v. City of Kalamazoo (C. C.) 182 Fed. 865, and much of the reasoning of that court applies here.

Much as the court regrets it, we expect this contention to remain with us until the sensible people of Toledo insist that the problem be approached from a different standpoint than that hitherto occupied generally by the city's official representatives. No injunction will issue from this court, temporary or otherwise, which will re-

strain the city from lawfully employing its full powers in any particular; but we may and will enjoin the city, and any one who assumes to act in the city's name, from taking any extraordinary action which has a tendency to embarrass the street railroad company in the performance of its service to the city, so long as the company is capable of and willing to serve the city with street car transportation.

A temporary injunction is to issue on the lines of the amended restraining order.

UNITED STATES v. WHEELER et al.

(District Court, D. Arizona. December 2, 1918.)

No. C-692.

1. ARMY AND NAVY ⟸20—SELECTIVE SERVICE ACT—DUTY OF REGISTRANTS TO REMAIN AT RESIDENCE.
   Neither the Selective Service Act nor the regulations prescribed by the President required registrants to remain in their permanent homes and actual places of legal residence until drafted into military service, etc.

2. CRIMINAL LAW ⟸5—WHAT LAW GOVERNS.
   The offense of forcibly taking a person in the state and carrying into another denounced by Pen. Code Ariz. 1901, § 186, as well as the offense of false imprisonment denounced by section 205, are within the police power reserved to the states by Const. Amend. 10.

3. CRIMINAL LAW ⟸5—WHAT LAW GOVERNS.
   As the congressional legislation against kidnapping found in Criminal Code, §§ 268–271 (Comp. St. 1916, §§ 10441–10444), is expressly limited to the constitutional authority of Congress to legislate against slavery, etc., under Const. Amends. 13, 14, this amounts to a legislative declaration that kidnapping not so limited was left to be dealt with by the states under their police power; the expression of one thing excluding others.

4. CONSPIRACY ⟸29—OFFENSES—FEDERAL LAW.
   It was not a violation of Criminal Code, § 19 (Comp. St. 1916, § 10183), denouncing conspiracy to injure, etc., any citizen in the exercise of any right secured by the Constitution or laws of the United States for defendants to conspire to deport from Arizona citizens of the United States some of whom had registered under the Selective Service Act; the conspiracy not depriving those conspired against of rights secured by Const. art. 4, § 2, or Amendment 14, the federal statutes against kidnapping, etc., being inapplicable, and the Selective Service Act not requiring registrants to remain at their legal residences.

5. CONSPIRACY ⟸29—CONSTRUCTION OF STATUTE.
   Section 19 of the Criminal Code of the United States (Comp. St. 1916, § 10183) has the same meaning as when it was enacted as section 6, Act May 31, 1870. As there enacted it was intended to protect the political rights of citizens of the United States in the several states, and not their civil rights as mere persons, residents or inhabitants. Baldwin v. Franks, 120 U. S. 678, 7 Sup. Ct. 656, 763, 30 L. Ed. 766.

6. CRIMINAL LAW ⟸95—JURISDICTION—FEDERAL COURTS.
   That it might be impossible to enforce the state law against kidnapping, etc., against defendants who conspired, etc., to deport citizens of the United States from Arizona, does not give the federal court jurisdiction of the prosecution; no federal law being violated.

Harry C. Wheeler and others were indicted for conspiracy in violation of Criminal Code, § 19. On demurrer. Demurrer sustained, and indictment quashed.

William C. Fitts, Sp. Asst. Atty. Gen., and Thomas A. Flynn, U. S. Atty., of Phœnix, Ariz.

E. E. Ellinwood, John Mason Ross, and Clifton Mathews, all of Bisbee, Ariz., for defendants Wilcox, Douglas, Rae, Merrill, Sherman, Cunningham, Allison, Watkins, Shattuck, Brophy, Tovrea, Hunt, Gannon, Johnson, Bledsoe, Hodgson, Howe, Sims, Snodgrass, Dowell, and Stout.

MORROW, Circuit Judge. This is a demurrer to an indictment charging the defendants with a conspiracy in violation of section 19 of the Criminal Code of the United States (Act March 4, 1909, c. 321, 35 Stat. 1092 [Comp. St. 1916, § 10183]).

The objection is that the facts stated in the indictment do not charge an offense within the constitutional provisions of that section. The section provides as follows:

"Sec. 19. If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same, or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than five thousand dollars and imprisoned not more than ten years, and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States."

The section was originally contained in section 6 of "An act to enforce the right of citizens of the United States to vote in the several states of the Union and for other purposes," approved May 31, 1870 (16 Stat. 140, 141, c. 114). It was afterwards contained in the Revised Statutes of the United States, enacted June 22, 1874, as section 5508, in chapter 7, entitled "Crimes against the Elective Franchise and Civil Rights of Citizens." The section is now contained in chapter 3 of the Criminal Code, bearing the same title as chapter 7, containing section 5508 in the Revised Statutes, did prior to the enactment of the Criminal Code.

This case is known to the public as the "Bisbee Deportation Case." It involves an alleged conspiracy on the part of the defendants, continuing from the 1st to and including the 12th day of July, 1917, to deport from Bisbee, in the state of Arizona, 221 persons to the state of New Mexico. The conspiracy was plainly a single act on the part of the defendants against all the persons to be deported; but for the purpose of classifying such persons with respect to their citizenship, and liability to the selective draft, the indictment has been split up into four counts, so as to charge the offense as a conspiracy directed against different classes of persons. This may be done, subject to certain limitations. United States v. Howell (D. C.) 65 Fed. 402; Orth v. United States, 252 Fed. 568, — C. C. A. —. These four counts

classify the persons against whom the conspiracy was directed as follows:

In the first count the whole number of 221 persons are described as citizens of the United States.

In the second count 25 of this number of persons are described as citizens of the United States residing in, but not citizens of, the state of Arizona.

In the third count, 196 of the persons mentioned in the first count are described as citizens of the United States and of the state of Arizona, residing in Arizona. There is also in this count a name not mentioned in the first count, making the number in this class 197. No objection is made to the indictment on this account.

In the fourth count 60 persons mentioned in the first count are described as citizens of the United States and of the state of Arizona, residing in said state, who were male persons between the ages of 21 and 30, required by the proclamation of the President of the United States, dated May 18, 1917, to present themselves on June 5, 1917, and who did present themselves, for and submit to registration under the provisions of the act of Congress approved May 18, 1917 (40 Stat. 76, c. 15).

It is alleged in the first count that the 221 persons against whom the conspiracy of the defendants was directed—

"were citizens of the United States, residing in the county of Cochise, in the state and in said district of Arizona, in the peace of said county, state, and district, and then and there as such citizens of the United States were exercising the right and privilege pertaining to citizens of said state peaceably there to reside and remain and to enjoy the blessings of liberty rather than in another state of the United States, and the right and privilege pertaining to citizens of said state to be immune from unlawful deportation from that state to another state, and then and there were not persons charged in any state with treason, felony, or other crime, who had fled from justice of said state, and had been found in said state of Arizona, or persons then in said state of Arizona, who had committed crimes or offenses against the United States in another state, or in other states, or persons not sentenced or imprisoned in a prison or prisons located in another state, or any other states, or persons subject to extradition to a foreign country or foreign countries."

It is charged that the defendants conspired and confederated together—

"to injure, oppress, threaten, and intimidate said citizens of the United States in the free exercise and enjoyment by them, respectively, of certain rights and privileges secured to them as such citizens by the Constitution and laws of the United States; that is to say, the rights and privileges aforesaid."

The rights and privileges "aforesaid" were the—

"right and privilege pertaining to citizens of the said state peaceably there to reside and remain and to enjoy the blessings of liberty rather than in another state of the United States, and the right and privilege pertaining to citizens of said state to be immune from unlawful deportation from that state to another state."

It is further charged that—

"Said unlawful and felonious conspiracy, combination, confederation, and agreement then and there was one for injuring, oppressing, threatening, and

intimidating said citizens of the United States in the free exercise and enjoyment of said rights and privileges, by unlawfully and with force and arms driving and conveying said citizens in a body from their said places of residence in said state of Arizona to and into another state, to wit, New Mexico, and threatening said citizens with great bodily harm and death if they should return or endeavor to return to said state of Arizona."

It is further charged that certain of the defendants in and for executing such conspiracy did certain overt acts set forth in the count.

The second count is the same as the first count, except that it is alleged that the 25 persons against whom the conspiracy was directed are described as citizens of the United States residing in, but not citizens of, the state of Arizona, who—

"were exercising the right and privilege pertaining to citizens of other states of the United States, other than said state of Arizona, peaceably there to reside and remain and to enjoy the blessings of liberty and the right and privilege of being immune from unlawful deportation from that state to another state."

The charge in this count is that the defendants conspired and confederated together—

"to injure, oppress, threaten, and intimidate the citizens in this count named in the free exercise and enjoyment by them, respectively, of certain rights and privileges, secured to them as such citizens by the Constitution and laws of the United States; that is to say, the rights and privileges in this count aforesaid."

The rights and privileges "in this count aforesaid" are the rights and privileges—

"pertaining to citizens of other states of the United States, other than said state of Arizona, peaceably there to reside and remain and enjoy the blessings of liberty and the right and privilege of being immune from unlawful deportation from that state to another state."

The third count is the same as the first count, except that it is alleged that the 197 persons therein named, against whom the conspiracy of the defendants was directed, were citizens of the United States and of the state of Arizona.

The fourth count is substantially the same as the first count, except that it is alleged that the 60 persons against whom the conspiracy was directed are described as—

"citizens of the United States and of the state of Arizona, residing in the county of Cochise, in said state, and in said district of Arizona, and were respectively male persons between the ages of 21 and 30, * * * who were then and there required by the proclamation of the President of the United States, dated May 18, 1917, to present themselves, and did present themselves, for and submit to registration under the provisions of the act of Congress approved May 18, 1917, * * * at divers registration places in divers precincts, * * * these precincts being the precincts where the citizens mentioned in this count of this indictment had their permanent homes and actual places of legal residence."

Against these persons so subject to the selective draft, it is charged that the defendants conspired—

"to injure, oppress, threaten, and intimidate in the free exercise and enjoyment by them, respectively, of the certain right and privilege secured to

them as such citizens by the Constitution and laws of the United States; that is to say, the right and privilege in the count aforesaid."

The right and privilege in the count aforesaid was—

"the right and privilege pertaining to citizens who had presented themselves for, and who had submitted to, registration as aforesaid, of remaining unmolested in their said permanent homes and actual places of legal residence, subject to draft and until drafted under the provisions of said act of May 18, 1917, into the military service of the United States."

[1] The act did not require registrants under the act to remain in their permanent homes and actual places of legal residence until drafted into the military service of the United States, nor did the selective service regulations prescribed by the President of the United States make such a requirement; but, on the contrary, the location of the registrant elsewhere than at his permanent home and actual place of legal residence at the time of his call into the military service was provided for in such regulations, and the absence from home of the registrant in no way prejudiced his rights under the act or under the regulations of the President.

Stripped of the verbiage required to state the various elements of the alleged conspiracy, we find that the injury charged in the four counts of the indictment may for the purpose of the present inquiry be reduced to the single charge of a conspiracy to injure, oppress, threaten, and intimidate certain citizens of the United States in the free exercise and enjoyment of the right and privilege, pertaining to citizens of the state of Arizona, peaceably there to reside and remain and to enjoy the blessings of liberty rather than in another state of the United States, and the right and privilege pertaining to citizens of said state to be immune from unlawful deportation from that state to another state.

[2] The offense which the defendants are charged to have conspired to commit is, then, an offense against the right and privilege of the persons conspired against, secured to them as citizens of the state of Arizona, and upon examining the law of that state we find that the charge in the indictment is correct in both form and substance, and that protection has been provided for such persons under the police power of the state. Section 186 of the Penal Code of 1901 of the state of Arizona provides:

"Every person who forcibly * * * takes * * * any person in this state, and carries him into another * * * state * * * is guilty of kidnapping"

—for which a punishment has been provided. Another aspect of the case is provided for in section 205 of the Penal Code, where it is enacted:

"False imprisonment is the unlawful violation of the personal liberty of another"

—for which a punishment has been provided.

The right of protection furnished by this police power of the state is a right reserved to the state under the Tenth Amendment of the Constitution of the United States, providing that:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

Whether this state protection is exclusive or not in a particular instance depends upon the question of whether the power has also been granted by the Constitution to the general government expressly or by necessary implication.

[3] Congress has provided a statute against kidnapping, to be found in sections 268–271 of the Criminal Code (R. S. §§ 5525–5527, and Act June 23, 1874 [Comp. St. 1916, §§ 10441–10444]); but this legislation is expressly limited to the constitutional authority of Congress to legislate against slavery, involuntary servitude, and peonage under the Thirteenth and Fourteenth Amendments to the Constitution. The Peonage Cases (D. C.) 123 Fed. 671; Clyatt v. U. S., 197 U. S. 207, 25 Sup. Ct. 429, 49 L. Ed. 726. This amounts to a legislative declaration that kidnapping, not so limited, was left to be dealt with by the states under their police power. "Expressio unius est exclusio alterius."

[4, 5] The question is broadly stated in the brief of the Assistant Attorney General in support of the indictment in this case as follows:

"We admit that the fundamental rights of a person as such, or of a citizen as such, are not secured to him by the Constitution of the United States. The rights to life, liberty, and the pursuit of happiness, for instance, existed before the Constitution, were not created by it, and hence are not secured by it, but by the Constitution and laws of the several states. If, however, these fundamental rights are brought into connection with the federal government, the situation is changed, and the right then becomes one secured by the Constitution of the United States."

He then proceeds to explain what he means by "fundamental rights" being "brought into connection with the federal government."

"For example," he says, "ordinarily the right to remain in any one place, or to move freely from place to place, is not secured by the Constitution of the United States; but if state boundaries are brought into the question, if the right claimed be to remain in one of the several states of the federal Union, as distinguished from another, or to move freely from one of the several states into another state of the federal Union, it then becomes a right secured by the Constitution of the United States"—citing Crandall v. Nevada, 6 Wall. 35, 18 L. Ed. 745; U. S. v. Patrick (C. C.) 54 Fed. 338–347.

In the case of Crandall v. Nevada, the question related to a capitation tax of $1 imposed by the statute of the state of Nevada—

"upon every person leaving the state by any railroad, stagecoach or other vehicle engaged or employed in the business of transporting passengers for hire."

The Supreme Court of the state held that this tax was not an impost on exports, nor an interference with the power of Congress to "regulate commerce among the several states," and upheld the statute. The case was taken to the Supreme Court of the United States, where the question whether the tax was an impost on exports, or was an interference with the powers of Congress to regulate commerce among the several states, was passed over, and the tax held to be the exercise of an authority by the state, affecting the functions of the

federal government and inconsistent with its constitutional operations. In support of this doctrine, the court refers to the extensive operations of the federal government, conducted through its various departments, with the citizens of the several states, and the necessity that such communications should be free and open, without any obstruction on the part of any of the states, and the court finds that the right of the state to impede or embarrass the constitutional operations of that government, or the rights which the citizens hold under it, has been uniformly denied. The court quotes from the opinion of Chief Justice Marshall in the case of McCullough v. Maryland, 4 Wheat. 316, 4 L. Ed. 579, finding:

"That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very means, is declared to be supreme over that which exerts the control—are propositions not to be denied. If the states may tax one instrument employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax the patent rights; they may tax the papers of the custom house; they may tax judicial process; they may tax all the means employed by the government to an excess which would defeat all the ends of the government, This was not intended by the American people. They did not design to make their government dependent on the states."

Manifestly this finding of the Supreme Court, that the state has no power to obstruct or burden the operations of the federal government, has no application to the facts alleged in the present indictment. The facts here stated do not relate to any act of the state, and do not charge any intent or purpose on the part of the defendants to obstruct or burden the operations of the federal government, or to obstruct or burden the transportation of passengers from one state to another. There is a recital in the indictment relating to the crossing of the state boundary by the persons against whom the conspiracy was directed. Treating this recital as a charge, it does not state any fact from which an inference may be drawn that it was the intent or purpose of the defendants to burden or in any way obstruct or interfere with the operations of the government, to obstruct, burden, or impede the transportation of passengers from one state to another, or to prevent or obstruct the persons against whom the conspiracy is alleged to have been directed in moving freely from Arizona into any other state.

We do not see how the decision of the Supreme Court in Crandall v. Nevada can be held as decisive of the present case.

In the case of U. S. v. Patrick (C. C.) 54 Fed. 338, the defendants were indicted for conspiracy and murder under the first clause of section 5508 (section 19 of the Criminal Code) and section 5509 of the Revised Statutes. The conspiracy charged against the defendants under section 5508 was to injure, oppress, threaten, and intimidate certain designated citizens of the United States in the free exercise and enjoyment of a right and privilege secured them by the Constitution and laws of the United States; three of these persons are described as deputy collectors of internal revenue of the United States, and two

as deputy marshals of the United States, and another as a person summoned as a "posse."

The particular right and privilege alleged to have been secured to these persons by the Constitution and laws of the United States and in the free exercise and enjoyment of which the conspiracy was formed and prosecuted to injure, oppress, threaten, and intimidate was the duty, right, and privilege on the part of the deputy collectors of internal revenue to make searches for and seizures of distilled spirits upon which the tax imposed by the laws of the United States had not been paid, and the duty on the part of the deputy marshals and of the person summoned as a "posse" to aid and assist in the search for and seizure of such distilled spirits, and the arrest of persons who might be discovered in the possession of such distilled spirits. All engaged in the performance of official duties for and on behalf of the federal government.

In support of the demurrer to the indictment in that case it was contended that the statute had for its object the protection of citizens in the free exercise and enjoyment of the rights and privileges secured to them as citizens by the Constitution, and not for the protection of officers of the United States engaged in the performance of duties as such. To this contention Judge Jackson, afterwards a Justice of the Supreme Court, replied:

"In respect to citizenship, and the rights and privileges incident thereto, it should be borne in mind that we have in the political system of this country, since the adoption of the Fourteenth Amendment to the Constitution, if such did not previously exist, both a national and state citizenship, corresponding with our dual form of government, state and federal, which owes allegiance to and is subject to the jurisdiction and entitled to the protection of each government within the sphere of their respective sovereignties. 'The same person may be at the same time a citizen of the United States and a citizen of the state; but his rights of citizenship under one of these governments will be different from those he has under the other. The government of the United States, although it is, within the scope of its powers, supreme, and beyond the states, can neither grant nor secure to its citizens rights or privileges which are not expressly or by implication placed under its jurisdiction. All that cannot be so granted or secured are left to the exclusive protection of the states.' U. S. v. Cruikshank, 92 U. S. 542 [23 L. Ed. 588]. Speaking generally, the Constitution and laws * * * add nothing to the rights of one citizen as against another, nor do they aim to protect one citizen from personal injury or violence by another within the limits of a state. These are matters coming properly within the sovereignty and jurisdiction of the states. But in respect to rights and privileges derived from the United States, or secured by their Constitution or laws, and exercised by their authority, within the scope of their powers and the sphere of their jurisdiction the general government may, under the legislation of Congress, protect its citizens. * * * The statute applies to any citizen in the exercise 'of any right or privilege secured to him by the Constitution or laws of the United States.' This language does not indicate or fairly imply that the right or privilege secured and exercised must be such right or privilege as is common to all citizens of the United States as such."

The case reviews the cases upon the question, and, referring to the fundamental rights which belong to any citizen as a member of society and who as such is protected by the state, quotes from U. S. v. Cruikshank, 92 U. S. 553, 554, 23 L. Ed. 588, where the Supreme Court said:

"Sovereignty for this purpose rests alone with the states. It is no more the duty or within the power of the United States to punish for a conspiracy to falsely imprison or murder within a state than it would be to punish for false imprisonment or murder itself."

The court concludes that sections 5508 and 5509 are confined to rights and privileges which are created or secured by the Constitution, wherein depends the authority of Congress to legislate for the protection of its citizens, and that such authority can never be allowed to extend to offenses affecting rights and privileges of citizens which exist by state authority independent of the Constitution and laws of the United States. The indictment was accordingly held sufficient in charging a conspiracy to injure, oppress, threaten, and intimidate citizens in the free exercise or enjoyment of the rights and privileges secured to them as agents or officers of the government discharging functions conferred or exercising rights and privileges secured by its laws and for its benefit.

It is clear that this case does not support the present indictment. The persons against whom the conspiracy of the defendants is alleged to have been directed in this case were not officers of the federal government, nor were they exercising any authority under that government. In the Patrick Case, had the persons conspired against had no other claim to the protection of the United States than that of being citizens of the United States, with the rights pertaining to the citizens of the state, as alleged in the present indictment, the indictment in that case would clearly have been held insufficient, for the reason, as there stated, that such protection would rest alone in the state.

We do not overlook Judge Jackson's reference to Baldwin v. Franks (120 U. S. 678, 7 Sup. Ct. 656, 763, 30 L. Ed. 766) on page 347 of 54 Fed., and his comment that—

"If the party affected or injured by the conspiracy had been a citizen, it is clear that the offense charged would have been embraced by the provisions of said section."

But this comment cannot prevail against what we believe to be the plain meaning of the decision of the Supreme Court in Baldwin v. Franks, as we shall show when we reach that case in this review. To repeat:

"It is no more the duty or in the power of the United States to punish for a conspiracy to falsely imprison for murder in a state than it would be to punish for false imprisonment or murder itself."

The attorney for the United States cites the case of U. S. v. Waddell, 112 U. S. 76, 5 Sup. Ct. 35, 28 L. Ed. 673, holding that the exercise by a citizen of the United States of the right to make a homestead entry upon unoccupied land, and to reside thereon and be protected from personal violence with respect to such residence, is the exercise of a right secured by the Constitution and laws of the United States, and by analogy that such authority secures to a citizen the right to be and remain in a particular place under the protection of the federal government against violence on account of such residence. The

decision of the court carefully excludes that construction of the statute. The court says:

"The right here guaranteed is not the mere right of protection against personal violence. This, if the result of an ordinary quarrel or malice, would be cognizable under the laws of the state and by its courts. But it is something different from that. It is the right to remain on the land in order to perform the requirements of the act of Congress, and, according to its rules, perfect his incipient title."

In Logan v. U. S., 144 U. S. 263–285, 12 Sup. Ct. 617, 36 L. Ed. 429, the defendants were charged under section 5508 (section 19 of the Criminal Code) with a conspiracy to injure and oppress certain citizens of the United States who were in the custody of the deputy United States marshal under a lawful commitment to answer the indictments in a federal court for offenses against the laws of the United States. The charge was that the defendants conspired to injure and oppress the persons in the custody of the deputy United States marshal in the free exercise and enjoyment of the right to be protected from violence while in said custody. Upon this question the court said:

"The prisoners were in the exclusive custody and control of the United States, under the protection of the United States, and in the peace of the United States. There was a coextensive duty on the part of the United States to protect against lawless violence persons so within their custody, control, protection and peace; and a corresponding right to those persons, secured by the Constitution and laws of the United States, to be so protected by the United States. If the officers of the United States, charged with the performance of the duty, in behalf of the United States, of affording that protection and securing that right, neglected or violated their duty, the prisoners were not the less under the shield and panoply of the United States."

The indictment was held sufficient, not because the persons conspired against were alleged to be citizens of the United States, but because it was charged that they were in the custody of the deputy United States marshal and in that relation they were entitled to the protection of the United States.

The case of In re Quarles, 158 U. S. 532–536, 15 Sup. Ct. 959, 39 L. Ed. 1080, was a conspiracy to injure and oppress a citizen of the United States in the free exercise and enjoyment of the right and privilege to report to a deputy United States marshal that a person named had violated the internal revenue laws of the United States by carrying on the business of distilling without having given bond as required by law. The court held that—

"The right of the private citizen who assists in putting in motion the cause of justice, and the right of the officers concerned in the administration of justice, stand upon the same ground just as do the rights of citizens voting and of officers elected."

The court quotes from the case of Ex parte Yarbrough, 110 U. S. 651–662, 4 Sup. Ct. 152, 157 (28 L. Ed. 274), where the court said:

"The power in either case arises out of the circumstance that the function in which the party is engaged or the right which he is about to exercise is dependent on the laws of the United States. In both cases it is the duty of that government to see that he may exercise this right freely, and to protect

him from violence while so doing, or on account of so doing. This duty does not arise solely from the interest of the party concerned, but from the necessity of the government itself, that its service shall be free from the adverse influence of force and fraud practiced on its agents, and that the votes by which its members of Congress and its President are elected shall be the free votes of the electors, and the officers thus chosen the free and uncorrupted choice of those who have the right to take part in that choice."

The right of the citizen of the United States to vote had reference to the act of May 31, 1870, to enforce the right of citizens of the United States to vote in the several states of the Union. Section 19 of the Criminal Code now under consideration was section 6 of that act and as there contained had reference to the right of a citizen of the United States to vote.

In Motes v. U. S., 178 U. S. 458–462, 20 Sup. Ct. 993, 995 (44 L. Ed. 1150), the conspiracy was of the same character as in the Quarles Case, but the case involved other questions. So far as the right of the person conspired against to give information to an officer of the government of the violation of the internal revenue laws, the court said:

"It was the right and privilege of" the person conspired against "in return for the protection enjoyed under the Constitution and laws of the United States, to aid in the execution of the laws of his country by giving information to the proper authorities of violations of those laws. That right and privilege may properly be said to be secured by the Constitution and laws of the United States. And it was competent for Congress to declare a conspiracy to injure, oppress, threaten or intimidate a citizen because of the exercise by him of such right or privilege to be an offense against the United States."

It follows, from this and other cases that might be cited, that the United States extends its jurisdiction and protection to its officers, agents, and employés against a conspiracy to injure, oppress, threaten, or intimidate them in the performance of their official duties. This jurisdiction and protection is also extended to citizens of the United States in the exercise of the right and privilege to freely pass from one state to another, or to the seat of government at Washington, to persons residing upon and making homestead entries upon public lands, and to persons engaged in service under or in connection with the constitutional operations of the government.

The United States also extends its jurisdiction and protection against any action of the state which impairs the constitutional privileges and immunities of citizens of the United States, or which injures them in life, liberty, or property, without due process of law, or which denies to any of them the equal protection of the laws, secured to them by the Fourteenth Amendment. In U. S. v. Cruikshank, 92 U. S. 542–554 (23 L. Ed. 588), the Supreme Court, in discussing the subject, said:

"The Fourteenth Amendment prohibits a state from depriving any person of life, liberty, or property, without due process of law; but this adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the states upon the fundamental rights which belong to every citizen as a member of society. * * * The Fourteenth Amendment prohibits a state from denying to any person within its jurisdiction the equal protection of the laws; but this provision does not, any more than the one which precedes it, and which we have just considered, add anything to the rights which one citizen has under the Con-

stitution against another. The equality of the rights of citizens as a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the states; and it still remains there. The only obligation resting upon the United States is to see that the states do not deny the right. This the amendment guarantees, but no more. The power of the national government is limited to the enforcement of this guaranty."

In U. S. v. Harris, 106 U. S. 629–639, 1 Sup. Ct. 601, 609 (27 L. Ed. 290), the court refers to the provisions of the Fourteenth Amendment in the following terms:

"The language of the amendment does not leave this subject in doubt. When the state has been guilty of no violation of its provisions; when it has not made or enforced any law abridging the privileges or immunities of citizens of the United States; when no one of its departments has deprived any person of life, liberty, or property without due process of law, or denied to any person within its jurisdiction the equal protection of the laws; when, on the contrary, the laws of the state, as enacted by its legislative, and construed by its judicial, and administered by its executive departments, recognize and protect the rights of all persons—the amendment imposes no duty and confers no power upon Congress."

In the Civil Rights Cases, 109 U. S. 3, 11–17, 3 Sup. Ct. 18, 21 (27 L. Ed. 835), the court again discusses the subject, adding emphasis that it is a limitation upon the action of the state, and does not deal with the invasion of the individual rights, the court says:

"It does not invest Congress with power to legislate upon subjects which are within the domain of state legislation, but to provide modes of relief against state legislation, or state action, of the kind referred to. It does not authorize Congress to create a code of municipal law for the regulation of private rights, but to provide modes of redress against the operation of state laws, and the action of state officers executive or judicial, when these are subversive of the fundamental rights specified in the amendment. * * * In this connection it is proper to state that civil rights, such as are guaranteed by the Constitution against state aggression, cannot be impaired by the wrongful acts of individuals, unsupported by state authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his property, or his reputation; but if not sanctioned in some way by the state, or not done under state authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the state for redress."

The United States also extends its jurisdiction and protection against state action by one state discriminating against citizens of another state. Section 2 of article 4 of the Constitution provides:

"Citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

The second count of the indictment seems to have had this constitutional provision in view, when it charged that certain citizens of the United States residing in Arizona, against whom the conspiracy was directed, were exercising the rights pertaining to citizens of other states of the United States; but this provision of the Constitution does not apply to acts of individuals. It is a limitation upon the action of the state. U. S. v. Harris, 106 U. S. 639, 1 Sup. Ct. 601, 27 L. Ed. 290,

supra. See, also, Le Grand v. U. S. (C. C.) 12 Fed. 577, an opinion by Mr. Justice Woods, who wrote the opinion in the latter case while sitting as Circuit Justice in the Eastern District of Texas, and who as a Justice of the Supreme Court wrote the opinion in U. S. v. Harris, supra. See, also, U. S. v. Morris (D. C.) 125 Fed. 322.

The prosecution on the oral argument relied very confidently upon the case of Baldwin v. Franks, 120 U. S. 678, 7 Sup. Ct. 656, 763, 30 L. Ed. 766, heretofore referred to, as supporting the sufficiency of the indictment in this case. As we understand that case, instead of supporting the sufficiency of this indictment, the opinion of the court points very clearly and distinctly to its insufficiency. The conspiracy of the defendants in that case was to drive and expel certain Chinese aliens from the town of Nicolaus, in the state of California, where they were engaged in legitimate business and labor to earn a living under and by virtue of the treaties existing between the government of the United States and the emperor of China. The treaty of November 17, 1880, referred to, provided that the United States was to exert all its power to devise measures for the protection of Chinese laborers and Chinese of any other class residing in the United States, "and to secure to them the same rights, privileges, immunities and exceptions as may be enjoyed by citizens or subjects of the most favored nations, and to which they are entitled by treaty." The Chinese persons against whom the conspiracy of the defendants in that case was directed appealed to the jurisdiction of the United States court for the punishment of the defendants under the provisions of the statute, which included the section of the Revised Statutes here in controversy.

The question arose: "Who are the citizens of the United States to which the statute referred?" This was a controlling question under the statute, and a most important inquiry under the treaty, since the Chinese persons conspired against were entitled to appeal to the United States for the same protection as "enjoyed by the citizens or subjects of the most favored nations." The court, after referring to a number of cases on the subject, says:

"The person on whom the wrong, to be punishable, must be inflicted, is described as a 'citizen,' * * * sometimes used in popular language to indicate the same thing as resident, inhabitant, or person. That it is not so used in section 5508 in the Revised Statutes is quite clear, if we revert to the original statute from which this section was taken. That statute was the Act of May 31, 1870, c. 114, 16 Stat. 140, 'to enforce the right of citizens of the United States to vote in the several states of this Union, and for other purposes.' It is the statute which was under consideration as to some of its sections in United States v. Reese, supra, and from its title, as well as its text, it is apparent that the great purpose of Congress in its enactment was to enforce the political rights of citizens of the United States in the several states. Under these circumstances there cannot be a doubt that originally the word 'citizen' was used in its political sense, and as the Revised Statutes are but a revision and consolidation of the statutes in force December 1, 1873, the presumption is that the word has the same meaning there that it had originally.

"This particular section is a substantial re-enactment of section 6 of the original act, which is found among the sections that deal exclusively with the political rights of citizens, especially their right to vote, and were evidently intended to prevent discriminations in this particular against voters on account 'of race, color, or previous condition of servitude.' Sometimes, as

in sections 3 and 4, the language is broader than this, and therefore, as decided in United States v. Reese, those sections are inoperative, but still it is everywhere apparent that Congress had it in mind to legislate for citizens, as citizens, and not as mere persons, residents, or inhabitants."

This opinion is a clear and distinct interpretation of the statute, declaring that it deals exclusively with the political rights of citizens especially establishing their right to vote, and not with the rights of citizens as mere persons, residents, or inhabitants. In the more recent case of United States v. Bathgate, 246 U. S. 220, 38 Sup. Ct. 269, 62 L. Ed. 676, the court reiterated its opinion that—

"Section 19 of the Criminal Code, of course, now has the same meaning as when enacted as section 6, Act of May, 1870."

In this latter case, the court states as pertinent to the construction of this section the rule referred to by the Supreme Court in U. S. v. Lacher, 134 U. S. 624–628, 10 Sup. Ct. 625, 626 (33 L. Ed. 1080), where the court said:

"There can be no constructive offenses, and before a man can be punished his case must be plainly and unmistakably within the statute."

The attorneys for the United States contend that these cases as here interpreted do not determine the questions involved in this demurrer for the reason that the conspiracy alleged in the indictment was to extend in its effect across the border of the state of Arizona into the state of New Mexico and involve interstate transportation, a subject over which the United States has jurisdiction and extends its protection in certain specified particulars; but this is not sufficient to bring into play the federal jurisdiction punishing acts of the character described in the indictment. There must be a statute of the United States to that effect enacted by Congress pursuant to constitutional authority either express or clearly implied.

It is nowhere stated in this section, or in the act in which it was originally passed, or in the statutes as revised, that the right to be enforced was a right pertaining to interstate transportation. We have therefore no basis from which we can draw a clear or necessary implication that the facts stated in the indictment come within the constitutional scope of section 19.

[6] Why has this prosecution been brought in the federal court rather than in the state court, which had unquestioned jurisdiction of the offense charged? The Assistant Attorney General stated on the oral argument that it might be because there was such bias and prejudice in the community where the offense was committed against the persons complaining of the offense that the law of the state could not be enforced against the defendants. This is not a legal or constitutional ground of federal jurisdiction, although frequently urged as a ground of federal legislation covering subjects where local authority is unequal to the task of administering equal and exact justice to all; but it is difficult to understand the explanation in this case, if the large body of persons against whom the conspiracy is charged to have been directed were in fact bona fide citizens of the United States as claimed. Those that were citizens by naturalization proceedings were each re-

quired to prove to the satisfaction of the court by two witnesses at the time of naturalization that for five years prior thereto he had behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same. Those that were native-born citizens should certainly have possessed an equally good moral character, have been equally loyal to the government of the United States, and equally attached to the principles of the Constitution of the United States, as those who had been naturalized. If this was the character of persons against whom the conspiracy was directed, we cannot understand why they could not submit their character and conduct to a tribunal in the community where they resided in proceedings against others for an open violation of the state law. The situation is indeed a lamentable one and one to be greatly deplored; but it ought not to influence this court to enlarge the statute to include an offense not within its constitutional authority. As stated by the Supreme Court in Hammer v. Dagenhart (recently decided) 247 U. S. 251, 38 Sup. Ct. 529, 62 L. Ed. 1101:

"This court has no more important function than that which devolves upon it the obligation to preserve inviolate the constitutional limitations upon the exercise of authority, federal and state, to the end that each may continue to discharge, harmoniously with the other, the duties intrusted to it by the Constitution."

It follows from these considerations that the demurrer to the indictment must be sustained, and the indictment quashed; and it is so ordered.

PETERSON v. DAVISON.

(District Court, S. D. New York. December 9, 1918.)

REFERENCE ⊂⊃8(1)—PROCEDURE IN FEDERAL COURTS—APPOINTMENT OF AUDITOR.

In an action at law to recover for goods sold and delivered, which involves the examination of long accounts, many items of which are in dispute, a federal court may properly appoint an auditor to make a preliminary examination, hear the evidence, and report his findings, with a view to simplifying the issues for the jury.

At Law. Action by Walter Peterson, receiver, against Arthur Sidney Davison. On motion for appointment of auditor. Granted.

Kellogg & Rose, of New York City, for plaintiff.
Zabriskie, Murray, Sage & Kerr, of New York City, for defendant.

AUGUSTUS N. HAND, District Judge. This is a motion for the appointment of an auditor to report as to the facts and circumstances in an action brought to recover for coal sold and delivered. The items in dispute are very numerous. I am convinced, from reading the affidavits, that the trial of this case will involve a consideration of so many separate issues of fact that a jury will, under any circumstances, have constant difficulty in remembering and passing upon the issues

involved. The contention of plaintiff's counsel that the facts are largely admitted ignores over 200 items, which the defendant proposes to attempt to establish by way of defense. Without a preliminary investigation the situation will be likely to be almost intolerable for the court, and the jury might become so confused as to reach its verdict largely by guesswork. This is the kind of case where a preliminary report by a skilled auditor will be of substantial service. The practice is approved, and is under proper conditions most desirable. Davis v. St. Louis Ry. Co. (C. C.) 25 Fed. 786; Fenno v. Primrose, 119 Fed. 801, 56 C. C. A. 313; Corporation v. Houlihan, 184 Fed. 252, 106 C. C. A. 394; Craven v. Clark (C. C.) 186 Fed. 959; Vermeule v. Reilly (D. C.) 196 Fed. 226; United States v. Wells (D. C.) 203 Fed. 146.

The practice of appointing an auditor in an action at law when numerous items are involved in the issues of fact raised by the pleadings appears to have originated in the method of procedure under the old common-law action of account. Various statutes have been enacted in different states to remedy the difficulty incident to the trial of an action involving a great number of disputed items by a jury.

In New York a referee has, since colonial times, been appointed under the state statutes in cases involving a so-called long account. This referee does not report in aid of the court or jury, but is, under the present Code of Procedure, appointed to try the issues.

The history of the New York practice is set forth with learning by Judge Earl, in the case of Steck v. C. F. & I. Co., 142 N. Y. 236, 37 N. E. 1, 25 L. R. A. 67. It appears from that case that, while under the Dutch rule actions involving long accounts could be referred to arbitrators, this mode of trial was not pleasing to the English colonists, and disappeared after the British occupation. For nearly 100 years thereafter actions in the common-law courts were wholly triable before juries, except the action of account, which was only applicable to the limited class of cases hereinafter mentioned. The difficulties inherent in this action were such that, as Judge Earl says:

"The practice became general for merchants and others having long accounts to enforce their collection by actions of assumpsit, which were always then triable by jury. But the embarrassments attending the trial of such actions by jury were such that, December 31, 1768, an act (2 Van Schaick's Laws of New York, 517) was passed, with a preamble as follows: 'Whereas, instead of the ancient action of account, suits are of late, for the sake of holding to bail, and to avoid the wager of law, frequently brought in assumpsit, whereby the business of unraveling long and intricate accounts, most proper for the deliberate examination of auditors, is now cast upon jurors, who at the bar are more disadvantageously circumstanced for such services; and this burden upon jurors is greatly increased since the laws made for permitting discounts in support of a plea of payment, so that by the change of the law and the practice above mentioned, the suits of merchants and others upon long accounts are exposed to erroneous decisions, and jurors perplexed and rendered more liable to attaints, and by the vast time necessarily consumed in such trials, other causes are delayed and the general course of justice greatly obstructed. Be it therefore enacted, etc., that whenever it shall appear probable in any cause depending in the Supreme Court of Judicature of this colony (other than such as shall be brought by or against executors or administrators) that the trial of the same will require the examination of a long account, either on one side or the other, the said court is hereby authorized, with or without the consent of parties, to refer such cause by rule, to be made at discretion, to referees, * * * and if the report or award

of the referees, or of the major part of them, shall be confirmed by the said court, and any sum be thereby found for the plaintiff, judgment shall be entered for the same, with a relicta verificatione, as by confession with costs, if by law the plaintiff would have recovered costs, had a verdict passed in the same cause for the sum so reported to be due; but if, after payment pleaded, any sum shall be reported to be due to the defendant, and the award be confirmed, he shall have judgment and recover his costs. * * * And when such referees shall report that nothing is due from the defendant, and the report be confirmed, then judgment shall be entered as by non pros., and the defendant shall recover his costs, to be taxed, and such judgment be a perpetual bar.'"

This statute was re-enacted and was in force at the time of the adoption of the state Constitution of 1777, and consequently was not subject to the guaranty as to jury trial provided therein.

It is to be noticed that these statutory enactments did not provide for a trial before a referee, for the report of the referee was subject to confirmation, but they did do away with jury trials in cases involving a long account.

Section 1013 of the Code of Civil Procedure makes the referee the court, dispenses with a jury, and judgment is entered upon his report as upon a decision of the court itself.

In Massachusetts, an official may be appointed, in such cases called an auditor; but his report is not necessarily a final determination upon which judgment is entered, but is prima facie evidence, if a jury trial of the issues is demanded.

In the federal courts, where a jury trial is a constitutional right, any auditor's report can be used only as an aid to court and jury. It can be regarded at most as evidence, and nothing more. The report is but a method of simplifying the issues.

Professor Langdell has, with much learning, expounded the history of the common-law action of account in his essay on Equity Jurisdiction published in the Harvard Law Review, vol. 2, pp. 243–257. This ancient form of action was allowed only against guardians, receivers, and bailiffs. A receiver in the sense used was a person who received money belonging to another for the sole purpose of keeping it safely and repaying it to the owner. A bailiff was in effect a person who was a managing agent of land, and was accountable for the rents.

It thus appears that the action of account always involved a fiduciary relation between plaintiff and defendant, and was limited to certain specific cases.

In the common-law action of account the defense consisted of either a denial of the fiduciary relation, or an affirmative plea of "plene computavit," and the issue as to whether the defendant should render an account or not was triable by a jury. If there was a verdict for the plaintiff, judgment "quod computet" was rendered against the defendant, upon which, unless he got bail, he was imprisoned until any judgment which might be rendered against him should be satisfied. In the judgment "quod computet," which was essentially interlocutory, the court appointed three auditors to take and state the account. If the account showed a balance in favor of the plaintiff, final judgment was rendered thereon for the balance due.

If a person liable to account at law converted plaintiff's money to his

own use, or promised to pay it, an action of either "indebitatus assumpsit," or debt, would lie, provided the amount had been stated. See Langdell article, supra, pp. 253, 254, and cases cited.

It is easy to see how this ancient action of account served as a historical background for the modern statutory enactments in aid of actions at law, where multiplicity of items render a trial by jury very difficult. The action of "indebitatus assumpsit" gradually supplanted at common law the action of account, though it extended over a much wider field. This form of action involved but one stage, and provided for a jury trial without auditors, but was at times confused with account, and used where account was the strictly proper remedy, until the latter became practically obsolete as a form of action at law. Many of its features survived in a suit in equity for an accounting, and I think it may be said that all issues formerly determined in the common-law action of account were, after it became obsolescent, determined either at law in an action of indebitatus assumpsit, or in equity in a suit for an accounting.

It thus appears that the statement of Brewer, J. (then Circuit Judge), in the case of Davis v. St. Louis & S. F. Ry. Co. (C. C.) 25 Fed. 786, that "it was the practice in the old English courts, the old common-law practice, where it was apparent that the examination of a long account was involved, to refer such account to a referee to report on the facts," was historically quite inaccurate as applied to an action arising out of breaches of contract, where no fiduciary relation appears to have existed. Nevertheless his decision, like others I have heretofore cited, shows the tendency of the common law to seize upon analogies derived from former practice, and extend that practice to meet manifest needs.

The leading case on this subject is the case of Fenno v. Primrose, 119 Fed. 801, 56 C. C. A. 313, by the Circuit Court of Appeals of the First Circuit, which has been since followed in that circuit, and by Judge Holt in the case of Vermeule v. Reilly, supra, in this district, and approved of in a learned opinion by Judge Sanford in the case of United States v. Wells, supra.

I can see no constitutional difficulty in allowing a report of an auditor to simplify the issues to be introduced in evidence before the jury, subject, of course, to the control of the court as to all matters of law which may be applicable to the same, and subject to the final determination by the jury as to all matters of fact in the case, whether embraced in the report or not. Craven v. Clark (C. C.) 186 Fed. 959.

The case of Sulzer v. Watson (C. C.) 39 Fed. 414, which was heard before Wallace and Wheeler, JJ., in the Circuit Court for the District of Vermont, prior to the Circuit Court of Appeals Act, is in no way against the conclusion which I have reached and is an interesting case, showing the accurate knowledge of Judge Wheeler, who wrote the opinion, as to forms of action. That was an action of book account, known to Connecticut and Vermont lawyers, and involving an appointment of auditors to hear and finally determine the issues. The plaintiff moved for the appointment of auditors to try the issues. The court denied this for the very good reason that it

would deprive the defendant of his right of trial by jury. Judge Wheeler said:

"It is an action at law, although not in any form known to the common law; and, although courts of equity have jurisdiction of some matters of account, they never have had any of matters merely in assumpsit, which may be involved in an action like this. These are called matters of account, because they may be kept on books of account, and not by reason of any relation of trust between the parties out of which the transactions might arise, such as courts of equity take cognizance of. * * * In this case there can be no trial by auditors, therefore no auditors should be appointed."

This case merely holds:

(1) That in any action of assumpsit brought in a United States court a trial by jury is necessary.

(2) That, where a defendant is in no fiduciary relation to a plaintiff, a reference which would dispense with a jury is never permissible.

(3) That a state statute cannot deprive the defendant of his right to a jury trial in any action brought in a federal court.

In the case of Swift v. Jones, 145 Fed. 489, 76 C. C. A. 253, the Circuit Court of Appeals for the Fourth Circuit held that in an action at law the trial judge had no power, even with the acquiescence of both parties, to order a trial before a special master, who should report his findings to the court, and that such mode of procedure deprived the parties of their jury trial. This case was referred to by Judge Sanford in United States v. Wells, supra, and does no more than decide that trial by jury must be preserved. In my opinion the form of the present order, just as the method of procedure under the Massachusetts statute, does essentially preserve trial by jury.

The order to be entered should appoint Wallace Macfarlane, Esq., auditor,

"to make a preliminary investigation as to the facts, hear the witnesses, examine the accounts of the parties and make and file a report in the office of the clerk of this court, with a view to simplifying the issues for the jury, but not finally to determine any of the issues in the action; the final determination of all issues of fact to be made by the jury on the trial, and the auditor to have power to compel the attendance of, and administer the oaths to, witnesses—the expense of the auditor, including the expense of a stenographer, to be paid by either or both parties to this action, in accordance with the determination of the trial judge."

The said auditor shall separately report as to the issues of fact, the following matters especially:

(1) All deliveries of coal alleged to have been made by the Interstate Coal Company to the defendant which are not disputed by the defendant.

(2) All payments alleged to have been made for coal delivered by the Interstate Coal Company to the defendant, which are not disputed by the plaintiff.

(3) All deliveries of coal alleged to have been made by the Interstate Coal Company to the defendant, which are disputed by the defendant, with his opinion as to each of such disputed items.

(4) All payments alleged to have been made by the defendant for coal delivered by the Interstate Coal Company to the defendant which

are disputed by the plaintiff, with his opinion as to each of such disputed items.

(5) The amount of charges for freight and demurrage which the defendant claims to have been obliged to pay for the account of the Interstate Coal Company, the items thereof admitted by the plaintiff to be chargeable, and the items in dispute, with his opinion as to each of such disputed items.

(6) All deliveries of coal alleged to have been made by the Interstate Coal Company to the defendant, which are claimed by the defendant to have differed upon analysis from the requirements of the city of New York, with his opinion as to each of such items.

(7) All settlements claimed by the defendant to have been made between the Interstate Coal Company and the defendant, whereby deductions were allowed by the plaintiff, because the coal differed upon analysis from the requirements of the city of New York, with his opinion as to each of such allowances.

(8) The amount of coal alleged by the defendant to have been contracted to be sold to the defendant by the A. H. Dollard Coal Sales Company, and assumed to be delivered by the Interstate Coal Company, which, when analyzed, did not conform to the requirements of the city of New York, and the items of damage which the defendant claims to have suffered in order to fulfill its contracts for resale to William Farrell & Son and Burns Bros., with his opinion as to each of such items.

Judge Holt made an order much resembling the above in the case of Vermeule v. Reilly, supra.

ORIGINAL SIXTEEN TO ONE MINE, Inc., v. TWENTY-ONE MINING CO. (two cases).

(District Court, N. D. California, S. D. March 2, 1918.)

Nos. 292-E, 16001-L.

1. TRIAL ⊂⊃340(1)—VERDICT—CORRECTION BY COURT.
A federal court cannot look to the testimony for the purpose of correcting a faulty verdict, even though there is no dispute over the facts.

2. NEW TRIAL ⊂⊃9—DEFECTIVE VERDICT—NEW TRIAL AS TO SINGLE ISSUE.
A federal court has power to grant a new trial as to a single issue in the case, and such procedure is proper, where the jury has found generally for plaintiff, but failed to find his damages, although shown by undisputed evidence.

3. MINES AND MINERALS ⊂⊃31(3)—MINING CLAIMS—RIGHT TO FOLLOW VEIN —CONTINUITY OF VEIN.
A segment of an ore vein, commencing 15 or more feet below where the vein apexing in complainant's claim terminated in a fault, *held* a continuation of the same vein, which complainant was entitled to follow in its dip through the side lines into defendant's adjoining claim.

At Law and in Equity. Action and suit by the Original Sixteen to One Mine, Incorporated, against the Twenty-One Mining Com-

pany. New trial granted in law action as to one issue. Decree for complainant in equity suit.

See, also, 153 C. C. A. 142, 240 Fed. 106.

William E. Colby, Grant H. Smith, and John S. Partridge, all of San Francisco, Cal., for plaintiff.

Frank R. Wehe and Bert Schlesinger, both of San Francisco, Cal., and Lynden Bowring, of Los Angeles, Cal., for defendant.

RUDKIN, District Judge. The plaintiff in the law action is the owner and in the possession of the Sixteen to One quartz mine or lode mining claim in the Alleghany mining district in the state of California. The defendant is the owner and in the possession of the Belmont, Valentine and Tightner extension mining claims, adjoining the Sixteen to One claim on the east. The complaint alleges that there exists within the Sixteen to One claim a lode or vein of rock in place, carrying gold and other valuable minerals; that such vein on its strike or course traverses the claim from end to end; that the top or apex of the vein lies wholly within the side lines of the claim; that on its downward course or dip the vein departs from the perpendicular and passes out through the easterly side line of the claim into and beneath the surface of the adjoining claims owned by the defendant, and into and beneath the surface of another claim owned by third persons, who are not parties to the action. The complaint then avers that the defendant entered upon this vein between planes drawn vertically downward through the end lines of the Sixteen to One claim, and removed ore therefrom of a value in excess of $100,000, for which sum the plaintiff demands judgment.

The answer in effect denies the title of the plaintiff, and by cross-complaint the defendant asserts title in itself, and avers that the plaintiff removed ore from the vein to the value of $125,000, for which sum it demands judgment.

The issues thus presented were tried before a jury. All testimony offered at the trial related to the title or ownership of the vein under the extralateral right statute, aside from a brief statement furnished by each of the parties showing the amount of gold extracted from the vein and the cost of mining, transporting, and reducing the ore. The charge of the court on the question of title or ownership was not excepted to by either party, and there is no claim of error in that regard at this time. On the question of measure of damages the court instructed the jury as follows:

"If the plaintiff is entitled to recover, the measure of damages will depend upon the nature of the trespass. If the trespass was a willful one, that is, if the ore was taken recklessly, willfully, or intentionally by the defendant, or by any person under contract with the defendant, then the plaintiff is entitled to recover the full value of the ore, without deduction for the labor performed by the trespasser."

"If, on the other hand, you find that the trespass was the result of inadvertence or mistake, the value of the property when first taken must govern, or if the conversion sued for was after value had been added to it by the work of the trespasser, he should be credited with this addition."

Again:

"The measure of damages, as I have said, as against a willful trespasser, is the full value of the ore taken; whereas, if the trespass is an innocent one, the measure of damages is the value of the ore in place, or the value of the ore after its removal less the actual cost of mining, transporting, and reducing the ore."

Under these instructions the jury returned the following verdict:

"We, the jury, find in favor of the plaintiff, and assess the damages against the defendant in the sum of $100,000, less cost of extraction of the ore, on account of unwillful trespass."

The plaintiff has interposed a motion for a judgment on this verdict, either in the sum of $100,000, or for the sum of $100,000 less the sum of $46,315.58. It might be stated in this connection that this latter sum is claimed to be the cost of mining, transporting, and reducing the ore, as disclosed by the statement furnished by the defendant. The defendant, on the other hand, has moved to set aside the verdict and for a new trial, on the ground that the verdict is indefinite, uncertain, and void.

[1] It is manifest that the plaintiff is not entitled to a judgment on the verdict for the sum of $100,000. The complaint alleged that the trespass was a willful one, and prayed damages in the sum of $100,000 on that basis. The jury found that the trespass was not willful, and therefore, under the charge of the court, there should have been deducted from the amount found by the jury the cost of mining, transporting, and reducing the ore. Nor, in my opinion, can the court deduct from the amount of the verdict the cost of mining, transporting, and reducing the ore, albeit such cost be shown by the admitted facts in the case. In other words, it seems that a federal court cannot look to the testimony for the purpose of correcting a faulty verdict, even though there is no dispute over the facts.

In Hodges v. Easton, 106 U. S. 408, 1 Sup. Ct. 307, 27 L. Ed. 169, the facts were as follows:

"The record states that the jury, impaneled and sworn to try the issues, 'rendered a special verdict in answer to the questions propounded by the court.' The questions so propounded, with the answers thereto, were made the special verdict. The jury having been discharged, the plaintiffs, by counsel, moved for judgment upon the special verdict for the value of the wheat wrongfully converted by defendants, or for such damages as the court should adjudge, and for such other and further relief as might be granted in the premises. On a later day the defendants moved to set aside the special verdict and grant a new trial, upon the ground, among others, that the special verdict 'does not contain findings upon the material issues in the case.' These motions were heard together, and it was ordered by the court 'that the motion of defendants for a new trial be, and is hereby, overruled, and that the motion of the plaintiffs for judgment upon the special verdict of the jury, and facts conceded or not disputed upon the trial, be, and is hereby, granted.' The damages were assessed by the court at $12,554.89, for which sum judgment was entered against the defendants."

In reversing the judgment thus entered, Judge Harlan, speaking for the Supreme Court, said:

"It is not necessary, in this opinion, to enter upon an examination of those decisions, or to consider how far the local law controls in determining either

the essential requisites of a special verdict in the courts of the United States, or the conditions under which a judgment will be presumed to have been supported by facts other than those set out in a special verdict. The difficulty we have arises from other considerations. The record discloses that the jury determined a part of the facts, while other facts, upon which the final judgment was rested, were found by the court to have been conceded or not disputed. If we should presume that there were no material facts considered by the court beyond those found in the answers to special questions, then, as we have seen, the facts found do not authorize the judgment. If, on the other hand, we should adjudge it to have been defendants' duty to preserve the evidence in a bill of exceptions, and that, in deference to the decisions of the state court, it should be presumed that the 'facts conceded or not disputed at the trial' were, in connection with the facts ascertained by the jury, ample to support the judgment, we then have a case at law, which the jury were sworn to try, determined, as to certain material facts, by the court alone, without a waiver of jury trial as to such facts. It was the province of the jury to pass upon the issues of fact, and the right of the defendants to have this done was secured by the Constitution of the United States. They might have waived that right, but it could not be taken away by the court. Upon the trial, if all the facts essential to a recovery were undisputed, or if they so conclusively established the cause of action as to have authorized the withdrawal of the case altogether from the jury, by a peremptory instruction to find for plaintiffs, it would still have been necessary that the jury make its verdict, albeit in conformity with the order of the court. The court could not, consistently with the constitutional right of trial by jury, submit a part of the facts to the jury, and itself determine the remainder without a waiver by the defendants of a verdict by the jury."

See, also, Slocum v. New York Life Insurance Co., 228 U. S. 371, 33 Sup. Ct. 523, 57 L. Ed. 879, Ann. Cas. 1914D, 1029.

[2] If the jury finds in favor of the plaintiff, and there is no dispute over the amount of the recovery, it seems somewhat technical to deny to the court the power to supply the omission from the undisputed facts, but such seems to be the law of the land. It does not follow from this, however, that a new trial must be granted as to every issue in the case. There was no uncertainty in the verdict, in so far as the jury found for the plaintiff, thus establishing its title to the vein and its right to damages. I see no reason why that issue should be submitted to another jury, with little likelihood that a different result would be obtained. The power of a court to grant a new trial as to a single issue in a case is well settled in the state of California and in the federal courts. San Diego Land, etc., Co. v. Neale, 78 Cal. 63, 20 Pac. 372, 3 L. R. A. 83; Duff v. Duff, 101 Cal. 1, 35 Pac. 437; Estate of Everts, 163 Cal. 449, 125 Pac. 1058; Calaf v. Fernandez, 239 Fed. 795, 152 C. C. A. 581.

This case, in my opinion, peculiarly calls for the exercise of the discretion of the court in awarding a new trial as to the single issue only. It was through mere inadvertence on the part of the jury that the case was not finally and forever disposed of at the last trial. There was at no time a substantial controversy over the amount of the recovery, and for reasons not disclosed by the record the plaintiff does not seem to be at all concerned as to the amount of the judgment for damages. Possibly the defendant is so far insolvent as to render the judgment for damages of no avail, if it loses the mine in controversy; but, whatever the reason, it would not be in the interest of justice or the exercise of a wholesome discretion to try the case over

again in its entirety. The verdict will therefore be permitted to stand, in so far as it finds the issues in favor of the plaintiff, and a new trial will be awarded for the sole and only purpose of assessing the amount of the recovery.

[3] The same state of facts is presented in the equity case. The relief sought is a decree quieting title in the plaintiff and awarding an injunction against the commission of further trespasses by the defendant. At the commencement of the trial of the law action it was stipulated that the equity case should be considered by the court on the testimony offered in the law action and such further testimony as the parties might present. Some further testimony has been offered, and in addition the defendant has requested the court to appoint some disinterested mining engineer or engineers to examine the mines and the mine workings and report to the court. On the trial of the law action a vast amount of expert testimony was offered by the plaintiff, tending to show the identity of the vein from the outcroppings or apex on the surface of the Sixteen to One claim down through the various workings, and perhaps an equal amount of testimony was offered by the defendant tending to show the contrary. The experts on each side consisted of geologists, mining engineers, and practical mining men. It is almost needless to say that the opinions of these experts were positive and unequivocal in favor of the party who called them, and little would be accomplished by adding one or more additional experts to the long list already in the record. It was conceded throughout the trial that there is a vein on the Sixteen to One claim; that this vein dips in an easterly direction at an angle of 45 or 50 degrees; that the vein terminates at a fault at about the 200-foot level; and that by dropping down a distance of 15 or 20 feet at the shaft, and a distance of 35 or 40 feet at the northerly boundary of the claim, another vein is picked up, likewise terminating at a fault. The witnesses for the plaintiff testified that these two segments were one and the same vein, while the witnesses for the defendant testified to the contrary. Their theory is that, while there are two segments of veins there, the upper segment of the lower vein was thrown up several hundred feet above the present surface of the mountain and has eroded away, while the lower segment of the upper vein can probably be found several hundred feet lower down. The jury found it much easier to join the two existing segments together, thus making a single vein, than to speculate as to what has become of the two lost segments, and with that conclusion I am in full accord.

A decree will therefore be entered in favor of the plaintiff in accordance with the prayer of the bill.

UNITED STATES v. RAM CHANDRA et al.

(District Court, N. D. California, First Division. August 4, 1917.)

No. 6133.

1. NEUTRALITY LAWS ⟸3—OFFENSES.
A single individual may violate Criminal Code, § 13 (Comp. St. 1916, § 10177), by providing or preparing the means for a military expedition referred to in the statute.

2. CONSPIRACY ⟸28—SETTING ON FOOT MILITARY EXPEDITION.
The offense of setting on foot a military expedition against the territory of any foreign prince, etc., with whom the United States are at peace, denounced by Criminal Code, § 13 (Comp. St. 1916, § 10177), does not require such a plurality of agents that those plotting such expedition cannot be punished for conspiracy, under section 37 (section 10201).

3. CONSPIRACY ⟸37—CONSUMMATION OF OBJECT.
The fact that the object of a conspiracy has been accomplished is no defense.

Ram Chandra and others were indicted under Criminal Code, § 37 (Comp. St. 1916, § 10201), for conspiracy to violate section 13 (section 10177). On demurrers to indictment. Demurrers overruled.

Daniel Yost, for defendants Leonheuser and Von Goltzheim.

Geo. A. McGowan and Charles Sferlazzo, both of San Francisco, Cal., for defendants Ram Chandra, Godha Ram, Sundar Singh Ghalli, Surendra Nath Kar, Ladli Prasad Varma, and Munchi Ram.

Geo. A. McGowan, of San Francisco, Cal., for defendant Von Brincken.

A. P. Black, of San Francisco, Cal., for defendants Deinat and Elbo.

Sullivan & Sullivan and Theo. J. Roche, of San Francisco, Cal., for defendants Bopp, Von Schack, Kaufmann, Rodiek, Bley, and Capelli.

Timothy Healy, of San Francisco, Cal., for defendants Bhagwan Singh, Santokh Singh, Gopal Singh, Bishan Singh, Nehdan Singh, and Ram Singh.

Robert M. Royce, of Oakland, Cal., for defendant Gobind Behari Lal.

Bert Schlesinger and Otto Irving Wise, both of San Francisco, Cal., for defendants Michaels and Hart.

Mrs. A. A. Adams, Asst. U. S. Atty., of San Francisco, Cal.

RUDKIN, District Judge. This indictment was returned under section 37 of the Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1096 [Comp. St. 1916, § 10201]), and charges a conspiracy to violate section 13 of the same Code (section 10177). The former provides that:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than ten thousand dollars, or imprisoned not more than two years, or both."

The latter provides that:

"Whoever, within the territory or jurisdiction of the United States, begins, or sets on foot, or provides or prepares the means for, any military expedition or enterprise, to be carried on from thence against the territory or dominions of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace, shall be fined not more than three thousand dollars and imprisoned not more than three years."

[1, 2] A number of the defendants have interposed demurrers to this indictment, but the majority of them have been submitted without argument. The demurrers argued have been pressed largely, if not solely, upon the ground that the offense denounced by section 13 necessarily and logically requires the concurrence of a plurality of agents for its consummation, and that such agents cannot be charged with conspiracy to commit the offense. In other words, it is claimed that the indictment in substance and effect charges a conspiracy to commit a conspiracy which is not permissible under the law.

This argument is based largely on the rule laid down by Wharton:

"When to the idea of an offense plurality of agents is logically necessary, conspiracy, which assumes the voluntary accession of a person to a crime of such a character that it is aggravated by a plurality of agents, cannot be maintained. As crimes to which concert is necessary (i. e., which cannot take place without concert), we may mention dueling, bigamy, incest, and adultery, to the last of which the limitation here expressed has been specifically applied by authoritative American courts. We have here the well-known distinction between concursus necessarius and concursus facultativus, in the latter of which the accession of a second agent to the offense is an element added to its conception, and in the former of which the participation of two agents is essential to its conception; and from this it follows that conspiracy, the gist of which is combination, added to crime, does not lie for concursus necessarius. In other words, when the law says: 'A combination between two persons to effect a particular end shall be called, if the end be effected, by a certain name' —it is not lawful for the prosecution to call it by some other name, and when the law says such an offense—e. g., adultery—shall have a certain punishment, it is not lawful for the prosecution to evade this limitation by indicting the offense as conspiracy." Wharton's Criminal Law (10th Ed.) § 1339.

But, even in the cases suggested by the author, parties who are not necessary participants in the crime may be indicted for a conspiracy to commit the crime.

I fail to see any analogy between the crimes of adultery, bigamy, incest, dueling, or the giver and receiver of a bribe, and the crime denounced by section 13. Doubtless a single individual would not constitute a military expedition, as that term is usually defined, and whether a single individual in an aeroplane, armed with bombs, would constitute a military enterprise, as suggested by one court, I will not inquire.

I see no reason, however, why a single individual may not begin or set on foot a military expedition or enterprise, and more especially why a single individual may not well provide or prepare the means for such an expedition or enterprise. Everything must have a beginning, and this must necessarily be true, if the words "to begin or set on foot" have the broad and comprehensive meaning attributed to them by counsel for the defense. They maintain that an act which would

tend to effect the object of a conspiracy would also constitute the beginning or setting on foot of a military expedition or enterprise. I doubt the soundness of this view, but I have no doubt that a single individual may violate section 13 of the Criminal Code. Thus in Wiborg v. United States, 163 U. S. 632, 648, 16 Sup. Ct. 1127, 1133 (41 L. Ed. 289), the court said:

"We think that it does not admit of serious question that providing or preparing the means of transportation for such a military expedition or enterprise as is referred to in the statute is one of the forms of provision or preparation therein denounced."

Again the court said (163 U. S. 655, 16 Sup. Ct. 1136):

"It is true that the expedition started in the Southern district of New York, and did not come into immediate contact with defendants at any point within the jurisdiction of the United States, as the Horsa was a foreign vessel; but the Horsa's preparation for sailing and the taking aboard of the two boats at Philadelphia constituted a preparation of means for the expedition or enterprise, and if defendants knew of the enterprise when they participated in such preparation, then they committed the statutory crime upon American soil, and in the Eastern district of Pennsylvania, where they were indicted and tried."

It seems manifest that these acts might be committed without a plurality of agents; indeed, while not controlling, it is a significant fact that, for upwards of 100 years Congress has employed the singular number in defining the crime here denounced. I am satisfied, therefore, that there is no inconsistency or repugnancy in charging a conspiracy to violate section 13 of the Penal Code. I have read and examined the authorities cited by the defendants, but have neither the time nor the disposition to review them at length. Suffice it to say I find nothing in them inconsistent with the views here expressed.

[3] Of course, the fact that the object of the conspiracy may have been consummated, if such be the fact, is no defense.

"Again, it is said that, if the evidence proved the petitioner guilty of a conspiracy, it proved him guilty of the substantive offense. It may be that there has been an abuse of indictment for conspiracy, as suggested by Judge Holt in United States v. Kissel [C. C.] 173 Fed. 823, 828; but it hardly is made clear to us that this is an instance. At all events the liability for conspiracy is not taken away by its success—that is, by the accomplishment of the substantive offense at which the conspiracy aims." Heike v. United States, 227 U. S. 131, 144, 33 Sup. Ct. 226, 229 (57 L. Ed. 450, Ann. Cas. 1914C, 128).

The demurrers are accordingly overruled.

THE TERESA ACCAMA.

(District Court, E. D. Virginia. December 19, 1918.)

SALVAGE ⊂=30—AMOUNT OF AWARD—RESCUE OF STEAMSHIP STRANDED AT SEA.

A salvage award of $12,000 made for the rescue of a steamship, laden largely with explosives, stranded outside the Virginia capes, off False Cape, in the winter, vessel and cargo being valued at $2,000,000, and the service, which was efficiently performed, including towage to a safe harbor, requiring some 24 hours.

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

In Admiralty. Suit for salvage by the Merritt & Chapman Wrecking & Derrick Company against the Italian steamship Teresa Accama. Decree for libelant.

Hughes, Little & Seawell, of Norfolk, Va., for libelant.
Edward R. Baird, Jr., of Norfolk, Va., for respondent.

WADDILL, District Judge. This is a libel to recover for salvage services rendered by the libelant to the respondent. The facts are briefly these: In the early morning of the 24th of January, 1918, off False Cape, some 2 miles northeast half east of the life-saving station, and about 20 miles south of Cape Henry, the Italian steamship Teresa Accama grounded about amidship, on the port side, for a space of about 100 feet. While there, representatives of the life-saving station came aboard, and through them, communication was had with Norfolk, calling for assistance for the stranded vessel. The libelant, being advised of the wreck, immediately dispatched its tug Rescue, properly officered, manned, and equipped, to the ship's assistance. The Rescue left Norfolk about 10 o'clock a. m., reached the scene of the stranding about 2 p. m., and after some preliminary talk between her officers, and those on the steamship, made fast to the vessel, and with considerable effort, succeeded in getting her afloat about half past 4 o'clock that evening.

The respondent insists that only about 45 minutes was taken in the effort to float the ship, while libelant says it took approximately 2 hours. Respondent further claims that the vessel was not in any serious danger, and that she was extricated from her position largely as a result of the rise of the tide, and the pumping of some 300 tons of water ballast overboard. After the ship was released, the Rescue towed her into Hampton Roads, starting about 5 a. m., reaching a place of anchorage in the vicinity and to the northward of Sewell's Point, about 10 a. m. Early the next morning, the vessel was taken to Lambert's Point, and subsequently taken to the convoy anchorage grounds for vessels containing explosives.

Respondent further insists that her purpose in communicating with Norfolk was to secure the aid of a government vessel to assist her, which would be furnished at nominal cost, and that, upon the Rescue coming, it was allowed to make fast to the Teresa Accama upon the supposition that she was a government vessel, and after the ship was gotten off the shoal it was expressly understood that she would be brought into Hampton Roads free of charge; the Rescue's master explaining that the ship could not come in without a pilot, who was not then accessible, and would not be permitted to pass through the submarine net then closing the channel at all, at that hour of the night, and that the Rescue could bring her in without delay.

The Teresa Accama, 380 feet long, 48 feet wide, 26 feet deep, gross tonnage 7,500, was a large ocean-going ship, loaded in part with a cargo of explosives, was en route from Wilmington, Del., to Genoa, Italy, and went into Hampton Roads, on account of ice conditions prevailing along the coast at that time. The value of the ship and her

cargo is alleged to be some $2,000,000. The Rescue is a large wrecking vessel, and with her outfit, worth about $250,000.

At the time of the service, the weather was good, sea smooth, and wind blowing a moderate breeze from the south. No special danger was incurred by the salvors, or the salved property, in making fast to and securing the release of the ship. The work was intelligently and expeditiously performed. The position of the ship was not one of extreme peril, but of considerable danger, having regard to the character of the coast, the size of the ship, the depth of water, and the nearness of the vessel to the shore, especially in case of a change of wind to the eastward, or of other weather conditions reasonably to be anticipated at that season of the year.

The court is not inclined to accept the respondent's statement that the services of the Rescue were availed of because it was a government ship. It was not such a ship, and, on the contrary, was one of the wrecking vessels of a well-known wrecking company, manned and operated by reputable and responsible officers, and the fact that they would have misrepresented themselves to be government officials is highly improbable. That there was some understanding that the ship would be towed in to the Roads, and that part of the service would be in the nature of towage, as distinguished from the salvage service, is strongly supported by the testimony. The court is inclined to treat that part of the service, including what was done the next day in removing the vessel from her first place of anchorage, to the safer anchorage set apart for vessels carrying explosives, as a towage and not a salvage service.

Just what would be a proper allowance for the entire service, taking into account all the circumstances of the case, is not free from difficulty, and, in fixing the same, the large values at stake and the dangerous position in which the respondent's ship was lying must be taken into account. She was en route from Wilmington, Del., to Hampton Roads, had encountered difficulty at the mouth of the Delaware river on account of large quantities of floating ice, and in proceeding to Hampton Roads had passed the Virginia Capes some 20 miles, and ran, in broad daylight, into the shoal waters off False Cape, where she went aground, and remained fast for hours, on an exposed shoal beach. Considering her value, the character of her cargo, and the vicissitudes of her journey thus far, the fact that she was promptly released, and safely gotten from the open sea into a harbor of safety and refuge, without exposure from possible weather conditions of another day and night, should not be lost sight of.

Under all the circumstances, the court believes an award of $12,000 is a reasonable one to make for the services rendered; and it will be so ordered.

O'BOYLE v. NEW YORK STEAM CO. et al.

(District Court, E. D. New York. November 15, 1918.)

WHARVES ⊂⊃20(3, 5)—UNSAFE BERTH FOR DISCHARGING—LIABILITY FOR INJURY TO VESSEL.

Consignee of a coal cargo *held* in fault for injury to the boat, caused by giving her an unsafe berth for discharging, where she rested on the bottom at low tide; and the master of the boat also *held* negligent in making no effort to ascertain the depth of water.

In Admiralty. Suit by Joseph F. O'Boyle, owner of the boat Stella Murphy, against the New York Steam Company and another. Decree for libelant for half damages.

Macklin, Brown & Purdy, of New York City, for libelant.
Frederick E. Fishel, of New York City, for respondents.

GARVIN, District Judge. A libel has been filed by the owner of the boat Stella Murphy against the New York Steam Company and the Coal & Delivery Company, Incorporated, alleging that the Stella Murphy, laden with a cargo of coal consigned to the respondents at Newtown Creek, arrived at the place of business of the latter on or about August 4, 1917; that the respondent failed to provide a proper and safe berth for the Stella Murphy; that as a result she grounded on the falling tide and was damaged.

The acts of negligence complained of are as follows:

(1) In that, being the consignees of said cargo, the respondents failed and neglected to furnish a proper, suitable, and safe place for the libelant's boat to lie at upon her arrival at her destination and until her cargo had been discharged.

(2) In furnishing for the libelant's said boat an unsuitable, unsafe, and improper berth, where the bottom was sloping, uneven, and of a hard substance.

(3) In failing to notify the libelant and those in charge of libelant's said boat of the dangerous and unsafe condition of the berth to which libelant's said boat was assigned.

There is no real dispute as to the material facts.

In view of the fact that no effort was made by the master of the Stella Murphy to ascertain how much water there was when he tied up at the respondents' wharf, it cannot be said that he was free from negligence. The Dave and Mose (D. C.) 49 Fed. 389.

But the owner of the pier was under a duty to employ reasonable diligence to have the place safe and proper for the vessel to lie. Union Ice Co. v. Crowell et al., 55 Fed. 87, 5 C. C. A. 49.

In the case of Nelson v. Phœnix Chemical Works, 7 Ben. 37, Fed. Cas. No. 10,113, the libel was dismissed; but that was not a case of inequality in the surface of the bottom.

It seems to me that The Dave and Mose, supra, is controlling. There will therefore be a decree for the libelant for one-half the amount of his damage, with order of reference to ascertain the amount.

FIRST NAT. BANK OF EL CENTRO v. HARPER.

(Circuit Court of Appeals, Ninth Circuit. December 2, 1918.)

No. 3175.

BANKRUPTCY ⟸303(3)—VOIDABLE PREFERENCES—PAYMENTS TO BANK.

Evidence *held* to sustain a finding that orders given by bankrupt, then known to be insolvent, to a bank where he had an overdraft, were not for deposit in the usual course of business, nor pursuant to prior arrangement, but on express understanding that they should be applied on the overdraft, and constituted a voidable preference.

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

Action by W. F. Harper, trustee in bankruptcy of H. G. Faubion, against the First National Bank of El Centro. Judgment for plaintiff, and defendant brings error. Affirmed.

The defendant in error, the trustee of the estate of H. G. Faubion, who was adjudged a bankrupt upon an involuntary petition filed October 11, 1913, brought this action against the plaintiff in error to recover $12,728 as a voidable preference. On and prior to September 1, 1913, one H. F. Davis, conducting a creamery business under the name of H. F. Davis Creamery Company, was doing his banking business with the plaintiff in error, hereinafter called the bank. He would purchase cream from ranchers, and from it make butter at El Centro, and consign the butter principally to Barber & Thompson, of Los Angeles. His property, consisting of the creamery, some automobiles, and other personal property, was covered by a mortgage to the bank for the sum of $2,000. For the cream which the creamery purchased from farmers it issued pay checks payable the 10th of each month. The merchants who purchased the butter did not always remit prior to that date, and the creamery was allowed to overdraw its account at the bank to meet its pay checks to farmers due on the 10th. This process was repeated each month.

About September 1, 1913, Davis sold the creamery to the bankrupt. The bankrupt paid Davis $7,500 and assumed all the outstanding liabilities. The $7,500 which Davis received was the money then due from Barber & Thompson for butter which Davis had sold them, but for which the ranchers who had furnished the cream had not been paid. On September 4, 1913, there was a balance in the bank of $53.75. About that time the bankrupt applied to the bank for continued credit upon the same terms as those previously given to Davis. Between that date and September 10 he drew pay checks to farmers aggregating over $12,000. On September 15 and 29, 1913, the bankrupt gave to the bank orders on Barber & Thompson and the Crescent Creamery Company, at Los Angeles, to which the bankrupt had transferred the business which had been formerly conducted with the Barber & Thompson company. The Crescent Creamery Company, upon such order, paid to the bank, September 29, $4,000, which was placed to the credit of the bankrupt, and reduced his overdraft to the amount of $4,133.17. The overdraft was thereafter increased by checks until October 5, when the bank received from the Crescent Creamery Company $4,904.49 and from Barber & Thompson $1,546.73 on the orders previously given by the bankrupt to the bank, leaving a balance in the bank of $260.67, which was subsequently paid to the trustee in bankruptcy.

It was the contention of the defendant in error that all payments made to the bank upon orders given by the bankrupt subsequent to September 18, 1913, were transfers made by the bankrupt as preferences, and received by the bank as such. It was the contention of the bank that it did all its busi-

ness with the bankrupt in due course of business, that it had a lien upon all the moneys deposited by the bankrupt or received from orders which he gave, and that it had the right to set off and apply the same upon the bankrupt's overdrafts. The court submitted to the jury the question whether the bankrupt was insolvent at the time when he made any transfer to the bank, and whether the transfer enabled the bank to obtain a greater percentage of its debts than any other creditor of the same class, and whether at the time of the transfer the bankrupt had reasonable cause to believe that the same would effect a preference.

The jury returned a verdict for the defendant in error for the sum of $6,045.50, having found that said transfers from the Crescent Creamery Company and the Barber & Thompson Company created preferences.

Lynn Helm, of Los Angeles, Cal., and Phil D. Swing, of El Centro, Cal., for plaintiff in error.

Dan V. Noland and Walter B. Kibbey, both of El Centro, Cal., and Duke Stone and H. E. Wassell, both of Los Angeles, Cal., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). The assignment of error upon which the bank relies is the denial of its motion, made at the close of the case, for an instructed verdict in its favor. It cites New York County Bank v. Massey, 192 U. S. 138, 24 Sup. Ct. 199, 48 L. Ed. 380, in which it was held that the balance of a bank account at the time of filing the petition is a debt due to the bankrupt from the bank, and that in the absence of fraud or collusion between the bankrupt and the bank, with a view of creating a preferential transfer, the bank need not surrender such balance, but it may set it off against notes of the bankrupt held by it. In the opinion the court said:

"It is true that the findings of fact in this case establish that at the time these deposits were made the assets of the depositors were considerably less than their liabilities, and that they were insolvent; but there is nothing in the findings to show that the deposit created other than the ordinary relation between the bank and its depositor. The check of the depositor was honored after this deposit was made, and for aught that appears Stege Bros. might have required the amount of the entire account without objection from the bank, notwithstanding their financial condition."

Again, the court said:

"As we have seen, a deposit of money to one's credit in a bank does not operate to diminish the estate of the depositor, for, when he parts with the money, he creates at the same time, on the part of the bank, an obligation to pay the amount of the deposit as soon as the depositor may see fit to draw a check against it. It is not a transfer of property as a payment, pledge, mortgage, gift, or security."

Among other cases cited for the bank are Continental Trust Co. v. Chi. Title Co., 229 U. S. 435, 33 Sup. Ct. 829, 57 L. Ed. 1268, and Studley v. Boylston Bank, 229 U. S. 523, 33 Sup. Ct. 806, 57 L. Ed. 1313. In the first of those cases the court said that it was the main purpose of Bankruptcy Act July 1, 1898, c. 541, section 68b, 30 Stat. 565 (Comp. St. § 9652), to prevent debtors of the bank from acquiring claims against the bankrupt for use by way of set-off and reduction of their indebtedness to the estate. Said the court:

"There is no question of the solvency of Prince when he deposited the money to secure the certificates, and what was done was not the acquisition of a claim against Prince with a view to setting it off against the bank's indebtedness on the certificates, but was the satisfaction, without diminution of the estate of the bankrupt, of possible claims of others who, in the event of Prince's default, would have been entitled to the deposits represented by the certificates. We do not think such transaction comes within the language or reason of section 68b."

In the second case the court said:

"There is nothing in the statute which deprives a bank, with whom an insolvent is doing business, of the rights of any other creditor taking money without reasonable cause to believe that a preference will result from the payment."

In that case the referee had found as a fact that the bank had no reasonable cause to believe that a preference would result. The court further said:

"The money so deposited was the proceeds of the sale of tickets to a large party of round the world tourists, and was put in bank, not for the purpose of preferring it, but in the expectation of being used for carrying on the business in the future as in the past. Indeed, the payments were made with the statement that the company would expect the bank to discount other notes. We find nothing in the record to indicate that the deposits were made for the purpose of enabling the bank to secure a preference by the exercise of the right of set-off."

But we find in the present case evidence which, if credited by the jury, was sufficient to distinguish the case from the cases so cited, and to justify the trial court in denying the motion for an instructed verdict. There was evidence: That on September 15 the bankrupt went to his attorney and told him he was unable to run the business any further. That he and his attorney then went to the office of Wachtel, the cashier of the bank, to whom the attorney repeated what the bankrupt had said, and further stated that the bankrupt had asked him (the attorney) to file a voluntary petition in bankruptcy for him. That Wachtel then requested that the bankrupt give an order on Barber & Thompson for the proceeds of the butter that was being shipped to Los Angeles, and said that the bank would try to carry the business along. That the order was thereafter given. That about the 28th or 29th of September the bankrupt and his attorney again went to Wachtel and the attorney stated to Wachtel that the bankrupt had renewed his request that he file a petition in bankruptcy. That his business was bankrupt. That the pay roll for help would come due the 1st of October, amounting to $2,000, and that the bankrupt had stated that Wachtel refused to pay any more advances to the creamery patrons because the overdraft had grown to such an extent that he did not feel it safe. That Wachtel replied, "This business is insolvent, and I cannot advance any more money," to which the attorney answered: "You are between the devil and the deep sea. The pay roll will be due here on the 1st. They have got a large overdraft at the bank. If you commence a suit against the business to recover your overdraft, these laborers, whose accounts have not been paid, amounting to nearly $2,000, will be preferred claims, and you would have it to pay anyway, and if you don't advance

the money on the pay roll on the 1st, when their wages are due, we will close the business up, and they will be preferred claims anyway." That Wachtel said that he would advance enough more money to take care of the pay roll as it came due on the 1st, "provided you will give me another order for all of the proceeds of the business on the Crescent Creamery Company to whom you are now sending butter." That the bankrupt agreed and the order was given. That at that time the bank knew that the bankrupt was owing $20,000 to ranchers who had furnished cream.

The cashier, testifying as to the method of doing business with the creamery under the Davis management, stated that the overdraft would occur generally from the 10th of the month to a few days there following, and would be paid by deposits of checks which the creamery received for the sale of the butter, but that upon receiving the orders from the bankrupt on Barber & Thompson and the Crescent Creamery Company, an officer of the bank immediately went to Los Angeles (200 miles away), and received the money directly from those companies, although the bank thereafter credited the same upon its books as deposits by the bankrupt. When asked by the court if the orders on Barber & Thompson and on the Crescent Creamery Company were given for the purpose of depositing the money to his account, the bankrupt answered that it was to secure the bank for its overdraft, but that it was put into his deposit account.

This is not a case where there was a previous agreement between a bank and a depositor that the latter should assign accounts to the bank for collection to pay overdrafts as they might occur, for the court below instructed the jury that, if an assignment of accounts was effected prior to the overdraft of September 18 of $12,928.09, the plaintiff was not entitled to recover any sum from the bank, but that, if there was no assignment before September 18, the jury should take into consideration whether such an assignment was then a preference, and, if they found that it was, the bank would not have the right to apply any of the proceeds of such assignment on the overdraft. The jury have found by their verdict that there was no such prior assignment. Nor is this a case where there is absence of evidence to show that the moneys so collected by the bank were deposits created otherwise than in the ordinary relation between a bank and its depositor. Here there was evidence that the accounts were assigned and the proceeds were received by the bank, not in the usual course of banking business, but with the specific understanding that they were to be applied to the reduction of the overdraft. In Traders' Bank v. Campbell, 14 Wall. 87, 20 L. Ed. 832, the depositor gave his bank a check for the balance of his account, which the bank applied to his indebtedness. It was the contention of the bank in that case that, as it had a right to set off its claim against the deposit, it was immaterial that the same thing was accomplished by the check. But the court held that the transaction was a payment, and not a set-off, since both the parties thereto knew of the depositor's insolvency and that the payment was a preference. That ruling was followed in In re Starkweather & Albert (D. C.) 206 Fed. 797, and of similar import are In re National Lumber Co., 212 Fed. 928, 129 C. C. A. 448; Knoll v. Commercial

Trust Co., 249 Pa. 197, 94 Atl. 750, L. R. A. 1916A, 683, Ann. Cas. 1916C, 988; Johnson v. Gratiot County Bank, 193 Mich. 452, 160 N. W. 544; National City Bank v. Hotchkiss, 231 U. S. 50, 34 Sup. Ct. 20, 58 L. Ed. 115; Mechanics' Bank v. Ernst, 231 U. S. 60, 34 Sup. Ct. 22, 58 L. Ed. 121; Ernst v. Mechanics & Metals Nat. Bank, 201 Fed. 664, 120 C. C. A. 92.

The bank asserts that there is no evidence of the amount of the bankrupt's estate, and that therefore there is absence of proof that the transfers to the bank enabled it to obtain a greater percentage of its debt than any other creditor of the same class will receive. But such proof was unnecessary, in view of the undenied allegation of the complaint that the assets of the estate are not sufficient, including the sum of $12,728, the amount sought to be recovered in the action, to satisfy the claims of the creditors of the bankrupt. There was proof, however, that the bankrupt had no money or assets when he went into the business; that he diverted from the assets which he purchased $7,500 to pay Davis; that the creamery plant and personal property which he bought was worth $6,000 or $7,000, on which the bank held a mortgage for $2,000, and that on the mortgage the bank subsequently acquired the property; that claims against the estate aggregating $6,574.13 had been presented and allowed, and claims aggregating $10,798.23 had been presented and not yet allowed. This showing was clearly sufficient.

The judgment is affirmed.

JONES v. FORD et al.

In re MORRIS.

(Circuit Court of Appeals, Eighth Circuit. October 14, 1918.)

No. 193.

1. BANKRUPTCY ⊂=200(3)—PREFERENCE—LANDLORD'S ATTACHMENT FOR RENT.
An attachment for rent, right to which is given by Rev. St. Mo. 1909, § 7896, but which, under section 7897, must be followed by determination of the rights of the parties by proceeding in court, and then by execution, is not the equivalent of a common-law distress for rent, and so does not give the landlord's claim a preference, but, being within four months of petition in involuntary bankruptcy, is void under Bankruptcy Act, § 67f (Comp. St. 1916, § 9651).

2. BANKRUPTCY ⊂=444—PETITION TO REVISE—CONTENTIONS AVAILABLE—RESPONDENTS.
Insistence of respondents, on petition of trustee in bankruptcy to revise order of District Court giving preference to their claim, thereby reversing order of referee, that the bankruptcy proceedings were not adversary, cannot be considered, not being covered by certificate of referee or order on review.

Petition to Revise Order of the District Court of the United States for the Western District of Missouri; Arba S. Van Valkenburgh, Judge.

In the matter of Sarah Morris, bankrupt. Petition by Joseph M. Jones, trustee, to revise the order of the District Court, on review,

reversing the order of the referee allowing the claim of Alfred Ford and another as a general claim only. Petition sustained, with directions.

I. J. Ringolsky, of Kansas City, Mo. (M. L. Friedman, of Kansas City, Mo., on the brief), for petitioner.

Frank Titus, of Kansas City, Mo., for respondents.

Before HOOK, CARLAND, and STONE, Circuit Judges.

STONE, Circuit Judge. This is a petition by a trustee in bankruptcy to revise an order of the District Court giving preference to respondents' claim, thereby overruling and reversing the order of the referee, which had denied such preference and allowed it as a general claim only.

The claim in question was for rent of a store building where the bankrupt was conducting a mercantile business in Kansas City, Mo. Before the involuntary petition in bankruptcy was filed, the respondents secured, in accordance with the Missouri statutes, an attachment levy by the state sheriff, who took possession of the chattels in question, a part of the stock in trade. Later they were delivered by him, under an order of the United States District Court, to the receiver appointed in this bankruptcy proceeding. Respondents presented and prayed for an allowance of their claim as a preferred claim, which preference was denied by the referee, and upon a petition for review allowed by the District Court. There are only two points properly before the court under this petition to revise: Respondents' claim that petitioner is not an interested party, entitled to a revision petition under the bankruptcy statute; and petitioner's claim that the preference was improperly allowed by the trial court.

The petitioner is the trustee of the estate, and as such is representative of the estate, and interested in the allowances of claims and preferences. It is part of his duty to see that the assets are properly distributed among the creditors who file claims therefor. This comprehends the matter of allowance of claims, which naturally includes the allowance of preferences.

[1] The theory upon which the trial court allowed the preference was that, under the Missouri statute, an attachment for unpaid rent was the equivalent of a distress for rent, where the levy of the attachment perfected an existing inchoate lien, which did not require a judicial proceeding to make it effective. The petitioner contends that the attachment for rent authorized by the Missouri statute (hereinafter set out) is in no sense analogous to distress for rent, but is merely the creation of an additional ground for attachment, requiring a judicial proceeding to make its lien effective. As such he contends it is avoided by the Bankruptcy Act of July 1, 1898 (30 Stat. 564, c. 541), section 67f of which declares:

"That all levies, judgments, attachments, or other liens obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt. * * *" Compiled Statutes 1916, § 9651.

The common-law distress for rent was a product of early feudal tenure. It is generally regarded as one of those instances in which the right or remedy, however it may be classified, was in the hands of the party, without the necessity of judicial aid. It may be that absolute accuracy would avoid this statement; however, if any judicial action was necessary to initiate or perfect the early distress, it belonged, not to royal tribunals, but to manorial courts, which meant, of course, the court of the lord who was enforcing the distress. History of English Law, by Pollock & Maitland, vol. 1, p. 589, and volume 2, p. 576.

Broadly defined, common-law distress allowed the landlord to go upon the demised premises and seize anything he might there find, irrespective of its ownership, and hold the same without sale or usage as a gage until the rental was paid. Interesting discussion of this remedy may be found in History of English Law, by Pollock & Maitland, vol. 1, pp. 353–355, 589, and volume 2, pp. 117, 130, 575–578; also in 16 R. C. L. 1003. Breaches of the peace were liable to occur in the enforcement of this summary method. To prevent such, in most, if not all, jurisdictions where distress is substantially preserved to-day, there are statutes providing that the seizure shall be by some official. Statutes have to an extent also altered the common-law distress in certain respects—such as limiting seizure to the property of the tenant, permitting seizure of such property away from the demised premises, and allowing sale of the property to satisfy the demand. But none of these statutes has annihilated the fundamental characteristic of distress, to wit, that the landlord shall, directly or indirectly, seize and control the gage without aid of judicial proceedings to establish his right.

The common-law distress for rent has never been countenanced in Missouri (Crocker v. Mann, 3 Mo. 472, 26 Am. Dec. 684), and, so far as we have been able to find, no statutory substitute therefor has been employed, except in some very early statutes applying to particular communities, where a "distress warrant" was for a time authorized (Quinnett v. Washington, 10 Mo. 53), but is no longer permitted. There are statutes giving liens upon crops and nursery stock grown on demised premises. R. S. Mo. 1909, §§ 7888, 7902. In other instances the landlord has been put to statutory actions for rent (Crocker v. Mann, 3 Mo. 472, 475), or for speedy possession of the premises (R. S. Mo. 1909, § 7904; Welch v. Ashby, 88 Mo. App. 400, 404). In aid of rent recovery, an attachment is allowed where the actions of the tenant are such as to justify the belief that the collection of the rent will be endangered, hindered, or delayed, or where the unpaid rent is overdue and demand has been made therefor. R. S. Mo. 1909, § 7896. The sections referring to attachment are as follows:

"Sec. 7896. *Attachment for Rent will Lie, When—How Obtained.*—Any person who shall be liable to pay rent, whether the same be due or not, or whether the same be payable in money or other thing, if the rent be due within one year thereafter, shall be liable to attachment for such rent, in the following instances: First, when he intends to remove his property from the leased or rented premises; second, when he is removing his property from the leased or rented premises; third, when he has, within thirty days, re-

moved his property from the leased or rented premises; fourth, when he shall in any manner dispose of the crop, or any part thereof, grown on the leased or rented premises, so as to endanger, hinder or delay the collection of the rent; fifth, when he shall attempt to dispose of the crop, or any part thereof, grown on the leased or rented premises, so as to endanger, hinder or delay the collection of the rent; sixth, when the rent is due and unpaid, after demand thereof: Provided, if such tenant be absent from such leased premises, demand may be made of the person occupying the same. The person to whom the rent is owing, or his agent, may, before a justice or the clerk of a court of record having jurisdiction of actions, by attachment in ordinary cases, of the county in which the premises lie, make an affidavit of one or more of the foregoing grounds of attachment, and that he believes unless an attachment issue plaintiff will lose his rent; and upon the filing of such affidavit, together with a statement of plaintiff's cause of action, such officer shall issue an attachment for the rent against the personal property, including the crops grown on the leased premises, but no such attachment shall issue until the plaintiff has given bond, executed by himself or by some responsible person for him, as principal, in double the amount sued for, with good security, to the defendant to indemnify him if it appear that the attachment has been wrongfully obtained: Provided, if any person shall buy any crop grown on demised premises upon which any rent is unpaid, and such purchaser has knowledge of the fact that such crop was grown on demised premises, he shall be liable in an action for the value thereof, to any party entitled thereto, or may be subject to garnishment at law in any suit against the tenant for the recovery of the rent.

"Sec. 7897. *Proceedings, Same as What.*—Proceedings on all attachments issued under this chapter shall be the same as provided by law in case of suits by attachment. * * *

"Sec. 7902. *What Property Exempt From Rent.*—Property exempt from execution shall be also exempt from attachment for rent, except the crop grown on the demised premises on which the rent claimed is due."

In our judgment these sections of the statute (sections 7896 and 7897) were not intended to and do not create any lien, nor recognize the existence of any inchoate lien. They give to landlords additional grounds for attachment, which grounds are connected with the tenancy or payment of rent. It may be suggestive that the affidavit for attachment filed herein contains six grounds for attachment. The first three are under the general statute (R. S. Mo. 1909, § 2294); the other three under the landlord section (section 7896, supra). Such an attachment must take the course of any ordinary attachment suit under the statutes (R. S. Mo. 1909, §§ 2294–2359, 7897), and merely serves to sequester and control in the custody of the court the means of satisfying any judgment later secured upon the merits. There is no right of sale of the levied property until after a determination of the rights of the parties by a court in a legal proceeding, and then only upon execution (R. S. Mo. 1909, § 2351), and only such property as is subject to execution is liable to attachment for rent, except crops grown upon the premises (section 7902, supra).

This case is distinguishable from Henderson v. Mayer, 225 U. S. 631, 32 Sup. Ct. 699, 56 L. Ed. 1233, In re West Side Paper Co., 162 Fed. 110, 89 C. C. A. 110, 15 Ann. Cas. 384, Id. (D. C.) 159 Fed. 241, Austin v. O'Reilly, 2 Woods, 670, Fed. Cas. No. 665, and In re Morris, 159 Fed. 591, relied upon by the trial court; also from In re Mock (D. C.) 228 Fed. 95, In re City Drug Store (D. C.) 224 Fed. 133, In re Floyd Scott Co. (D. C.) 224 Fed. 987, In re Place (D. C.) 224 Fed. 779, 785, and In re Printograph Co. (D. C). 210 Fed. 567, 569, cited by respondents. The Henderson Case dealt with a Georgia statute

expressly (225 U. S. 638, 639, 32 Sup. Ct. 701, 56 L. Ed. 1233) establishing "liens in favor of landlords," and giving them "power to distrain for rent as soon as same is due." Under such proceeding:

"The sheriff was not required to return it to any court, and no judicial hearing or action was necessary to authorize him to sell for the purpose of realizing funds with which to pay the rent. Such a lien was not created by a judgment nor 'obtained through legal proceedings.'"

In re West Side Paper Co. is a case purely of distress under the Pennsylvania law, where, as said by the court (162 Fed. 112, 89 C. C. A. 112, 15 Ann. Cas. 384):

"No suit or proceeding at law, whether in personam or in rem, in the proper sense of those words, was necessary for the assertion of this right. It belongs to that small category of personal rights, the assertion of which has always been independent of legal procedure, of which the right to abate a nuisance, under certain circumstances, and the right to distrain cattle damage feasant, are examples."

Austin v. O'Reilly is also an instance of distress under a Mississippi statute; the court saying:

"In Mississippi, it is true, the landlord is obliged to sue out an attachment for the purpose of effecting a distress for rent; but when the attachment is sued out, his rights are the same in effect as those of the landlord at common law. That they are founded on and grow out of those rights is evident from the fact that he is not compelled to pursue his claim to judgment like other creditors. The attachment in his case is in the nature of an execution; or, more properly speaking, of a distress."

In re Morris is of doubtful application, but at most is merely an application of the Pennsylvania statute discussed in Re West Side Paper Co., supra.

The Mock, City Drug Store, and Printograph Cases were on the district, and dealt, respectively, with the Pennsylvania, Georgia, and Mississippi laws discussed above. We think the Place and Floyd Scott Cases inapplicable.

[2] An insistence of respondents that the bankruptcy proceedings were not adversary cannot be considered, because, among other reasons, not covered by the certification of the referee or the order on review.

The petition for revision is sustained, with directions to the trial court to revise its order allowing respondents' claim as a preference into an allowance as a general claim against the bankrupt.

PENN DEVELOPMENT CO. v. STONER et al.

(Circuit Court of Appeals, Ninth Circuit. December 2, 1918.)

No. 3107.

MORTGAGES ⇐362—COLLUSIVE FORECLOSURE—RIGHTS OF VENDOR.

A corporation, which purchased oil property at trustee's sale under a mortgage, pursuant to contract with another corporation which had bought the property and assumed the mortgage, *held*, under the contract, to have only a lien as between the two corporations, leaving the property equitably that of the original purchaser and subject to foreclosure for its default in payments.

Appeal from the District Court of the United States for the Southern Division of the Southern District of California; Oscar A. Trippet, Judge.

Suit by C. E. Stoner and others, directors and trustees of the Ventura-California Oil Company, against the Penn Development Company and others. Decree for complainants, from which defendant Penn Development Company appeals. Affirmed.

The amended bill, upon which this suit was tried and decided in the court below, first alleged that the complainant, Ventura-California Oil Company, a California corporation, was the owner and in possession of certain specifically described oil lands, situated in Ventura county, containing in the aggregate 569.54 acres, together with the oil wells thereon and the personal property connected therewith; that the defendants to the suit claimed some interest in the property, which claim was without the basis of any right; and for a second cause of suit the bill alleged, among other things, in substance that on the 22d of July, 1913, the complainant and the defendant Stephen W. Dorsey entered into a contract by which the complainant agreed to sell and the said Dorsey to buy all of the said property, the consideration therefor to be, according to the allegations of the bill, as follows:

"The defendant Dorsey agreed to transfer and assign, within 30 days of the date of said agreement, 11,000 shares of the capital stock of the Pacific Petroleum Company, one of said defendants, of the par value of $110,000, and $25,000 par value of first mortgage bonds of said Pacific Petroleum Company, secured by a mortgage on said property and other property in said state [of California] and to pay in cash $15,000 on or before November 1, 1913, and said Dorsey also assumed and agreed to pay an indebtedness represented by notes secured by a trust deed then existing against said property, made to and held by the Citizens' Trust & Savings Bank, as trustee, which notes had been executed to Benson Investment Company, a corporation, on February 19, 1913, and by it assigned to certain individuals residing in England. That the total amount of the issue of said notes secured by said trust deed made to said Citizens' Trust & Savings Bank was the sum of $50,000, but at the time when the said agreement was entered into the total amount unpaid thereon was the sum of $25,000, and interest at the rate of 6 per cent. for about three months, and that the assumption of said lien, and the payment thereof according to the terms of said notes and trust deed, was a part of the consideration for the purchase of said property on the part of said Dorsey."

The bill further alleged that Dorsey assigned the contract of purchase to the Pacific Petroleum Company, under which the latter entered into possession of the property, and that in and by the assignment that company "agreed to perform all the covenants on the part of said Dorsey contained in said contract to be performed, and assumed and agreed to pay all the payments provided therein, and to pay and satisfy the indebtedness secured by the trust deed to the Citizens' Trust & Savings Bank."

The bill further alleged that subsequently the defendant Penn Development Company entered into an agreement with the Pacific Petroleum Company, by which it obtained some interest in the property, and that the individual defendants likewise obtained some interest therein, all of which interests so obtained were subject to the rights and interests of the complainant; that neither of the defendants paid to the complainant the $15,000 due on or before November 1, 1913, under the Dorsey contract, nor have they transferred or caused to be transferred the $25,000 par value of first mortgage bonds of the Pacific Petroleum Company, as required by the Dorsey contract, by reason of which failure each of the defendants forfeited all right to any of the property.

The answer of the Penn Development Company, while admitting that it had not paid to the complainant "the sum of $15,000, nor transferred nor caused to be transferred the particular mortgage bonds" referred to in the bill, denied that it was at any time legally or equitably required to make such payment or such transfer of bonds, and among other things alleged that on March 11, 1914, it purchased and acquired for a valuable consideration all of the property described in the bill, of which it has ever since been in continuous possession and its owner in fee.

The answer of the Pacific Petroleum Company denied that the complainant is, or at any time since March 11, 1914, has been, the owner of, or had any interest in, any of the property referred to, and alleged that ever since the day last mentioned the Penn Development Company has been its owner in fee. It also denied that the two defendant corporations ever entered into any agreement by which the Penn Development Company obtained any interest in the real property described in the bill, and denied that any interest ever acquired by the latter company was taken subject to any right of the complainant, and denied that the $15,000 referred to in the bill was not paid. The answer of the Pacific Petroleum Company admitted the nondelivery of the $25,000 par value bonds, in respect to which it alleged that it "duly authorized the issuance of bonds, including said bonds for plaintiff; that temporary receipts for such bonds were executed by this defendant, and delivered to and accepted by plaintiff; that this defendant has been hindered and delayed in the actual issuance and delivery of its bonds by the refusal of the trustee agreed upon to act, by litigation, and by other unforeseen events, but that this defendant intends in good faith to execute and deliver its said bonds to plaintiff as agreed, and that plaintiff has not been prejudiced or damaged by such delay in the issuance and delivery of said bonds"; and in addition to various other denials the Pacific Petroleum Company pleaded a judgment entered in the superior court of the county of Los Angeles, rendered in its favor against the Penn Development Company for $350,000, besides costs.

On the trial it was stipulated that the judgment so pleaded was in fact rendered on or about November 8, 1914, in an action brought by the Petroleum Company against the Penn Company for a breach of the aforesaid contract between those parties, and it was further stipulated that in February, 1913, the title to the property in controversy was in the Ventura California Oil Company.

Theodore Martin and William H. Cochran, both of Los Angeles, Cal., for appellant.

Tanner, Odell, Odell & Taft, Peyton H. Moore, and Porter & Sutton, all of Los Angeles, Cal., for appellees.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge (after stating the facts as above). The suit was commenced in one of the superior courts of the state, from which it was transferred to the court below on motion of the defendants thereto. The complainant, being the owner of the lands involved, on which oil was then being produced, and of the appurtenant property,

had executed a trust deed covering it to the Citizens' Trust & Savings Bank of Los Angeles to secure certain of its indebtedness, on which there remained unpaid $25,000, with certain interest thereon. One Stephen W. Dorsey, owner of a majority of the stock of the Pacific Petroleum Company, a corporation, then entered into a contract with the complainant, by which the latter agreed to sell, and he to buy, all of the said property, the consideration therefor being his assumption of and agreement to pay the indebtedness to the bank, $15,000 in cash on or before November 1, 1913, $25,000 par value of first mortgage bonds of the said Pacific Petroleum Company, and 11,000 shares of its stock, of the par value of $110,000, and all taxes upon the property accruing subsequent to the fiscal year 1912–1913—the contract expressly providing that Dorsey should enter into possession of the property, and have the right to operate the wells thereon and to drill other wells, and to extract and sell the oil therefrom, during his performance of the contract, and that, in the event of the breach by him of any of the provisions of the agreement, the complainant should have the right to foreclose the contract, in which event Dorsey should forfeit any money, bonds, or stock theretofore paid by him, and surrender possession of the premises. The contract further provided that it should bind the successors and assigns of the respective parties, and that upon full performance of its provisions by Dorsey the complainant would execute to him or to his assigns a conveyance of the title to the property.

Two days after the contract was executed Dorsey executed to the Pacific Petroleum Company an assignment of the contract, concluding with the clause, "Subject to all the conditions contained in said agreement upon the part of the party of the first part herein to be performed and which the party of the second part herein agrees to perform," which assignment does not appear to have been signed by the assignee. The answer, however, of the Pacific Petroleum Company, as well as other portions of the record, abundantly show that such assignment was accepted by that company, and that it delivered to the complainant, in pursuance of its contract with Dorsey, the 11,000 shares of the stock of the said Pacific Petroleum Company stipulated for, and denied that it had not paid the $15,000 in cash as provided for by the contract, and, while admitting the nondelivery of the $25,000 par value bonds of the Petroleum Company, set up that instead thereof it had delivered, and the complainant had accepted, "temporary receipts," and what is designated in other portions of the record as "interim bonds."

The record shows that, the interest on the $25,000 remaining of the indebtedness to the Citizens' Trust & Savings Bank not having been paid when due, the trustee advertised the property in question for sale, pursuant to the provisions of the trust deed securing the said indebtedness, designating March 11, 1914, as the time when it would offer at public sale all of the said property in satisfaction of the lien thereon secured by the trust deed. Neither Dorsey nor the Pacific Petroleum Company, the majority of the stock of which, as has been said, he owned, and who with said company owned or claimed to own various leasehold interests in other oil-bearing lands in California,

being able to pay the indebtedness against the property here in question, Dorsey went East in the endeavor to raise the necessary money, resulting in the incorporation of the appellant Penn Development Company, and in the execution February 17, 1914, of a contract between that company and the Pacific Petroleum Company, which, after reciting that—

"Whereas, Stephen W. Dorsey is the owner of a majority of the capital stock of the Pacific Petroleum Company; and

"Whereas, the said Pacific Petroleum Company is under contract to purchase, in fee simple, certain oil properties in the state of California, and is the holder of certain leasehold interests in other oil properties in California; and

"Whereas, the Pacific Petroleum Company has heretofore, under date of July 24, 1913, executed its mortgage or deed of trust to secure certain bonds upon the said property when acquired; and

"Whereas, certain certificates have been issued by the Pacific Petroleum Company, agreeing to deliver bonds if and when issued; and

"Whereas, certain of the agreed purchase price has not been paid on certain of the properties under contract of purchase as aforesaid; and

"Whereas, certain underlying mortgages assumed by the Pacific Petroleum Company have not been paid; and

"Whereas, the Pacific Petroleum Company is indebted to various parties, and is without means to pay said indebtedness; and

"Whereas, the Pacific Petroleum Company is desirous of entering into an agreement under which its property may be, to such extent as may be found possible, preserved, upon the terms and conditions set forth in this agreement; and

"Whereas, the property known as the Ventura-California property is about to be sold in proceedings under a trust deed"

—expressly provided, among other things, as follows:

"First. The Penn Development Company agrees to purchase at a sum not exceeding thirty thousand dollars ($30,000), at the forthcoming trustee's sale, the title in fee simple of the Ventura-California property [specifically describing the property in question]"—the Penn Development Company "to take title to the same in fee simple absolutely without conditions or trust relations of any kind whatsoever, except the Penn Development Company shall forthwith enter into an option in the form attached hereto as Exhibit A.

"Second. The Penn Development Company agrees to advance for the purpose of the preservation of the assets of the Pacific Petroleum Company the additional sum of thirty thousand dollars ($30,000) over and above the sum paid for acquiring the aforesaid Ventura-California property, which said sum shall be used and applied" to various specified purposes relating to the leasehold interests that have been referred to, and including "the payment for labor and other claims against the Pacific Petroleum Company," aggregating $6,500, and "$4,000 to be expended upon the cementing, redrilling, and bringing into operation of the two existing wells on the Ventura-California property. * * *

"Fourth. The Pacific Petroleum Company hereby transfers, sets over, and assigns to the Penn Development Company all its right, title, and interest of every kind and description in and to all the oil to be derived from the operation of all the properties owned or leased by it, or held by it under contract, to be held by the Penn Development Company, in trust" (a) to pay certain specified expenses; (b) "to retain the monthly sum of two thousand five hundred dollars ($2,500) for the period of four (4) months from the date hereof, and thereafter to retain the monthly sum of five thousand dollars ($5,000) until all the money advanced for the benefit of the Pacific Petroleum Company shall have been paid to the Penn Development Company, or until such further period as shall be sufficient to pay to the Penn Development Company the amount to be paid under the option hereto attached as Exhibit A for the Ventura-California property; (c) the balance to be used

for the purposes of the Pacific Petroleum Company for the liquidation of the items named in paragraph 2 hereof, as the said Dorsey from time to time shall determine, and upon the property of the Pacific Petroleum Company as the said Dorsey and counsel for the Penn Development Company shall determine. * * *

"Sixth. In the event of the failure of the Penn Development Company becoming the purchaser at the sale of the Ventura-California property after a bid of not exceeding thirty thousand dollars ($30,000), no obligation shall exist upon the Penn Development Company to carry out any part of this agreement, but this agreement shall remain in full force and effect for the benefit of the Penn Development Company until the return to it of all sums theretofore advanced, together with all expenses incurred, and a counsel fee to counsel for the Penn Development Company."

And by the seventh paragraph of this contract the Pacific Petroleum Company covenanted, among other things:

"That upon the payment of not exceeding $30,000 the title in fee simple may and shall be purchased by the Penn Development Company of the Ventura-California property on March 11, 1914, or on any adjournment thereof," and "that there are two wells on the Ventura California property, that the same were oil-producing wells until September, 1913, and that the same can be and will be brought into operation by the expenditure estimated not to exceed four thousand dollars ($4,000)."

The Exhibit A referred to in the contract between these two corporations, and thereby made part thereof, is an exclusive option given by the Penn Development Company to the Pacific Petroleum Company to purchase the property here in question "at any time within three years for the sum of two hundred thousand ($200,000) in cash, and upon the further delivery to the Penn Development Company of 25 per cent. of all the capital stock issued and outstanding issued by the Pacific Petroleum Company or by its successor, less only" (a) such stock as should remain in the treasury or be issued pending the exercise of the option with the approval of counsel for the Penn Development Company for development or financing purposes; (b) such stock as should be issued and delivered for the funding of indebtedness of the corporation; (c) such stock as should be issued and delivered for "the payment in part purchase to other than the said Stephen W. Dorsey, for the part payment of the properties acquired by the Pacific Petroleum Company." And as conditions precedent to its exercise, the option expressly provided the following:

"(1) All outstanding bonds or agreements to receive bonds shall be canceled by the Pacific Petroleum Company and preferred stock issued therefor to an amount not to exceed $600,000.

"(2) Such amount of the preferred stock as shall be agreed upon by Dorsey and the counsel for the Penn Development Company shall be left in the treasury of the company for sale for development purposes, and not less than one-third of the capital stock shall be left in the treasury for development purposes.

"(3) There shall be subtracted from the purchase price under this option:

"(a) Twice such sum as shall comprise the difference between the amount advanced by the Penn Development Company and one hundred thousand dollars ($100,000);

"(b) Such sums as shall have been received by the Penn Development Company under the operation of subdivision (b) of paragraph 4 of a certain agreement made and entered into between the Pacific Petroleum Company and the Penn Development Company, and dated the 17th day of February, 1914.

"(4) The Pacific Petroleum Company shall at the option of the said Stephen W. Dorsey have the right to sell all of its assets for cash or other securities for such sum or sums as shall in the opinion of the said Stephen W. Dorsey and counsel for the Penn Development Company not be equivalent to less than the total sum of two million dollars ($2,000,000). Should such sale be made, one-half of the sum to be paid to the Penn Development Company under the terms of this option shall be subtracted from the 25 per cent. to be received under the terms of this option by the Penn Development Company out of the proceeds of such sale.

"(5) Should the Pacific Petroleum Company in its discretion after the repayment of the amount due to the Penn Development Company for advances cease the payment to the Penn Development Company is authorized to retain under subdivision (b) of paragraph 4 of a certain agreement made and entered into between the Pacific Petroleum Company and the Penn Development Company, and dated the 17th day of February, 1914, this option shall forthwith terminate and expire."

The record shows that, in pursuance of the foregoing agreements between the parties mentioned, the Penn Development Company, through its attorney, purchased at the sale of the trustee bank on March 11, 1914, the properties in question, for $30,000, and received from such trustee a deed therefor, thereby acquiring the legal title to the property of the complainant without the payment to it of the consideration specified in the agreement between it and Dorsey, whose rights passed to and whose obligations were assumed by the Pacific Petroleum Company, which company, the record further shows, for breach of the foregoing obligations of the present appellant, recovered judgment against it in the sum of $325,000, which, so far as appears, is still in force.

As a matter of course, all of the instruments referred to must be read and considered together, and, so read, and considered, we think it clear that the claim of the appellant to ownership in fee of the property in question, by virtue of the deed from the trustee bank, as against the successors in interest of the Ventura-California Oil Company, cannot be sustained. The contract between the Pacific Petroleum Company and the Penn Development Company not only expressly recognized the existence of the contract between the complainant and Dorsey, and the assignment by the latter to the Petroleum Company, and its assumption of Dorsey's obligations, but a number of the provisions of the contract between the Petroleum and Penn companies, as well as the oral testimony in the case, clearly show that both of those companies, not only knew that the Penn Company bought and received the title to the complainant's property through the sale of it by the trustee bank because of the failure of the Petroleum Company to perform the obligations of Dorsey which it had assumed, but also well knew from unmistakable provisions of the contract between the Petroleum and Penn Companies that the latter took the legal title to the property here involved as part security for the various sum of money it agreed to advance in and about the development and operation of this particular property, as well as other property referred to in the contracts. Beyond question, equity regards the conveyance of the complainant's property by the trustee bank to the Penn Development Company as a mortgage as between the latter and the Pacific Petroleum Company, leaving the property therein de-

scribed subject to foreclosure for default in the payment therefor which both of those companies by their agreements had assumed. These views are given substantial effect by the judgment of the court below, and in principle are well supported by the decisions of the Supreme Court of California, here applicable, in the cases of Keller v. Lewis, 53 Cal. 118; S. P. R. R. Co. v. Allen, 112 Cal. 455, 44 Pac. 796; Longmaid v. Coulter, 123 Cal. 208, 55 Pac. 791; Odd Fellows Savings Bank v. Brander, 124 Cal. 257, 56 Pac. 1109.

The judgment is affirmed.

UNITED STATES v. REDONDO DEVELOPMENT CO.

(Circuit Court of Appeals, Eighth Circuit. November 18, 1918.)

No. 5035.

1. BOUNDARIES ⟸3(1)—SURVEYS—RULES FOR CONSTRUCTION.
   The general rule of precedence of proofs for determining disputed boundaries is: First, natural monuments; second, artificial marks; third, courses and distances; and, last, recitals of quantity; but the rule is not imperative, and is adaptable to circumstances.
2. BOUNDARIES ⟸3(9)—SURVEY—CALL FOR QUANTITY—ACREAGE.
   Where persons entitled under a treaty to select certain lands out of the public domain undertook to locate nearly 100,000 acres of land, and the selection and location were made specifically to comprise that acreage, *held*, that the calls for quantity will prevail over the marks, etc., of contract surveyors employed by the Surveyor General; it being apparent from the field notes that such surveyors did not actually run the exterior lines of the location.
3. CONSTITUTIONAL LAW ⟸68(1)—POLITICAL QUESTIONS—JUDICIAL POWER—SURVEYS.
   The making and correction of surveys of public lands belong to the political department of the government, and the courts should not attempt to determine, in a suit by the United States against a patentee of public land, that a private survey is correct, though the court may adjudge a survey made to be incorrect.
4. PUBLIC LANDS ⟸28—RESURVEYS.
   The erroneous refusal of the Land Office to make a resurvey of a location of public lands based upon a misconception of the patentee's rights does not preclude a resurvey; the refusal not operating as a permanent bar.

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

Suit by the United States against the Redondo Development Company, which sought affirmative relief. From the decree, the United States appeals. Modified, and, as modified, affirmed.

J. O. Seth, Asst. U. S. Atty., of Santa Fé, N. M. (Summers Burkhart, U. S. Atty., of Albuquerque, N. M., on the brief), for the United States.

George S. Klock and Alonzo B. McMillen, both of Albuquerque, N. M., for appellee.

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

HOOK, Circuit Judge. This is a suit by the United States to enjoin the Redondo Development Company from fencing and cutting timber from a tract of land in New Mexico known as "Baca Location No. 1," outside the exterior boundaries thereof as established by the official government survey and marked upon the ground by the surveyors. The defendant affirmatively sought a judicial confirmation of its boundary claim. Upon final hearing the trial court held that the true boundaries were delineated in the field notes and plat of the survey officially reported, were not correctly marked upon the ground, and that the fencing of the defendant was upon the right lines. It dismissed the complaint of the government but retained jurisdiction of the cause for further orders if defendant was interfered with. The government appealed.

The Baca floats, locations, or grants as variously called, are five in number, and their history may be found in Shaw v. Kellogg, 170 U. S. 312, 18 Sup. Ct. 632, 42 L. Ed. 1050, involving No. 4, and Lane v. Watts, 234 U. S. 525, 34 Sup. Ct. 965, 58 L. Ed. 1440, and 235 U. S. 17, 35 Sup. Ct. 3, 59 L. Ed. 104, involving No. 3. See, also, Maese v. Herman, 183 U. S. 572, 22 Sup. Ct. 91, 46 L. Ed. 335. Only so much will be recited as is necessary to exhibit the present controversy. By Act June 21, 1860, c. 167, 12 Stat. 71, and proceedings under it, the heirs of Luis Maria Baca were entitled to select from the vacant, nonmineral, public lands in the then territory of New Mexico an aggregate of 496,446.90 acres in not more than five square tracts or bodies. In December, 1860, they made selection No. 1, to contain one-fifth of the quantity, or 99,289.39 acres, and located it by describing a point, definitely determinable by reference to section, township, and range of a distant government survey, "as a common center, and extending north, south, east, and west a sufficient distance to embrace the area last above mentioned, and that the boundaries of said location shall conform to the cardinal points of the compass." A few days later the surveyor general of New Mexico, being duly authorized, certified that he approved and had located the selection. His certificate recited the quantity and the description furnished by the heirs. The Commissioner of the General Land Office approved the selection. A survey was necessary to segregate the lands from the public domain. Lane v. Watts, supra.

In 1876 the Commissioner of the General Land Office directed the surveyor general to make survey in accordance with the selection and location. Following the practice which obtained in those days, the surveyor general contracted with a firm of surveyors to do the work, and in June, 1876, they returned field notes and plat showing a survey in exact accordance with the selection and location; that is to say, of a tract of land in square form containing the number of acres mentioned and with boundaries on the cardinal points of the compass equidistant from the center designated. The survey as reported was approved by the officials of the Department of the Interior. The lands in the location and the surrounding country were wild, mountainous, and principally in forest, unsettled in 1860 and ever since. In October, 1909, the defendant purchased the location, relying solely upon

the field notes and plat for its boundaries and contents. In proceeding to inclose it, it was discovered that the marks upon the ground of the survey of 1876 were grossly inaccurate. Defendant's petition for a resurvey was denied by the Commissioner of the General Land Office, and on appeal by the Secretary of the Interior. In 1910 it caused a private survey to be made on the lines shown by the field notes and plat of 1876, and commenced the erection of fences. This suit by the government followed.

The field notes and plat of the survey of 1876 conformed to the selection and location and embraced the quantity of land intended to be confirmed to the locators. But it clearly appears that the surveyors practiced a gross fraud in that part of their duty which consisted in marking the boundary lines upon the ground. A tracing of the lines according to such of their marks and monuments as could be found disclosed a shortage in the required area of nearly 10,000 acres. In very few, if any, instances were the marks and monuments at the places indicated in their report, and for long distances none whatever were found. It is quite apparent that a considerable part of the exterior lines was not traversed at all by the surveyors. They reported a completion of their work in about one-sixth of the time reasonably necessary for a faithful performance by the force they employed; their contract rate of compensation was by the mile. We think that their marking of the lines upon the ground was fully discredited. To sustain them it is necessary that the intent of the government and the Baca heirs and the field notes and plat reported by the surveyors be put aside. The case is not one of mere deviation from mathematical accuracy, but one in which a part of what is comprised in the term "survey" may be said not to have been performed.

[1, 2] The government contends that the tracks of the original surveyors so far as they are discoverable upon the ground must prevail over the calls and distances of the field notes and plat notwithstanding their apparent inaccuracy and the great discrepancy in the area. The general order of precedence of proofs for determining disputed boundaries gathered from the multitude of adjudicated cases is: First, natural monuments or objects, like mountains, lakes, and streams; second, artificial marks, stakes, or other objects, made or placed by the hand of man, as in this case; third, courses and distances in documents or writings prescribing or reporting the establishment of the lines; lastly, recitals of quantity. But the rule is not imperative. It proceeds upon considerations of the comparative certainty or fallibility of the evidences of the intention of the qualified authority, public or private, by which the boundary was prescribed. The rule is one of construction, and, like all such rules, it is not conclusive or final, but is adaptable to circumstances. The intention controls when it is clear and manifest from all its evidences. In Ainsa v. United States, 161 U. S. 208, 229, 16 Sup. Ct. 544, 552 (40 L. Ed. 673) it was said:

"So monuments control courses and distances, and courses and distances control quantity; but, where there is uncertainty in specific description, the quantity named may be of decisive weight, and necessarily so if the intention to convey only so much, and no more, is plain."

See, also, Ely's Adm'r v. United States, 171 U. S. 220, 234, 18 Sup. Ct. 840, 43 L. Ed. 142; Reloj Cattle Co. v. United States, 184 U. S. 624, 637, 22 Sup. Ct. 499, 46 L. Ed. 721; Conkling Mining Co. v. Mines Co., 144 C. C. A. 607, 230 Fed. 553.

A series of cases in this circuit involving a fraudulent government survey in Minnesota are particularly in point. The surveyor's report of the shores of a permanent lake as a boundary of surveyed tracts of land, officially approved and made of record, and upon which patents issued to innocent persons, was annulled years afterwards as fraudulent, and a correct survey was made by the government and judicially sustained. Security Land & Exploration Co. v. Burns, 193 U. S. 167, 24 Sup. Ct. 425, 48 L. Ed. 662; Id., 87 Minn. 97, 91 N. W. 304, 63 L. R. A. 157, 94 Am. St. Rep. 684; Kirwan v. Murphy, 189 U. S. 35, 23 Sup. Ct. 599, 47 L. Ed. 698; Murphy v. Tanner, 100 C. C. A. 125, 176 Fed. 537. The call of the lake as a permanent natural monument for the boundary line gave way to distances and quantity. In the first of these cases the Supreme Court said:

"The rule as to natural monuments is not, however, absolute and inexorable. It is founded upon the presumed intention of the parties, to be gathered from the language contained in the grant, and upon the assumption that the description by monuments approaches accuracy within some reasonable distance, and places the monument somewhere near where it really exists."

Again:

"It seems plain that the intention was to convey no more than the number of acres actually surveyed and mentioned in the patents. In Ainsa v. United States, supra, this is deemed to be a very important and sometimes a decisive fact."

These rules may work both ways—in favor of or against the United States. They are applicable in a direct proceeding to which it is a party, and in which it is seeking to give effect to a fraudulent survey to the injury of a private person. A definite and very important feature of Baca location No. 1 was the area. It was to contain 99,289.39 acres of land. Quantity was a primary, not a secondary, consideration. Moreover, it was not a largess or bounty to the Baca heirs, but a right founded on treaty obligations recognized by Congress, which thereafter no officer or employé of the government could deny or impair. The selection and location were made specifically to comprise the designated area, and all the official actions of the Land Office, including the report of the survey and the approval of it, were in accord with the right of the locators. The only thing out of harmony with the manifest intention of both parties as regards the quantity and the lines necessary to embrace it was the fraudulent conduct of the surveyors, which did not appear in their report. In the very nature of things, when the survey was approved in 1876, the government officials acted upon the field notes and plat, which were fair on their face. They could not have known of the marks on the ground. We find nothing in the case warranting a holding that defendant and its predecessors in title acquiesced in the error or are estopped.

[3, 4] In effect, the decree of the trial court dismissed the govern-

ment's complaint, which was right; but it also permanently established defendant's private survey as defining the true boundaries of the location. We think that in the latter particular the decree went too far. The making and correction of surveys of public lands belongs to the political department of the government. Kirwan v. Murphy, 189 U. S. 35, 23 Sup. Ct. 599, 47 L. Ed. 698; Stoneroad v. Stoneroad, 158 U. S. 240, 15 Sup. Ct. 822, 39 L. Ed. 966; Murphy v. Tanner, 100 C. C. A. 125, 176 Fed. 537. It may well be that defendant's survey is correct, but the exterior boundaries of its property mark also the limits of a large amount of contiguous land which it does not own; and it is important that, while according to defendant the full measure of its location, the authoritative delimitation be that of the public officials to whom such things are committed. An erroneous refusal to resurvey, based upon a misconception of defendant's rights, ought not to operate as a permanent bar to the discharge of the duty.

The decree should be modified, so that the dismissal of the complaint upon the merits be without prejudice to the right of the government to make a correct resurvey by marking the boundaries of Baca location No. 1 upon the ground according to the selection and location, the field notes and plat of 1876, and to contain the area specified, and when so made to require the defendant to adjust its enclosure accordingly.

As so modified, the decree is affirmed.

In re P. J. SULLIVAN CO., Inc. (two cases).

Petitions of CITY OF SYRACUSE et al.

(Circuit Court of Appeals, Second Circuit. November 13, 1918.)

Nos. 11, 12.

1. CONTRACTS ⟸306(3)—BUILDING CONTRACTS—CONSTRUCTION.
   Though a contract for the installation of plumbing in a school building authorized the city, in case of the contractor's default, to take over the work and use materials, *held*, that materials at the site must be deemed in the possession of the contractor, and until the city took over the same the contractor might recover them, or its creditors levy execution thereon.

2. CHATTEL MORTGAGES ⟸194—FILING—NECESSITY.
   The provision, in a contract for the installation of plumbing in a city building, that the city might take over and use the equipment at the site, and the contractor's assignment of the same to its surety, *held* to give the city and surety no rights, except on the theory of chattel mortgages; so neither were entitled to the equipment as against creditors of the contractor, the contract and assignment not having been filed as chattel mortgages, as required by Lien Law N. Y. § 230.

3. PLEDGES ⟸11—DELIVERY OF POSSESSION—NECESSITY.
   Though a contract for the installation of plumbing in a municipal building authorized the city to take over equipment in event of the contractor's default, and contractor, to secure bonding company against loss, had assigned to it all equipment on the site, *held*, that there was no valid pledge, which either the city or the bonding company might enforce; there having been no delivery of possession, which is essential to a pledge.

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4. BANKRUPTCY ⇐205—TRUSTEE—RIGHTS OF.
Under Bankruptcy Act July 1, 1898, § 47a, as amended by Act June 25, 1910, § 8 (Comp. St. § 9631), and in view of sections 67a and 70a (5), being Comp. St. §§ 9651, 9654, *held*, that the trustee of a bankrupt contracting company was entitled to property at site of a building, where contracts between contractor and owner and contractor's surety, assigning to them materials, were not recorded, so as to be valid as chattel mortgages, and there was no delivery of possession, so that they could be enforced as a pledge.

Petitions to Revise Orders of the District Court of the United States for the Northern District of New York.

In the matter of the P. J. Sullivan Company, Incorporated, bankrupt. Petitions by the City of Syracuse and the Massachusetts Bonding & Insurance Company, and by the City of Syracuse and others, to revise orders of the District Court (247 Fed. 139), directing the delivery to H. A. Whiting, trustee, and Frank B. Hodges, ancillary receiver, of certain property. Orders affirmed.

Costello, Burden, Cooney & Walters, of Syracuse, N. Y., for Sullivan Co.

S. F. Hancock, of Syracuse, N. Y., for city of Syracuse and commissioners.

Gannon, Spencer & Michell, of Syracuse, N. Y., for bonding companies.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

WARD, Circuit Judge. The first cause is a petition by the city of Syracuse and the Massachusetts Bonding & Insurance Company for revision of an order of Judge Ray that H. A. Whiting, trustee, and Frank B. Hodges, ancillary receiver in bankruptcy of the P. J. Sullivan Company, Incorporated, recover of the city $1,550 value of material belonging to the bankrupt used by it and that they are entitled to certain tools and equipment in the possession of the receiver, but claimed by the bonding company.

December 8, 1916, the Sullivan Company, a corporation of the state of Massachusetts, was adjudicated a bankrupt on its own petition in the district of Massachusetts. Hodges was appointed ancillary receiver by the District Court for the Northern District of New York of the company's property in that district and Whiting was appointed trustee in bankruptcy by the District Court for the District of Massachusetts.

The case was tried summarily by consent of the parties upon a stipulation of facts, which is all we shall look at in determining whether the District Judge made any error of law.

October 21, 1915, the bankrupt entered into a contract to do certain plumbing in the Delavan School, belonging to the city, and the bonding company became surety for the faithful performance of the contract. To secure the bonding company against loss the bankrupt assigned to it all the tools, plant, equipment, and material that was then or ever should be located by the bankrupt at the site of the

school. The bonding company did not file this assignment as a chattel mortgage and never was in possession of anything on the site.

In the contract with the city it was provided that in case the bankrupt abandoned the contract the city might after three days' notice in writing take over the work and use the plant, materials and equipment at the site in so doing. If the work were completed at more than the contract price the bankrupt was to pay the difference to the city and if at less the city was to pay the difference to the bankrupt. This contract was not filed as a chattel mortgage.

[1] The evidence of abandonment of the contract by the bankrupt was its adjudication. Some time thereafter the city gave three days' notice in writing of its intention to complete the work, took possession of the materials, valued at $1,550, and used the equipment at the site in doing so. The city paid nothing for either and completed the work at a loss. We regard the material and equipment at the site as in the possession of the bankrupt for the performance of the work and not as delivered to the city and we think that before the city actually took possession the bankrupt could have removed the material and equipment or could have sold it and that its creditors could have levied execution upon it.

[2] The city can only recover on the theory that it has a chattel mortgage or that it was pledgee of the property in question. There can be no claim as for a chattel mortgage because there was no filing nor any delivery of possession as required by Lien Law N. Y. (Consol. Laws, c. 33), § 230:

"*Chattel Mortgages to be Filed.*—Every mortgage or conveyance intended to operate as a mortgage of goods and chattels or of any canal boat, steam tug, scow or other craft, or the appurtenances thereto, navigating the canals of the state, which is not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged, is absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage, or a true copy thereof, is filed as directed in this article. This article shall not apply to agreements creating liens upon merchandise or the proceeds thereof for the purpose of securing the repayment of loans or advances made or to be made upon the security of said merchandise and the payment of commissions or other charges provided for by such agreement, where the conditions specified in section 45 of the Personal Property Law are complied with."

[3] And there can be no claim of a pledge, because there was no delivery of the possession, which is essential to a pledge of chattels. Pledges of stock and securities stand upon a different footing. For the same reasons the bonding company can claim no lien because it never filed its contract as a chattel mortgage and never had any possession whatever of the property.

[4] No doubt between the parties and as against purchasers with notice equity would complete and perfect these imperfect titles to the after-acquired property, but it would not do so as against general creditors. American Can Co. v. Erie Preserving Co., 183 Fed. 96, 105 C. C. A. 388. Or if the city and the bonding company had taken possession before the adjudication their claims might have been recognized and sustained. But upon adjudication the trustee, under

section 47a of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 557), as amended in 1910 (Act June 25, 1910, c. 412, § 8, 36 Stat. 840 [Comp. St. § 9631]), no longer stands merely in the shoes of the bankrupt, but—

"as to all property in the custody or coming into the custody of the bankruptcy court shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied."

So under section 70a (5), being section 9654, upon adjudication the trustee became vested with the title of the bankrupt 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," and section 67a (section 9651) provides:

"*Liens.—a* Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate."

The District Judge followed the decision of the Court of Appeals of New York in Titusville Iron Co. v. City of New York et al., 207 N. Y. 203, 100 N. E. 806. In it the contract between the bankrupt and the board of education provided that in case of abandonment of the contract by the contractor the board might complete the work and use all materials on the line of the work in so doing. After adjudication the board did take and install certain boilers which were on the line of the work but were not there and did not belong to the bankrupt at the time the contract was executed. The assignee of the trustee in bankruptcy brought suit for conversion. The court held that he was entitled to recover. Judge Mayer in the case of Midtown Contracting Co. (D. C.) 238 Fed. 871, reversed upon a question of jurisdiction in Re Southern Arizona Smelting Co., 240 Fed. 50, 153 C. C. A. 83, followed the New York decision, and we agree with the views on that point there expressed by him and by Judge Ray in the instant case.

The trustee relies upon two decisions of the Circuit Court of Appeals for the Third Circuit to the contrary. Duplan Silk Co. v. Spencer, 115 Fed. 689, 53 C. C. A. 321, decided before the amendment of 1910 to section 47a, and In re Shelly, 242 Fed. 251, 155 C. C. A. 91, decided subsequently. In the first the owner made an additional advance of $15,000 to the contractor not called for by the contract, on the strength of the material then at the site. The court regarded this as a delivery of possession and specific appropriation of this property on the owner's premises to the owner for the advance, which gave its claim priority over the rights of the trustee under sections 67a and 70a (5). In the second case the principal inquiry was whether the amendment of 1910 required a different conclusion. The contractor in the latter case had agreed that—

"All work and materials delivered on the premises to form part of the works are to be considered the property of the owner, and are not to be removed without its consent; but the contractor shall have the right to remove all surplus materials after the completion of the work."

The court reaffirmed the proposition that delivery on the premises of the owner by the contractor under such an agreement was a delivery or quasi delivery of possession superior to the rights of the trustee, even if the owner did not take actual possession until after adjudication. It will be seen that the provisions of the contracts enforced were much stronger for the owner than are those of the contracts in the instant case.

Chief Judge Cullen, in refusing to follow the Duplan Silk Co. Case, pointed out an additional reason, viz. a difference between the contract in it and in the Titusville Iron Co. Case, in that in the Titusville, Case, if the owner completed the work for less than the contract price, the contractor was to lose the difference, which would amount to a forfeiture of unused material. We fail to see the importance of this consideration in a case where the work was completed at a loss and there was no forfeiture of anything. In such case there is no forfeiture of unused material; all the material being used in part performance of the contract. Equity might well refuse its help to carry out a forfeiture, and yet give it willingly to protect a fair claim.

The real difference between the courts is in the view taken of the effect of delivery by the contractor of materials on the owner's premises which the owner is given the right to use in completing the work.

In the second case, of the Vocational High School, the respondents are the board of commissioners of Vocational High School and the Fidelity & Deposit Company of Maryland; but there is no substantial difference of fact or of law between the two cases under consideration—certainly none to make the second stronger.

The order is affirmed in each case, with costs.

In re BROSE.

Petition of PECK.

(Circuit Court of Appeals, Second Circuit. November 13, 1918.)

No. 6.

1. MORTGAGES ⟸199(1)—RENTS AND PROFITS—RIGHT TO.
The general rule is that the mortgagee is not entitled to rents and profits of the mortgaged premises until he takes actual possession, or until possession is taken in his behalf by a receiver, or until he demands and is refused possession.

2. COURTS ⟸372(9)—FEDERAL COURTS—WHAT LAW GOVERNS.
In bankruptcy proceeding arising in New York, where there was a controversy between the receiver in bankruptcy and a receiver appointed in a subsequently instituted action to foreclose a mortgage, the federal court will follow the decisions of the state court as to the rights under the mortgage; the property being in New York.

3. BANKRUPTCY ⟸116—MORTGAGES—RENTS AND PROFITS—RIGHT TO.
Where a New York mortgage provided that, in event of default, the mortgagee should have the right to enter and take possession of the premises and to receive the rents and profits, etc., *held*, that the mort-

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

gagee was not entitled to the rents and profits until he entered into possession or foreclosed the mortgage, and hence the receiver in bankruptcy of the mortgagor is entitled to the rents and profits collected before the mortgagee foreclosed.

Petition to Revise Order of the District Court of the United States for the Southern District of New York.

In the matter of Anthony Brose, bankrupt. Petition by Nathan Peck, as receiver in bankruptcy, to revise an order of the District Court directing him to pay over to a receiver in a mortgage foreclosure action rents collected, etc. Order reversed, and record remanded, with directions.

Taylor More, of New York City, for petitioner.

Gustav Lange, Jr., of New York City (Ralph Barnett and Wallace A. Kroyer, both of New York City, of counsel), for respondent.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

ROGERS, Circuit Judge. The question which is presented by this case involves the right to the rents of an apartment house owned by the bankrupt in the city of New York, and the controversy is between the trustee of the bankrupt and a receiver appointed in a foreclosure proceeding instituted by a second mortgagee, who is the petitioner. The petitioner's mortgage contains the following clauses:

"Fifth. That if default shall be made in the payment of any installment of the whole of the principal sum mentioned in the condition of the bond, or of the interest which shall accrue thereon, or any part of either, at the respective times therein specified for the payment thereof, the mortgagee shall have the right forthwith, after any such default, to enter upon and take possession of the said mortgaged premises, and to let the said premises, and receive the rents, issues, and profits thereof, and to apply the same, after payment of all necessary charges and expenses, on account of the amount hereby secured, and said rents and profits are in the event of any such default hereby assigned to the mortgagee.

"Sixth. And the mortgagee shall also be at liberty immediately after any such default, upon proceedings being commenced for the foreclosure of this mortgage, to apply for the appointment of a receiver of the rents and profits of the said premises without notice, and the mortgagee shall be entitled to the appointment of such a receiver as a matter of right without consideration of the value of the mortgaged premises as security for the amounts due the mortgagee, or the solvency of any person or persons liable for the payment of such amounts."

It appears that the bankrupt filed a voluntary petition in bankruptcy on April 30, 1917, and on May 2d there was appointed a receiver in bankruptcy of the assets, property, and effects of the bankrupt. The receiver in bankruptcy has collected the rents from the premises on which the petitioner held a second mortgage for $10,000, which mortgage was long overdue, being due and payable on December 7, 1910. For reasons not necessary to state the second mortgagee took no steps to foreclose his mortgage until November 27, 1917, when he commenced an action in the Supreme Court of the state of New York for the county of New York and obtained the appointment of a receiver on December 1, 1917. Then on January 2, 1918, the mortgagee filed a petition in the bankruptcy court, in which he asked for an order directing that the rents collected by the receiver in bankruptcy

be used for paying the taxes and assessments upon the property, as well as the principal and interest due under the mortgage. He also asked that future rents be payable to the receiver appointd in the foreclosure proceedings, and that possession of the premises be also turned over to that receiver. The District Judge thereupon entered an order directing the receiver in bankruptcy to pay over, to the receiver in the foreclosure action, all of the rents which he had collected, irrespective of the time or times when such rents had been collected by him less his expenses and disbursements incurred in the maintenance of the premises, and to turn over the possession of the premises. The order he directed to be entered was not in accordance with the opinion which he had previously filed in the case, in which he held that the rents previously collected should not be turned over. The explanation made is that, after filing his opinion, his attention was directed to the case of Sullivan v. Rosson, 166 App. Div. 68, 151 N. Y. Supp. 613, in which the Appellate Division of the Supreme Court of the state of New York of the First Department, in construing a similar mortgage, had held that the rent clause entitled the mortgagee to the rents upon default without entry and without the appointment of a receiver. In reliance upon that decision he signed the order now sought to be revised.

There is no doubt what the general rule is relating to clauses in a mortgage giving the mortgagee the right to take the rents in terms similar to those used in the mortgage herein involved.

[1] It was stated by the Supreme Court in Freedman's Saving Co. v. Shepherd (1888) 127 U. S. 494, 502, 8 Sup. Ct. 1250, 1254 (32 L. Ed. 163), when Mr. Justice Harlan, writing for the court, said, citing cases:

"The general rule is that the mortgagee is not entitled to the rents and profits of the mortgaged premises until he takes actual possession, or until possession is taken, in his behalf, by a receiver, * * * or until, in proper form, he demands and is refused possession."

This general rule the federal courts will follow, except in cases where it appears that the law of the state where the premises are situated applies a different rule.

[2, 3] The mortgage, the meaning of which is involved here, is a New York mortgage, and if the New York courts have determined its meaning this court must give the same meaning to its words which would be given to them by the courts of that state.

The question involved herein does not appear heretofore to have been before this court. It has, however, been before the District Court of the Southern District, with the result that conflicting decisions have been rendered.

In 1907 the District Court held in In re Banner, 149 Fed. 936, that a provision in a mortgage, following the usual one giving the mortgagee a right to a receiver of rents and profits in case of default, operated merely as a pledge of the rents, and that the pledgee was not entitled to them until he asserted his right in some legal form, as by an application for a receiver and a demand by such receiver. The decision was rendered by Judge Hough, then District Judge, but now of this court. So in 1916, in In re Israelson (D. C.) 230 Fed. 1000,

the question was whether under such a mortgage clause the assignment of rents became operative at the time of the default, or only upon the appointment of the state court receiver, and it was held by Judge Mayer that the clause only authorized a mortgagee to collect the rents after taking possession of the property, and not while he permitted it to remain in the possession of the mortgagor after default. In 1915 the question came before Judge Learned Hand in In re Jarmulowsky (D. C.) 224 Fed. 141, 35 Am. Bankr. Rep. 514. A mortgagee asked for an order directing a receiver in bankruptcy to pay to him rents which had been collected after default, but before the mortgagee had applied either for a foreclosure, receiver, or for a sequestration order; and the receiver in bankruptcy was directed to pay over the rents which he had so collected.

In all the cases in the Southern District the principle has been conceded that the question involved arising under a New York mortgage should be determined in accordance with New York law. The difficulty has been to determine what the law of that state upon the subject is. That difficulty has now been cleared up by a recent decision of the New York Court of Appeals in the case of Sullivan v. Rosson, 223 N. Y. 217, 119 N. E. 405, which reversed the decision made by the Appellate Division to which reference has already been made, and upon which the District Judge relied. A fourth mortgage in that case provided that in case of default the mortgagee should have the right forthwith "to enter upon and take possession of the said mortgaged premises, and receive the rents, issues, and profits thereof, and apply the same after payment of all necessary charges and expenses on account of the principal and interest," etc. It also expressly gave the mortgagee the right upon default to have a receiver of the rents, issues, and profits of the mortgaged premises, with power to pay taxes and assessments and to keep the premises insured, and after deducting all charges and expenses apply the residue of the rents to the payment and satisfaction of the mortgage. The plaintiff was the owner of this fourth mortgage, and had applied for and obtained the appointment of a receiver in her behalf. A second mortgage on the same premises contained a clause providing that upon default the mortgagee should have the right forthwith to enter upon and take possession of the premises and let the same, "and receive the rents, issues, and profits thereof," etc.; and a third mortgage provided that the mortgagee should be entitled, in any action to foreclose, to the appointment of a receiver of the rents, and that "the rents and profits in the event of any default hereby" are assigned to the holder of the mortgage as further security for the payment of the indebtedness. The owner of the second and third mortgages had not sought to collect the rent, either by voluntary payment with the consent of the mortgagor or through a receiver, but claimed the rents in the hands of the plaintiff's receiver. The order appointing such receiver had never been modified or in any way extended for his benefit; and the court held that the holder of the senior mortgages was not then entitled to appropriate the proceeds of the diligence of the junior mortgagee. The court said that a mortgage of real property is but a pledge of property as security

for a debt, and that an assignment of rent of the character above described is of the like character as the transfer of the real property, and that a mortgagee desiring to obtain such rents to apply upon his mortgage should actually possess himself of them or of the right to them through some mutual arrangement therefor, or he should make application to the court to have the receivership extended for his benefit. The court in its opinion refers approvingly to the decision of the Supreme Court in Freedman's Case, supra. The case clearly settles the law of New York upon this subject, and establishes the principle that such a clause in a New York mortgage as is herein involved operates merely as a pledge of the rents, to which the pledgee does not become entitled until he asserts his right.

In view of that decision, this court holds that the receiver in bankruptcy herein is entitled to retain in his possession all rents due and collected by him prior to the time when the receiver appointed in the foreclosure proceedings acquired the right to possession of the premises by the entry of the order of his appointment on December 10, 1917.

The order complained of is hereby reversed, with costs, and the record remanded to the District Court, with directions to proceed in accordance with this opinion.

THE RICHLAND QUEEN.

RICHLAND S. S. CO. v. BUFFALO DRY DOCK CO.

(Circuit Court of Appeals, Second Circuit. November 13, 1918.)

No. 31.

1. CONTRACTS ⟸212(2)—REPAIRS—TIME.
Under dry dock company's contract to repair a vessel, where no time was specified, the repairs are to be made within a reasonable time; and where a strike occurred among the operatives of the dock company, which delayed the work, the question is whether the delay was reasonable or not, in view of the circumstances at the time the contract was being performed.

2. CONTRACTS ⟸300(5)—PERFORMANCE—EXCUSE—STRIKES.
Where, after a dry dock company had contracted to repair a vessel, its employés demanded shorter working hours, and struck because their demand was refused, *held* that, though the strike was not accompanied by violence, it was an excuse for delay in completing the repairs; the delay being reasonable in view of the strike, and there being no difference in principle between peaceable and violent strikes.

Manton, Circuit Judge, dissenting.

Appeals from the District Court of the United States for the Western District of New York.

Libel by the Buffalo Dry Dock Company against the steamship Richland Queen, her engines, etc., claimed by the Richland Steamship Company, together with a libel by the Richland Steamship Company against the Buffalo Dry Dock Company. From decrees for the Dry Dock Company, the Steamship Company appeals. Affirmed.

Thomas C. Burke, of Buffalo, N. Y., and Hoyt, Dustin, Kelley, McKeehan & Andrews, of Cleveland, Ohio, for Buffalo Dry Dock Co.

Harvey D. Goulder and Goulder, White & Garry, all of Cleveland, Ohio, and Botsford, Lytle, Mitchell & Albro, of Buffalo, N. Y. (Thomas H. Garry, of Cleveland, Ohio, and Almon W. Lytle, of Buffalo, N. Y., of counsel), for Richland S. S. Co.

Before WARD, ROGERS, and MANTON, Circuit Judges.

WARD, Circuit Judge. This is an appeal from a decree of Judge Hazel in favor of the Buffalo Dry Dock Company for the reasonable cost of repairs to the steamer Richland Queen, and dismissing the cross-libel of the Richland Steamship Company for damages for loss of the use of the vessel due to unreasonable delay in making the repairs.

September 5, 1916, the steamer was sent to the Dry Dock Company's yard, and remained there until December 5th. No express contract for the repairs was made, but the reasonable value of the use of the dry dock and of the repairs is admitted to have been $39,984.08. The Steamship Company, in order to get possession of its vessel, paid $30,000 to the Dry Dock Company without prejudice, and gave a stipulation for the balance, and in its cross-libel alleged that the repairs should have been completed by October 9, 1916, and that it was deprived of the use of its steamer during the remainder of the season to November 13th, or 37 days, at the reasonable rate of $500 a day, aggregating $18,500.

The Dry Dock Company kept an open shop, and justified the delay by the fact that a strike of its workmen began October 14, 1916, without grievance or warning, which prevented by intimidation and violence old hands and new hands from working.

At the trial the only contention was as to the damages for delay, viz. whether the Steamship Company was entitled to a decree for $18,500, less the unpaid balance of the Dry Dock Company's bill of $9,984.08.

The working day in the Buffalo shipyards at the time in question was nine hours, with a half holiday on Saturday during the summer months, while some competing yards on the Lakes required a nine-hour, and some a ten-hour, day.

October 14, 1916, a committee of workmen demanded of the Dry Dock Company an eight-hour day without reduction of pay, which the company refused, and notified the men that thereafter they must work a straight nine-hour day for six days in the week. As a consequence 80 to 90 per cent. of the men left the yard, and although the company did its best to secure an adequate force of workmen, it was not able to do so. The strike involved no violence, although picketing was kept up in the neighborhood of the yard, and there was much persuasion of both old and new hands. The men gradually came back between November 15th and December 2d, without any change in the hours of labor, and there has been no labor trouble since that time.

[1, 2] Judge Hazel was of opinion that the Dry Dock Company, in view of all the circumstances, made the repairs to the steamer in a reasonable time, and was not liable under the decision of the Court of

Appeals of the state of New York in D., L. & W. R. R. Co. v. Bowns, 58 N. Y. 573. In that case, however, there was an agreement to deliver coal within a fixed time, with an express exception of interference by strikes. No time was fixed in the case under consideration for making the repairs, so that the obligation of the Dry Dock Company was to make them within a reasonable time, and there was no exception of strikes. The question, therefore, is simply whether the delay complained of was reasonable or unreasonable, not in view of the circumstances existing at the time the contract was made, but in view of the circumstances existing when the contract was being performed. Empire Transportation Co. v. P. & R. R. R. Co., 77 Fed. 919, 23 C. C. A. 564, 35 L. R. A. 623; Hick v. Rodoconachi, 2 Q. B. D. 626.

The Court of Appeals of the state of New York has held that a peaceable strike of the employer's servants is no defense to a claim for delay (Blackstock v. New York & Erie R. R. Co., 20 N. Y. 48, 75 Am. Dec. 372), while a strike with violence is a defense (Geismer v. Lake Shore & M. S. Ry. Co., 102 N. Y. 563, 7 N. E. 828, 55 Am. Rep. 837). The employer in each of these cases was a common carrier, but, as the recovery sought was for damages caused by delay in delivery, the decisions are applicable to the situation under consideration, because common carriers are not insurers of prompt delivery, but only liable for ordinary care and diligence. The duty is the same as in the present case, viz. the performance in a reasonable time in view of all the circumstances.

We do not appreciate the distinction made in these cases, thinking that the difference between a peaceable and a violent strike as a defense is one of degree only, a strike with violence being more likely to be a good defense than a peaceable strike. The question, however, in each case is the same, whether the conduct of the employer was reasonable. A peaceable strike upon frivolous grounds, which the employer did all he could to prevent, should be a defense against a claim for delay. On the other hand, a violent strike on justifiable grounds, which the employer either fomented or unreasonably resisted, ought to be no defense. Of course, the employer in either case could end the strike by surrendering. We are not disposed to differ with Judge Hazel's finding that the Dry Dock Company's performance was reasonable in view of the strike.

Decree affirmed.

MANTON, Circuit Judge (dissenting). I dissent. About the 10th of September, 1916, pursuant to an oral agreement, the appellee undertook to make repairs to the Richland Queen which was then placed in its dry dock. Work was immediately commenced thereon, and in the ordinary course of the company's business it should have been completed about October 24th. The repairs, however, were not completed until December 8, 1916. These facts are admitted. No time was fixed for the completion of the work, and it was therefore implied that the work would be done in a reasonable time. A reasonable time should be measured by when the work would have been done, but for the strike herein referred to. On October 12th the appellee posted a notice for its employés as follows:

"Beginning October 14th, this yard will work 9 hours a day. The men will be paid off at 5 o'clock, instead of at 12, as previous."

This discontinued the half holiday on Saturday. The men rebelled, and did not work on the afternoon of October 14th, but returned as usual on Monday morning. They were met by a timekeeper, who asked each individual if he was ready to work the nine-hour day for six days of the week, and those who said they would were allowed to work; the others were refused work. Eighty or 90 per cent. of the men did not work. A committee of the men waited upon the president of the company to discuss the matter, and he took the position that he would not change his order or submit to the eight-hour working day, which was then demanded, and abruptly announced there was nothing to discuss. This was a matter of business regulation, which, concededly, he might decide as he did; but the testimony indicates plainly that, prior to the time of the acceptance of the Richland Queen for repairs, labor troubles were brewing in the Dry Dock Company's yard, which were unknown to the owners of the Richland Queen, but which were known to the officers of the appellee. No mention of this fact, however, was made to the vessel's owners.

During the time of this cessation of work, there was no violence of any character. The month's delay in making the repairs caused a loss of about $500 a day to the owners of the vessel. Judge Rogers, in Frankfurt-Barnett Co. v. Prym Co., Ltd., 237 Fed. 21, 150 C. C. A. 223, L. R. A. 1918A, 602, quoting and accepting the language of the New York Court of Appeals in Eppens, Smith & Wiemann Co. v. Littlejohn, used this language:

"If a contract fails to fix the exact time for delivery, the law fixes it for the parties, by presuming that a reasonable time was intended. The law was so declared in the Court of Appeals of New York in Eppens, Smith & Wiemann Co. v. Littlejohn, 164 N. Y. 187 [58 N. E. 19, 52 L. R. A. 811]."

And what is a reasonable time must be determined by what the parties had in mind when the contract was made, and this must be judged by the circumstances which surrounded the parties at the time the contract was made, rather than by the circumstances and conditions which subsequently arose, and in this connection knowledge which the appellee had as to its unsettled condition of labor, or the prospect of a strike, could not be locked up in the mind of the appellee, and should have been disclosed to the owners of the vessel; for it is true that the owner of the vessel, without knowledge, could reasonably have in mind that the work would be done within a reasonable time, such as normal conditions in the yard would permit. It was within the power of the appellee to disclose such information, and, indeed, to make it one of the conditions of accepting the work. Even where labor trouble is not anticipated, such provisions are frequently put in contracts. D., L. & W. v. Bowns, 58 N. Y. 573.

Judge Grosscup, in Iron Moulders' Union v. Chalmers Co., 166 Fed. 52, 91 C. C. A. 638, 20 L. R. A. (N. S.) 315, said:

"A strike is a cessation of work by employés in an effort to get for the employés more desirable terms. A lockout is a cessation of the furnishing of work to employés, in an effort to get for the employer more desirable terms."

I think it of little importance to this case, under the proof, to determine whether this was a strike or a lockout. Certainly, there was nothing in the conduct of the employés who did not work that bordered upon or approached violence. I concede that there is no legal obligation for an employer to yield to the strikers on a matter of rate of wages and hours of labor, but here the contract was undertaken to be performed within a reasonable time, and the strike cannot be taken into consideration in determining what was a reasonable time. It was well said in School Trustees of Trenton v. Bennett, 27 N. J. Law, 514, 72 Am. Dec. 373:

"Where one of two innocent persons must sustain a loss, the law casts it upon him who has agreed to sustain it, or rather the law leaves it where the agreement of the parties has put it; the law will not insert, for the benefit of one of the parties, by construction, an exception which the parties have not, either by design, or neglect, inserted in their engagement."

Here it was within the power of the dock company, before issuing the orders to the men, to finish the work upon this boat and the only other boat it had in its yard for repairs. It may be that as to the other boat it was protected by a clause which relieved it of obligation in the event of a strike or lockout. The law is well settled that, where a party by his contract creates a duty or charge upon himself, he is bound to make good notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. School Trustees, etc., v. Bennett, supra.

The case of D., L. & W. v. Bowns, 58 N. Y. 573, cited by the District Judge, does not help the appellee. It contained a provision which relieved the company from responsibility in the event of strike or lockout, and is not a useful authority here.

In Smith, etc., v. Littlejohn, supra, the contract for the sale of goods to be shipped from a foreign port fixed no time for the shipment. It was held that it must be made within a reasonable time, and what that is depends upon the circumstances of the particular case, such as the parties may be supposed to have contemplated in a general way in making the contract, and the burden was fixed upon the seller to show compliance, where an action was instituted to recover damages for the buyer's refusal to accept and pay for the goods. There the court said:

"Thus the jury could find that although the plaintiff made every reasonable effort to ship the coffee promptly, and did ship it at the first opportunity it could command, nevertheless the delay in the shipment was prolonged, not because of the conditions and circumstances of the shipping facilities themselves, but because of the plaintiff's personal inability to avail itself of them. The delay was therefore unreasonable as to the defendant, because uncommonly long, and made so by the conditions peculiar to the plaintiff, and not to the transportation facilities. This personal disadvantage was not within the contemplation of the contract, and is not available to the plaintiff either to disprove unreasonable delay or to excuse it."

In Blackstone v. N. Y. & Erie R. R. Co., 20 N. Y. 46, 75 Am. Dec. 372, in a suit for damages on account of nonfulfillment of a contract of transportation by a common carrier, it was held that a railroad corporation was responsible for damages resulting from a delay to trans-

port freight in the usual way, which was caused by a great number of its servants suddenly and wrongfully refusing to work.

Nor do I consider the rule of the state courts different from that of the federal court. This subject was treated in an able opinion by Judge Sanborn in Empire Transportation Co. v. Phila. & R. Coal & Iron Co., 77 Fed. 919, 23 C. C. A. 564, 35 L. R. A. 623, but there the defendant was excused because there was violence and interference by illegal methods. Here such was not the case.

In Brown v. Certain Tons of Coal, 34 Fed. 914, Judge Severens, speaking for the Circuit Court of Appeals, said:

"It was therefore a part of this contract that this unloading should be done within a reasonable time. It being the duty of the consignee to unload this freight, it was his duty to provide the facilities for doing so. He was bound to promptitude and diligence. The measure of that diligence is to be estimated by the urgency of the case, by the circumstances surrounding the parties, by the loss and damage which would accrue to the owner of valuable vessels by detention during the earning season of the year; and the circumstances in this case required that the consignee should exercise promptitude and a high degree of diligence in unloading these vessels."

Hardship, expense, or loss to the party performing his contract, or anything short of impossibility of performance, will not excuse a breach of the contract. In my opinion there has been a breach here to the damage of the libelant, and it should have a decree on the cross-libel.

THE TRANSFER NO. 17.

(Circuit Court of Appeals, Second Circuit. November 13, 1918.)

No. 7.

1. COLLISION ⊂=106—COLLISION RULES—WHAT GOVERNS.
   A vessel coming out of her slip and maneuvering to get on her course, or one maneuvering to get into her slip, is not on any course, and the steering and sailing rules do not apply, but article 27 of the Inland Regulations (Comp. St. § 7901), which is the special circumstance rule, is applicable.
2. COLLISION ⊂=106—LOOKOUT—NECESSITY.
   Where the master of a tug, which was maneuvering to push its floats up the river, so as to berth them, would have known of the perilous situation as another tug was maneuvering in the vicinity, if proper lookout was kept, the first tug cannot escape liability on the ground that the master was not at fault for not sooner discovering the situation.
3. COLLISION ⊂=106—VESSEL AT FAULT—LIABILITY.
   Libelant's tug, which with its tow attempted to squeeze in behind the stern of a second tug, which was attempting to push her floats up the river so as to berth them, etc., *held* at fault for the collision, and the second tug also was at fault for beginning its maneuver, without regard to the presence of libelant's tug, which could plainly be seen if lookout was kept.

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

Libel by the Lehigh Valley Transportation Company against the steam tug Transfer No. 17, her engines, etc., claimed by the New York,

New Haven & Hartford Railroad Company. There was a decree dismissing the libel, and libelant appeals. Reversed, with directions to reinstate the libel and enter a decree for half damages against the steam tug Transfer No. 17.

This is an appeal from a decree dismissing a libel of the Lehigh Valley Transportation Company, as owner of the tug Geneva, to recover damages sustained by the Geneva as a result of a collision which occurred on July 13, 1913, in the North River, off the Lehigh Valley Terminal at Jersey City, at about 4:30 a. m.

The libelant is a corporation organized and existing under the laws of the state of New Jersey, and it is conceded that the Lehigh Valley Transportation Company and the Lehigh Valley Railroad Company are one and the same: the Railroad Company being the owner of the Transportation Company.

An answer was filed by the New York, New Haven & Hartford Railroad Company, as claimant of the steam tug Transfer No. 17, in which it was alleged that the collision and damage complained of were not caused or contributed to by any fault of those in charge of Transfer No. 17, but was due wholly to the fault and negligence of the tug Geneva.

Harrington, Bigham & Englar, of New York City (T. Catesby Jones, of New York City, of counsel), for appellant.

Charles M. Sheafe, Jr., of New York City, for appellee.

Before WARD, ROGERS, and MANTON, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). [1] This collision occurred in daylight, when everything was in plain view, and there was no difficulty in seeing. Daylight collisions do not occur without fault on the part of one, and sometimes of both, vessels. In the present case the District Judge has found that the Geneva was at fault, but that Transfer No. 17 was not at fault, and on that account the libel was dismissed.

This is a case of special circumstances under article 27 of the Inland Regulations (Act June 7, 1897, c. 4, § 1, 30 Stat. 102 [Comp. St. § 7901]), which is found in the margin.[1] In the William A. Jamison, 241 Fed. 950, 154 C. C. A. 586, this court declared that a vessel coming out of her slip and maneuvering to get on her course, or one maneuvering to get into her slip, is not navigating upon any course, and the steering and sailing rules do not apply. In this case Transfer No. 17 was maneuvering to get her floats into their slip, and the Geneva, which had just come out of a slip, was floating down with the tide to get into another slip, in close proximity, but had not actually begun the maneuver of entering the slip. It was the duty of each of these vessels to act with prudence. And the question is: Did they do it?

[2, 3] Transfer No. 17, with car float No. 48 on her port side and car float No. 39 on her starboard side, arrived at the Bridges at the Lehigh Valley Railroad Terminal at Jersey City on the morning of July 15th at about 1 o'clock. She found the Bridges all full, and lay outside until 3 a. m., when she was ordered to put the floats into Bridges 5 and 6, respectively. Two unsuccessful attempts to do this

1 "Article 27. In obeying and construing these rules due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger."

were made, and the time from 3 o'clock until the collision occurred was spent in getting the floats into position for entering the Bridges because of the unusually strong ebb tide. At about 4 o'clock the Transfer had the floats in a position where the tow of the float upon her port hand was against the outer end of the rack between Bridges 5 and 6. The bow of the outer float upon the starboard side was against the southerly side of Pier A, or close to it. The two floats were held together at the bow by a line, and another line ran from the starboard float bow to Pier A. The Transfer was backed out from between the two floats, and had her bow against the stern of the port float, in order to push the floats around and up the river, with the idea that the floats would be separated by letting out the cross-line and would "split" on the center pin, and with the idea of shoving the two floats into those Bridges when they reached a position where they could be forced in. The floats were 320 feet long and lying at an angle across the entrance of the Bridges. There was a float in Bridge No. 4, which was 234 feet in length, and the floats of the Transfer rested against the ends of this float in Bridge No. 4, and the latter float projected about 50 feet beyond the end of the rack between Bridges 4 and 5. The result was that the floats of the Transfer to a considerable extent locked the entrance to Bridge 1.

The steam tug Geneva had taken in tow on her port side on this same morning and at about 4 o'clock a Lehigh Valley car float which she was to put into Bridge No. 1. The tug had come out of the Morris Canal Gap which was north of where Transfer No. 17 was lying. The Geneva backed out from the upper side of Pier A into the river, and got her float upon her starboard side, and the tug and float were on a line substantially up and down the river. The Geneva then started to drop down with the tide, there being a very strong ebb tide. The captain of the Geneva testified that when he got out into the river and swung the float around he judged he was about 250 feet from the end of the pier and that he was out far enough to clear the floats by 100 feet, if not more, if Transfer No. 17 had remained at rest. Before he came out from Pier A he knew of the position of Transfer No. 17. After he got out into the river and was drifting down he says Transfer No. 17 started to push her floats up the river and that the out-river end of the float swung up in an arc of a circle. He claimed that he immediately blew an alarm and started his engine at once straight ahead, "hooked up to try to get away from him (Transfer No. 17), to get further up the river." Prior to this attempt of Transfer No. 17 to push her floats up the river the Geneva evidently intended to drop down and pass as close behind the stern of the New Haven floats as might be, and then attempt to shove her own float up and into Bridge 1. But in carrying out such a maneuver the duty was clearly upon the Geneva not to attempt to squeeze in behind the stern of Transfer No. 17 by a slight margin of safety and without indicating her navigation and making known that she desired the Transfer to remain still until she had passed. And as a matter of fact there was nothing in the river which would have prevented the Geneva from going out a little further into the stream instead of trying to pass under the stern of the Transfer and in such

close proximity thereto. If the Transfer had remained stationary, it is by no means certain that the Geneva could have succeeded in the maneuver she contemplated. Some of the witnesses testified that the Geneva could not have accomplished it on an ebb tide, as she was a small boat, and did not have sufficient power to accomplish such a result. The captain of the Geneva, before he came out of his slip, had seen Transfer No. 17 maneuvering unsuccessfully to bridge her floats, and after he got out into the river he looked again at her, and saw she was at right angles on the stern of the float. He admitted that he did not observe the movements the Transfer was about to make, and that he acted without any reference to those movements. In so doing he certainly did not act with the prudence the law required, and the liability of the Geneva is undoubted.

The court, however, does not agree with the District Judge in his conclusion that no blame can be attached to Transfer No. 17. If the Geneva started down the river after No. 17 had begun to shove her floats up, as the District Judge has found, there would be a great deal to be said in favor of his exoneration of No. 17; but as we read the evidence it has convinced us that the Transfer began to shove after the Geneva started drifting down the river. The master of the Luzerne, who witnessed the collision, testified that after he saw the Geneva in the river, and drifting down with the tide, Transfer No. 17 started shoving the floats up, and that they were shoved quite a distance before the Geneva blew her alarm, which the New Haven tug answered. He was asked whether the New Haven tug (Transfer No. 17) stopped after the alarm was blown, and he was very positive she did not. He formed his opinion from the action of the water from the tugboat and from the bells, which he could hear being rung from the pilot house of the tug. The master of No. 17 testified that he saw the Geneva when he started to push the floats in, and that she was then out in the river dropping back. At a subsequent time he was asked whether he had gotten under way when he first saw the Geneva, and he replied, "Just starting to shove the floats up when I saw her." Afterwards he said he did not see her before he started to move the floats. "I had started to move the floats when I first saw her." When he started to push the floats into the river, it was necessary for him to swing between four and six points of the compass, and he was asked whether, before he started a maneuver of that sort, he would count himself a prudent man unless he looked to see what other boats there were in the river. He replied, "Well, it probably would be imprudent if I didn't look." He claimed, however, that he did look, and was asked, "How is it that you didn't see her when you first started out?" To this he replied, "Well, I don't know." Afterwards he was asked how long he had been shoving on his floats when he first saw the Geneva. His reply was, "A very short interval of time, possibly 10 or 15 seconds." The Geneva must have been in plain view when Transfer No. 17 began the maneuver which resulted in this collision. If the captain of No. 17 did not discover her before he commenced the maneuver, it must have been because he did not look, and if he began it without looking he was at fault. He was in like manner at fault if he began his maneuver, as we think he did, after the

Geneva was out in the river and dropping down with the tide. If it could possibly be claimed that the master of No. 17 was not at fault for not sooner discovering the situation, the answer must be that the Transfer was at fault because of the absence of a lookout to give warning seasonably of the close proximity of the Geneva. Wolcott v. Union Ferry Co. of New York & Brooklyn, 225 Fed. 40, 140 C. C. A. 366; The William A. Jamison, supra. In any view it is possible to take, it seems to us that there was a lack of prudence as well on the part of Transfer No. 17 as on the part of the Geneva.

The decree dismissing the libel is reversed, and the court below is directed to reinstate the libel and enter a decree for half damages against the steam tug Transfer No. 17.

In re WEIDENFELD.

(Circuit Court of Appeals, Second Circuit. November 13, 1918.)

No. 57.

1. BANKRUPTCY ⟸236—EXAMINATION—ESTATE IN PROCESS OF ADMINISTRATION.
   The estate of an alleged bankrupt is in process of administration from the time of the filing of the petition, and hence, though adjudication had not been had, an order for the examination of the bankrupt's wife, pursuant to Bankruptcy Act, § 21a (Comp. St. § 9605), was warranted; it appearing that the bankrupt by his dilatory tactics had delayed adjudication more than one year.
2. BANKRUPTCY ⟸443—PETITION TO REVISE—PARTY IN INTEREST.
   An alleged bankrupt is not a party aggrieved, within Bankruptcy Act § 24b (Comp. St. § 9608), by an order for the examination of his wife, and he cannot maintain a petition to revise the same.
3. BANKRUPTCY ⟸234, 443—EXAMINATION OF WITNESSES—DISCRETION OF COURT.
   An order, under Bankruptcy Act, § 21a (Comp. St. § 9605), for the examination of witnesses is a discretionary order, and as such is not reviewable upon the application even of the party aggrieved, except for an abuse of discretion.
4. BANKRUPTCY ⟸234—EXAMINATION OF WITNESSES—ABUSE OF DISCRETION.
   In involuntary proceedings, an order under Bankruptcy Act, § 21a (Comp. St. § 9605), for the examination of the bankrupt's wife as a witness, *held* not an abuse of the court's discretion.

Petition to Revise Order of the District Court of the United States for the Eastern District of New York.

In the matter of Camille Weidenfeld, alleged bankrupt. Petition by the alleged bankrupt to revise an order of the District Court denying the bankrupt's application for an order directing that the referee or special master should determine for the information of the court whether a motion for the examination of the bankrupt's wife, which had been granted, was made in good faith. Order affirmed.

Herman J. Witte, of New York City, for alleged bankrupt.

Otto B. Schmidt, of New York City (Marshall S. Hagar, of New York City, of counsel), for creditor Fischer.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

ROGERS, Circuit Judge. It appears that an involuntary petition in bankruptcy was filed against the alleged bankrupt on May 12, 1917. The alleged bankrupt appeared and filed his answer, and denied the allegations of the petition, and up to the present time no adjudication has been had; the trial of the issue having been repeatedly adjourned at his request. It appears, therefore, that for more than 17 months the creditors of this alleged bankrupt have been prevented from prosecuting or in any way endeavoring to collect their claims.

In July, 1917, one Bessie C. Fischer, a creditor with claims against the alleged bankrupt aggregating upwards of $14,000, and who had been unable to prosecute her claims by reason of the pending bankruptcy proceedings, made an application for the examination of the alleged bankrupt, his wife, Katherine C. Weidenfeld, and others, pursuant to section 21a of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 551 [Comp. St. § 9605]), which may be found in the margin.[1]

The application to examine the alleged bankrupt was granted. The application to examine his wife was reserved subject to a renewal of the application. The alleged bankrupt having been examined, the application was renewed in December, 1917, for leave to issue a subpœna for the examination of his wife, and after due consideration the motion was granted on January 19, 1918, and an order to that effect was entered. That order, upon motion of the alleged bankrupt, and not upon the motion of his wife, was resettled, and, as resettled, was entered in the clerk's office on May 16, 1918. No application to review that order has ever been made by the wife.

Thereafter, and after the time to appeal or to revise the order of May 16th under section 24b of the act (Comp. St. § 9608), which is found in the margin,[2] had expired, the alleged bankrupt again, and not his wife, sought to obtain an order directing that a referee or special master should hear and determine for the information of the court whether the motion which had been made and granted for the examination of the wife was made in good faith. This application was denied on June 3, 1918, and on June 10, 1918, an order to that effect was entered; so that the petition to revise is to review this order of June 10th, and the petitioner is the alleged bankrupt, and not the wife, who is the witness to be examined.

The petitioner asks this court to declare the order erroneous, on the ground that the court before adjudication cannot inquire into

[1] "*Evidence.—a* A court of bankruptcy may, upon application of any officer bankrupt, or creditor, by order require any designated person, including the bankrupt and his wife, to appear in court or before a referee or the judge of any State court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this act: Provided, that the wife may be examined only touching business transacted by her or to which she is a party, and to determine the fact whether she has transacted or been a party to any business of the bankrupt."

[2] "The several Circuit Courts of Appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised on due notice and petition by any party aggrieved."

matters pertaining to the bankrupt's business, and had no right to make the order of April 10, 1918, and that it also exceeded its jurisdiction by denying the petitioner's motion by the order filed on June 10th, refusing to vacate the order of April 10th.

[1] Section 21a of the Bankruptcy Act, heretofore cited, authorizes the bankruptcy court upon the application of any creditor to require any designated person including the bankrupt's wife to submit to an examination concerning the acts, conduct or property of a bankrupt "whose estate is in process of administration" under the act. That Bessie C. Fischer, who made the application in this case, is a creditor, is not denied.

There has been a very decided difference of opinion in the courts as to when an estate "is in process of administration" under the act. But in 1914 the Supreme Court settled the matter in Cameron v. United States, 231 U. S. 710, 717, 34 Sup. Ct. 244, 58 L. Ed. 448. It declared, as we understand the decision, that the estate is in process of administration from the filing of the petition in bankruptcy; that being the time when the property of the alleged bankrupt passes in custodia legis. It is not material whether there has yet been an adjudication, or whether a receiver has yet been appointed; and it is not material whether the proceeding is in a voluntary or involuntary bankruptcy. The filing of the petition prevents any creditor from attaching the estate, and it is intolerable that a creditor should be left in the position in which this creditor finds herself for a period of a year and a half, with nothing determined as to her rights in the estate. The object of such an examination as is here proposed is to enable the court to discover the extent and whereabouts of the alleged bankrupt's estate, and to come into possession of it, in order that the rights of creditors may be preserved. The importance of an early examination in such cases has been more than once emphasized by the courts. In Cameron v. United States, 231 U. S. 710, 34 Sup. Ct. 244, 58 L. Ed. 448, the Supreme Court, in commenting upon the necessity of an early examination to ascertain the extent and whereabouts of the estate, said:

"If such examination is postponed until after adjudication, which may not take place for at least 20 days, within which the bankrupt in involuntary bankruptcy is given leave to appear and plead, the estate may be concealed and disposed of and the purpose of the act to hold it and to distribute it for the benefit of creditors defeated."

In the case of In re Fleischer (D. C.) 151 Fed. 81, 83 (1907), Judge Hough, then a District Judge, in referring to the necessity of prompt action in this class of cases said:

"The desirability and importance of promptly conducting an investigation into the affairs of any person petitioned into the bankruptcy court has been too often shown to be open to doubt. To wait until adjudication to ascertain from the bankrupt's own lips the situs of his property and his own explanations of the situation in which the creditors find themselves is in many cases giving to those guilty of fraud just the necessary time to permit the fraud to be consummated and the fruits thereof secured. In my opinion it is not too much to say that a skillful and vigorous use of early examinations of involuntary bankrupts is the one thing which enables creditors to prevent this statute being easily turned into a shield for dishonesty and a potent aid to fraud."

[2] The petitioning creditor is clearly entitled to the order which has been entered. The alleged bankrupt has no standing in this court to complain of the order; he not being the party aggrieved within the meaning of section 24b.

[3, 4] We may add that in any event the order sought to be reviewed is a discretionary order, and as such would not be reviewable upon the application even of a person aggrieved, except for an abuse of discretion, and no abuse of discretion in the making of the order is shown.

In conclusion it must be said that the petition to revise which the alleged bankrupt has brought indicates what his policy has been throughout. He has sought to delay and to obstruct the orderly and proper administration of the bankruptcy court. The examination of his wife should take place at the earliest practicable time, and an end be put to the obstructive tactics which have been employed to hinder and delay creditors contrary to the intent of the Bankruptcy Act.

The petition to revise is dismissed, with costs.

LEHIGH VALLEY R. CO. v. NORMILE.

(Circuit Court of Appeals, Second Circuit. November 13, 1918.)

No. 18.

1. COMMERCE ⊜27(6)—"INTERSTATE COMMERCE"—RAILROADS.
A brakeman, employed by a railroad company engaged in interstate commerce, is himself engaged in interstate commerce, while working on a train carrying goods destined for points outside of the state.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

2. APPEAL AND ERROR ⊜1062(1)—SUBMISSION OF ISSUES TO JURY—IMPROPRIETY.
Where two issues of negligence were submitted to the jury, and the verdict was general, a new trial should be granted, if either was improperly submitted.

3. MASTER AND SERVANT ⊜137(3)—INJURIES TO SERVANT—SIGNALS.
In an action by a railroad brakeman, who was thrown from a car on which he was standing to give signals during switch maneuvers, *held*, that the failure of the engineer to give notice of his intention to back the train was immaterial.

4. APPEAL AND ERROR ⊜262(1)—REVIEW—EXCEPTIONS.
Where the defendant railroad company did not except to the improper submission of an issue of negligence, *held*, that it cannot take advantage of the matter on writ of error.

5. MASTER AND SERVANT ⊜286(30)—INJURIES TO SERVANT—NEGLIGENCE—JURY QUESTION.
In an action by a railroad brakeman, who was thrown from a car on which he was standing to give signals for switching, evidence *held* sufficient to carry to the jury the question whether the engineer was negligent in backing the train with unnecessary violence, and to sustain a verdict against the company.

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

Action by Frank L. Normile against the Lehigh Valley Railroad Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Cobb, Cobb, McAllister, Feinberg & Heath, of Ithaca, N. Y. (Riley H. Heath, of Ithaca, N. Y., of counsel), for plaintiff in error.

Dorr & Seubert, of Syracuse, N. Y., for defendant in error.

Before WARD, ROGERS, and MANTON, Circuit Judges.

MANTON, Circuit Judge. [1] The defendant below, a railroad corporation, was engaged in interstate commerce. On the 28th of November, 1916, plaintiff below, an employé of the defendant below, was working as a brakeman upon a train of 30 cars in the east-bound yards of the defendant below at Sayre, Pa. This train carried commerce and was destined for a point outside of the state of Pennsylvania, and was therefore engaged in interstate commerce, as was the plaintiff below at the time of his injury. In its yard, the defendant below maintained sidings which diverged from the lead or leader track. They were numbered upon the drawing in evidence from 2 to 28, among which are sidings 16 and 18. Plaintiff below was directed to his work on this train at about 6 o'clock in the evening, and between that time and up to 7:30, the hour of his accident, helped in various movements in the making up of the train. When completed, the train consisted of an engine, 30 cars, and a caboose. As thus made up, the plaintiff below was a member of the crew which, it was intended, should move the train from siding 16 south to Coxton, Pa., and points outside the state.

At the time of the injury to the plaintiff below, the train was engaged in the doubling-over movement from siding 16 to siding 18. Plaintiff below took a position, for the purpose of signaling, on the second or third car from the rear end of the 30 cars, about 7 or 8 feet from the head end of his car, and from this position he was later thrown and sustained very serious injuries. From here the train started out of siding 16 onto the lead track at a speed of about 8 miles per hour, to a point about 128 feet beyond siding 16, and then came to a full stop, pursuant to signals transmitted from the conductor, who was stationed on the ground, to the plaintiff below, and in turn by him to the head brakeman, who was on the seventh or eighth car from the engine. The conductor immediately gave plaintiff below a slow back-up signal, which he transmitted to the head brakeman with his lantern, who passed it on to the engineer. This was responded to by backing up, which plaintiff below says he felt through a slight backward move of the car under him. The engineer then moved the train forward without any signal, and the car on which the plaintiff below was standing moved forward through a space of about 15 feet, then without signal the movement was reversed, the engine backed, forced the cars between the plaintiff below and the engine back against the car he was standing on, which, at the time, he says, was still in forward motion, with great force and violence, resulting in the plaintiff below being thrown forward through a space of 7 or 8 feet, and he fell between his car and the next one. Just

prior to this last movement, which resulted in his fall, plaintiff below stood in a position braced with feet apart and toes pointed outward, which is described as the usual and customary position for trainmen to take on the top of moving cars under similar circumstances.

[2] The court below left two questions to the jury with reference to the liability of the defendant below: First, whether the engineer negligently failed to give a whistle signal before he began to back the train, as he was required either by a rule or by the practice of the company to do, for the purpose of giving notice of his intention; second, whether he negligently backed the train with such unnecessary violence as to cause the injury to the plaintiff below. No one can say whether the jury arrived at their verdict in favor of the plaintiff below on both these grounds, or one of them, or, if so, upon which. Therefore, if either was improperly submitted, there should be a new trial.

[3, 4] The plaintiff below testified that he knew the engineer, after going ahead to take up the slack between the cars, was going to back, and, of course, he was further advised of this fact by the bumping of each car between his and the engine until his own car was reached. Therefore the failure to give a signal to that effect was absolutely immaterial. If given, it would not have informed him of anything more than he already knew. If the engineer was negligent in this respect, his negligence did not contribute in any way to the accident, and the question should not have been submitted to the jury as a reason for holding the defendant below liable to the plaintiff below. But as this point was not presented to the court below, and no exception was taken to cover it, it is not helpful to defendant below here.

[5] The defendant below disputed the severity of the violence caused by the abrupt stopping of the car the plaintiff below stood on, and the reversing of its movement; but the evidence as to this raised a question for the jury as to whether or not there was an unusual and violent movement such that an ordinary prudent engineer would not have caused in the exercise of ordinary care and caution. Texas & Pacific Ry. Co. v. Behymer, 189 U. S. 468, 23 Sup. Ct. 622, 47 L. Ed. 905; Curran v. Lake Champlain Co., 211 N. Y. 60, 105 N. E. 105; Breed v. Lehigh Valley Co., 131 App. Div. 492, 115 N. Y. Supp. 1019.

We believe the court below correctly submitted the issue of fact to the jury as to whether or not the engineer negligently backed the train with such unnecessary violence as to cause the injury. Considering these facts, the length of the train, the position of the plaintiff below near the rear end thereof, and that the train was in forward movement when suddenly reversed, and a violent movement backward was indulged in, not in response to any signal from any member of the crew, but for reasons known only to the engineer, the jury could predicate negligence thereon.

The fact that there was a forward movement and then a sudden reverse, with growing momentum, produced by the force of each car (some 25 or more in number) striking the other, would cause the car on which the plaintiff below was standing to be bumped backward with a very unusual and dangerous blow.

The court properly submitted the question of contributory negligence to the jury, as it did also the question of assumption of risk. For all that appears, the jury may have charged the plaintiff below with some contributory negligence, for the verdict is a small one, $5,000 for the loss of his arm.

We find no error, to which exception has been taken, which warrants a reversal.

Judgment affirmed.

GREAT NORTHERN RY. CO. v. JOHNSON.

(Circuit Court of Appeals, Eighth Circuit. October 28, 1918.)

No. 5130.

1. MARRIAGE ⟸13—COMMON-LAW MARRIAGE—RECOGNITION.
   Minnesota recognizes common-law marriages.
2. MARRIAGE ⟸3—WHAT LAW GOVERNS.
   Where a man sent a woman residing in Missouri a written contract, signed by him, stating that the parties would henceforth be husband and wife and so conduct themselves, the laws of Missouri, where the woman accepted the contractual offer, govern.
3. MARRIAGE ⟸13—COMMON-LAW MARRIAGE—RECOGNITION.
   Missouri recognizes and enforces common-law marriages (Rev. St. Mo. 1909, § 8279); the rule being that marriage is a civil contract, possessing in its creation in præsenti the elements, and only the elements, attaching to any contract.
4. MARRIAGE ⟸20(1)—COMMON-LAW MARRIAGE—CREATION.
   In Missouri, mutual assent to the present institution of the status of matrimony is sufficient to establish a valid common-law marriage; so the marriage may be established where a nonresident duly executed an agreement that he and a woman residing in Missouri should henceforth become husband and wife, and she accepted the offer.
5. MARRIAGE ⟸3—STATES.
   The question whether the parties must be together, or within the same jurisdiction, at the time of celebrating a marriage, is for the states, except in the District of Columbia and the territories.

In Error to the District Court of the United States for the District of North Dakota; Charles F. Amidon, Judge.

Action by E. H. Johnson, as administrator, etc., against the Great Northern Railway Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

M. L. Countryman, of St. Paul, Minn., and C. J. Murphy, of Grand Forks, N. D. (T. A. Toner, of Grand Forks, N. D., on the brief), for plaintiff in error.

L. J. Palda, of Minot, N. D., for defendant in error.

Before HOOK and STONE, Circuit Judges, and WADE, District Judge.

STONE, Circuit Judge. Writ of error from judgment for damages on account of personal injury death claim brought by wife.

The plaintiff founded her right of recovery upon the claim that she

was the wife of deceased through a common-law marriage. Plaintiff based the marriage upon a written contract sent from Minnesota, where deceased then was and continued for some time afterwards, to her in Missouri, where she resided and was employed. Her testimony was that upon receipt of the duplicate papers, which had been signed by deceased, she signed them and returned one to him. The contract in question was Exhibit C in this case and was as follows:

"St. Paul, Minn., March 10, 1916.

"It is hereby agreed, by and between E. R. Spiers and Mayme Woodall, from this date henceforth to be husband and wife, and from this date henceforth to conduct ourselves towards each other as husband and wife, the said E. R. Spiers to contribute to the support and maintenance of the said Mayme Woodall as her husband, and the said Mayme Woodall to conduct herself towards the said E. R. Spiers as a dutiful wife.

"[Signed] E. R. Spiers.
"Mayme Woodall."

The contentions of plaintiff in error are concisely stated in a portion of the printed argument as follows:

"* * * Claimant has testified in the case at bar that she intended at the time of executing Exhibit C to then become the wife of decedent. If this statement of hers must be believed, and the law does not require the parties to agree in the presence of each other, then we concede that the finding of marriage in this case must be sustained."

[1-3] The state of Minnesota recognizes common-law marriages, but the contract is governed by the laws of the state of Missouri, where acceptance by plaintiff of the contractual offer made by deceased occurred. That state recognizes and enforces common-law marriages. R. S. Mo. 1909, § 8279; Dyer v. Brannock, 66 Mo. 391, 27 Am. Rep. 359; State v. Bittick, 103 Mo. 183, 15 S. W. 325, 11 L. R. A. 587, 23 Am. St. Rep. 869; State v. Cooper, 103 Mo. 266, 15 S. W. 327; Banks v. Galbraith, 149 Mo. 529, 51 S. W. 105; Topper v. Perry, 197 Mo. 531, 95 S. W. 203, 114 Am. St. Rep. 777; Bishop v. Investment Co., 229 Mo. 699, 129 S. W. 668, Ann. Cas. 1912A, 868; Imboden v. Trust Co., 111 Mo. App. 220, 86 S. W. 263; Davis v. Stouffer, 132 Mo. App. 555, 112 S. W. 282. Under these decisions the rule seems to be that marriage is a civil contract, possessing in its creation in præsenti the elements, and only the elements, attaching to any contract, but that because it establishes a legal status of grave concern to the state and society, and because of the natural temptations to perjury, and the difficulties of combating such testimony, both of which frequently arise, the courts will closely scrutinize testimony intended to establish such a contract after the death of one of the parties thereto.

[4, 5] The court fairly submitted the facts of execution, time of execution, and intent at time of execution of the contract. The evidence has been carefully examined, and in our judgment there was substantial evidence upon all of those points to sustain the verdict of the jury in favor of the plaintiff. In fact, so far as the matter of present intention of the parties is concerned, it may be doubted whether there was any room for submission to the jury. The con-

tract was written, and its expressions are not only unambiguous, but are emphatic as to that point. The agreement is:

"* * * From this date henceforth to be husband and wife, and from this date henceforth to conduct ourselves toward each other as husband and wife. * * *"

In approaching the proposition that the parties must be together or within the same jurisdiction, it is to be noted that this matter of marriage is for the states, except in the District of Columbia and the territories (Davis v. Pryor [8th Cir.] 112 Fed. 274, 50 C. C. A. 579; 26 Cyc. 829, and citations in notes 12 and 13 thereto), and is to be determined by the law of the state where it was contracted or celebrated (26 Cyc. 829, and citations in note 14 thereto). So far as the law on the point here involved has been defined by the adjudications of the Missouri courts, it will be followed, irrespective of the view which might be taken by this court, if the question were open. A careful examination of the above-cited Missouri cases, and of many others from that state, convinces that in that state the marriage contract possesses the elements of an ordinary contract and none others. That contract establishes a very important status, but the contract itself is in no respect peculiar. Mutual assent to the present institution of the status is all sufficient. No other act, such as cohabitation (Davis v. Stouffer, 132 Mo. App. 555, 112 S. W. 282), is necessary to complete the institution of the status where the mutual assent contemplates a marriage in præsenti. Why should the physical presence of the parties be essential to the legality of this contract, any more than of any other? It is not for us to devise means of making common-law marriages difficult. It is our duty to recognize the law as it exists. Nor is there any reason why the parties should be within the same jurisdiction. The existence and validity of the contract must be determined by the law of the place where it is legally regarded as made. Here, however, there is no point in the suggestion, for both of the states involved approve common-law marriages.

The judgment is affirmed.

TRAMMELL v. YARBROUGH et al.

(Circuit Court of Appeals, Fifth Circuit. December 19, 1918. Rehearing Denied Feb. 13, 1919.)

No. 3305.

1. BANKRUPTCY ⟸88(2)—PETITION—INTERVENTION.
While Bankruptcy Act, § 59f (Comp. St. § 9643), provides that creditors other than the original petitioner may at any time enter their appearance and join in the petition, yet, where a petition in involuntary bankruptcy is entirely dismissed, it is improper for the court to reserve to other creditors the right to intervene and have the matter reopened, and where creditors attempted to intervene, pursuant to such leave, such proceeding cannot be deemed a continuation of the original one.

2. BANKRUPTCY ⟸56—ACTS OF BANKRUPTCY—PETITION.
Under Bankruptcy Act, § 3b (Comp. St. § 9587), a petition in bankruptcy cannot be maintained on alleged acts of bankruptcy occurring more than four months before the filing of the petition.

Appeal from the District Court of the United States for the Northern District of Texas; Edward R. Meek, Judge.

On the petition of Jack Yarbrough and others to intervene in bankruptcy proceedings previously instituted, Thomas Trammell was adjudicated a bankrupt, and he appeals. Reversed, with directions that the proceeding be dismissed.

Frank Willis, of Canadian, Tex., and J. H. Beall, of Sweetwater, Tex. (Ed. J. Hamner and Beall & Douthit, all of Sweetwater, Tex., on the brief), for appellant.

R. C. Chambers, of Abilene, Tex. (James P. Stinson, of Abilene, Tex., on the brief), for appellees.

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

WALKER, Circuit Judge. On the 11th day of July, 1917, three creditors of Thomas Trammell filed an involuntary petition in bankruptcy against him, alleging the commission of acts of bankruptcy within four months prior to the date mentioned. The alleged bankrupt's answer to that petition put in issue its averments of insolvency and of acts of bankruptcy, and averred a state of facts relied on as estopping the petitioners to maintain the proceeding. On July 26, 1917, other alleged creditors of Trammell filed an intervening petition, which, so far as appears, was not acted on by the court, and was not served on, or answered or pleaded to, by Trammell. On September 21, 1917, another alleged creditor filed an intervening petition, which the alleged bankrupt demurred to and answered. On October 16, 1917, the court made the following order:

"On this the 16th day of October, A. D. 1917, after the above styled and numbered cause had been regularly set down for a hearing upon this day, came on to be heard the said creditors' petition in bankruptcy, seeking to secure an adjudication in bankruptcy, and the intervention as filed by other creditors seeking an adjudication, and the petitioning creditors and the intervening creditors having failed to appear and prosecute their action, the case was heard upon the answer and demurrers of the alleged bankrupt, and it appearing that the petitioners and interveners have failed to prosecute their action, and that the demurrers as filed by the alleged bankrupt are sufficient:

"It is therefore ordered that the above styled and numbered cause be dismissed, at the costs of petitioning creditors and interveners, reserving, however, to any other creditors of the alleged bankrupt the right to intervene and have this matter reopened within 30 days, and in the event no other creditor of said alleged bankrupt so intervenes for said purpose, then this order of dismissal to be final. It is further ordered that a copy of this order be published three consecutive days in a leading Dallas newspaper."

[1] On November 15, 1917, Jack Yarbrough and others filed a petition, which averred the above-stated prior occurrences in the bankruptcy proceeding, and that petitioners were creditors in amounts stated, adopted the allegations of the original and previously filed intervening petitions in regard to the acts of bankruptcy and the insolvency of Trammell, and prayed that the above-mentioned order dismissing the proceeding be set aside, that the proceeding be reopened, that the petitioners be permitted to intervene therein, and that a hearing be had on the original and intervening petitions. On Decem-

ber 5, 1917, Trammell demurred to and answered the petition just mentioned, and prayed that the same be referred to a jury. The court made an order reopening the bankruptcy proceeding, and permitting the petitioners in the last-filed petition to intervene in the cause and to join with the original petitioning creditors therein, but referred the cause to a special master in chancery for a hearing upon the issues of fact therein. An adjudication of bankruptcy was made on such master's report. Trammell appeals from that decree.

The above order of October 16, 1917, adjudged that the petitioning creditors and those who theretofore had intervened were not entitled to maintain the proceeding. The court's action was not based alone upon the failure of those creditors to prosecute the proceeding. No reservation was made in favor of the parties adversely affected by that ruling. They did not again appear in the proceeding, and it then ended in so far as they were actors in it. The order undertook to reserve "to any other creditors of the alleged bankrupt the right to intervene and have this matter reopened within 30 days." A revival of the proceeding at the instance of other creditors was not a joinder by them with those who previously had prosecuted the proceeding, because the latter had ceased to be actors in it. So far as they were concerned, the proceeding was not revived. They remained out of it. A reopening of the proceeding to let in other creditors to carry it on, after the elimination from it of all who previously had been actors in it, was in necessary effect the institution of a new proceeding. The statute provides that "creditors other than the original petitioners may at any time enter their appearance and join in the petition." Bankruptcy Act July 1, 1898, c. 541, § 59f, 30 Stat. 561 (Comp. St. § 9643). This provision presupposes the continued presence in the proceeding of petitioners with whom other creditors may join. It does not contemplate a revival of the proceeding after its life has been ended by the elimination of all who were actors in it. When that occurred, there was nothing left to intervene in. In re Bolognesi, 223 Fed. 771, 139 C. C. A. 351. We do not think that what was done by and at the instance of the creditors who appeared in the proceeding after the making of the order quoted properly can be regarded as an intervention in a pending proceeding.

[2] The petition under which the proceeding was opened was filed more than 4 months after the commission of the alleged acts of bankruptcy. This was too late for a new proceeding based upon those acts to be maintainable. Bankruptcy Act, § 3b (section 9587). It follows that the adjudication appealed from was erroneous. It is reversed, with direction that the proceeding be dismissed.

Reversed.

In re CAREY.

Petition of GRAUTEN.

(Circuit Court of Appeals, Second Circuit. November 13, 1918.)

No. 59.

BANKRUPTCY ⟸78—PETITION—RIGHT TO ANSWER.

As Bankruptcy Act July 1, 1898, § 67f (Comp. St. § 9651), vacates judgments rendered within four months of the filing of the petition, *held* that, under sections 1(9), 18b, and 59f (sections 9585, 9602, 9643), a judgment creditor of an alleged bankrupt, whose judgment was recovered within the four months period, might answer the petition; the filing of the petition destroying the lien of the judgment and leaving the judgment creditor an unsecured creditor.

Petition to Revise Order of the District Court of the United States for the Eastern District of New York.

In the matter of Charlotte A. Carey, alleged bankrupt. Petition by Elizabeth J. Grauten to revise an order striking out, on the ground that she was a preferred and secured creditor, the answer of the petitioner opposing the adjudication. Order reversed, and cause remanded.

Petition to revise an order in bankruptcy entered in the District Court for the Eastern District of New York. The District Judge granted an order on the 15th of June, 1918, striking out the answer of the petitioner, a creditor, for the reason that she was a preferred and secured creditor, and retained her preference and security, and had no standing to oppose adjudication of the alleged bankrupt. The petitioner appeals.

Walter B. Milkman, of Brooklyn, N. Y., for Elizabeth J. Grauten, answering creditor and petitioner.

Maurice B. Gluck, of New York City, for petitioning creditors.

Before WARD, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge. The petitioner recovered a judgment in the New York Supreme Court for $3,680.21 and issued execution to the sheriff, to whom a fund sufficient to satisfy the judgment came on the 19th of March, 1918. An involuntary petition in bankruptcy was filed by creditors. An order staying the sheriff of Kings county from paying over the moneys so held was granted. Before adjudication, the petitioner herein filed her answer to the petition in bankruptcy, denying that the petitioning creditors were bona fide and actual creditors of the alleged bankrupt, denying insolvency, and that any act of bankruptcy had been committed, and that the facts did not set forth sufficient to constitute an act of bankruptcy. The trial presented by this issue was had on the 5th of June, 1918. A motion was then made "to dismiss the answer, and for an order declaring the alleged bankrupt to be insolvent," on the ground that the petitioner was a preferred and secured creditor and not entitled to be heard. Later the court struck out the answer and decreed that an adjudication follow. In this the court erred.

The petitioner was a creditor up to the time of the satisfaction of her judgment. When the bankruptcy intervened on March 23d, the benefits she had secured by her judgment and execution thereunder were suspended, but she still maintained her rights as a creditor. Clarke v. Larremore, 188 U. S. 486, 23 Sup. Ct. 363, 47 L. Ed. 555. It is provided in section 67 of the Bankruptcy Act July 1, 1898, c. 541, 30 Stat. 564 (Comp. St. § 9651):

"f. That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same. * * *"

And section 18b (section 9602) provides that any creditor may plead to the petition, and section 59f (section 9643) that creditors other than original petitioners, may file an answer. Section 1, cl. 9 (section 9585), defines a creditor as one who owns a demand or claim provable in bankruptcy.

By virtue of section 67f of the act, if it should be ultimately determined that Charlotte A. Carey is in fact a bankrupt and therefore that this petition is well founded, the petitioner would be a creditor. She would still have her claim or demand provable in bankruptcy, although deprived of her preference. If, in the event of a legal adjudication, she is such a creditor, she must be a creditor for the purpose of contesting the propriety of an adjudication. In re C. Moench & Sons Co. (D. C.) 123 Fed. 977; Jackson v. Wauchula, etc., Co., 230 Fed. 409, 144 C. C. A. 551; Blackstone v. Everybody's Store, Inc., et al., 207 Fed. 752, 125 C. C. A. 290.

In Re Columbia Real Estate Co., 112 Fed. 643, 50 C. C. A. 406, relied on by the court below, the petitioner sought to intervene, not as a creditor of the bankrupt, but alleging that he had an equitable lien on real estate which stood in the name of a third person, but which real estate was in equity the property of the bankrupt. The petitioner claimed the lien was acquired through the ostensible owner, without knowledge of the rights of the bankrupt in the property. The Circuit Court for the Seventh Circuit held that a dismissal of the petition on demurrer was not a final decision upon the merits of the petitioner's rights as equitable mortgagee, and concluded that the order was not appealable. Under the facts of the case the court considered the petitioner as a stranger to the proceeding.

The order is reversed, with costs, and the cause remanded, with instructions to vacate the adjudication in bankruptcy, and to permit petitioner's answer to stand, and proceed with the trial of the issue accordingly.

REYNOLDS et al. v. HOURIGAN et al.

In re HANCE.

(Circuit Court of Appeals, Third Circuit. December 9, 1918.)

No. 2400.

BANKRUPTCY ⊂=341—CLAIM AGAINST TRUSTEE FOR RENT—DISCRETION OF COURT.

Disallowance of the claim of bankrupt's landlord for rent after all the personal property had been sold by the trustee and removed, except articles to which the landlord made an unwarranted claim as fixtures, and which remained in the building pending decision as to their ownership, *held* within the court's discretion.

On Petition for Review from the District Court of the United States for the Middle District of Pennsylvania; Charles B. Witmer, Judge.

In the matter of John Hance, bankrupt. On petition to review order denying claim of Reynolds & Reynolds for rent. Affirmed.

Reynolds & Reynolds, of Wilkes-Barre, Pa., for petitioners.

Before BUFFINGTON and WOOLLEY, Circuit Judges.

PER CURIAM. This case arises in the settlement of the bankrupt estate of John Hance. That estate consisted of a lot owned by Hance, having a store building erected thereon, and certain personal property in said building. At the time of the bankruptcy, this property was under execution on process issued by Reynolds, a mortgage creditor. The receiver of the Hance estate notified the sheriff not to sell any personal property, but, in answer to inquiry by Reynolds, stated he was willing the sheriff's sale of the real estate should proceed. It did proceed, and Reynolds became the purchaser, and thereafter the receiver retained possession of the real estate for the purpose of disposing of the personal property in the store building, and sold all of the personal property in the building, except certain articles which Reynolds claimed were fixtures, notified the receiver not to sell, and which in his petition in the bankrupt court, before the attempted sale by the receiver, Reynolds there averred—

"are a part of the permanent structure, and any attempt of the removal will cause everlasting injury to your petitioners."

It subsequently appeared by a decision of the court that the claim of Reynolds was unwarranted, that the personal property he claimed belonged to the bankrupt estate of John Hance, and it is clear it would have been sold with the other personal property, had not Reynolds made this unwarranted claim. The referee made a proper allowance to Reynolds for the use and occupation of the premises up to the date of said sale and for 4 days thereafter, and refused to allow the claim of Reynolds for 38 days of alleged use and occupation before he subsequently got the key, and for some 7 or 8 months' alleged use and occupation thereafter, pending which the goods or the fixtures which Reynolds unwarrantedly claimed remained on the

premises. It will thus be seen that, if Reynolds had not made the unwarranted claim for the personal property, he would no doubt have been given full and exclusive possession of the premises, at the time the unclaimed part of the personal property was sold. It is equally clear that out of his unwarranted claims this difficulty has arisen. The court below has reached the conclusion that the—

"referee's disposition of the rent claim of Reynolds fairly meets the equity of the case, and his opinion is accepted and adopted as expressing the opinion of the court."

We shall not enter into a discussion of the facts and circumstances of the case, further than to say that if either the receiver, who was then about giving way to the trustee, or the landlord, or both of them, had promptly called the attention of the court to the landlord's desire to have the key, and to the situation which was caused by his holding onto the personal property of the estate after the key was delivered to him, that the court could have made some order both as to the occupancy of the building and of the personal property of the estate therein which Reynolds was wrongfully claiming, but which the trustee was warned not to remove from the premises by Reynolds' averment of permanent injury. The case presented was one for an administrative exercise of discretion, which could have been readily met by either the trustee or the landlord, or both together, calling to the attention of the court. But neither of them did anything. If there was any act of omission or commission involved, clearly it may be said that Reynolds, as well as the trustee, shared therein. But, granting this, we see no reason why the creditors should suffer from a situation in which the landlord is not wholly free from fault. Under all the circumstances of the case, we think the case was one for the exercise of wise discretion, and the court below, in awarding Reynolds rent up to the time of the sale and a few days thereafter, fairly met the equity of the case.

We therefore affirm the decree of the court below, but, under all the circumstances of the case, we direct the costs of this appeal be paid by the bankrupt estate.

DALY v. NEW YORK DOCK CO.

(Circuit Court of Appeals, Second Circuit. November 13, 1918.)

No. 30.

1. WHARVES ⇐20(3)—WHARFINGER—CARE.
   While a dock company is not bound to provide enough water for any boat which may choose to come into the slip, it is bound to notify boats of any dangers or obstructions, the existence of which it knows, or ought to know, and which may be in the way of boats coming into the wharf.

2. WHARVES ⇐20(5)—INJURIES TO VESSELS—CONTRIBUTORY NEGLIGENCE.
   Where wharfinger failed to notify master of barge of a sunken spile, which the barge struck while it was being hauled into the wharf to be berthed, the master was not negligent for failure to examine the bottom; it appearing that he was unfamiliar with the obstruction.

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

3. SHIPPING ⇐12—SURVEY—NOTICE TO WHARFINGER.
Where a barge was injured while being berthed at a dock by reason of a sunken spile, of which the wharfinger should have warned, the wharfinger is entitled to notice of survey of the barge, and, notice not having been given, a decree against the wharfinger should be affirmed, with only half costs.

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

Libel by Bartle Daly against the New York Dock Company. From a decree for libelant, respondent appeals. Affirmed.

Davies, Auerbach & Cornell, of New York City (Charles E. Hotchkiss and Martin A. Schenck, both of New York City, and Henry C. Field, of Brooklyn, of counsel), for appellant.

Herbert Green, of New York City, for appellee.

Before WARD, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge. The libelant's barge Harrison, loaded with a cargo of coal, was sent on January 13, 1917, to Pier 29, there to be discharged. The tug placed the barge in the slip between Pier 28 on the north and Pier 29 on the south (which slip is about 141 feet wide). She was damaged while the master was attempting to berth her at Pier 29 by running upon a sunken spile. At the time of the injury, she was being hauled to the bulkhead at the inner end of the slip, there to be discharged of her cargo. The captain was hauling her into place by a line he caused to be tied to the dock and pulling her in thereby.

The appellant contends there was deep waterway on the southerly side of the slip, which was available for passage, and that the captain took the shallower water on the northerly side of the slip, and was therefore at fault. It is not made to appear that the captain had knowledge that the water was shallower on the northerly side; and, furthermore, it does appear that this was the one way for him to proceed in order to reach her berth at the place intended for unloading. This free space, the witnesses agree, was at the bulkhead at the foot of Harrison street, and there was no other way open to him. Not only did the captain testify to this, but the appellant's witness Flower. The appellant controlled the whole bulkhead under a lease, and owned and controlled the whole of Pier 29, and collected wharfage for the use of the same. There was testimony that both light and loaded boats tied up "all along here" (indicating the entire bulkhead); and it was the custom for boats to berth at the coal dock, as well as at Pier 29, for which the dock company collected wharfage.

[1, 2] While the dock company was not bound to provide enough water for any boat which chose to come into the slip, it was bound to notify boats of any dangers of obstruction, the existence of which it knew or ought to have known, and which may be in the way of boats coming into its wharf. If the boat had berthed, and the master had selected the place where the damage occurred, without examining the bottom with a pike pole, as usual, he would have been at fault; but the damage occurred while he was hauling her into her berth. He

was unfamiliar with any obstruction, was without knowledge thereof, and there was nothing to put him on guard to cause him to sound. What was discovered later as submerged spiles at the point where the captain says the damage occurred, and all the surrounding circumstances, are sufficient to justify the District Judge in finding, as he did, that the damage was due to a submerged spile. Under the circumstances, the appellant, as a wharfinger, was obliged to give notice to the public of conditions that render the slip dangerous in the exercise of ordinary care and diligence. Heissenbuttel v. Mayor, etc., of N. Y. (D. C.) 30 Fed. 456; Toxaway Tanning Co. v. Sulzberger & Sons Co. et al., 242 Fed. 888, 155 C. C. A. 476.

[3] It appeared at the argument that a survey of the damaged vessel was had, but no notice thereof was given to the dock company, nor did the appellant have the advantage of being represented. This is a grievous fault, and one which is now not infrequently occurring. We disapprove of such practices, and, because it has been indulged in by the libelant here, we shall affirm with half cost only.

Decree affirmed.

TRUMANN COOPERAGE CO. v. DILLARD.

(Circuit Court of Appeals, Eighth Circuit. October 28, 1918.)

No. 5107.

1. MASTER AND SERVANT ⟸278(16)—INJURIES TO SERVANT—EVIDENCE.
   In an action by a servant, hurt by a piece of wood thrown by a rapidly revolving drop saw, evidence *held* sufficient to sustain a verdict in favor of the servant, on the ground that the mechanical dogs holding the wood were defective, and that the master knew it, but failed to repair.
2. EVIDENCE ⟸ 474(11)—OPINION—MACHINERY.
   In an action by a servant, injured by a piece of wood thrown by a drop saw, testimony by an experienced sawyer, who had seen the accident, that, if the mechanical dogs intended to hold the wood had held, the piece would not have been thrown, was admissible.

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

Action by J. A. Dillard against the Trumann Cooperage Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

J. H. Hawthorne, of Kansas City, Mo., and J. C. Hawthorne, of Jonesboro, Ark., for plaintiff in error.

C. T. Carpenter, of Marked Tree, Ark., for defendant in error.

Before HOOK and STONE, Circuit Judges, and MUNGER, District Judge.

HOOK, Circuit Judge. [1] Dillard recovered a judgment against the Trumann Cooperage Company for personal injuries sustained in its service and caused by defective machinery. He was hit by a piece of wood thrown by a rapidly revolving drop saw, used to cut into short lengths logs held by mechanical dogs operated by steam. The negli-

gence charged was in a defective condition of the dogs, which permitted the logs to wabble and be thrown out of position while being cut.

It is urged that the evidence was not sufficient to sustain the verdict; but there was substantial testimony that the dogs were working defectively, that the company knew it and failed to repair, and that the accident consequently resulted. Counsel weigh it too nicely and technically. The testimony of men as to conditions and occurrences which they have observed in the ordinary walks of life and with which they are familiar should be taken more roughly and practically.

[2] Complaint is also made that a witness was allowed to testify that, if the dogs had held the log, the piece would not have been thrown by the saw. The witness had seen the accident. He was a man of six years' experience as a sawyer, had operated drop saws, and for five years had been in the service of the defendant in nearly every capacity, except that of foreman. The court did not err in admitting the testimony. Gila Valley, Globe & Northern Ry. Co. v. Lyon, 203 U. S. 465, 474, 27 Sup. Ct. 145, 51 L. Ed. 276.

The judgment is affirmed.

S. STERNAU & CO., Inc., v. GEORGE BORGFELDT & CO.

(Circuit Court of Appeals, Second Circuit. November 13, 1918.)

No. 78.

APPEAL AND ERROR ⊂⊃S39(1)—REVIEW—MOOT CASE.

Review of a decision of the Circuit Court of Appeals cannot be had by agreement between counsel for the respective parties, but only on a record and hearing presenting a real contest.

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

Suit by S. Sternau & Co., Incorporated, against George Borgfeldt & Co. From a decree for defendant, complainant appeals. Appeal dismissed.

John Robert Taylor, of New York City (J. Edgar Bull, of New York City, of counsel), for appellant.

Hans v. Briesen, of New York City, for appellee.

Before WARD, HOUGH, and MANTON, Circuit Judges.

PER CURIAM. This appeal is dismissed without prejudice, under our decision in Stromberg Co. v. Arnson, 239 Fed. 891, 153 C. C. A. 19. Reconsideration of that case cannot be had by agreement between counsel for the respective parties, but only on a record and hearing presenting a real contest.

JACOB SCHMIDT BREWING CO. v. UNITED STATES.

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

No. 5128.

INTOXICATING LIQUORS ⊂=138—INTERSTATE COMMERCE—BRANDING OF LIQUOR—SHIPMENTS.

Where defendant made interstate shipments of beer, and the only external marks indicating the nature of the packages were the name of the defendant brewing company, the trade-name, "Select," and a serial number, etc., *held*, that defendant was guilty of violation of Criminal Code, § 240 (Comp. St. 1916, § 10410), prohibiting the interstate shipment of liquors, unless the package be plainly labeled on the outside, etc.; the fact that the nature of the contents might have been inferred or learned from other sources being immaterial, etc.

In Error to the District Court of the United States for the District of North Dakota; Charles F. Amidon, Judge.

The Jacob Schmidt Brewing Company, a corporation, was convicted of violating Criminal Code, § 240, and it brings error. Affirmed.

Halvor L. Halvorson, of Minot, N. D. (James Manahan and Paul G. Bremer, both of St. Paul, Minn., on the brief), for plaintiff in error.

John Carmody, Asst. U. S. Atty., of Fargo, N. D. (M. A. Hildreth, U. S. Atty., of Fargo, N. D., on the brief), for the United States.

Before HOOK and STONE, Circuit Judges, and WADE, District Judge.

HOOK, Circuit Judge. The Jacob Schmidt Brewing Company was convicted of violating section 240 of the Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1137 [Comp. St. 1916, § 10410]), which prohibits the shipment of intoxicating liquors in interstate commerce unless the package or container "be so labeled on the outside cover as to plainly to show the name of the consignee, the nature of its contents, and the quantity contained therein."

What defendant did was this: It shipped certain packages containing beer from St. Paul, Minn., to customers in Minot, N. D., on which the only external marks indicating the nature of the contents were, "Return to Jacob Schmidt Brewing Co.," with street address in St. Paul; the trade-name "Select"; and "Serial No. 33." The name of defendant and the trade-name it adopted for its product may be put aside. An inference might, perhaps, be drawn from them by some persons that the packages contained beer, instead of a nonintoxicating beverage, but the act of Congress has not left the matter to such inconclusive inferences. Nor is defendant in any better position with its expression, "Serial No. 33." It appears that defendant's "Select" beer, so called, was registered with officials of North Dakota under a pure food law of that state, and that the designation "Serial No. 33" was assigned to it. But that was done merely for the local purposes of the state law. It was not designed to give a new or additional name to a well-known article, when outside the purview of that law or in relations with which that law had no concern.

Defendant invokes the rule that that is certain which can be made certain. The rule does not apply to a case like this. The act of Congress says that the nature of the contents of the package shall be plainly shown and shown on the outside cover. The requirement is a definite one, very easily complied with. It means that the marks must be of manifest, self-evident import, and must appear at the place indicated. It clearly excludes the idea of reference elsewhere for information, or of a general knowledge of the trade-names or brands adopted by particular merchants for their business, which have not gained a place in the common vocabulary of the country. What has been said also precludes resort to bills of lading issued by the carrier.

The judgment is affirmed.

BAYLEY & SONS, Inc., v. BLUMBERG et al.

(Circuit Court of Appeals, Second Circuit. December 11, 1918.)

No. 55.

1. JUDGMENT ⊂⊃632—PERSONS WHO MAY ASSERT BAR.
A judgment in a suit by a patentee against different parties, holding the patent invalid, is not a conclusive adjudication, which will bar a suit by the patentee against another for infringement of the same patent.
2. PATENTS ⊂⊃310(4)—INFRINGEMENT—BILL.
A bill for patent infringement *held* sufficient to state a cause of action; averments as to previous litigation over the patent being immaterial.
3. EQUITY ⊂⊃362—BILL—DISMISSAL.
A bill should not be dismissed, as not stating a cause of action, unless it is possible to conceive that, even if all of the allegations in the bill are true, the bill must be dismissed at hearing.
4. PATENTS ⊂⊃313—BILL FOR INFRINGEMENT—DISMISSAL.
In view of the claim of the patentee that it would produce new evidence at trial, *held*, that it was improper to dismiss a bill setting up the infringement of a patent, notwithstanding it appeared that on previous suit against other parties the patent had been held by the Circuit Court of Appeals to be invalid.

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

Suit by Bayley & Sons, Incorporated, against Michael J. Blumberg and Mrs. J. Blumberg, doing business under the name of J. Blumberg. From an order dismissing the bill, plaintiff appeals. Reversed.

Lester F. Dittenhoefer, of New York City (Dodson & Roe, of New York City, of counsel), for appellant.

Sidney S. Bobbe, of New York City, for respondent.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge. The appellant seeks to recover for willful infringement of design patent No. 49,593, for a lighting fixture, issued to the appellant's assignor, and for which the appellant now holds an assignment. The issues were framed by the service of an amended bill, an answer, and supplemental answer. A motion was then made to dismiss the bill on the merits, for the reason that the

same "fails to state facts sufficient to constitute a cause of action in equity," and for the further reason that the facts sought to be adjudicated by the said complaint are res judicata. The District Judge dismissed the bill upon the merits.

[1] It does not appear that the District Judge has held that "the facts sought to be adjudicated by the appellant are res judicata," and apparently this part of the relief sought was not granted. The claim of the appellee was that, because of the decision of this court in Bayley & Sons, Inc., v. Standard Art Glass Co., 249 Fed. 478, — C. C. A. —, the court having passed adversely to the claim of invention in the patent in suit, this action is not maintainable. This claim is untenable. The present action is between different parties and the complainant is entitled to present its proof, including such additional evidence in amplification as it may have, in addition to that offered in the trial of Bayley & Sons, Inc., v. Standard Art Glass Co. The District Judge would be obliged, of course, to be guided by what has been held by this court in our decision in that case.

[2-4] The amended complaint alleged the incorporation of the plaintiff, facts sufficient to justify the jurisdiction of this court, the issuance of the patent, and the date thereof, together with the recital of the assignment to plaintiff.

In the fifth paragraph it is alleged that when the fixture was placed upon the market, embodying the design patent thus issued, it sprang into instant popularity, resulting in large sales, creating a large and profitable business in the sale of said fixtures to this plaintiff.

In paragraph 6 it is alleged that in defiance of the plaintiff's rights thus secured by his patent, and the benefits obtained by its popularity in the trade, the defendants manufactured, sold, and exposed for sale electric lighting fixtures, which were substantial duplicates of the plaintiff's patent and fixtures and they have derived unusual gains and profits from such infringement, damaging the plaintiff thereby.

In paragraph 7 it is alleged that the defendants' electric light fixtures, which they placed on the market, were such a close copy of the plaintiff's as to make it difficult to determine defendants' article from the genuine, and that, contrary to the plaintiff's wishes and demands, the defendants persist in a continued infringement. It is further alleged that all this was done without license or consent of the plaintiff. This, standing alone, is sufficient to charge that appellant has a valid patent, and the infringement of the patent.

In paragraph 10 it is alleged that in an action upon the same patent tried in the District Court for the Southern District of New York (246 Fed. 314), in which the appellant here was there the plaintiff, and Braunstein Bros. Company the defendant, a decree was granted and entered, holding the patent valid and infringed.

By his supplemental answer the defendants alleged that upon appeal this decision of the District Court was reversed, and it was held that the patent was invalid and void. See Bayley & Sons v. Standard Art Glass Co., 249 Fed. 478, — C. C. A. —. The allegation set forth in the tenth paragraph of the complaint is not essential to the plaintiff's success here. It may have been omitted. If the appellee

desired to raise the question which apparently his counsel had in mind when the motion was made to dismiss before the court below, it could be presented by a general demurrer, after demanding profert of the patent. However, we have not here in the record, nor was there produced or attached to the bill of complaint for the court below, a copy of the patent as issued. The appellee rests his right to dismissal here because "said bill of complaint fails to state a cause of action." Unless it is possible to conceive that, even if all the allegations in the bill are true, the bill must be dismissed at the hearing, a court of equity will not sustain a demurrer when interposed, nor will it dismiss a bill. Kansas v. Colorado, 185 U. S. 125, 22 Sup. Ct. 552, 46 L. Ed. 838.

In Ralston Steel Car Co. v. National Dump Car Co. (D. C.) 222 Fed. 590, it is said:

"Under our practice, the federal courts are inclined to allow a case in equity involving important matters to go to issue and proofs, where a doubtful question is raised by the pleadings. It has been the practice to overrule a demurrer, unless it is founded upon an absolutely clear proposition that, taking the allegations to be true, the bill must be dismissed at the hearing."

The practice which prevails in the courts of equity, in disposing of motions to dismiss bills because the bill does not set forth facts sufficient to constitute a cause of action, is to overrule the motion and let the case go to hearing, unless it is made absolutely clear that, taking all the allegations to be true, the bill must be dismissed at the hearing. The appellant contends that, upon the trial, it intends to go back of two of the patents, and produce such additional evidence as would result in sustaining the patent in this action.

In view of this prospect, and, further, that the bill on its face set forth facts sufficient to constitute a cause of action, we are of the opinion that the District Judge erroneously granted the motion, and the order is therefore reversed.

FLIGEL et al. v. SEARS, ROEBUCK & CO.

(Circuit Court of Appeals, Second Circuit. November 13, 1918.)

No. 35.

1. PATENTS ⟸328—CONSTRUCTION—VALIDITY.
Patent No. 1,099,031, for a waterproof garment, including a cape and hood, with the hood having a front band capable of folding forward to constitute a visor when hood is up, and capable of contraction and fastening to give the appearance of a military collar when hood is down, *held* valid, and to disclose invention, in view of the ingenuity and popularity of the device.

2. PATENTS ⟸328—CONSTRUCTION—INFRINGEMENT.
Patent No. 1,099,031, a waterproof garment, including a cape and hood, *held* not infringed.

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

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

Bill by Bernard I. Fligel and Mitchell Fligel, copartners doing business as Fligel & Son, against Sears, Roebuck & Co. From a decree dismissing the bill, complainants appeal. Affirmed.

Munn, Anderson & Munn, of New York City (T. Hart Anderson, of New York City, of counsel), for appellants.

Duell, Warfield & Duell, of New York City (C. H. Duell, F. P. Warfield, and L. A. Watson, all of New York City, of counsel), for appellees.

Before WARD, ROGERS, and MANTON, Circuit Judges.

MANTON, Circuit Judge. [1] The patent in suit, No. 1,099,031, was for a waterproof garment, including a cape and hood, with the hood having a front band capable of folding forward to constitute a visor when the hood is up, and capable of contraction and fastening to give the appearance of a military collar when the hood is down. The defendants, a large mail-order house, do not manufacture, but sold the alleged infringing garments, which were manufactured by another. The District Judge held there was no invention and no infringement. We disagree with his conclusion that there was no invention but agree with him that the defendants' garment, as made up and sold, did not infringe the plaintiffs' patent.

The testimony showing the various devices of the prior art does not indicate a hood provided with a convertible collar, which, when the hood is over the head, provides a shade, or, when allowed to fall in a dependent position at the back, constitutes a finish having the effect of a military collar. The patentee placed on this hood a band, which, when the hood is down, is used as a standing collar about the neck, which had never been applied to hoods attached to capes. This band has been referred to in the trade as the "Billey Burke" band. The type of hoods on raincoats used theretofore, when attached to the cape, were elastic about the front edge, and this so as to accommodate the size of the head and make the cape adjustable therefor. It was not practical to have the attached collar, as provided by the patent in suit, entirely elastic, for this would destroy the appearance and the idea of its function as a collar. It resulted in the patentee making the collar shorter than the hood, and for the space between the ends of the band or collar and the edge of the hood were inserted elastic sections. This afforded a smooth collar, which could provide for the military effect when down, and at the same time retain the elasticity of the hood and thus secure the fit. There was this novelty presented, and the inventor, during the period of three years, sold many thousands of these garments. While this construction is within a limited scope and may be of minor importance, yet it added this novelty and resulted in considerable sales. Its ingenuity and popularity warrants the sustaining of the patent.

In Greenwald Bros. v. La Vogue Petticoat Co., 226 Fed. 449, 141 C. C. A. 278, this court sustained a patent for a petticoat, where the novelty consisted only in the application of an elastic waistband and a knitted hip portion to a woven skirt portion. And again in Witzel v.

Berman, 212 Fed. 734, 129 C. C. A. 344, this court sustained a patent for a wire mattress having along its longitudinal edges a spring guard to hold the upper mattress in place. And in David et al. v. Harris, 206 Fed. 902, 124 C. C. A. 477, a patent for improvements in sweaters, consisting of an attachment to a low-necked sweater of two enfolding lapels and a collar which could be turned up to convert it into a high-necked sweater, was sustained. These cases follow the reasoning and law in the case of the Barbed Wire Patent, 143 U. S. 275, 12 Sup. Ct. 443, 450, 36 L. Ed. 154.

[2] The conception of a convertible collar and band as a desirable adjunct to a rain cape, and the inserting of an elastic whereby it could be applied to a rain cape, embodied inventive thought. The defendant's rain capes do not comprise a convertible military collar; indeed, it is in no way made apparent that it was ever the intention of the defendant to use the collar and hood as such. The band upon the defendant's cape is sewed down and fastened by buttons, and, in order to bring forward the band, it would be necessary to unstitch and alter the structure of the garment. The band appears to be a piece of decorative trimming, and, in its condition when sold, does not seem capable of manipulation to serve either the function of drawing forward to extend the hood as a bonnet, or of so contracting it when let down at the shoulders as to provide a military collar. It would require some strap, either of elastic or cloth, to bring the ends of the band together about the front of the neck, so as to hold the collar upright and tend to give the military effect.

No such strap or band is sold with the garment, and no instructions seem to have been given that such use might be made of the defendant's garment, or result produced, and no evidence is adduced that any such use was ever made of it. The defendant's present garment, as marketed by it, omits these features which give novelty and popularity. The band about the hood of defendant's garment constitutes decorative trimming and serves no functional purpose. It is a type of rainproof garment which was old in the art, and at least not such an article of wearing apparel as infringes the complainant's patent.

Judgment affirmed.

LUTEN v. MARSH et al.

(District Court, S. D. Iowa, C. D. January 7, 1919.)

No. 4009.

1. PATENTS ⇐328—INVENTION—CONCRETE BRIDGE.
The Luten patent, No. 852,970, for concrete bridge, *held* void for lack of invention.

2. PATENTS ⇐328—INVENTION—ARCH STRUCTURE.
The Luten patent, No. 853,202, for arch structure, *held* void for lack of invention.

3. PATENTS ⇐328—VALIDITY AND INFRINGEMENT—REINFORCING CONCRETE BRIDGES.
The Luten patent, No. 853,203, for method of reinforcing concrete arches in bridges, *held* void for lack of invention; also *held* not infringed, if conceded validity.

4. PATENTS ⇐328—INVENTION—WALL.
The Luten patent, No. 934,411, for wall, *held* void for lack of invention.

In Equity. Suit by Daniel B. Luten against J. B. Marsh and others. Decree for defendants.

Hood & Schley, of Indianapolis, Ind., for complainant.
Wallace R. Lane, of Chicago, Ill., and Henry E. Sampson, of Des Moines, Iowa, for defendants.

WADE, District Judge. I am going to dispose of this case now, notwithstanding the fact that it must be self-evident that I have not had time to study the various items of evidence presented here upon both sides, and, if I had any doubt in my mind as to what the decision ought to be, I would take the time to go through this record more carefully. But I have not the time to study this record within the next few months, and I feel that this is a case that should be promptly disposed of—first, because of the public importance of it, the far-reaching effect it may have; and, second, because of some of the methods, disclosed here, which have been employed by the plaintiff in the business of constructing bridges or getting the business of designing bridges. These methods no court can approve—some of them, at least. I am not sure but what they ought to be construed as sufficient to deny the party relief on the ground that he does not come into court with clean hands. I refer especially to the half-truths, which are worse than falsehoods, in some of these representations made to contractors; because, when a man recites a list of cases as having been tried, or in which decisions have been rendered, without disclosing that nearly all of them have been consent decrees, it is not the truth. It is only half the truth. Those consent decrees should never have been utilized for any such purpose. It ought to appear upon their face, stamped plainly "by consent of parties," and not be held out as the solemn action of the court, which has never inquired into the facts at all. In fact, I am not sure but that there ought to be a prohibition of consent decrees in patent cases, because of the fact that they are by some per-

sons used as the basis of obtaining settlements, when the one party knows that the decree is not the decree of the court, but the decree prepared by consent of parties and simply approved by the court without investigation, and the other party does not. So that I feel that this is a matter which ought to be disposed of promptly, and I also feel that, in view of the disclosures in this case, Congress ought to pass a law providing that the Attorney General, or some one else, may institute a proceeding testing the validity of patents, settling the rights of parties on both sides—at least, as to the validity and as to the construction of the patent. Of course, anybody can see, in a field of this kind, which extends so far, that until these patents are settled they will always be an obstacle, or always may be an obstacle, to the development of the art, and to the utilization by communities of the best there is in bridge engineering. Plaintiff has certain rights, or he has not, and the plaintiff in this length of time certainly should have some of these rights determined finally. I do not know whose fault it is, but so far as the case which Judge Lewis decided so long ago, which has been lying there two years after his decision was rendered, with the rights of the public still in the balance, it is all wrong. The final decision of that matter should and would aid very materially the rights of the plaintiff here, and the rights of the public. There is something wrong.

[1] Well, now, in this first group of claims under patent No. 852,970, nobody claims that this pavement under a bridge is new. No one claims that the method provided for putting in this pavement is new; but what plaintiff claims is, as I understand it, that the tapering edge extending into the bed of the stream is a new invention. Well, if there is any invention about it, I do not think it is new. Without going into the evidence, the publication in the Engineering News in 1891 is such that I feel that any mechanic, called upon to do that work, would do it, if he was sufficiently well educated to understand the matter, in the manner pointed out by Mr. Luten in his patent. This Engineering News says:

"Wherever water is to be carried, it is very necessary to protect both ends by sheet pile aprons or curb walls, as shown in Figures 1 and 3. This is needed as much, if not more, at lower than at upper ends, because if water is at all rapid, and material soft, failure most frequently takes place at lower ends, as shown by the line of scour in Figure 3.

"A filling of large and small broken stones to carry this protection still farther is desirable, and, in case of a rapid fall in the water surface, several cross-walls to protect the scour are often useful. Sheet piles can be used instead of cross-walls, if always wet."

And further:

"These remarks cover an important and much-neglected matter. Our observation is that the protection is needed very much more at the lower end than the upper. Great carelessness is often shown in this respect, when great care should rather be used to carry the water safely away from the structure."

In other words, anybody with powers of observation and experience in handling beds of streams—trying to pave the bed of a stream—would know instinctively, when he saw the paving tapering off there, that if it stopped with the actual technical bottom of the stream the

effect of the current would be to do the very thing described in this Engineering News. The very danger that the Engineering News gives for the protection of the lower end must be provided against, or else you would have a washout, and of course any one could see, without the exercise of any inventive genius, that a floor on the bottom of the stream, just level with the bottom of the stream, not extending into it to any degree, would simply invite a counter-current under the edge there, which would wash it out. In this patent, of course, it shows the curve of the whole paving downward, to and into the bottom of the stream; but that is not essential at all. It does not make any difference, nor is it any advantage, what form the bottom of the paving is. The only thing that is of importance is what is the form of the top of the paving. In other words, if you put paving in there a foot deep in the bottom of the stream, and have the lower edge taper off in the form described by Mr. Luten, I assume that you have the same thing exactly as if you had a three-inch paving, which curved down and extended into the bed of the stream to the same degree that the surface of the other pavement extended. I do not think, in the state of the art at the time that this patent was granted, that Mr. Luten's patent is of any validity.

Now, group 2 is under patent No. 852,970. That relates to the extending of the spandrel and the wing walls. I have not yet been able to determine what Mr. Luten claims to have invented. I understand, of course, what he has described in his application, and what is described in the patent. I understand the purpose which he claims this construction will serve; but the particular thing invented I have not yet been able to grasp. It is not disputed that the extension of the spandrel was old. There cannot be any question about that. It did extend, prior to that time, sometimes to a greater or less degree, beyond the pier. Of course, if it was old and varied in its extension, then it became simply a matter of experience and custom of those skilled in the art, working in the peculiar roadway involved in each particular case, as to how far the spandrel ought to extend out—how far it would have advantage in extending out, depending, of course, upon the length of the bridge and other things; and there is no claim here that the extension of the spandrel is a patentable novelty, or was at that time.

As to the wing wall, it is nothing more or less than a retaining wall, which probably has been in use as long as civilization has existed, because I apprehend that even the savage, if there was a bank of earth liable to wash down by the rains upon the back end of his tent, would go out and take stones or other material and try in a crude way to retain it from sliding. Now, whether you need a retaining wall in connection with a bridge, or not, depends, of course, upon the nature of the soil, the height of the banks, the extent to which the spandrel goes, and all those things. But I can find no patentable novelty or patentable idea in combining the old extended spandrel and the old retaining wall. It is true that Mr. Luten may have added very materially to the usefulness of the art of building bridges by pointing out a way in which the amount of material necessary for the retaining wall might be reduced by the proper conformation of the embankment or fill which

might be possible with an extended spandrel; but this mere reduction of the amount of material, after all, is purely an engineering proposition, and, while to the layman it may seem to involve invention to reduce materially the amount adequate to stand strain, to the mind of the engineer it is just as simple as the adjustment of battens on the cracks of a barn to the ordinary man—or should be, at least. It is simply the application of knowledge which he possesses. In judging whether these things involve inventive genius, we have got to consider the field of scientific knowledge in which the party undertook to work. Things that might seem very dense to us, who are not educated in that field, would be matters of common knowledge there.

I thought yesterday, when counsel was referring to the opinion of Judge Orr in the Melber Case, that this language was peculiarly apt as applied to the claims put forth on this particular group:

"A man is not entitled to a patent for a structure which is old, just because he determines the reason why the structure should be used."

Now, it may be that nine-tenths of the men who build circular cisterns do not know or understand the reason why they can build a solid, strong structure with so few brick; they do not understand the arch construction, which gives support, one brick to another, all the way around; but it does it, and it has been done right along. If some man comes along and points out that masons are using too many brick, that all pressure and strains can be met by a wall half the thickness of the structure usually constructed under the methods employed by cistern builders, he has not invented anything at all; he has merely pointed out something that any competent person with knowledge, who sits down and studies the situation, would know.

[2] Now, as to group 3, under patent No. 853,202, I cannot agree that this extended rod or wire, or support across, is, or was at the time this patent was issued, a patentable invention. It is true that I have not given the study to this matter that possibly the subject requires; but I gave it considerable study at the time of the trial of the Thacher Case, and I have very grave doubts whether any of this method of reinforcing is patentable invention, or has been for 20 years, or has been at all after some man first found that reinforcing could be put into concrete and maintained, and that it would add to its strength. Once you have settled the problem that reinforcing can be added to concrete formation by the use of wires and rods, and that it is possible to form these structures and maintain them intact, and give them strength and power because of this reinforcement, all the rest is a matter of engineering knowledge, pure and simple. The cantilever principle which Mr. Luten sought to apply in this patent, of course, was old and well known. The cantilever principle has been applied in a thousand ways to bridges and other structures, and I do not believe that, because a man uses it in a particular structure in which it was never used before, he can get a patent on that structure, or the form of use in that structure. It is a matter of simply sitting down and figuring it out with a pencil and paper (that is, for the skilled engineer), where the reinforcement ought to go, in order to bring the best support to the structure; and, as I understand, it is a matter which any competent engineer can

figure out. Some of them, I admit, are more skillful than others, being perhaps better able to figure it out; but I do not believe that, because one man is more skillful in that particular science than some other man, what he figures out purely, I might say, as a mathematical problem, is invention, and I do not believe that it is patentable.

I do feel that somewhere along the progress of the art, when somebody discovered that it was possible to use these rods, and that they might be utilized to good advantage in particular work, that he may have exercised inventive genius in bringing that knowledge to the world; but certainly after the Monier patent, and certainly after the disclosures made by the publications in the field of knowledge in which Mr. Luten worked, and certainly after the extensive discussion and great public interest in the work of reinforcement, I do not feel that anybody, who in his structure simply applies well-settled principles of mathematics applied to strain, has any patentable invention.

Judge Lewis says something about that, and his remarks ought to be approved. He says:

"The complainant as a witness disclaimed that his patents, or any of them, embodied anything beyond or more than placing the steel in a new way that produces better results in a more efficient form. Now, in a concrete bridge, the greatest efficiency is always secured by resisting tension or pull with steel rods. That has been established for a half century; not perhaps with curved tension members, but the basic idea is very old. There is no question about that."

This relates to the claims of complainant in this case, as I understand Judge Lewis' opinion. Judge Lewis continues:

"But none of complainant's patents in its specifications, including drawings, and in the claims, gives any specific direction as to just where any of the reinforcing members should be placed. This I suppose would in each instance depend upon the maximum load to be carried."

In other words, strictly speaking, the contention here must logically end in the proposition that you have patented a principle and not a structure. Again, Judge Lewis says:

"This I suppose would in each instance depend upon the maximum load to be carried, the length of the spans, and other elements which involve mechanics only, and would necessarily, I assume, be worked out in determining the amount of compression and tension under the established formulas in statics. In a general way the points of greatest stress can be roughly approximated without the use of mathematical tables, but this is centuries old—that is, it is open to common observation, and the fundamental purpose of reinforcing concrete was to strengthen the structure at these points; such a discovery in Luten's day is no evidence of inventive genius."

I agree with that statement of Judge Lewis. Somewhere along in civilization, humanity got to the point where they came to use barbed wire fences; before that it was a smooth wire fence. The man who put up the first wire fence of any character found that he had to have his corner posts stayed in some way or his fence would fall down. From that time, and since, there have been various devices produced to better stay the corner posts. The first man that put a stay there may have fastened it on the post 4 feet from the ground, and may have carried it back 8 feet into the earth, and his fence may have slackened

because the post gave way in 6 months or a year. Some other man came along, and fastened the wire to the top of the post, and carried it back 20 feet, and better results were obtained. I do not think he has invented anything at all. I think he has simply applied the ordinary rules of mechanics to a situation the whole field of which was disclosed in the first conception of bracing a post in that way. The rest was a mere matter of detail in carrying it out, depending upon the height of the post and the weight of the fence. Another man comes along, and to hold the fence he uses a brace on the inside, and I do not think he invented anything. Now, to the mind of the skilled and educated engineer these bridges are but to a large extent corner fence posts. Simple to their mind and complex to ours. And in the varying applications of supports to strains and stresses they are not using inventive genius. I cannot sustain this patent. Aside from the considerations I have already expressed, long before this patent was granted, Monier and Von Emperger had given it to the world—not, perhaps, the particular piece of wire or iron which the Luten patent contemplated, but the method of doing that very thing. The art is old.

[3] Now, patent No. 853,203, of 1907, relates to the arch supported on abutments or piers, as shown in claim 1:

"An arch supported on abutments or piers having tension members embedded near its concave surface, and other tension members passing back and forth through the material of the arch and between the first-mentioned tension members and the adjacent surface, substantially as described."

What I have said with regard to the previous patent, No. 853,202, is applicable to this as well. I have also given some consideration to the questions involved in a similar claim in the Thacher Case, and I feel that, if this patent be valid at all, in view of the prior art, it would be so narrow that this construction of the defendant would not be an infringement. My own judgment, with all the consideration I have given to the matter, is that, in the description of the invention in this patent, the inventor or patentee simply disclosed an application of the knowledge which at that time had been disclosed by engineers and publications and patents. True, he may have given some study to it; but his conclusion from that study was not inventive. It was merely demonstrative—the application of well-settled, well-disclosed principles to peculiar conditions, which vary in each structure, perhaps. But if I should be wrong, if he got something in that patent, it must be limited simply to the very thing that he has disclosed, and that very thing, in my judgment, is not infringed in this case. I need not say more about that, because I have already considered this same question—not upon the same patents, of course, but in the Thacher Case, where the same principles were involved.

[4] Now, as to group 5, patent No. 934,411, which pertains to the wall with the coping of such top formation as to divert attention from the defects of the lower wall: There Mr. Luten was applying knowledge which has existed ever since men have understood the placing of lights and shadows in art. So far as that being the particular function of the structure is concerned, I do not think it is patentable at all. He did no more, in that, so far as that particular purpose is concerned,

than the men over in France who are now doing the camouflage for the army. If that wall for that purpose was patentable, then every gun over there, with its barrel painted to represent a zebra or some other animal, to try to conceal its presence from the enemy, is patentable. As I see it, the principle involved in the patent is simply to adopt a method that will attract attention to one feature of an object and detract from another. It is simply the application of the known peculiarities of humanity that we usually think about only one thing at a time; and if you can attract attention to the top of this wall, we do not see the rest. I think it was Josh Billings who disclosed the same theory to us when he said that tight boots were the greatest blessing of humanity, because they made a man forget all of his other miseries. I do not think there is anything patentable in that, at all. In so far, now, as he did create a method of putting on a coping, which would be more effective, or which might be easier constructed, or having some other valuable purpose in the construction of a wall, there might be a chance for a patentable invention.

But it is quite apparent to me that, in that particular structure which he describes, he was not doing any more than applying matters of knowledge common at that time. The building of a wall partially, and then allowing it to harden, and then building on an additional portion on top, whether it takes the form of a coping or the mere extension of the same size wall, I do not think is claimed to have been new. I think it must be conceded, in view of the record here, that it was in common use. When I say "common use," and when we talk about "common use," with relation to this art, of course, it does not mean what is ordinarily meant by the word "common," because back at that time there was very little of this concrete used. It was in the beginning of the development of the art, the building of concrete bridges and concrete structures, so that I could not say it was an everyday event; but what I mean is that such structures were actually in use and built before this patent was issued, in a manner practically as described in the patent. In other words, I see nothing in the patent of an inventive nature to improve on the methods the other fellows employed in the manner of building the coping or tops of walls. For that reason I cannot sustain that claim, and the complainant's petition is dismissed, and judgment will be allowed against him for costs.

LYONS v. F. LEWALD & CO.

(District Court, N. D. Illinois, E. D. January 6, 1919.)

No. 1014.

PATENTS ⊂=328—VALIDITY AND INFRINGEMENT—CUFF BUTTON.

The Barney patent, No. 885,135, for a separable cuff link button, is valid, and covers in a limited way a primary invention, which entitles it to a wider range of equivalents than for a mere improvement; also *held* infringed.

In Equity. Suit by Charles D. Lyons against F. Lewald & Co. Decree for complainant.

Emery, Booth, Janney & Varney, of Chicago, Ill., Thomas B. Booth, of Boston, Mass., and Laurence A. Janney, of Chicago, Ill., for plaintiff.

Walter H. Chamberlin, of Chicago, Ill., for defendant.

SANBORN, District Judge. Infringement suit as to patent No. 885,135, issued to F. P. Barney, April 21, 1908, for a separable cuff link button.

The cuff buttons covered by the patent have been on the market for some years and are mainly used with soft or unstarched cuffs, one part being put in each buttonhole, and snapped together by means of a link similar to the glove button fastener. Patents prior to Barney, such as Buchanan reissue, No. 12,020, and Marks, No. 712,080, show similar buttons for attaching the cuff to the sleeve, but Barney was the first to produce a flexible cuff button, so he is in a limited way a primary inventor. There is no question of the validity of his patent.

As to infringement, defendant claims it is making its buttons under the prior Marks patent. Claim 1 only is in issue and reads:

"As an improved article of manufacture a separable cuff link button, the same comprising a pair of independent button members, each provided with a fixed shank terminating in a lateral flange or enlargement adapted to pass through a buttonhole of the cuff and retain said member therein, a swinging coupling member or link mounted in one of the button members and extending longitudinally beyond its flange, and having the free end of said link constructed to engage with the fellow button member for detachably securing them together."

Defendant has changed the Marks construction by lengthening the coupling member or link, so as to permit it to swing upon its free end when it is attached to the other button member. It is literally, therefore, a swinging link, answering the claim in this respect. The word "swinging" was introduced into the claim by amendment, to define a flexible structure, as distinguished from an absolutely rigid one, as shown in the Marks patent.

The two parts or members of defendant's buttons are locked together by a link integral with one part, and fitting into and swinging in a socket of the other, as if pivoted therein. It is insisted that this construction does not meet that part of the claim which requires the link to be "mounted in" one of the members, because defendant's link is

simply stuck against the side of the member, and not in or into it. From the specifications and drawings, as well as plaintiff's commercial form, it appears that the words were used in the sense of loosely connected with or pivotally mounted in the member. But Barney was a primary inventor, in a relatively unimportant field it is true, but still entitled to a wider range of equivalents than a mere improver. The only possible distinguishing feature between the two constructions is that plaintiff's link swings on both ends, and defendant's only on one. Thus plaintiff's button is more flexible. The claim should be given a construction broad enough to cover a link attached to, but not literally mounted in, the member. The two types can hardly be distinguished from each other. If it were not for the fact that every part of the structure of both performs a useful part, so that the device is highly "functional," the sale of either one might be unfair competition as to the other.

There should be a decree sustaining the plaintiff's patent and finding claim 1 infringed, with costs.

CHAPELLE v. APPLEBAUM.

(District Court, E. D. New York. June 4, 1918.)

TRADE-MARKS AND TRADE-NAMES ⊂=95(4)—INFRINGEMENT—PRELIMINARY INJUNCTION.

Preliminary injunction granted, restraining defendant from using, on bottles containing a preparation of sandalwood oil, labels and wrappers with lettering and devices which, while not identical with those used for many years by complainant and his predecessors, and registered as a trade-mark, are so like as to indicate an intention to deceive purchasers.

In Equity. Suit by Philippe Chapelle against Samuel K. Applebaum, trading as the Montauk Chemical Company. On motion for preliminary injunction. Granted.

Mock & Blum, of New York City, for plaintiff.
Eadie, Innes & Walser, of New Brighton, N. Y., for defendant.

GARVIN, District Judge. Plaintiff moves to enjoin the defendant pendente lite from further making, offering, or selling the preparation known as "Santal Comp.," bottled by the Montauk Chemical Company, of Port Richmond, N. Y., or from further making, using, offering, or selling labels, wrappers, or containers used for said preparation.

The moving papers set forth that, for more than 40 years last past, plaintiff and his predecessors in title have continuously manufactured and sold throughout the world a preparation known as "Santal Midy," which consists of sandalwood oil in capsules, and that this preparation and the trade-mark and labels connected therewith have obtained a great and favorable reputation throughout the world; that the trade-mark "Santal Midy" has been duly registered as a trade-mark by

plaintiff's predecessors in the United States Patent Office on May 25, 1897, and again on October 17, 1911.

It further appears that in marketing this preparation Santal Midy bottles of peculiar shape and design have been continually employed, having a black seal with a yellow design thereon, bearing the words L. Midy, attached to the cork of each bottle. Each bottle has a label with a red and black border, having thereon "Santal Midy" in black, with a yellow and white design in the center. This design is unusual in character. It consists of a white circle, something over an inch in diameter, which contains a white design on a yellow ground. This design is described, in the statement which accompanied the application for the trade-mark filed in the United States Patent Office March 27, 1897, as a rising sun. The design also bears a striking resemblance to a full-face representation of an Indian chief. Each bottle has a wrapper upon which appears a duplicate of the label appearing on the bottle. On each end of the wrapper is a black seal, with a similar design thereon, and the words "L. Midy."

The defendant has caused to be made seals, labels, wrappers, and bottles, each of which complainant claims imitate those in use by him. The bottle of the defendant as wrapped presents an appearance similar to that of the plaintiff. It is true that the black and red border on the label and wrapper used by the plaintiff is replaced by a border of green; but the general appearance presents many points of striking similarity, which satisfies me that the defendant had attempted to employ them in marketing his wares for the purpose of deceiving the public. There is no reason to suppose that dealers would be deceived, but, as was remarked by Judge Lacombe in National Biscuit Co. v. Baker et al. (C. C.) 95 Fed. 135, "No one expects that they will be." The article marketed by the defendant is likewise a preparation of sandalwood oil, which accounts for his attempt to imitate the methods employed by the plaintiff in placing his preparation before the public.

The defendant denies that plaintiff has properly pleaded the continuous claim of title to the trade-mark in plaintiff and his assignors. I am of opinion that this allegation is sufficiently set forth in the bill of complaint, although the various assignments must be proved at the trial.

In December, 1914, defendant was using labels on packages containing a preparation of Santal Compound which plaintiff claimed was an imitation of the registered trade-mark of "Santal Midy." Plaintiff objected, and defendant forthwith discontinued their use. Defendant claims that in his opinion the labels he was using did not imitate or infringe upon plaintiff's registered trade-mark of "Santal Midy." Plaintiff claims that, after defendant agreed to discontinue the use of the labels, he knew nothing of the acts of defendant now complained of until about April 1, 1918.

The defendant also claims that the plaintiff thereupon gave him permission to use the labels and seals to which objection is now made. This is vigorously denied by the answering affidavit submitted in behalf of the plaintiff, and in view of the similarity of the labels and seals in question I cannot credit defendant's contention, particularly

as there was a previous use by the defendant of a design to which plaintiff objected as infringing upon his trade-mark, which he (defendant) abandoned.

I am of the opinion that the defendant has endeavored to take advantage of a market developed by the plaintiff and his predecessors, as the result of many years of business activity, and that he has, with that end in view, prepared a package which was calculated to mislead. The design in the center of the label satisfied me of this beyond doubt. This design consists of a white circle of the same size as that on plaintiff's label, containing a white design on a ground of substantially the same color as that used by plaintiff. This design is a profile of an Indian chief. The circle, colors, and subject-matter could have been selected with no other aim than to mislead the public.

The motion is granted, and an injunction will issue, restraining the defendant, until further order of the court, from further making, offering for sale, or selling the preparation bottled by the Montauk Chemical Company, of Port Richmond, N. Y., in the labels, wrappers, or containers now used for said preparation, and from further using said labels, wrappers, or containers in any manner whatsoever.

Ex parte COHEN.

(District Court, E. D. Virginia. April, 1918.)

1. ARMY AND NAVY ⟸20—SELECTIVE DRAFT ACT—POWERS OF LOCAL BOARD.
A local draft board, which certified for service a Russian subject, who had not declared his intention of becoming a citizen and was therefore not subject to the Selective Draft Act, which facts were shown by his claim of exemption and affidavit filed in due form, and were undisputed, and was denied a hearing, *held* to have exceeded its authority, and its action held void.

2. HABEAS CORPUS ⟸16—PERSON ILLEGALLY INDUCTED INTO ARMY.
Failure of one certified for service by a local draft board, although not subject to draft, to appeal to the district board, does not exclude the jurisdiction of a court to discharge him from the army on habeas corpus, where the local board, before making its order, had consulted with and obtained the approval of the district board.

Application by David Cohen for writ of habeas corpus. Writ granted.

Nicholas Aleinikoff, of New York City, for petitioner.
Clifford V. Church, Major Judge Advocate, for the United States.

WADDILL, District Judge. [1] The petitioner seeks to be discharged from the military service of the United States. The facts are substantially these:

That he is a subject of the Russian Empire, and has never declared his intention of becoming a citizen of the United States; that for some three years prior to the summer of 1917 he had been a resident of Virginia Beach, Princess Anne county, Va.; that on the 30th of July, 1917, he was notified by the local board of the county to report for

physical examination, with a view of serving in the army of the United States; that on the day named he appeared before the board, filed claim for exemption from military service in due form, supported by his affidavit, setting forth that he was exempt because a resident alien, not German, and had never declared his intention of becoming a citizen; that said petition for exemption was duly made under subsection F of section 18 of the rules and regulations prescribed by the President under the Selective Draft Act, approved May 18, 1917 (Act May 18, 1917, c. 15, 40 Stat. 76). This act requires that petitioner's affidavit should set forth the following information:

"1. Date and place of birth. 2. Date of emigration to the United States. 3. Whether he has taken out his first papers—that is, declared his intention to become a citizen of the United States. 4. Present address; and upon presentation of affidavits or such other evidence as may be required in the opinion of the board to substantiate the claim."

No request was made of affiant to furnish other or additional evidence than that contained in his own affidavit, and his case was taken up by the local board and decided adversely to him, and the local board took the case up with the district board, and that board approved the action of the local board, and petitioner was therefore certified for draft in the army, and on the 10th day of October, 1917, he was inducted into service at Camp Lee, Va. He subsequently, on the 3d of December, 1917, presented his petition to the commanding general at Camp Lee, praying to be discharged from military service, on the ground that he was an alien and had never declared his intention to become a citizen, and to this application he attached affidavits in support of his claim which were not before the local board. The commanding general declined to discharge the petitioner, because there was no claim that he had been denied a full and fair hearing before the local board, or that said board acted beyond its jurisdiction or contrary to the procedure required by law.

These suggestions by the commanding general are renewed here by the government in opposition to petitioner's discharge on habeas corpus, and the further fact is urged that the petitioner failed to appeal to the district board from the action of the local board; and the government earnestly insists that the writ of habeas corpus cannot be used as an appellate procedure and the courts are without jurisdiction unless the executive and military authorities whose action is brought into question either exceeded their jurisdiction or denied to the petitioner a fair and impartial hearing.

These legal positions taken by the government may be conceded, but nevertheless it is undisputed, as is shown by the authority relied upon by both sides (Angelus v. Sullivan [Circuit Court of Appeals, Second Circuit, October, 1917] 246 Fed. 54, 158 C. C. A. 280), that if the tribunal whose action is complained of acted beyond the scope of their authority, or failed to accord to the accused a fair trial, or rejected proper evidence offered by him, then that such relief can and should be afforded by habeas corpus. The petitioner filed the precise affidavit required under the law, and no other or additional evidence was required of him, as the act in terms contemplated, if needed, and up-

on his affidavit it is entirely clear that he was not subject to draft, but, on the contrary, he was a Russian subject who had made no declaration of his intention to become a citizen of the United States. That was the sole point in the case. There was no dispute then as to his being a Russian subject; there is none now; nor has there been a suggestion to the contrary apparent from the record.

[2] It is true he did not appeal to the district board, as perhaps he should have done, but he ought not to be denied his rights to habeas corpus, where his personal liberty and nationality are involved because of his failure to have done a vain thing. The local board for some reason took the matter up with the district board, which board approved the action of the local board, and hence to have appealed to them would have been an act of folly. It is entirely clear that an impartial hearing, the facts not being disputed, required the granting of petitioner's claim to exemption, and that both that board and the district board and the commanding general acting upon his case, with his nationality and the fact that he had made no previous declaration of his intention to become a citizen undisputed, and that he made due claim to his exemption and filed proper affidavit in support thereof, and was denied a hearing, acted beyond their authority in inducting a Russian subject into the army of the United States, and their action and orders in that respect are void.

Moreover, under Compiled Rules of the Provost Marshal, dated September 27, 1917, No. 12, form No. 44, paragraph B of subdivision No. 2 of said regulations, it would appear that, under the authority reposed in the military authorities at the mobilization camp, this petitioner should have been relieved as coming within the class against whom hardship would be worked, arising from error in law on the part of the authorities acting in this case, or the nonculpable ignorance of the registrant in failing to properly protect himself from the consequences of the illegal ruling against him.

The petitioner will be discharged.

CHASE v. LATHROPE et al.

(District Court, E. D. New York. May 23, 1918.)

COURTS ⊂=318—JURISDICTION OF FEDERAL COURTS—DIVERSITY OF CITIZENSHIP.

In an action in a federal court on a promissory note against two defendants, both of whom have appeared and raised the question of jurisdiction, plaintiff cannot vest the court with jurisdiction by a dismissal as to one, who is a citizen of the same state as himself.

At Law. Action by Samuel C. Chase against Maxwell D. Lathrope and Henry R. Lathrope. Dismissed for want of jurisdiction.

Joseph D. Baucus and George H. Rice, both of New York City, for plaintiff.

Franklin Leonard, Jr., of New York City, for defendants.

GARVIN, District Judge. This is a motion by plaintiff for judgment on the pleadings upon the ground that the answer interposed is fictitious. The action is on a promissory note. The plaintiff is a citizen of the United States, residing in the state of Pennsylvania. Both defendants are citizens of the United States; Maxwell D. Lathrope residing in the state of Pennsylvania, and Henry R. Lathrope residing in the state of New York. Both defendants have joined in an answer setting up, first, that the court has no jurisdiction of the subject of the action; second, that the court has no jurisdiction of the persons of the defendants.

The plaintiff submits a memorandum, in which he states that the defendant Maxwell D. Lathrope was not served with process, and that the plaintiff desires to discontinue as against him, if he is now before the court. The service of an answer by both defendants brings all of the parties into court, and the plaintiff may not, by asking leave to discontinue, at this time, deprive the defendants of the right to raise the question of jurisdiction.

This is an action on a promissory note. The plaintiff and one of the defendants are citizens of the United States and residents of the same state. This is an action where the jurisdiction of the court depends upon diversity of citizenship. There being more than one defendant, all must be liable to be sued, and the court has no jurisdiction when one defendant and the plaintiff are citizens of the same state. Mirabile Corp. v. Purvis (C. C.) 143 Fed. 920; Columbia Digger Co. v. Rector (D. C.) 215 Fed. 618.

There are numerous other authorities to this effect. The action must be dismissed.

UNITED STATES v. JACOB SCHMIDT BREWING CO.

(District Court, D. North Dakota. December 28, 1918.)

1. INTEREST ⟸22(1)—JUDGMENT.
   At common law a judgment does not bear interest as an absolute matter of right, and ordinarily the question whether interest is recoverable depends on the nature of the judgment and, as a rule, whether allowed by some statute.
2. FINES ⟸17½—JUDGMENTS IN CRIMINAL CASE—SURVIVAL.
   Judgments imposed as a punishment for the violation of a criminal law stand in a class by themselves, and do not survive the death of the party against whom they are entered, so as to be a charge against his estate.
3. INTEREST ⟸22(8)—JUDGMENTS IN CRIMINAL CASE.
   In view of Rev. St. § 966 (Comp. St. 1916, § 1605), providing for allowance of interest on all judgments in civil cases, the United States cannot recover interest on a judgment imposing a fine for violation of a criminal statute, though enforcement was stayed pending defendant's writ of error by a stay bond.

The Jacob Schmidt Brewing Company was convicted of violating Criminal Code, § 240 (Comp. St. 1916, § 10410), and, the conviction being affirmed on defendant's writ of error, the question whether the United States was entitled to interest on the judgment, the defendant

having given a stay bond, was submitted on stipulation of counsel. Interest denied.

M. A. Hildreth, of Fargo, N. D., for the United States.
James Manahan, of St. Paul, Minn., for defendant.

AMIDON, District Judge. A question has arisen in this case which is submitted to the court by stipulation of counsel. Defendant is charged in the indictment with violation of section 240 of the Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1137 [Comp. St. 1916, § 10410]), upon the ground that it shipped intoxicating liquors without properly marking the package in which the same was contained. It was found guilty, and as punishment therefor adjudged to pay a fine amounting in the aggregate to $7,250. It sued out a writ of error to review this judgment, and gave a stay bond. The question submitted by the stipulation is whether the government is entitled to interest upon the judgment from the date it was entered to the time of its payment, which the company now desires to make; the judgment having been affirmed by the Circuit Court of Appeals. Jacob Schmidt Brewing Co. v. United States, 254 Fed. 695, —— C. C. A. ——.

The first impression is that the judgment created a debt due from the defendant to the government, and that it was the duty of the defendant to pay this judgment immediately upon its rendition. As it escaped that duty by suing out a writ of error, interest would, in the ordinary course of things, constitute the damage caused to the government by reason of the delay in making the payment.

This, however, proceeds upon the assumption that interest is recoverable as a matter of right. Such is not the case. The judgment, by its terms, did not bear interest. No interest is awarded specifically by the judgment of the Circuit Court of Appeals. On the contrary, that court has even withheld costs.

[1] At common law, a judgment does not bear interest as an absolute matter of right. Whether interest is recoverable depends upon the nature of the judgment, and as a rule upon whether interest is awarded by some statute upon all judgments of the class to which the particular judgment belongs.

[2] Judgments imposed as a punishment for the violation of a criminal law stand in a class by themselves. They do not survive the death of the party against whom they are entered, so as to be a charge upon his estate. United States v. Mitchell (C. C.) 163 Fed. 1014; United States v. Dunne, 173 Fed. 254, 97 C. C. A. 420, 19 Ann. Cas. 1145. California has a statute almost identical with that of the state of North Dakota, and it has been ruled under that statute that judgments imposed as a fine for the violation of criminal law do not bear interest. People ex rel. Warfield v. Sutter, 129 Cal. 545, 62 Pac. 104, 79 Am. St. Rep. 137.

[3] This subject, however, is settled for federal courts by section 966 of the Revised Statute (section 1605 of United States Compiled Statutes for 1916). That statute provides as follows:

"Interest shall be allowed on all judgments in *civil* causes, recovered in a Circuit or District Court," etc.

Congress having undertaken to deal with the subject of interest upon judgments, and having expressly restricted the allowance of interest to judgments in civil causes, the implication is strong that judgments in criminal causes do not bear interest.

My conclusion, therefore, is that the government is not entitled to interest upon the judgment in the above-entitled cause.

GORHAM v. CUNARD S. S. CO., Limited.

(District Court, D. Maine. October 17, 1918.)

No. 478.

1. SHIPPING ⟸84(3)—LIABILITY OF SHIP—INJURY TO STEVEDORE.
A steamship company *held* liable for injury to an employé of contracting stevedores for coaling a ship, on the ground that its walking boss, co-operating in the loading as on former occasions in the course of his employment, furnished an unsafe rigging for use in delivering the coal at the hatchway.

2. CORPORATIONS ⟸423—LIABILITY FOR NEGLIGENCE OF AGENT.
A corporation may be held liable for negligence of its agents, where the act in question was performed in the course of the agent's employment in the business of the principal.

In Admiralty. Suit by Patrick F. Gorham against the Cunard Steamship Company, Limited. Decree for libelant.

Woodman & Whitehouse and Raymond S. Oakes, all of Portland, Me., for libelant.

Bradley & Linnell, of Portland, Me., for respondent.

HALE, District Judge. The libelant brings this suit for personal injuries alleged to have been received by him on January 4, 1918, while engaged as a stevedore in the service of Randall & McAllister, coal dealers, in loading bunker coal into the respondent's steamer Ascania, while lying at the dock alongside the Grand Trunk wharf in Portland Harbor. He says that his duties required him to guide heavy tubs of coal from the side of the ship to the hatchway; that the respondent was under the duty of exercising reasonable care in providing a safe place for him to work, and that this included the duty of seeing that any rigging or machinery which it undertook to provide should be reasonably safe; that the respondent failed in this duty; that by its walking boss, Covell, it put up a rigging which proved unsafe; and that thereby a block became unhooked from a guy wire, and was thrown, with violence, against libelant's head, causing injury.

The respondent denies that it was its duty to provide appliances to carry on the work of coaling, or that its agent constructed any temporary device for the purpose of dragging buckets of coal from the side of the ship to the hatchway, and says that this device was constructed by Randall & McAllister, under the direction of their foreman; that it gave no invitation for the libelant to render service on the ship, or to come upon the ship for any purpose; that it contracted with the libelant's employers, Randall & McAllister, to coal the ship,

and did not undertake to provide any rigging for the purpose; that whatever Covell did in supplying the rigging was voluntary, and in the nature of a loan; and that it was not the act of the company.

The proofs show that the Ascania was to be supplied with coal for her bunkers, under a verbal contract between the respondent company and Randall & McAllister. Gorham was in the temporary employment of Randall & McAllister, and was acting as one of the stevedores in loading coal upon the ship. By reason of the construction of the vessel, and its height out of water, it was found impossible to load the coal with the usual appliances which Randall & McAllister had; the derrick on the lighter used by Randall & McAllister would not reach far enough on board to land the tubs of coal conveniently for dumping through the small center hatch on the ship. Covell, the head walking boss of the respondent company, obtained from the respondent company's shed a special rigging suitable for the required use, a rigging which the company had provided before in such cases. A so-called Warren lighter, having a tall derrick mast and heavy buckets, was brought alongside. It appears that Covell had rigged this vessel and other vessels in the same manner, and knew how to do it. The rigging consisted generally of a span leading from one of the funnels on the vessel to the deck; this span wire was extended from the smokestack, and carried forward to a ventilator across the hatch, lengthwise of the vessel; a block, called a Boston block, with an open hook, was placed on the span wire and hung over the hatch; the open hook of this Boston block had no shackle bolt to close its opening; a guy wire was attached to the block, and carried backwards to a point near the funnel, to hold the block from sliding down the slanting wire toward the ventilator; a cross guy wire was affixed to the slanting wire, and carried back to a point on the opposite side of the ship, to prevent the slanting wire from swinging too far toward the side of the vessel over which the coal came in; in order to hold the block on the wire, a mousing, or lashing, was wound around the neck of the hook; a rope attached to, and running from, the drum end, on the steam winch, forward near the ventilator, was passed through the block, and attached to a tub on the side of the vessel nearest the lighter. The pull from the tub on the slanting wire was at about right angles; and the pull from the rope to the steam winch drum was between the right angle and the direct line of the slanting wire, something less than a right angle. The tubs to which the rope was thus attached were dragged by this line, passing through the block, and by the turn of the steam winch, along the deck, and were dumped into the hatch. In the passageway of the tubs across the deck were two lifeboat stanchions, about 15 feet apart, with a rest in the center, between them, about 18 inches above the deck; this center rest tended to obstruct the tubs. Gorham was engaged in attempting to pull the tubs by the obstruction, and the tubs were found so heavy that it was necessary for the winchman to turn his drum in order to swing and surge the tubs, and thus lift them by the obstruction. This surging and rapid movement of the tubs caused the block to be brought back sharply against the span wire; in this way the mousing, or lashing, on the hook

was chafed, so that the hook jumped off the span wire, and the block was thrown with force against the libelant's head.

The evidence shows that, when Randall & McAllister's crew came on board the Ascania on the morning of the injury, for the purpose of coaling the ship, their foreman, Mulkern, knew that the ship had to be loaded, no matter what was her position; it was evidence that she stood too high in the water for their trucks to swing the buckets over the hatch, and that a special rigging would have to be put up; the walking boss of the respondent was then consulted; Covell sent at once to the Cunard shed to get the rigging, and helped to put it up; he co-operated with Mulkern and instructed him; he had, before that, supervised the loading and unloading of the same vessel, and had superintended the putting in of coal by his own crew and others from the upper deck when the ship was light; he had used the extra hoist in the same way he was then using it; he knew he would have to use the same rigging as before, so that, when the coal and the men came, he was there, expecting to assist and to supply the rigging.

[1] I cannot sustain the contention of the respondent that, in furnishing the rigging and putting it up, Covell was acting only as a volunteer, and was merely loaning the rigging to the coal dealers. It was clear that the character of the ship and its position high out of the water required a special rigging; Randall & McAllister were not obliged by their contract to furnish it. When confronted with this situation, the walking boss of the ship furnished the rigging, and directed its erection and use. The testimony leads me to the conclusion that he was acting in the general course of his duties, and in furtherance of the business of the ship; those intrusted with the conduct of the ship must be bound by his action. Even though the ship was under no contractual obligation in the premises, it was under the duty of seeing that the instrumentalities, furnished by its walking boss, and superintended by him, under the circumstances shown by the proofs, were reasonably safe for the purpose for which they were intended. It is shown, too, that Covell stayed around the ship and saw the operation of the rigging, and that he had knowledge of the mousing on the hook; he knew that, when the hook repeatedly swung back, bringing the mousing against the span, this action would tend to wear off the mousing, and to cause the consequent fall of the block. It is in testimony, too, that after the injury he furnished a block not having an open hook, but provided with a shackle, because, as he says, "we thought it was safer." The evidence is convincing that he was a man of experience in his work; that he was acting in the course of the business of the ship; that he selected the special rigging and superintended its installing; that he saw it in operation with the heavy tubs; that he knew the difficulties and liability to injury resulting from its use. If he had stopped the work as soon as he perceived the danger, and had then procured from his shed a shackle block with an iron bolt, which could not have chafed, the injury would not have occurred. The libelant was engaged in performing a service in which the ship had an interest; those in charge of the ship were under the duty of exercising the care of a reasonably prudent man in providing a safe place for him to

work; this must be held to include the duty of seeing that any instrumentalities which it undertook to provide should be reasonably safe. It is the duty of an employer, inviting workmen to use his structures, to exercise reasonable care and diligence to make them fit for use. The Rheola (C. C.) 19 Fed. 926; Pioneer S. S. Co. v. McCann, 170 Fed. 873, 96 C. C. A. 49; Hough v. Railway Co., 100 U. S. 214, 220, 25 L. Ed. 612.

I am constrained by the testimony to hold that the rigging was actually furnished by the ship, even though the ship was under no contract to provide such a structure. The action of Covell, the walking boss, was clearly an act of co-operation on the part of the ship in the work of loading the coal. In The Lisnacrieve (D. C.) 87 Fed. 570, 572, Judge Thomas, of the Eastern District of New York, held that, where the owners of a ship furnished a winchman to assist in unloading, they were liable to an employé of the stevedore, who was unloading the ship under a contract, for injuries caused by the negligence of the winchman, although they were under no contractual obligation to furnish the winchman, and although the winchman was working under the orders of the stevedore; that such an undertaking was not merely loaning a servant to a stevedore; it was co-operation on the part of the ship in the work of unloading the cargo.

In the case at bar, the walking boss of the respondent was clearly co-operating in the work of loading the coal, although he was under no contractual obligation to so co-operate. In so doing, it is clear that he was acting in furtherance of the business of his principal; that he was put forward by it as the man in general charge, in the course of the ship's business, of all matters pertaining to loading it and fitting it for sea. Under these circumstances, the respondent must be held to be bound by the action of Covell. I am satisfied, too, by the evidence, that the liability to injury from the use of the rigging in question could have been discovered by the exercise of the degree of care required under all the circumstances of the case, and that therefore the shipowner must be held to be liable for the libelant's injuries. In this respect The Bolton Castle, 250 Fed. 403, —— C. C. A. ——, is in point; that case was lately decided by the Court of Appeals in this Circuit, in an opinion sent down in April last.

[2] The law of the federal courts is clear that, in order to hold a corporation liable for the negligence of its agents, the act in question must be performed in the course of the agent's employment in the business of the principal. There must be evidence of some facts from which the authority of the agent to act upon the subject-matter involved may be fairly and legitimately inferred by the court; and this rule is applicable to the case of a corporation as in the case of an individual. Salt Lake City v. Hollister, 118 U. S. 256, 6 Sup. Ct. 1055, 30 L. Ed. 176; Lake Shore, etc., Ry. Co. v. Prentice, 147 U. S. 101, 109, 13 Sup. Ct. 261, 37 L. Ed. 97; Washington Gaslight Co. v. Lansden, 172 U. S. 534, 544, 19 Sup. Ct. 296, 43 L. Ed. 543.

Such evidence as is referred to in the above cases is found in the case before me. I can have no doubt, from this evidence, that the respondent was bound by the act of its walking boss in co-operating

with the employers of the libelant in loading the coal upon the ship, and in furnishing a rigging for that purpose. If Covell, who must be held to have been the agent of the respondent in the premises, had exercised the caution of a reasonably prudent man, as soon as he found that injury might result from the operation of his rigging, and had provided the shackle block with an iron bolt, as he did after the injury, the accident would not have occurred. I am satisfied that his negligence was the negligence of the ship, and was the primary cause of the injury.

No fault of the libelant is alleged by the answer or shown by the proofs.

The respondent must therefore be held to have been solely at fault.

Pursuant to this opinion, a decree should be rendered for the libelant in an amount that shall fairly compensate him for his injury. He lost his wages for 10 weeks; he suffered something from the reduction of his pay after he returned to work; he paid his medical expenses; he suffered some pain. A careful examination of the evidence leads me to the conclusion that the sum of $900 will be reasonably compensatory to the libelant. Let a decree, therefore, be entered for that sum, with costs.

STATE OF MARYLAND, to Use of BODDIE, v. BALTIMORE & O. R. CO. et al.

(District Court, D. Maryland. December 24, 1918.)

SHIPPING ⊂=84(1)—ACTION FOR WRONGFUL DEATH—NEGLIGENCE.

A dredge, stationed in a slip and made fast to piers by two lines on each side, which allowed the second line to sag while a launch loaded with stevedores was passing out under them, by which a stevedore was swept off and drowned, *held* in fault and liable for the death; it appearing that the launch signaled her start, and that if the lines had been held taut, as customary, she could have passed under safely, but that through negligence of the lookout on the dredge she was neither heard nor seen.

In Admiralty. Suit by the State of Maryland, to the use of Louise Boddie, widow of William Boddie, deceased, against the Baltimore & Ohio Railroad Company, the Maryland Dredging & Contracting Company, the Patapsco Ship Ceiling & Stevedore Company, and the Empire Engineering Company, Incorporated. Decree for libelant against the Maryland Dredging & Contracting Company.

Benjamin H. McKindless and Charles W. Main, both of Baltimore, Md., for libelants.

Charles R. Webber and Duncan K. Brent, both of Baltimore, Md., for respondent Baltimore & O. R. Co.

Joseph N. Ulman and George Forbes, both of Baltimore, Md., for respondent Maryland Dredging & Contracting Co.

Marbury, Gosnell & Williams, Frank Gosnell, and Jesse Slingluff, all of Baltimore, Md., for respondent Patapsco Ship Ceiling & Stevedore Co.

William Fell Johnson, Jr., of Baltimore, Md., for respondent Empire Engineering Co., Inc.

ROSE, District Judge. The equitable libelant seeks compensation for her husband's death. There is no dispute as to how he was killed, and upon the facts there can be none that it was the result of the negligence of some one other than himself. The controversy is as to whose carelessness it was. He was in the employ of the respondent the Patapsco Ship Ceiling & Stevedore Company, hereinafter called the "Stevedore Company." It had frequent occasion to move its workmen about the harbor, and for that purpose, it sometimes used launches of its own, and sometimes hired those of others. At the time of the fatal accident, the deceased was in one of the latter, upon which the gang, of which he was a member, had been ordered by the Stevedore Company. The launch attempted to pass under the lines which held fast to the pier a dredge which was owned and operated by the respondent the Maryland Dredging & Contracting Company, hereinafter called the "Dredging Company." One of these lines sagged down upon the launch, and swept the deceased off to his death by drowning.

The dredge had been working in the same slip for something over three weeks before the accident. The launch had passed in and out of the slip almost daily, and usually a number of times each day. During working hours, the dredge was made fast to the piers, on either side, by lines; there being two of them on each side. One of these the breast line, ran from amidship the dredge to the pier. It was about 80 feet long. The other extended from the dredge's quarter diagonally forward about 200 feet to the pier. When these lines were taut, there was ample room for a launch safely to pass under them. When the dredge was at work, as the result of the movements of its bucket, the lines were continually passing from taut to slack, and back again. About three-quarters of a minute elapsed from one slackening of the line until the next. The accident happened on an August morning. The launch started from the head of the slip; that is, from a point 200 or 300 feet from the dredge. The starboard side of the dredge was that upon which the launch should have gone, if upon any, and upon that side it attempted to pass. At the time it started, the dredge's starboard lines were both taut, and remained so until after the launch had passed under the first, presumably the breast line. Then the other line sagged down on the launch and swept the deceased off.

There are only two controverted questions of fact: (1) Did the launch sound its whistle as it left the wharf? and (2) was the dredge at work when the launch started towards it?

It is abundantly established that the whistle was at hand. There was no reason why it should not have been sounded, and every reason why it should. The master of the launch and two other persons swear positively that it was. Seven other persons who testified were, at the time, in a position in which it was physically possible for them to have heard the blast, if given. Of these, two do not remember whether the whistle was sounded or not. A third, a very intelligent man, states that, had it been blown before the launch started, his attention would hardly have been attracted to it. Of the remaining four, two were the master and engineer of the dredge. Their evidence that it was not sounded is of little worth.

The captain is quite deaf, and says he has been increasingly so for the last 10 years. He claims that he can hear better when the dredge is vibrating than he can at other times. However that may be, his evidence that he did not hear the whistle proves nothing, in spite of the fact that he appeared to be, outside of the defect in his hearing, a competent and truthful man. He was in the pilot house looking forward at the time of the accident, and he did not rely on his own ears for knowledge as to signals which might be given by boats coming up from the rear of the dredge. In the absence of his mate, he had stationed his engineer on the stern, at a point from which all that went on aft his boat could have easily been seen, and from which there were ample facilities for communicating promptly with him. All these precautions were bound to prove useless, unless the engineer in fact did keep his eyes and his ears open. It never seems to have occurred to him that there was any reason why he should do either. Apparently he supposed that he had nothing whatever to do, except once in every 20 minutes or so, at which interval it was customary to move the dredge. He says he did not hear the whistle, but then he was equally deaf to the noise made by somewhere from 20 to 40 stevedores crowding upon the launch. He never saw the launch at all, until it was under the line which caused the disaster. From his whole manner on the stand, I concluded that he was either physically or mentally asleep for some while before the accident. When testifying, he was voluble in his criticisms of the actions of the launch on previous occasions, and as to the warnings given it by the dredge captain, and as to its speed at the time of the accident. A comparison between what he says on these matters and the testimony of the dredge master shows that many of his statements are gross and obvious exaggerations, to call them by no harsher term.

The remaining witnesses, who say that the whistle was not sounded, are a colored stevedore and a very intelligent launch captain, then in the employ of the Stevedore Company, but now in the government service. He was standing on a wharf near by at the time the launch put out. Both these witnesses made a favorable impression, and yet such negative testimony, even when given by honest and capable men, is not persuasive against the positive testimony of witnesses who appear also to be trying to tell the truth. Neither of these men was charged with any duty which depended upon his hearing the whistle. It might well have been sounded without its making the slightest impression on either of them. Under such circumstances, all of us have ears, but we hear not. It is, of course, not possible to be absolutely certain that the whistle was sounded; but I have little doubt that it was, and must so find. That being so, the dredge was clearly in fault. It could have suspended its operations long enough to allow the safe passage of the launch, as had been its habitual practice with reference to this and other launches. If, for any reason, it was at the moment impracticable to stop, the engineer could, as was also usual, have signaled the launch with his hands to wait. Neither was done, because for some reason the engineer was for the moment oblivious to all that was going on about him, and the captain of the dredge, handicapped

by his defective hearing, relied on his engineer for information as to what was happening to the stern of his boat.

In view of this conclusion, it is unnecessary to determine the other point in controversy, namely: Was the dredge at work when the launch started towards it? There are many witnesses, and not all from one side, who are positive that it was, and had been for some hours before. Those who claim that it was not point out that every one agrees that the dredge's starboard lines were taut when the launch left the wharf, and remained so until after the launch had successfully passed under the first of them. The launch was not, even at the time of the accident, moving more than three knots an hour. It is argued that, had there not been some stoppage of the dredge, the lines would not have been taut so long. The calculation is a close one, but it is not necessary to make it.

It must be remembered that the owner of the launch is not a party to this cause. If he were, it would be necessary to give much consideration to the contention that the master of the launch was in fault for not making sure that his signal had been heard and understood by the dredge; but, if so much be granted, it would not exonerate the dredge, but it would merely inculpate the launch also. The libelant may hold either or both responsible. In point of fact, the launch owner was not sued, very possibly because the prospect of being able to collect a large sum of money from him was not thought to be hopeful. Any one of the respondents could have brought the launch owner in. No one of them has done so. If the Dredging Company thinks it worth while, it may, after paying the decree, seek contribution from him, unless the expiration of the period of limitation prescribed by the Maryland form of Lord Campbell's Act will prevent.

The Stevedore Company does not appear to be liable for the negligence of the master of the launch. It is true that its general foreman, who, under all the circumstances, bore to the deceased the relation of vice principal, and not fellow servant, ordered the men into the launch. It is possible, if the accident had been the result of overcrowding the boat, or of its unseaworthiness, the Stevedore Company might have been liable, because it had told its workmen to take passage in it; but it is certainly not answerable for unanticipated negligence in the management of a launch, which it did not own, and whose master was not selected by it. It follows that, as to the Stevedore Company, the libel must be dismissed.

The Baltimore & Ohio Railroad Company owns the piers on either side of the slip. It engaged the Empire Engineering Company to have the slip dredged out, and the latter employed the Dredging Company to do the actual work. The Railroad Company and the Engineering Company were sued, I suppose, upon the theory that the work to be done was of such a character, or was to be done in such a place, that the defense of independent contractor is not open to them as against the claim of one who has suffered injury in the course of its doing. It does not seem that, under the facts in evidence, the doctrine is applicable; but it will probably be unnecessary to pass upon that question. If they, or either of them, could be held liable, it would be be-

cause, and only because, they, or one of them, was answerable for the negligence of the employés of the Dredging Company, and the latter would be bound to reimburse them for whatever they were called upon to pay in consequence of such negligence. Fortunately it is abundantly solvent, and the question of whether the Railroad Company or the Engineering Company is under any liability to libelant may be postponed until after the libelant has failed to collect its decree from the Dredging Company.

The deceased was a young man in good health, making at the time of his death from $22 to $25 a week. These wages are about double what, before the war, stevedores used to receive at this port; but, according to the official index numbers, prices have gone up on an average in about the same degree, or the purchasing power of a dollar is only one-half of what it was—whichever way you choose to put it. This state of facts may not be permanent; probably to its full extent it will not be. Taking all things into account, I think a reasonable award is $7,500, and for that amount a decree will be given against the Dredging Company, the question of the possible liability of the Railroad and the Engineering Company, respectively, being reserved.

GREGG et al. v. MEGARGEL.

(District Court, S. D. New York. October 28, 1918.)

1. JOINT ADVENTURES ⇐5(2)—ACTIONS—EVIDENCE.
   In suit by members of a syndicate against defendant, who organized the same and transferred to the syndicate certain corporate stock, evidence *held* to show that defendant did not intend, by means of a letter to those invited to become members of the syndicate, to deceive as to the price he paid for the stock.
2. JOINT ADVENTURES ⇐4(1)—MUTUAL RIGHTS AND LIABILITIES—DECEIT—WRITTEN INSTRUMENTS.
   Where defendant, who organized a syndicate, issued a letter inviting persons to join, ambiguities in the letter must be resolved against defendant, where it was asserted that he was guilty of fraud in misrepresenting to members of the syndicate the price he paid for the corporate stock delivered to the syndicate.
3. JOINT ADVENTURES ⇐4(1)—RELIANCE ON FRAUDULENT STATEMENT.
   Where persons who entered a syndicate formed by defendant knew at the time they joined the facts concerning defendant's purchase of stock which he transferred to the syndicate, they cannot recover on the theory that defendant, in letters inviting them to join the syndicate, misrepresented the price he paid for the stock.
4. JOINT ADVENTURES ⇐4(1)—RELIANCE ON FRAUDULENT STATEMENT.
   Where persons who joined the syndicate formed by defendant did not rely on his representations as to the price at which he acquired corporate stock which he delivered to the syndicate, they cannot recover for misrepresentations as to the matter.
5. JOINT ADVENTURES ⇐4(1)—MUTUAL RIGHTS AND LIABILITIES.
   Where defendant, who organized a syndicate to take over corporate stock, which he had already acquired, in conversations with one H., who became a member, induced H. to believe that defendant had paid for the stock the price received from the syndicate, *held*, that others who were induced by H. to join the syndicate could not rely on the misrepresentations made to H.

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6. JOINT ADVENTURES ⟸5(2)—ACTIONS—BURDEN OF PROOF.
In an action for fraud upon members of a syndicate formed by defendant, *held*, that persons joining the syndicate had the burden of proving the fraudulent misrepresentations of defendant.

7. JOINT ADVENTURES ⟸4(1)—MUTUAL RIGHTS AND LIABILITIES.
Where one who had joined the first syndicate organized by defendant, who transferred to the syndicate at $7 a share stock which he had bought for half that sum, learned of the true facts, *held*, that such person, having, without objection, joined a second syndicate organized to take over the stock, cannot recover, for that amounted to an affirmance of the first contract.

8. PRINCIPAL AND AGENT ⟸111(1)—AUTHORITY OF AGENT—SUBSCRIPTION TO SYNDICATE.
An agency to subscribe to a syndicate organized to take over corporate stock does not continue, per se, as an agency to waive, relinquish, or condone misrepresentations made by the organizer of the syndicate.

9. JOINT ADVENTURES ⟸5(2)—ACTIONS—EVIDENCE.
In a suit against defendant, the organizer of a syndicate, where it was contended defendant misrepresented the price at which he acquired stock delivered to the syndicate, and the written contract, embraced in letters to persons invited to join the syndicate, was ambiguous, *held*, that evidence as to defendant's conversations was admissible, as showing the construction plaintiffs were led to place upon the writing.

10. JOINT ADVENTURES ⟸4(1)—MUTUAL RIGHTS.
Where defendant organized a syndicate to take over corporate stock, which he had already acquired, persons who joined the syndicate, relying on representations that the stock was turned over to the syndicate at the price defendant paid, may, without repudiating the whole agreement, require defendant to deliver them shares in the syndicate on the basis of the price he paid for the stock, but they cannot require defendant to account for the entire profits resulting from the transaction.

11. JOINT ADVENTURES ⟸5(1)—ACTION FOR ACCOUNTING.
Where it did not appear that defendant, who organized a syndicate, had refused to fully and properly account, though there was a controversy as to whether he misrepresented to members the price which he paid for corporate stock delivered to the syndicate, *held* that, in a suit seeking relief on that basis, defendant should not be required to account as to the transactions of the syndicate.

In Equity. Suit by Nathan Gregg, Charles B. Whitehead, and George O. Wolf, copartners doing business under the firm name of Gregg, Whitehead & Co., and others, against Roy C. Megargel, doing business under the firm name and style of R. C. Megargel & Co. Bill dismissed as to some of plaintiffs, and as to others part only of the relief granted.

See, also, 248 Fed. 960.

White & Case, of New York City (George O. Redington and Vermont Hatch, both of New York City, of counsel), for plaintiffs Gregg and others.

George L. Ingraham, of New York City, for plaintiffs Gates and Eccles.

Wollman & Wollman, of New York City (Henry Wollman, of New York City, Clarence Alexander, of Yonkers, N. Y., and Herbert Haase, of Chicago, Ill., of counsel), for intervening plaintiffs.

Powell, Wynne, Lowrie & Ruch, of New York City (Herbert C. Smyth and Frederick J. Powell, both of New York City, of counsel), for defendant.

MAYER, District Judge. Though in form one lawsuit, the trial really involved the consideration of a series of cases, because of the fact that the various plaintiffs and interveners entered into transactions with defendants under varying circumstances, and each case, to the extent not governed by certain propositions common to all, must be disposed of on its own facts.

The complaint of plaintiffs, so far as it relates to Gregg, will serve to typify the theory of plaintiffs. Gregg alleges that in August, 1917, Megargel made a proposition, contained in a letter dated August 17, 1917, which was accepted by Gregg and the other plaintiffs, and "thereupon constituted a separate agreement on the part of each of the plaintiffs with the defendant; that said letter * * * constitutes the entire agreement between the parties," except, of course, the number of shares of stock subscribed for by each plaintiff; that Gregg et al. subscribed in certain amounts, and paid certain amounts on account of their stock subscriptions; and—

"Seventh. That the said agreements were obtained from the plaintiffs by the defendant through fraud and misrepresentation, in that both by the wording of the agreements and by statements made to the plaintiffs by the defendant, with the intent to deceive and defraud the plaintiffs, and to induce them to enter into the agreements, the defendant represented that he had paid. or was to pay, $7 per share for all of the 100,000 shares of stock embraced within the agreements; whereas, on information and belief, the plaintiffs allege that at the time of making such representations the defendant, unknown to the plaintiffs, had an option for, or already had acquired, the said stock at a price of $3.50 per share.

"Eighth. That plaintiffs relied upon the said representations made by the defendant and were induced thereby to enter into the said agreements.

"Ninth. That the defendant, in acquiring said stock at $3.50 per share, was acting as the agent or representative of the plaintiffs and each of them.

"Tenth. That the plaintiffs have tendered and do now tender to the defendant payment for their nonwithdrawn stock on the basis of $3.50 per share, in addition to such reasonable commission and brokerages for sales or purchases effected by the defendant, and all necessary expenses incurred by the defendant in the acquisition and marketing of the syndicate stock, and other necessary expenses incurred by him as syndicate manager; and plaintiffs have demanded and do now demand of the defendant the delivery to the respective plaintiffs of the number of shares of nonwithdrawn stock of their subscription, but that the defendant has refused and still refuses to accept said payment as payment in full and to deliver said nonwithdrawn stock to the plaintiffs."

The complaint then refers to transactions of the syndicate as such and after its formation. Relief is asked for as follows:

"(1) That the defendant render to the plaintiffs a true and full account setting forth the following items and particulars:

"(a) The amount defendant paid per share for the 100,000 shares of syndicate stock, referred to in Exhibit A, together with the date or dates when defendant acquired said stock.

"(b) An itemized account of the purchases and sales of the syndicate stock. * * *

"(c) An itemized expense account of the disbursements. * * *

"(d) The amount of cash received from participants on account of the 80,670 shares of nonwithdrawn participation stock, and the amount receivable.

"(e) An itemized account of all other receipts and expenditures of the said syndicate.

"(2) That pending a full * * * accounting the defendant be enjoined from disposing of * * * any of the stock of the syndicate which the plain-

tiffs claim, and that defendant be enjoined from disposing of any of the property, money, interests or effects of the syndicate.

"(3) That a receiver of the syndicate stock, money, and property * * * be appointed, with the usual powers and duties.

"And plaintiffs demand final judgment against the defendant as follows:

"(4) That upon payment to the defendant by each or any of the plaintiffs of the balance due on their subscriptions for nonwithdrawn stock, at the rate of $3.50 per share, plus their pro rata share of the commissions and expenses, referred to in paragraph or subdivision 10 of this bill of complaint, the defendant be required to deliver forthwith to each of the plaintiffs making such payment, the entire number of shares of their subscriptions for said nonwithdrawn stock. * * *

"(7) That the plaintiffs have such other and further relief in the premises as may be just and proper."

Defendants deny liability, and counterclaim for the difference between $7 per share and the amount paid by respective plaintiffs on their subscriptions to which plaintiffs interpose their reply in accordance with New York Code practice, denying liability for the difference so claimed by defendants.

It will be noted at the outset that plaintiffs have not brought an action at law to recover damages for fraud or deceit, nor do they seek in equity for a rescission and the return of their money. They proceed on the theory that Megargel was their agent in purchasing the stock, and as such must account for the difference between $3.50, the price he paid for the stock, and any amount over $3.50 which he may have received from any of the persons who became members of the syndicate. To put the matter in their own way, plaintiffs affirm the contract and seek to compel one who they assert was their agent fiduciary to account for all his profits. Defendant insists that he was not acting as an agent to purchase, but was a vendor to the respective individuals who became syndicate members, and as such was not under any obligation to disclose the price at which he was buying the stock.

Plaintiffs may be divided preliminarily into two general classes: (1) Those who relied on the letter alone; and (2) those who also relied on oral representations or statements by defendant or others—the legal effect of which will be discussed later. The syndicate letter is annexed,[1] the paragraphs being numbered for convenient reference.

[1-4] It is but just to defendant to state that I am satisfied, on the evidence, that there was no intent to deceive by means of the letter. The letter was prepared by attorneys of unquestioned integrity, and, if there was ambiguity, it was not deliberate, but was due to the elusive character of language. Megargel and his lawyers undoubtedly supposed that they had made clear that he was a vendor to the syndicate, selling the stock for $7, without any representation as to what he paid or was to pay for it, and from that point of view it was nobody's business what he paid or was obligated to pay for it. There is no doubt that Megargel did not disclose, nor intend to disclose, the price he was paying. Such a course, he may have thought, might interfere with the sale, because it sometimes happens—at least in certain kinds of syn-

[1] See note at end of case.

dicate transactions—that possible subscribers hold off if they think the vendor is making too much of a profit.

But the failure to disclose does not import fraud nor misrepresentation, if the relation is one of vendor and vendee at arm's length. Another fact which indicates the lack of intentional fraud is that the letter was not distributed broadcast to the public, but was sent to a limited clientele. Indeed, all the plaintiffs knew their way about, and most, if not all, of them, for one reason or another, sought to be permitted to subscribe.

But, whatever may be the purpose or the mental conception of the writer of a letter, he is held to the language employed, as that language may impress the reader of ordinary intelligence. The test is not the intent of the writer but the meaning to the reader. When, therefore, such a writing as this syndicate letter invites money subscriptions, the writer must make his meaning clear, and any ambiguity must be resolved against the author.

Counsel for both sides have elaborately analyzed the letter, but the true approach is to obtain the impression created by the first reading of the letter. A fine analysis, word by word, is often responsible for a wrong conclusion. Much has been said (a) to the effect that Megargel clearly represents himself as an agent and (b) per contra that he clearly represents himself as a vendor. The fact is that there is great difficulty in determining the true construction. The letter deals with two propositions: (1) The forming of a syndicate by buying from Megargel; and (2) the conduct of the syndicate after formation. The important paragraphs to be considered are Nos. 2, 4, 6, and 9.

The impression created upon the mind of the reader, colloquially put, might readily be as follows:

"We are negotiating for the purchase of some Glenrock stock, which we have not obtained as yet, and we are forming a syndicate to take from us, out of this stock not yet obtained, an amount not to exceed 100,000 shares, if we succeed in getting the stock, as we expect, for $7 a share. (Par. 2.) In that event, you can come into a syndicate participation at $7 per share. (Par. 9.) We will not charge the syndicate for acting as syndicate managers other than reasonable commissions and the usual brokerages, because, so far as the purchases of the stock for the syndicate are concerned, we have been otherwise (satisfactorily) compensated, or, in other words, so far as these 100,000 shares are concerned, we have received pay for services rendered. We are to be managers of the syndicate, notwithstanding we are vendors thereto; i. e., notwithstanding that we are acting as the conduit through which the stock goes at $7 per share from its present owner to the subscriber via us."

Of course, a different construction might follow if paragraph 2 were construed so as to give emphasis to the comma after the word "us" and before the word "at," or if the phrase "at a price of $7 per share" had been differently placed, and other changes had been made, so as to read, for instance:

"To acquire from us at a price of $7 per share a portion of said stock to the extent of not exceeding 100,000 shares when, as and if said shares are acquired by us."

Then, again, in paragraph 6, if, instead of "compensated" ("to make suitable return to or for, as for services, loss, etc.; * * * remuner-

ate; as, to compensate one for his services; to compensate one's services"—Standard Dictionary), some language had been used to indicate a profit, as, for instance:

"We shall make no charge in view of our profit in our purchases and sales of said stock."

But, whatever may have been litigation-proof language, the result is that the letter is so worded that an intelligent man might well conclude that Megargel was negotiating to buy Glenrock stock at $7 per share, 100,000 shares of which he would put into the syndicate at $7 per share, and take his compensation, so far as the subscribers were concerned, out of the usual commissions and brokerages accorded to a syndicate manager, which, in an active syndicate, might result in a tidy sum. In point of fact, at that time Megargel, by virtue of an agreement with one Collins, dated August 10, 1917 (Exhibit 5), had contracted to buy 100,000 shares at $3.50 per, and that contract was carried out, so that the 100,000 shares of stock stood Megargel $3.50 per share.

Whatever may be the result of the representations made in the circular or (in addition) to some of the plaintiffs orally, there can be no recovery if, prior to subscribing, a plaintiff knew the fact that Megargel was paying $3.50; nor can there be recovery, unless a plaintiff relied upon the representations made. Certainly, if a plaintiff did not read the syndicate letter, or subscribed on representations made, without authority, by others than defendant or his agents, and the syndicate letter was a matter of indifference to such subscriber, it cannot be said that the letter or defendant's oral representations were an inducing cause; and, as alleged, in effect, in paragraph second of the complaint, each acceptance constituted a separate agreement individual to the particular plaintiff. There is no reason why the rule in this regard should be any different from rescission. The effect of going into the syndicate dehors the representations in the letter is that the subscriber did not care what the defendant made, and thus subscribed to the syndicate solely because he was satisfied to pay the price for what he considered a good investment.

In reviewing this branch of the case, it is impracticable to set forth at length an analysis of the testimony as it was developed, either by deposition or by witnesses orally on the stand. The depositions are voluminous and considerably interspersed with what seem to me to be irrelevant inquiries. The conclusions arrived at in some instances, and the impressions created by the witnesses, will be briefly (and, in a sense, summarily) stated.

Plaintiffs urged that one Taylor, who had full knowledge of the facts, was defendant's agent, and defendant, likewise, sought to characterize Taylor as the agent of some of the plaintiffs, but the testimony does not bear out either contention. What may be called the Taylor group subscribed largely on Taylor's representations, and, in one form or another, paid no attention to the syndicate letter. In this group are Bingenheimer, Clarkson, and Lathrop, and the bill is dismissed in favor of defendant as against these plaintiffs.

Manbeck went in because Hagens principally, and Sullivan also, thought the syndicate was a good thing. He did not remember whether

he received, or where he saw, the syndicate letter, but remembered seeing it, although he could not say that he took a good look at it. The bill is dismissed as against him.

Dailey undoubtedly relied on what one Kelly told him. In his case we have the extraordinary fact that, until his deposition was taken in this suit, he did not know that Megargel had paid $3.50 a share for the stock, and was surprised to find that the lawsuit, started in his behalf, contained such an allegation, and an allegation that he knew this fact. The bill is dismissed as to him.

Green (to whom the syndicate letter was shown by Kelly, and not sent by Megargel) merely read the letter in a "casual way," and really went in on "the information I could get from men that I thought knew more about it than I did"—i. e., Taylor, Wall and Kelly. The bill is dismissed as to him.

[5] As to E. A. Howard, I am satisfied that Megargel's conversations with him led him fairly to infer that he was buying the stock at $7 per share. I think that Megargel did not so state in so many words, but in his desire not to disclose that he was making a profit on the sale to the syndicate—and particularly in view of the conversation about the financing of the Norbeck and Nicholson property—he left Howard in a position to conclude that Megargel was selling the stock at the price it cost him, and thus to rely upon that interpretation of the syndicate letter, even though Howard may not have read the letter very carefully. The stipulation as to E. *P.* Howard's testimony is not impressive.

The E. A. Howard Group.—All of these men came in on the recommendation of E. A. Howard. Howard was not Megargel's agent, and his representations cannot bind Megargel, even though Howard, especially because of talk with Megargel, was justified in construing the syndicate letter as he did. The point is that the Howard group went in for reasons other than their reliance on the syndicate letter. The talk of Megargel with Howard cannot reach from Howard to the men who subscribed, relying on Howard's statements or judgment. The result seems anomalous, but it is the necessary consequence of the proposition that a plaintiff in this suit cannot have any recovery unless it is clear that he relied upon the representations of defendant.

Spratlen read the syndicate letter, but did not study it very carefully, and came in because, inter alia, he had been told by Howard that Megargel was to acquire the stock at $7 and "we would be on the same basis that he acquired it." Benedict never read the syndicate letter. Byram "left the whole thing to Col. Howard," and did not "know that I ever did learn" the price Megargel paid, and "did not understand much about the whole transaction."

Newton had determined to go in before he received the syndicate letter. In this group the only close case is that of Burnham; but he relied "a good deal on Mr. Howard's judgment in matters of that kind," and, in all the circumstances, I am satisfied he did not rely on any alleged false representations in the letter. The bill as to all this group is dismissed.

Lamson Bros. & Co. went in entirely on the faith of defendant's telegram of August 15th, and not on the faith of the letter. The telegram of August 15th is clear, and is lacking either in ambiguity or misrepresentation. The bill is dismissed as to them.

The situation as to Nicholson is very much like that of E. A. Howard. There is considerable dispute as to the details of the conversations between Nicholson and Megargel (see testimony of Nicholson, Megargel, Ruch, and E. A. Howard), but enough was said to justify Nicholson in concluding that the ambiguous letter represented Megargel as buying, as well as selling, the stock for $7.

[6] Haase is an attorney, practicing in Chicago. He had been called in early in the matter, to wit, on August 8, 1917, in connection with the acquisition of certain properties known as the Norbeck and Nicholson properties, the details of which it is unnecessary to recite. Suffice it to say that on August 8, 1917, Haase left Chicago for Denver, and, after certain conferences, started back for Chicago on the night of August 10, meeting Megargel, Ruch, his attorney, and one E. A. Howard (the man who had brought the Glenrock proposition to Megargel's attention) on the train. As the result of a suggestion of Howard, Megargel stated that he was agreeable to letting Haase into the syndicate. Megargel showed Haase a typewritten draft of the proposed syndicate letter, which Haase read over carefully. There is a conflict in the testimony of Haase and Megargel as to whether at this time Haase made certain important observations. I do not doubt, for a moment, the good faith of Haase in placing the date of this vital conversation in which these observations were made at a time subsequent to the train trip on August 10; but the memory of the most scrupulous men is not always reliable, and I am satisfied that Haase is in error in denying, and Megargel is right in insisting, that the conversation took place on the train on August 10. The surrounding circumstances bear out Megargel. Haase is an experienced lawyer. He read the letter carefully, and an experienced lawyer might well, thereupon, say, as Haase did, that the paper was weak, because it made Megargel act in several capacities. A great deal of testimony (direct and cross) was taken on the point, but it comes down to this: That Haase must have understood that Megargel made clear that he was a vendor. That he so did seems clear, and the only real question is whether it was on the train on August 10, or later in the fall. In any event, whether, in point of fact, Haase or Megargel is right as to dates, the burden of proof is on Haase. Where, as here, the best that can be said is that the testimony on the question of dates is evenly balanced, the plaintiff, under fundamental rules, must fail. In such circumstances, the bill must be dismissed as against Haase.

Hubert E. Howard clearly relied on the representations of the syndicate letter, and, on the evidence, Haase was not H. E. Howard's agent, in the sense that Haase's knowledge, if any, bound him.

As to Wyland, there is no evidence to contradict his reliance on the syndicate letter. The fact that he came in through Taylor, and joined with Pelton and others in a circular letter, does not impute knowledge

to him. It is also clear that Parker and Brooks relied solely on the letter.

I was very favorably impressed with Gregg, and, while Megargel may not have used all of the expressions assigned to him by Gregg, I am satisfied that Gregg was justified by his talk with Megargel in concluding that the buying and selling price was $7, and in so construing the letter. Whitehead's testimony satisfactorily corroborates Gregg. Cranmer similarly impressed me, and I think is in the same position in this respect as Gregg.

Gates was concededly the agent of Eccles, and the position of one is that of the other. A careful analysis of the testimony of Gates will show that there were no misleading oral misrepresentations by Megargel. If there is any doubt, I accept Megargel's testimony as the more impressive. Gates, however (and therefore Eccles), had the right to rely on the syndicate letter representations, as also did Keeler Bros., for whom at this juncture Gates was likewise acting as agent.

To me, one of the most puzzling cases is that of Kelly, rendered additionally difficult because his testimony was taken by deposition. I disregard the oral representations alleged to have been made by Megargel, but I see nothing to controvert the fact that he relied on the syndicate letter.

From the foregoing, it will be seen that up to this point, Wyland, Parker, Brooks, Kelly, Gregg, Whitehead & Co., Keeler Bros., Wilson, Cranmer & Co., Nicholson, E. A. Howard, and Hubert E. Howard, Gates, and Eccles, are entitled to such relief as the law may accord.

[7] An additional question arises in the case of Keeler Bros., and still another question in the cases of Kelly, Gates, and Eccles. After Gates had learned that Megargel had paid only $3.50 for the stock, he signed an acceptance of the syndicate letter of November 1, 1917, for 3,000 shares, and an acceptance of the syndicate letter of November 14, 1917. He had read the letter of November 1, 1917, in Casper, and noticed that it was substantially similar to the letter of August 17. Before signing an acceptance of the second syndicate letter, he related to his attorney, Mr. Ridgley, in Cheyenne, all the matters that he knew or had heard about the Glenrock affair. He also helped to get proposed subscribers to the second syndicate. In reply to the second call, he wrote to Megargel, under date of December 4, stating, among other things:

"I realize, however, that you have been up against a hard game, and profit of any amount cannot be expected from the syndicate at this time. * * * It seems to me that from a standpoint of fairness and equity that you should not insist on your $3.50 per share profit out of the syndicate under the circumstances. In other words, if the stock goes to the syndicate members at a substantial reduction below the $7 mark, they will feel that, while they have something which they cannot sell, yet their investment will be of some substantial merit."

Numerous cases are cited by counsel as to the effect of waiver, and on the proposition that, in effect, no ratification can be had when a principal, who discovers a fraud, accepts the contract and affirms, instead of disaffirms. But it seems to me that equity requires, in such

case, the same rule as is applied at law, and as is thus stated in 14 Am. & Eng. Enc. 171:

"The rule that affirmance of a contract with knowledge of fraud does not bar an action for damages is subject to the limitations that the party defrauded must stand towards the other party at arm's length, must comply with the terms of the contract on his part, must not ask favors of the other party, or offer to perform the contract on conditions which he has no right to exact, and must not make any new agreement or engagement respecting it. If he does so, he waives the fraud."

The law does not favor speculating on results. If Gates had refused to do more than pay $3.50, he might have been met by the insistence of Megargel that he was out of the syndicate, and if Megargel had been right in that stand, if the syndicate had been successful, Gates ran the risk of losing his $3.50 as well as his profits from the syndicate operation. But Gates was taking no chances on a quarrel or a lawsuit, and signed up for the second syndicate, which is but another way of stating that he condoned what he now claims was a fraud. Brown v. Lead, etc., Co., 231 Mo. 166, 132 S. W. 693, 140 Am. St. Rep. 509; Kingman & Co. v. Stoddard et al., 85 Fed. 740, 29 C. C. A. 413; Simon v. Goodyear Metallic Rubber Shoe Co., 105 Fed. 573, 44 C. C. A. 612, 52 L. R. A. 745. The fact that the second syndicate was not consummated is immaterial. It is the act of Gates which counts. For these reasons, the bill must be dismissed as against Gates and Eccles.

The bill must also be dismissed as against Kelly. The fact that Kelly had not paid $3.50 in all is immaterial. He ran the same risk for what he put in as did Gates. The same result would follow in the case of Keeler Bros., if Gates was their agent when he signed an acceptance of the second syndicate letter of November 14. The bill would also be dismissed on this ground as against Haase, in addition to the ground heretofore stated.

[8] As to Keeler Bros., it appears from the evidence that Gates was not, at the time of what defendant calls the "ratification," the agent of Keeler Bros. as matter of fact; nor, on the facts, was there any agency by estoppel. An agency to subscribe does not continue per se as an agency to waive, relinquish, or condone.

[9, 10] Before concluding this part of the case, it may be well to state that the theory upon which antecedent conversations as to representations were received is that, where false representations are alleged and the written contract is ambiguous, the conversations are admissible as showing the construction of the writing which defendant's oral statements led plaintiffs to place upon it. If plaintiffs had sued at law or in equity for a rescission, there would be no difficulty in according appropriate relief. It is rare that a plaintiff affirms the contract, because, ordinarily, the plaintiff is only too glad to get his money back and to be restored to his original position. In this case, however, it is perfectly plain that, while many of the plaintiffs, in view of the vagaries of the market, saw very little profit, if any, out of the syndicate itself, they did see a possible very comfortable share of the profits which Megargel made in selling the stock to the syndicate. Therefore plaintiffs proceed on the theory which, in effect, is that the syndicate started

at once with the purchase of the stock by Megargel in accordance with his option, and thus it is that, when the question of remedy is considered, plaintiffs seem to think that "affirming" the contract means that defendant must account for the profit he made in the separate transactions whereby he sold shares of stock to various persons at presumably $3.50 gross profit per share. That defendant must account for the operations of the syndicate, as such, and that in such respect he was the agent of each and every subscriber, nobody disputes.

That he was the agent of those who became subscribers, to purchase 100,000 shares for their joint benefit, is negatived both by the syndicate letter and the conduct of the parties. The furthest his agency went in this regard was to purchase a definite number of shares for the particular person subscribing for those shares, and, when so purchased, such subscriber became a member of a syndicate, which, in the conduct of the syndicate business, might make or lose money. In nearly every well-known cited case (as above suggested), the person who alleges fraud seeks to recover back his money or other property, and the syndicate relation springs up from the start. Brewster v. Hatch, 122 N. Y. 349, 25 N. E. 505, 19 Am. St. Rep. 498 (which took the form finally of a suit to recover personal damages); Heckscher v. Edenborn, 203 N. Y. 210, 96 N. E. 441; Sim v. Edenborn, 242 U. S. 131, 37 Sup. Ct. 36, 61 L. Ed. 199.

The principles stated in these cases, and many analogous with them, are well enough known; but the case at bar does not present any such situation as was developed in any of these cases. The furthest to which the facts in this case lead is to prevent defendant from making a profit out of those plaintiffs who relied, and were justified in relying, on the representation that defendant was getting the stock for a figure other than he really paid. This is but another way of stating that those plaintiffs are entitled to the stock at the price which Megargel paid for it, and that, to that extent, he acted as their agent, and must be regarded as having bought the stock for these plaintiffs at $3.50 per share, and in so deciding I have not overlooked Kilbourn v. Sunderland, 130 U. S. 505, 9 Sup. Ct. 594, 32 L. Ed. 1005.

Therefore there may be a decree in favor of plaintiffs Wyland, Parker, Brooks, Gregg et al., Wilson, Cranmer et al., Keeler Bros., Nicholson, E. A. Howard, and H. E. Howard, substantially in accordance with paragraph 4 of the relief asked for in the complaint. The decree, however, is to be worded so as not to include any accounting for or payment over to a given plaintiff of the difference between $7 and $3.50 in sales to other plaintiffs or persons. Nicholson will have the relief referred to in paragraph 5 of his demand for judgment.

The decree will provide that defendant will be enjoined from disposing, etc., of the nonwithdrawn stock necessary to cover the amounts deliverable to the various plaintiffs entitled to the same, as above provided. In those cases where the bill is dismissed, defendant may have a decree for his counterclaim.

[11] As to the accounting of the syndicate itself: This, it seems to me, is premature, and cannot be asked for until this decree (or any modification thereof) is carried out. I am unable to find any refusal

on the part of defendant fully and properly to account as the manager of the syndicate itself. On the contrary, the preliminary statement of account, furnished by defendant, does not show any intention to fail to account, and to undertake an accounting now would not only be premature, but result in an unnecessary expense. It is altogether likely that, at the proper time, defendant will furnish a full account.

The bill in this regard will be dismissed, without prejudice to any of the plaintiffs to the bringing of a new suit for that purpose if so advised. No costs.

NOTE.

Private and Confidential.

R. C. Megargel & Co., 27 Pine Street, New York City.

August 17, 1917.

The Glenrock Oil Company (Incorporated).

Capital Stock Syndicate.

To ————:

Dear Sirs: 1. The Glenrock Oil Company (Incorporated) has been recently incorporated under the laws of the state of Virginia with a total authorized capital stock of $10,000,000, divided into 1,000,000 shares of the par value of $10 each. The corporation was organized for the purpose of acquiring by direct purchase, or through controlling interests in other corporations, producing and prospective oil properties located in the state of Wyoming and elsewhere.

2. We are negotiating for the purchase of certain shares of the capital stock of this corporation, and are forming a syndicate to acquire from us a portion of said stock to the extent of not exceeding 100,000 shares, when, as and if acquired by us, at a price of $7.00 per share.

3. The syndicate will terminate on October 15, 1917, subject to our right to dissolve it at an earlier date and to our right to extend it from time to time beyond said date for an aggregate period not to exceed sixty days.

4. We are to be managers of the syndicate and may be members thereof, notwithstanding our relations as vendors thereto and managers thereof, and as such managers we shall have full power to determine, within the limit above stated, the amount of stock to be purchased from us by the syndicate, and with full power to sell, purchase, resell and repurchase, for account of the syndicate, at public or private sale, any shares of stock at such prices and on such terms as we may deem fit; to pay the usual brokerages, as well as such commissions for effecting sales or purchases for account of the syndicate as we may deem proper; to charge the syndicate reasonable commissions and the usual brokerages for sales or purchases effected by us; to make advances to the syndicate, charging interest thereon; to make or procure loans and secure the same by pledge of syndicate stock or otherwise, to such amounts and in such manner as from time to time we may deem expedient; and generally to act in all respects as in our opinion may be to the interest of the syndicate. We shall not be liable under any of the provisions of this letter or for any matter connected therewith, except for want of good faith, and no obligation not herein expressly assumed by us shall be deemed to be implied.

5. The syndicate managers may purchase, sell or otherwise dispose of, or be interested in the purchase, sale or other disposition of, any stock or other securities of said corporation or its subsidiary companies, or contract in any respect with it or them, without restriction and without responsibility therefor to the syndicate.

6. All expenses incurred in the acquisition of such stock for the syndicate, in the marketing of the same, and all other expenses incurred by us as syndicate managers shall be charged against the syndicate. We shall make no charge to the syndicate for acting as syndicate managers, other than reason-

able commissions and the usual brokerages for sales or purchases effected by us, being otherwise compensated in our purchases of said stock.

7. Your total obligation shall not in any event exceed the amount of your participation as herein stated, but the failure of any participant to perform any part of his obligation hereunder shall not release any other participant. Nothing herein contained shall constitute the participants partners with the syndicate managers or with one another. Syndicate participations are not transferable except with the written consent of the syndicate managers. The syndicate managers reserve the right to cancel the participation of any member violating the syndicate provisions, and to hold him liable for any losses sustained by such violation. The firm constituting the syndicate managers acts as a copartnership and all rights and powers hereunder of said firm shall vest in any copartnership which shall be the sole successor of said firm without further act or assignment.

8. We, as syndicate managers, may grant to, or withhold from, any syndicate participants the privilege of withdrawing their respective allotments of stock, or any part thereof, for investment. No participant withdrawing stock shall be entitled in respect thereof to share in any profits of the syndicate. Applications to make such withdrawals, in whole or in part, must be made to us upon written acceptances of participation within the period below provided, and any such application may be refused or granted by us in such cases and to such extent as we may, in our discretion, determine. In respect of your participation, or any part thereof, so withdrawn, you will be required to pay at the time and in the manner hereinafter provided an additional sum of one dollar per share on the number of shares so withdrawn to cover the proportion of the syndicate expenses attributable to such withdrawn participation. Upon the completion of all payments in respect of such withdrawn stock, you will be entitled to receive an appropriate certificate, issued by or on behalf of the syndicate managers, reciting that you are the owner of the number of shares specified therein and will be entitled to receive the same upon the termination of the syndicate. No stock so withdrawn from sale by any participant shall be delivered to him until the termination of the syndicate.

9. *We have reserved for you, subject to the acquisition by us of such stock and to the reduction of such participation in case of oversubscription as hereinafter provided, a participation in the syndicate of ——— shares of such stock, which, at the syndicate price of $7.00, amounts to $———.*

10. Should you desire to accept such participation, please confirm your assent to the conditions as herein stated by signing the enclosed acceptance and return the same to us at No. 27 Pine street, New York City, on or before August 23, 1917, after which time all offers of participation not so accepted will be deemed refused and canceled. This letter and your acceptance will thereupon constitute the contract between us.

11. All acceptances, in whole or in part, are subject to our approval, and in case of an oversubscription the syndicate managers shall have the right to allot to you such less amount of participation in the syndicate than the amount reserved as above stated, as they in their uncontrolled discretion may determine.

12. You will be required to make payment in New York funds in respect of your obligation hereunder to the syndicate managers at their office, No. 27 Pine street, New York City, on three days' previous notice stating the amount of participation in the syndicate allotted to you by the syndicate managers as above stated, mailed or telegraphed to you by us, against delivery to you at said office of subscription receipts representing your payment. Such call may, in our discretion, be for full payment or for payment in installments.

Yours truly, ————, Syndicate Managers.

MANNERS v. MOROSCO.

(District Court, S. D. New York. November 29, 1918.)

1. COPYRIGHTS ⟸50—CONTRACT—RIGHT TO PRODUCE PLAY—CONSTRUCTION.
Contract by which the author of a play granted to a manager the exclusive right to produce it, and the manager agreed to give it at least 75 performances each theatrical season for five years, otherwise the contract to terminate, *held* not limited to a term of five years, but to continue in force so long as the manager desired and paid the stipulated royalty.

2. COPYRIGHTS ⟸50—GRANT—RIGHT TO "PRODUCE" PLAY—MOTION PICTURE RIGHTS.
A contract granting the exclusive right to "produce" a play *held* to include the right to present it in motion pictures.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Produce.]

In Equity. Suit by J. Hartley Manners against Oliver Morosco. Decree for defendant.

For convenience of counsel interested in this class of case, the essential features of the two contracts between the parties are here set forth. For brevity, they will be referred to as the first and second contracts.

First Contract.

"Whereas, the party of the first part is the sole and exclusive author and owner of a certain dramatic composition at present entitled 'Peg O' My Heart'; and

"Whereas, the party of the second part wishes to obtain the exclusive right and license to produce, perform, and represent the said play in the United States of America and the Dominion of Canada:

"Now, therefore, in consideration of the premises * * * it is hereby understood, covenanted, and agreed by and among the parties to the agreement as follows:

"First. The party of the first part hereby grants, and by these presents hereby does grant, to the party of the second part, subject to the terms, conditions, and limitations hereinafter expressed, the sole and exclusive license and liberty to produce, perform, and represent the said play in the United States of America and the Dominion of Canada.

"Second. The party of the second part, in consideration of such grant, hereby agrees to pay to the party of the first part the sum of five hundred ($500.00) dollars upon the signing and execution of this agreement * * * in advance of the royalties to accrue to the party of the first part under this agreement. * * *

"Third. The party of the second part agrees to produce the play not later than January 1, 1913, and to continue the said play for at least 75 performances during the season of 1913–1914, and for each theatrical season thereafter for a period of five years.

"Fourth. The party of the second part further agrees to pay to the party of the first part * * * further sums as royalties, as follows:

"Five per cent. (5%) of the first four thousand five hundred ($4,500) dollars gross weekly receipts; seven and one half (7½) per cent. on the next two thousand ($2,000) dollars gross weekly receipts; and ten (10%) per cent. on all sums over that amount of six thousand five hundred ($6,500) dollars gross weekly receipts—which said sum of money, together with certified box office statements, the party of the second part agrees to send to the party of the first part.

"Fifth. The said party of the second part further agrees that if during any one theatrical year, such year to begin on the 1st day of October, said

play has not been produced or presented for 75 performances, then all rights of the said party of the second part shall cease and determine and shall immediately revert to the said party of the first part.

"Sixth. It is further agreed that the said party of the second part shall present the said play in first-class theaters with a competent company, the said company to be mutually satisfactory to both the parties to this agreement, and with Miss Laurette Taylor in the title role of 'Peg O' My Heart,' and that the play will have a production in New York City, and will be continued on the road with Miss Taylor in the part of 'Peg,' for at least one season, or longer, if considered advisable by both parties to this agreement.

"Seventh. No alterations, eliminations, or additions to be made in the play without the approval of the author.

"Eighth. The rehearsals and production of the play to be under the direction of the author.

"Ninth. The name of the author to appear on all advertising, reading, and printed matter used in connection with the play.

"Tenth. The author to have the right to print and publish the play, but this right is not to be exercised by the author within six months after the production of said play in New York City, unless the written consent of the manager has first been obtained.

"Eleventh. Said manager does hereby agree that he will not lease, sublet, assign, transfer, or sell to any person or persons, firm or corporation, any of his aforesaid rights in and to the said dramatic composition or play, without the written consent of said author has first been obtained. Should the play fail in New York City and on the road, it is agreed between both parties it shall be released for stock.

"Twelfth. Whenever the play is released for stock, the royalties received from the stock theaters to be divided equally between the party of the first part and the party of the second part.

"Thirteenth. This agreement is binding upon the parties hereto, upon their heirs, executors, assigns, administrators, and successors. * * *"

To this agreement there was an addendum as follows:

"It is further agreed that after Miss Taylor shall have finished her season in 'Peg O' My Heart,' as provided for in this contract, her successor in the rôle of 'Peg' for any subsequent tours shall be mutually agreeable to both parties to this contract.

J. Hartley Manners.
"Oliver Morosco."

Second Contract.

"Whereas, J. Hartley Manners, of the city, county, and state of New York, party of the first part hereto, and Oliver Morosco, of Los Angeles, California, party of the second part hereto, have heretofore entered into an agreement, dated January 19, 1912 (hereinafter called 'original agreement'), a copy of which is hereto attached, and by express reference thereto made a part hereof, and controversies have arisen and now exist between the parties hereto with reference to the meaning of said original agreement, and the parties hereto desire to settle and adjust said controversies, and to change said original agreement as hereinafter set forth:

"Now, therefore, in consideration of the premises * * * the parties hereto do hereby enter into this supplemental agreement:

"First. The parties hereto do hereby settle and adjust all of said controversies.

"Second. Said original agreement, except as by this supplemental agreement changed, is hereby in all respects ratified, confirmed, and approved.

"Third. Paragraphs 'Sixth' and 'Eighth' of said original agreement, and also the addendum or postscript to said original agreement (which addendum or postscript bears the signatures of said Manners and said Morosco), are each and all hereby canceled and eliminated from said original agreement.

"Fourth. There shall be and there is hereby added to said original agreement the following, to be designated as new paragraph 'Sixth' thereof:

"'Said Morosco may, contemporaneously, and from time to time, as long as this contract is in force, produce, perform, and represent said play "Peg O' My Heart," with or in as many companies in the United States and Canada

as he, the said Morosco, may, in his sole discretion, deem proper; and it is further agreed that Laurette Taylor (Laurette Taylor Manners) need not be engaged to appear, and need not appear, in the title rôle, or star or principal part, or any other part in any of said companies, and that the said Morosco need in no way consult or confer with the said J. Hartley Manners respecting the star, the cast, the featured member or members of the cast, the rehearsals, or production of said play by any of said companies—of all of which the said Morosco shall have, and is hereby given, sole and exclusive charge and control.'

"Fifth. There shall be, and there is hereby, added to said original agreement, to be known as new paragraph 'Sixth-a,' the following:

" 'Said Morosco shall use reasonable efforts to direct that all advertising matter in the United States and Canada shall contain a reference to the fact that said Laurette Taylor was the creator of the rôle of "Peg" in said play; it being the intention of this provision that said Morosco shall use reasonable endeavors to have said Laurette Taylor's name featured in the manner above indicated, but it being expressly understood and agreed that said Morosco shall have the unlimited right and privilege to feature, star, and advertise any other person or persons appearing or to appear in any of said companies, in any manner that he, said Morosco, shall deem fit or proper.'

"Sixth. There shall be, and there is hereby, added to paragraph 'Fourth' of said original agreement the following provision:

" 'The royalties herein specified shall be paid to the said Manners by said Morosco at the rate herein set forth, for every company performing the said play of "Peg O' My Heart" in the United States or Canada, under the management of said Morosco, under said original agreement or this supplemental agreement.'

"Seventh. It is further agreed that paragraph 'Eleventh' of said original agreement shall be, and the same is hereby, amended so as to read as follows:

" 'Eleventh. Said Morosco is hereby expressly authorized to lease, sublet, assign, transfer, or sell to any person or persons, firm or corporation, whatsoever, any of his rights acquired under said original agreement or this supplemental agreement; it being expressly understood and agreed that no such leasing, subletting, assignment, transfer, or sale shall in any way release or discharge said Morosco from his personal liability to pay to said J. Hartley Manners the royalties in amounts, manner, and at the time as specified in said original agreement and in this supplemental agreement.'

"Eighth. It is further agreed that paragraph 'Twelfth' of said original agreement shall be and the same is hereby amended, so as to read as follows:

" 'Twelfth. Said play "Peg O' My Heart" may be released for stock, in the United States and Canada, during the time that this contract is in force, whenever the net amount realized from all the companies producing the play in any one theatrical season shall yield a net profit of less than two thousand ($2,000) dollars. Whenever the said play is released for stock company or companies, the royalties received from the stock theaters shall be divided equally between the said J. Hartley Manners and said Morosco as and when received by said Morosco.'

"Ninth. It is further agreed that, during the period of four years from and after the date hereof, neither party hereto shall or will, without the written consent of the other party hereto first had and obtained, directly or indirectly produce, represent, or exhibit, or permit, allow, or suffer to be produced, represented, or exhibited, or sell, lease, give, or transfer, any permission, privilege, or right to produce, represent, or exhibit the said play by cinematograph or motion or moving pictures in the United States or Canada. It is further expressly understood and agreed that, after the expiration of said four-year period, the rights, whatever they may be, of either said Morosco or said J. Hartley Manners, to directly or indirectly produce, represent, or exhibit, or permit, allow, or suffer to be produced, represented, or exhibited, or sell, lease, give, or transfer any permission, privilege, or right to produce, represent, or exhibit, the said play by cinematograph or motion or moving pictures in the United States or Canada, shall be such as said Morosco and said J. Hartley Manners shall respectively be legally entitled to under and pursuant to the terms of said original agreement, to the said extent and

with the same effect as though this supplemental agreement had not been entered into. This provision is not to be construed as a recognition by either party hereto that the other had under the original agreement, or has under this agreement, the right to give or authorize the giving of cinematograph or motion or moving pictures of said play.

"Tenth. The said J. Hartley Manners and the said Morosco hereby forever mutually release the one the other from any and all claims and demands which either one now has or asserts, or might have or assert, against the other, for or on account of any alleged violation of said original agreement, on the part of either of the parties hereto, prior to the execution of this supplemental agreement. * * *"

Walter C. Noyes and David Gerber, both of New York City, for plaintiff.

Charles H. Tuttle and William Klein, both of New York City, for defendant.

MAYER, District Judge (after stating the facts as above). The suit is brought, in effect, to restrain defendant (1) from playing, producing, or controlling in any manner the dramatic composition "Peg O' My Heart," and (2) from manufacturing or presenting any motion picture based upon "Peg O' My Heart." The case requires only the construction of the two contracts; testimony in respect of customs and conversations antecedent to the contracts having been excluded.

[1] 1. Plaintiff urges that the first contract amounts only to a license, revocable at his option, except as to the interest of defendant for the period referred to in paragraph "Third" of the first contract, and that time, according to plaintiff, expired in June, 1918; a "theatrical season" concededly meaning from October to June.

Applying fundamental principles to the construction of this contract, it is entirely clear that the parties intended that defendant should have all the rights mentioned for all time and that paragraph "Third" (particularly when illuminated by paragraph "Fifth"), as aptly put by counsel for defendant, is a statement of the least that defendant is to do, not of the most he is to have. Had the parties otherwise intended, they could readily have fixed a time limit in paragraph "First" by the addition of words such as "for ——— years from" or "until" a stated date. The provision in paragraph "Eleventh" merely expressed, inter alia, the natural precaution of the playwright in preventing the disposition of the play to persons or corporations who might be distasteful or otherwise not satisfactory to the playwright. Whatever may be said as to paragraphs "Eleventh" and "Sixth," and the addendum, is now academic, in view of paragraphs "Third," "Fourth," and "Eleventh" of the second contract.

Indeed, the first contract in this respect was an entirely normal arrangement, which contemplated full right to defendant to produce the play as long as he deemed proper, provided that he would, in any event, give the play a fair trial and the opportunity for success which the minimum of 75 performances during the theatrical seasons covered by paragraph "Third" would develop.

[2] 2. I now come to what is the real controversy between the parties, viz. the motion picture rights. On this branch of the case, the question, simply stated, is whether the case at bar falls under Froh-

man v. Fitch, 164 App. Div. 231, 149 N. Y. Supp. 633, or Klein v. Beach (D. C.) 232 Fed. 240, and 239 Fed. 109, 151 C. C. A. 282. In the former case the contract recited: "Whereas," Frohman "desires the exclusive right to produce or to have produced the said play," and provided that Fitch "does sell" to Frohman "the exclusive right to produce the said play." In the case at bar, the contract recites: "Whereas," Morosco "wishes to obtain the exclusive right and license to produce, perform, and represent the said play," and provides that Manners "does grant" to Morosco "the sole and exclusive license and liberty to produce, perform, and represent said play."

It will thus be noted that the word "produce" occurs in both contracts; i. e., in Frohman-Fitch and in Manners-Morosco. When used alone, that word has a definite meaning, by virtue of Kalem Co. v. Harper, 222 U. S. 55, 32 Sup. Ct. 20, 56 L. Ed. 92, Ann. Cas. 1913A, 1285, and Frohman v. Fitch, supra, as was pointed out by Judge Learned Hand in Klein v. Beach, supra. In other words, "produce" includes the presentation in or by way of motion pictures. The scope of the word, as thus judicially defined, can be narrowed only by some other language, employed by contracting parties to express a different intent. Thus it was that the question in Klein v. Beach, supra, was whether the additional words "for presentation on the stage" and "on the stage," construed with their context, meant the spoken play.

Of course, it is often possible to find in the opinions of courts some sentence or phrase which, if isolated from its context, may convey a meaning different from what the writer intended. Opinions, however, must be read as a whole, and illustrative observations must be understood as applying only to the question and facts under consideration. Thus read, it will be found that the opinion of each court in Klein v. Beach, supra, simply held that the particular contract there considered contemplated the spoken play only.

In the case at bar, however, the decision need not rest solely upon particular words found in particular paragraphs. The whole structure of the contract demonstrates plainly the strength of defendant's position.

When the first contract was executed, motion pictures, as the parties agree and as the testimony shows, were well known. It is not controverted in this case that a motion picture of "Peg O' My Heart" would seriously damage, from a financial standpoint, the production of the spoken play. It is difficult to suppose that Morosco, as a producing manager, would risk the money necessary to produce the play at least 75 times each year for several years and leave the motion picture rights outstanding in Manners. In such a situation Manners might, at any time, for some reason satisfactory to himself, sell the motion picture rights and destroy the financial value of the spoken play. Indeed, the second contract discloses that controversies arose between the parties.

It might very well have happened that the play, instead of turning out a great success, might have had a run of short duration, with consequent lean royalties. Yet the production might have been salable for motion pictures at a price in excess of any royalties which failure as a

spoken play would indicate. In such circumstances, Manners could not lose. He would have, for himself, the proceeds resulting from his ownership of the motion picture rights, while Morosco would be compelled to pay him the stipulated per cent. of gross (not net) receipts derived from the compulsory performances required by paragraph "Third," and contemporaneously the financial results to Morosco might be gravely affected by the contemporaneous motion picture. In other words, Manners could not lose and Morosco was sure to lose, and practically the same result would follow if the play were released for stock. Courts are not astute to construe contracts with such a result, unless the language and intent clearly so require.

Per contra, if Morosco, by the contract, gained the motion picture rights, it is hardly conceivable that, while the spoken play was a success, he would destroy its financial future and possibilities by producing motion pictures contemporaneously, and thus destructively compete with himself.

Finally, that it was not intended to limit the scope of the production to any field of presentation is well evidenced by paragraph "Tenth" of the first contract. The express exclusion of the right to print and publish the play is clearly expressive of the intent to include all rights except those specifically excluded or reserved. The suggestion that paragraph "Seventh" has any bearing upon the question of motion picture rights is not persuasive, in view of the Kalem and Frohman v. Fitch Cases.

The bill is dismissed, with costs.

In re CALEDONIA COAL CO.

(District Court, E. D. Michigan, N. D. October, 1918.)

No. 835.

1. BANKRUPTCY ⊂=342—CLAIMS—PETITION FOR RE-EXAMINATION.
Where a petition of a trustee for re-examination of claims previously allowed was filed about a year after the filing of the claims, but no motion to dismiss the petition as improperly filed was made, and the reasons for delay were explained, *held*, that the petition will be treated as authorized under the bankruptcy rules for the district, which require the filing of petitions for re-examination within 60 days, unless the time therefor shall be extended.

2. BANKRUPTCY ⊂=342—CLAIMS—RE-EXAMINATION—LACHES.
In view of Bankruptcy Act, § 57k (Comp. St. § 9641), providing that claims which have been allowed may be re-examined and rejected at any time before the estate has been closed, a year's delay by the trustee in filing a petition to expunge claims previously allowed will not be deemed laches, where the claimants were not injured, for mere delay is not laches.

3. BANKRUPTCY ⊂=342—CLAIMS—PETITION TO RE-EXAMINE.
Under General Order in Bankruptcy No. 21 (89 Fed. x, 32 C. C. A. x) it is unnecessary that copies of a petition to re-examine claims previously allowed be sent to each of the claimants, and it is permissible to join all of the claimants in the single petition.

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4. BANKRUPTCY ⟸342½—REFEREES—FINDINGS.
Findings of fact of a referee in bankruptcy upon disputed questions of fact will not be set aside by the court, unless manifestly erroneous.

5. CORPORATIONS ⟸228—STOCKHOLDERS—LIABILITY OF.
A stockholder, who owns stock for which payment has not been made to the corporation, and who is not a bona fide holder thereof, is liable to the corporate creditors for the unpaid balance of the par value of such stock.

6. JOINT-STOCK COMPANIES ⟸15(1)—PARTNERSHIP ASSOCIATIONS—STOCKHOLDERS.
The rule that a stockholder, who owns stock for which payment has not been made to the corporation, and is not a bona fide holder thereof, is liable to corporate creditors, etc., is applicable to stockholders in a partnership association.

7. BANKRUPTCY ⟸308—CLAIMS—RECOVERY.
Where a stockholder in a partnership association, who had not fully paid for his stock, presents a claim against the association in bankruptcy, he cannot recover thereon, as against other creditors, until he has first paid the amounts due and payable upon his stock.

8. JOINT-STOCK COMPANIES ⟸6—STOCK—PAYMENT IN FULL.
Though stockholders who had fully paid for their stock performed voluntary labor for a partnership association, and the value of the assets of the association increased, so that at one time it exceeded the amount of the total authorized capital stock, and no dividends were paid to stockholders, such stock cannot be treated as having been paid in full, for that would disregard the difference between the capital of the association and its capital stock.

9. BANKRUPTCY ⟸348—ASSOCIATIONS—WAGE CLAIMS.
Where stockholders in a partnership association engaged in mining consented that part of their wages for services rendered the association should be withheld and loaned to the association, such stockholders are not, on the bankruptcy of the association, entitled to priority upon such claims, on the theory that they were wage claims.

10. BANKRUPTCY ⟸348—CLAIMS—PRIORITY.
Bankruptcy Act, § 64b, subd. 5 (Comp. St. § 9648), does not make applicable the state statutes giving priority to wage claims for longer periods than three months; the restriction to three months in subdivision 4 being controlling.

In Bankruptcy. In the matter of the Caledonia Coal Company, bankrupt. Petition to review an order of the referee disallowing certain claims against the estate, and denying priority to other claims. Petition denied, and cause remanded to referee.

Harry L. Stearns and E. L. Beach, both of Saginaw, Mich., for trustee.

George C. Ryan, of East Saginaw, Mich., for claimants.

TUTTLE, District Judge. This is a petition to review an order of the referee disallowing certain claims against the estate and denying priority to certain other claims.

The Caledonia Coal Company, the bankrupt, was a Michigan partnership association, organized under the statute governing such associations, being Act 191 of the Public Acts of 1877, as amended by Pub. Acts 1881, No. 216. It was engaged in the mining of coal on a co-operative plan. Under this plan each stockholder worked as a miner in the mines owned by the company, for which he received wages

on a certain scale. The capital stock of the company consisted of 5,000 shares, of the par value of $10 each. After operating in Michigan for several years with varying degrees of success, the company was finally, in the latter part of May, 1916, compelled to file a voluntary petition in bankruptcy. Thereupon the claims involved in this proceeding were filed by over 70 of the stockholders, who claimed various sums as wages earned by them in working in the mines of the company. These claims were filed about a month after the adjudication in bankruptcy, and, upon their being filed, were allowed as a matter of course; no objections to them having been presented. The administration of the bankrupt estate was then suspended for about a year, while an attempt was made to resume the operation of the company. After about a year, however, the trustee abandoned the attempt and proceeded with the administration of the estate.

In July, 1917, the trustee filed a petition asking that the claims of these stockholders be re-examined and expunged. He alleged two grounds for the rejection of such claims: First, that the amounts claimed to be due as wages had been advanced by the claimants to the company out of their unpaid wages, for the purpose of furthering the common enterprise in which they were engaged and from which they expected to reap a profit; and, second, that the claimants were indebted to the company, on account of unpaid subscriptions for their stock, for sums at least equal to the amounts claimed to be due them. A time was fixed for the hearing on this petition, and notice thereof was duly given to the claimants. Testimony was taken before the referee. The latter then entered an order disallowing a number of the claims, and holding that the balance of such claims should be allowed merely as general unsecured claims, without any priority. This petition is filed to review such order.

[1] Certain questions raised concerning the practice followed by the trustee and referee may be first considered. Complaint is made that the petition for the re-examination of these claims was not seasonably filed, in view of the provisions of rule 32 of the Bankruptcy rules for this district. This rule provides that—

"Petition for re-examination of claims shall be filed within sixty days after the filing thereof, unless the time therefor shall be extended by the court upon cause shown and after such notice to the claimant of the hearing of the said application as the court may direct."

As already stated, the petition of the trustee was filed about a year after the filing of the claims in question, and it does not appear that there has been any formal compliance with the rule just quoted. In view, however, of the fact that due notice was sent to all of the claimants of the hearing on such petition, and as one of the questions raised by claimants and argued by both parties here is whether the petition of the trustee can be filed after the lapse of the time mentioned, I am disposed to consider this petition as if it included an application for the extension of time contemplated by the rule referred to. No motion to dismiss the petition as improperly filed was made, and the merits of the case have been fully argued. Reasons for the delay have been explained by the attorney for the trustee and are now before

the court, so that no good purpose would be served by insisting upon the presentation of a formal application for an extension of time. Treating the petition, then, as involving such an application, I am of the opinion that the delay of the trustee has been satisfactorily explained, and that sufficient cause has been shown for the necessary extension of time.

[2] It is further urged that the trustee has been guilty of such laches in filing his petition as to bar his right to do so. Delay alone does not constitute laches; the essential element being prejudice to another person by reason of the delay complained of. It does not appear that the delay in this case has resulted in any injury or prejudice to the claimants which would now make it inequitable to allow the trustee to file his objections to these claims. Section 57k of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 560 [Comp. St. § 9641]) provides that—

"Claims which have been allowed may be reconsidered for cause and reallowed or rejected in whole or in part, according to the equities of the case, before, but not after, the estate has been closed."

Under the circumstances it cannot be held that the trustee has been guilty of laches. In re Globe Laundry (D. C.) 198 Fed. 365.

[3] Complaint is made because copies of the petition to re-examine were not sent to the claimants, and also because all of these claimants were joined in one petition. No statute, rule, or authority is brought to the attention of the court in support of these objections, which seem clearly without merit. General Order 21 (89 Fed. x, 32 C. C. A. x), which governs the practice in such a case, provides in paragraph 6 as follows:

"When the trustee or any creditor shall desire the re-examination of any claim filed against the bankrupt's estate, he may apply by petition to the referee to whom the case is referred for an order fixing a time for hearing the petition, of which due notice shall be given by mail addressed to the creditor. At the time appointed the referee shall take the examination of the creditor, and of any witness that may be called by either party, and if it shall appear from such examination that the claim ought to be expunged or diminished, the referee may order accordingly."

It will be noted that there is nothing in this rule requiring the service of a copy of the petition upon the claimant or requiring a separate petition containing the necessary allegations, and due notice of the hearing thereon was sent to each of the claimants. I am satisfied that the proper practice has been followed, and the contention to the contrary must be overruled.

Coming, then, to the merits of the case, did the referee err in the disallowance of these claims? The referee found, as a matter of fact, that the stock owned by a number of the claimants, a list of whose names is given in his findings, was not paid in full, and, furthermore, that such claimants were not bona fide purchasers of such stock.

[4] It is well settled that the findings of fact of a referee in bankruptcy upon disputed questions of fact will not be set aside by the court unless manifestly erroneous. I have carefully examined the transcript of the testimony attached to the report of the referee, and am satis-

fied that there was ample evidence in the record in support of the findings referred to. Such findings, therefore, will not be disturbed.

[5] It is elementary that stockholders, who own stock for which payment has not been made to the corporation, and who are not bona fide holders thereof, are liable to creditors of the corporation for the unpaid balance of the par value of such stock, so far as may be necessary to pay such creditors, notwithstanding the fact that the stock may be fully paid and nonassessable as between the corporation and its stockholders. Handley v. Stutz, 139 U. S. 417, 11 Sup. Ct. 530, 35 L. Ed. 227.

[6] The same rule is applicable to a partnership association such as the bankrupt company. Rouse, Hazard & Co. v. Detroit Cycle Co., 111 Mich. 251, 69 N. W. 511, 38 L. R. A. 794; Wood v. Sloman, 150 Mich. 177, 114 N. W. 317.

[7] When, therefore, such a stockholder presents a claim against his company in bankruptcy, he is not entitled to recover thereon, as against other creditors, until he has first paid the amount so due and payable upon his stock, for which he is so liable. Kiskadden v. Steinle, 203 Fed. 375, 121 C. C. A. 559; In re Wiener & Goodman Shoe Co. (D. C.) 96 Fed. 949.

[8] It is urged, however, that even if payment has not been expressly made upon this stock, yet because, after the stock was issued, the stockholders performed certain voluntary labor for the company, and the value of the assets of the company increased, so that at times it exceeded the amount of the total authorized capital stock, and no dividends were paid to stockholders, therefore, such stock should be treated as having been paid in full. This argument overlooks the difference between the capital of the company and its capital stock. The former consists of the property owned by the company, and varies in extent and value with the changes in the quantity and value of the property owned by the company from time to time. The capital stock, however, is the trust fund contributed by the stockholders for the benefit, not only of the company, but also of its creditors, who have a right to rely upon its payment by the stockholders to the full amount of its par value. The fact that the capital of the company increases in value after its organization does not operate as a payment by the stockholders on their stock, any more than a decrease in value of such capital would reduce the amount to which the stockholders are entitled to credit for payments on their stock subscriptions. Scoville v. Thayer, 105 U. S. 143, 26 L. Ed. 968. This contention is plainly without merit.

[9] It is claimed, also, that the referee erred in denying priority to any of these claims. It appears that at certain meetings of the stockholders and of the board of managers of the company, held about four months prior to the filing of the petition in bankruptcy, the financial condition of the company was considered, and resolutions were passed declaring that part of the wages of the men should be withheld on each pay day for the purpose of providing necessary funds to meet running expenses. It appears, also, that from time to time thereafter a part of the wages of these claimants was retained by the company for the purpose mentioned. It was the claim of the trustee, which

was adopted by the referee, that as to the sums thus withheld out of the wages earned by these claimants their claims should be considered as brought for the recovery of money loaned, and not for wages, and that, therefore, such claims were not entitled to the priority accorded to labor claims. It is, in my opinion, clear that to the extent that these stockholders permitted the company to retain and use money due them as wages they must be held to have loaned this money to the company.

In so far as they consented, or failed to object, to the action of the company in deducting these sums from their pay and crediting them with the amounts on the books of the company as loans made by them, they cannot now be heard to deny that they in reality made such loans. While the record before me is not very definite or positive as to the course of dealing in regard to this matter, it does appear from the pay roll book of the company that transfers were regularly made from the labor accounts to special loan accounts with the miners. Of course, the mere arbitrary withholding of money due the men as wages, if done without their consent, express or implied, would not be sufficient to change the character of these claims from unpaid wages to unpaid loans. Where, however, it appears that an amount was so withheld and so charged upon the books, and that the claimant accepted the balance of his wages without objection, I am satisfied that the proper inference to be drawn is that the claimant understood and consented that the sum not paid to him was retained by the company as a loan. As to such loans, claimants are not entitled to priority, as for labor claims.

The actual claims as filed have not been shown to me, and I am unable to determine whether the claimants are seeking to recover only the amounts retained from their wages as loans, or whether they are claiming that, not only such loans, but also wages earned in addition thereto, are due and unpaid. Nor am I certain, from the record before me, whether, when the wages earned became due and payable, all of such wages were withheld or only a portion thereof. The referee, however, will doubtless have no difficulty in properly applying the principles which I have stated to the facts in each particular case.

[10] Finally, it is urged by the claimants that under the law of Michigan all claims for sums due for work and labor are entitled to priority, and not merely claims for wages earned during the three months prior to the date of the filing of the petition in bankruptcy, as provided by the Bankruptcy Act. The contention is that the fourth subdivision of section 64b of the Bankruptcy Act (section 9648), providing for the priority of wage claims earned within the three months mentioned, is enlarged by the fifth subdivision of said section, which gives priority to "debts owing to any person who by the laws of the states or the United States is entitled to priority"; so that by virtue of the Michigan statute, giving priority to all wage claims against insolvent corporations without limitation as to time, these claimants are entitled to priority without such limitation.

This contention cannot be sustained. The clause of the Bankruptcy Act just quoted, relating to debts entitled to priority by the state laws, must be read in connection with the preceding clause, which indicates the intention of Congress to provide a fixed and certain preference for

wage claims as such, without regard to the varying degrees of priority accorded to such claims by the laws of the different states. This provision, therefore, supersedes the state laws on the same subject; the authority of Congress over this subject being, to the extent to which it is exercised, exclusive. In re Rouse, Hazard & Co., 91 Fed. 96, 33 C. C. A. 356; In re Slomka, 122 Fed. 630, 58 C. C. A. 322.

The cause will be remanded to the referee for proceedings not inconsistent with the terms of this opinion.

HARNICK v. PENNSYLVANIA R. CO.

(District Court, S. D. New York. June 12, 1918.)

No. 229.

ACTION ⇐68—STAY—ACTIONS AGAINST RAILROADS—ORDER OF DIRECTOR GENERAL.

Order No. 26 of the Director General of Railroads, dated May 23, 1918, providing that "upon a showing by the defendant carrier that the just interests of the government would be prejudiced by a present trial of any suit against a carrier under federal control * * * the suit shall not be tried during the period of federal control" is within the powers conferred by Congress and the President, but an application for a stay is addressed to the discretion of the court and the burden rests on defendant to show that interests of the government would be substantially prejudiced by a present trial.

At Law. Action by Charlie Harnick against the Pennsylvania Railroad Company. On application by plaintiff for preference. Granted.

S. A. Machcinski, of New York City, for plaintiff.

Burlingham, Veeder, Masten & Fearey, of New York City (Samuel C. Coleman, of New York City, of counsel), for defendant.

MANTON, Circuit Judge. Plaintiff sues for personal injuries which have permanently crippled him. The action is at issue on the calendar and is awaiting its turn for trial. While holding the common-law term of this court on May 20, 1918, an application was made before me for a preference. When the motion was called, the plaintiff defaulted. Thereafter, and on May 25, 1918, an order to show cause was obtained asking to open the default and hear the motion upon the merits. This will be granted.

Plaintiff makes out a case sufficiently strong to warrant the granting of a preference and the obtaining of a speedy trial. This for the reason that his serious injuries and financial condition demand the relief he asks. The only obstacle is whether or not this case should be stayed under order of the Director General of Railroads of May 23, 1918, known as Order No. 26, which provides:

"That upon a showing by the defendant carrier that the just interests of the government would be prejudiced by a present trial of any suit against any carrier under federal control, which suit is not covered by General Order No. 18 and which is now pending in any county or district other than where the cause of action arose, or other than in which the person alleged to have been

injured or damaged at that time resided, the suit shall not be tried during the period of federal control: Provided, if no suit on the same cause of action is now pending in the county or district where the cause of action arose, or where the person injured or damaged at that time resided, a new suit may, upon proper service, be instituted therein; and if such suit is now barred by the statute of limitations, or will be barred before October 1, 1918, then the stay directed by this order shall not apply unless the defendant carrier shall stipulate in open court to waive the defense of the statute of limitations in any such suit which may be brought before October 1, 1918.

"This order is declared to be necessary in the present war emergency. In the event of unnecessary hardship in any case either party may apply to the Director General for relief, and he will make such order therein as the circumstances may require consistent with the public interest.

"This order is not intended in any way to impair or affect General Order No. 18 as amended by General Order 18a."

The cause of action arose at Keiser, Pa. The plaintiff, at the commencement of this action, resided in Westchester county, New York state, and instituted a suit in the Supreme Court of that county. The defendant removed it to this court. By acquiescence of the defendant the court has jurisdiction.

On August 29, 1916, Congress passed an act, entitled "An act making appropriation for the support of the army for the fiscal year ending June 30, 1917, and for other purposes" (Act Aug. 29, 1916, c. 418, 39 Stat. 645 [Comp. St. § 1974A]), which provides as follows:

"The President, in time of war, is empowered through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion, as far as may be necessary, of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable."

Under this authority, on December 26, 1917, by a proclamation of the President, the government took possession and assumed control, on the 28th of December, 1917, of each and every system of transportation and appurtenances thereof, located wholly or in part within the boundaries of the continental United States. This proclamation directed:

"That the possession, control, operation and utilization of such transportation systems hereby by me undertaken shall be exercised by and through William G. McAdoo, who is hereby appointed and designated Director General of Railroads."

By Act Cong. March 21, 1918, c. 25 (Comp. St. 1918, §§ 3115¾a-3115¾p), the President was authorized and given "such other and further powers necessary or appropriate to give effect to the powers herein and heretofore conferred." The President's proclamation of December 26, 1917, provided:

"Until and except so far as said Director shall from time to time otherwise by general or special orders determine, such systems of transportation shall remain subject to all existing statutes and orders of the Interstate Commerce Commission and to all statutes and orders of the regulating commissions of the various states in which said systems or any part thereof may be situated. But any orders, general or special, hereafter made by said Director, shall have paramount authority and be obeyed as such."

Section 10 of the Act of March 21, 1918, provides:

"That carriers while under federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law. * * * But no process, mesne or final, shall be levied against any property under such federal control." Comp. St. 1918, § 3115¾j.

The jurisdiction of the District Court is limited, and depends upon the statutory enactments of Congress. Its jurisdiction may therefore be limited by the same power which creates it. Congress has given authority to the Director General, and the President's proclamation provides, that any orders, general or specific, made by the Director, shall have paramount authority and be obeyed as such. Likewise it is provided that actions at law or suits in equity may be brought by or against such carriers and judgments rendered as now provided by law. This indicates clear intent to permit actions pending to be tried and actions to be instituted thereafter. The right to pursue a remedy in a particular court is not a vested right and may be removed while an action is pending. Railroad Co. v. Grant, 98 U. S. 398, 25 L. Ed. 231. The right to stay an action pending, under Order No. 26, however, is dependent upon whether the interest of the government be prejudiced by a present trial of a pending suit, and there must be a showing of prejudice by reason of a present trial.

Therefore the intention of Order 26 is to address the discretion of the court as to its application in each particular case. Since the plaintiff's case warrants a preference, a grave injustice would be imposed upon him who has sought his proper forum (except for the rule) to now require the suspension of his trial and compel him to sue in the courts of Pennsylvania. There can only be read from the act an intention to divest this court of jurisdiction upon good cause being shown on the part of the railroad company defendant. Indeed, the defendant here alleges, in opposing affidavits, that they do not ask at this time for a stay but urge Order 26 as a defense to the motion for a preference. There is no showing here as to the number of witnesses or what inconvenience the defendant would be put to by its witnesses coming to this jurisdiction to try the case when reached. There is no showing, from the papers, the number of men employed by the defendant, or the nature or quality of the work engaged in at the present time. Indeed, the men so employed by the defendant, who are necessary witnesses in the defense of the action, could easily be replaced by men who could perform their work during their absent period. There is no position requiring particular skill which could not be so filled. To say that the difference of a few hours in point of time required in railroad travel would result in serious consequence or prejudice to the defendant, is stretching credulity.

The application for a preference will therefore be granted and the case set down for trial for June 20, 1918.

THE MERCER.

THE EL CHICO.

(District Court, E. D. New York. November 1, 1918.)

COLLISION ⊂⊃105—VESSEL LYING IN SLIP AND BARGE IN TOW—FAULT OF TUG.

A collision between a barge alongside of a tug and a steam lighter lying in a slip *held*, on the evidence, due solely to the fault of the tug, and not to the interference of another tug, which was backing out of the slip.

In Admiralty. Suit for collision by the Clyde Lighterage Company, Incorporated, owner of the steam lighter Henry C. Rowe, against the Pennsylvania Railroad Company, owner of the steam tug Mercer, with the Southern Pacific Company, owner of the steam tug El Chico, impleaded. Decree for libelant against the Pennsylvania Railroad Company.

Foley & Martin, of New York City, for libelant.

Burlingham, Veeder, Masten & Fearey and C. I. Clark, all of New York City, for the Mercer.

Kirlin, Woolsey & Hickox and Mr. Maclay, all of New York City, for the El Chico.

GARVIN, District Judge. The steam tug Mercer, with a barge on either side, brought the corner of her port barge into the stern of the steam lighter Henry C. Rowe, owned by the libelant, on September 26, 1917. The lighter was lying in the slip on the south side of Pier 49, North River, and was not at fault.

It is claimed on behalf of the Mercer that the accident occurred because the steam tug El Chico, in backing out of this slip, did not check her sternway, but allowed it to come in contact with the other barge of the Mercer, as a result of which the Mercer's whole tow swung so that her port barge collided with the Henry C. Rowe. It is claimed on behalf of the El Chico that she did not approach the tow of the Mercer. A preponderance of the evidence fully substantiates this contention. Both Tyson, manager of the Clyde Lighterage Company, owner of the Henry C. Rowe, and Anderson, her master, corroborate the testimony of the captain and mate of the El Chico. It has not been established, therefore, that the El Chico was operated in a negligent manner. The Mercer, according to the testimony, was backing and filling at the entrance to the slip, and had brought her tow within a few feet of the Henry C. Rowe.

I am of the opinion that the collision occurred as the result of negligence in the operation of the Mercer. Decree accordingly.

THE OREGON.

(District Court, E. D. New York. November 2, 1918.)

SEAMEN ⊂=19—DISCHARGE BY ORDER OF CONSUL—LIABILITY OF SHIP FOR WAGES.

A vessel *held* not liable for wages and transportation to a seaman discharged in a foreign port by order of the United States consul, after hearing on a complaint made by libelant without the knowledge of the captain, and where he was paid all wages then due him.

In Admiralty. Suit by Joseph C. Peed against the steamship Oregon. Decree for respondent.

Silas B. Axtell, of New York City, for libelant.

Alfred H. Strickland, of New York City, for claimant.

GARVIN, District Judge. Joseph C. Peed sues to recover wages, maintenance, and cost of transportation, aggregating $517. In January, 1917, he shipped as cook and steward on the steamship Oregon for a voyage to the Atlantic Coast and West Indies, the regular shipping articles signed to extend over a period of six calendar months. The Oregon sailed, continuing her voyage, and reached Kingston, Jamaica, early in May, 1917. There was some trouble between the libelant, Peed, and the chief engineer of the vessel, as a result of which Peed lodged a complaint with the United States consul at Kingston, Jamaica, when the Oregon arrived at that port. Peed did not bring the matter to the captain of the ship before making this complaint to the consul.

An investigation was instituted by the vice consul (then acting consul), a hearing had, and by the direction of the vice consul Peed was discharged after having paid him the wages due him up to that time. The consular certificate shows that Peed committed forgery in his complaint, that Peed was of a disposition to instigate quarrels, to the destruction of the discipline of the crew, and sets forth that the vice consul found that good and substantial reasons existed for his discharge.

Libelant urges that this consular certificate is only prima facie evidence of the facts stated therein. Even if this be so, inasmuch as the certificate of the consul is prima facie evidence of the discharge, the libelant must offer proof sufficient to overcome the prima facie case. I do not find that he has offered such proof. I consider that his own testimony, which is that of a self-confessed forger (according to the consular certificate), should be received with great caution.

In the various cases which have had to do with claims for wages and maintenance arising out of the discharge of a seaman by order of the consul, my attention has been directed to no case which has rendered the vessel liable for such discharge, where the complaint was made by the seaman himself without the knowledge of the captain, and with no alternative to the captain but to obey the direction of the consul. That is the exact situation here, and I am of the opinion that the boat should not be held responsible.

The libel is dismissed.

CROSBYTON INDEPENDENT SCHOOL DIST. v. C. B. LIVE STOCK CO.

(Circuit Court of Appeals, Fifth Circuit. December 20, 1918. Rehearing Denied February 1, 1919.)

No. 3223.

SCHOOLS AND SCHOOL DISTRICTS ⟸70—CONTRACTS—VALIDITY.

A contract by a school district for the purchase of a school building *held* invalid, on the ground that the building purchased did not conform to the requirements of the state law as to light, ventilation, and safety, and was not susceptible of changes which would meet such requirements.

Appeal from the District Court of the United States for the Northern District of Texas; George W. Jack, Judge.

Suit in equity by the Crosbyton Independent School District against the C. B. Live Stock Company. Decree for defendant, and plaintiff appeals. Reversed and remanded.

W. H. Kimbrough, R. E. Underwood, and M. J. R. Jackson, all of Amarillo, Tex., for appellant.

J. W. Burton, of Crosbyton, Tex., for appellee.

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

BATTS, Circuit Judge. The C. B. Live Stock Company, owning a large body of land in Crosby county, Tex., sold it out in small tracts to actual settlers. Through a subsidiary company, the town of Crosbyton was established. In 1909 an independent school district was formed under the general laws of Texas, with the maximum territory. It was impracticable, with the taxable values and under the taxing power of the district, to construct a satisfactory school building, and 39 of the citizens executed a note for $10,000 to secure funds for the erection of such building. It was the understanding that the Legislature would be asked to create, by special act, an independent school district with an enlarged area, and that the district would discharge the debt. The note was sold to the C. B. Live Stock Company. A building was constructed; the construction being in the hands of trustees selected by the signers of the note. The $10,000 provided, in part used for other school purposes, was insufficient, and an additional sum was borrowed to complete the building and meet debts contracted in the operation of the school. The trustees for the note signers made a contract with the trustees of the independent school district, by which the latter agreed to pay (if possible) the interest on the $10,000 note as rent for the school property. The lot upon which the building was erected was furnished by the C. B. Live Stock Company, with the understanding that it was to ultimately become the property of the school district. A special act was passed in 1913 (Acts 33d Leg. c. 20), creating the independent district, to include within its area about 120 sections, and in other respects giving to it the powers of a school district under the general law.

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

After the formation of the district under the special act, a petition was filed by the requisite number of taxpaying citizens for an election, to determine whether or not bonds should be issued to "provide funds to be expended for the purpose of purchasing a school building of concrete material," and "to determine whether the trustees of said district shall be authorized to levy, assess, and collect annually" a tax, etc. On September 24, 1913, the board passed a resolution in the following language:

"On motion, the board ordered an election to be held November 1st, for the purpose of voting on the issuance of eighteen thousand dollars bonds to buy the school building and grounds. Bonds to be 40-year bonds, with 5 per cent. interest, with the privilege of redeeming after 10 years."

On November 22d an order was made to this effect:

"On motion, it was ordered the election returns were examined on the school bond election held November 1, 1913, and found to be 47 votes for the issuance of the bonds and 34 against it, with 13 majority in favor of the bonds, and so declared."

Subsequent to the election, an election order was adopted and submitted to the Attorney General as a part of the record, wherein an election was ordered to determine if bonds to the amount of $18,000 should be issued "to provide funds to be expended in the payment of accounts legally contracted in the purchasing of a building of concrete material, to be used as a public school building, and to determine whether the trustees of the district shall be authorized to levy," etc., a tax. At the same time, and after the entry of the order actually adopted declaring the result of the election, an order was prepared canvassing the return, and declaring the result of the election, and declaring that 47 votes had been cast for the bonds and 37 against, and in addition declaring that 47 votes had been cast for the tax, and 34 against. It was certified that these orders had been passed on September 12, 1913, and November 20, 1913, respectively. The record thus prepared was submitted to the Attorney General, and the bonds were approved. On April 8, 1914, a resolution was passed to the effect that all the bonds be delivered to the C. B. Live Stock Company as the purchase price of the school building, equipment, and grounds; but it was provided that, if the C. B. Live Stock Company could sell the bonds at par to the state, it would retain of the proceeds $17,932.27 only, and return the balance to the school board. A contract to the same effect was signed by the parties. The bonds, however, were sold direct to the state, and the treasury warrants received in payment were turned over to the C. B. Live Stock Company.

The $17,932.27 was made up of the following items: Note, $10,000; interest, $2,890; note of August 3, 1911, $3,991.61; interest, $778.66; insurance premiums, $272. The note for $3,991.61 was given to cover items for material used in the construction and for money to cover deficits in the operating expenses of the school.

At the time the resolution was adopted by which the building was to be purchased, and as the result of which the notes were to be delivered to the makers, six members of the board were present, three

of whom were signers of the notes, and another of whom was an employé of the C. B. Live Stock Company.

Parol evidence was admitted to the effect that the understanding of the voters at the bond and tax election was that the school building and grounds were to be acquired with the bonds and that the citizens who had signed the notes were to thereby be released from their personal obligations.

Appellant contends that, because of the personal interest of members of the school board, the action by which the C. B. Live Stock Company acquired the proceeds of the bonds was void.

Appellee answers that the action of the school board was in response to the will of the people; that the trustees had, with reference to the issuance of the bonds and the purchase of the building, no discretion; and, exercising ministerial functions only, their action was not invalidated by the interests of members adverse to the interests of the school district.

To the answer of appellee, appellant rejoins:

(1) That whatever the wishes of the voters, it could not have been the duty, nor within the power of the board, to issue the bonds or purchase the building, because: (a) The building purchased could not be legally acquired because not constructed to meet the requirements of the law with reference to light, ventilation and safety; (b) bonds may not be constitutionally issued by an independent school district to purchase a building; (c) the constitutional taxing power had already been appropriated, and no provision could be made to provide for payment of interest, and to create a sinking fund to discharge the bonds at maturity; (d) the voters did not vote for the necessary tax.

(2) That no action could be taken by the voters that would relieve the trustees of the duties imposed upon them by law, and render that ministerial which is by law placed within their discretion.

(1a) The building purchased was not constructed in accordance with the requirements of the Texas law. No provision was made by the bond issue, by the contract, or otherwise, for making changes to meet the requirements of the law. The building was not susceptible of changes which would meet these requirements, and there was nothing in the evidence to indicate that changes of any kind were contemplated. My associates agree with the conclusion reached that these facts would invalidate the purchase and furnish a sufficient basis for the judgment hereinafter rendered. The discussion of the other issues is an expression of the views of the writer alone. I prefer to base my action upon what are to me definite and well-established principles, rather than upon a proposition which is, I think, correct, but which has not heretofore been announced by a court.

Appellee insists that, while a school board cannot erect a building without complying with the requirements of the law, a defective building can be purchased. And it is said that inasmuch as there were, when the law was passed authorizing the purchase of buildings, no buildings which complied with the law, to apply the requirements to purchased buildings would nullify the law authorizing purchase. The law has a continuing effect. It applies to buildings in being at the time

of the passage of the act, and to buildings to be thereafter erected. By the terms of the specific act, or any other act dealing with the matter, the character of the building to be purchased may be indicated. It is immaterial which act was passed first. The acts are not in conflict, and to hold that a building may not be erected unless it meets the requirements of the law, but that one may be purchased without reference to the requirements, is to render a salutary law nugatory by a conclusion not logically warranted.

(1b) Article 7, § 3, of the Constitution of Texas, provides:

"That the Legislature may authorize an additional ad valorem tax to be * * * collected within all school districts * * * for the further maintenance of public free schools, and the erection and equipment of school buildings therein."

It is contended that authority to tax for the "erection and equipment of school buildings" does not include authority to tax to purchase school buildings. The Legislature of Texas has given the provision a more liberal construction. The Texas courts appear not to have passed upon the matter, and, since this case can be disposed of upon other grounds, their decision will not be anticipated.

(1c) The taxing power of an independent school district is limited by the Constitution of Texas to 50 cents on the $100. At the time the enlarged district was established there was a vote in favor of a tax of 50 cents on each $100 valuation of taxable property, to be levied for the year 1913, and each succeeding year, "to supplement the state and county apportionment of said district." It is not clear that a vote of the maximum tax to supplement the other revenues of the district precludes a subsequent vote appropriating a part of the tax to the acquisition of necessary buildings and equipment.

(1d) Under the Constitution of Texas, municipal bonds cannot be legally issued, unless at the time of issuance provision is made by taxation to pay interest and create a sinking fund to discharge the bonds at maturity. Action by trustees in a school district to make such provision must be preceded by a vote of the people in favor of the tax.

The minutes of the school board already quoted, providing for the bond election, do not refer to a tax election. The minutes already quoted, declaring the result of the election, make no reference to votes cast for or against taxation. The order certified to the Attorney General as the election order was not prepared until after the election. The order certified to the Attorney General as declaring the result of the election supplemented the result primarily declared by adding the result of a tax election. The order for the election is the basis for the election, and all subsequent proceedings. There is no evidence, other than the certificate, that the election order certified to the Attorney General was passed before the election; and there is no evidence, other than the certificate, that a tax election was held at any time. The verity of the certificates is attacked by the person who made them. Minutes may be amended to speak the facts, but the evidence in this case rather suggests anxiety to "get up the proper minutes for the Attorney General" than to make the record veracious.

Appellee insists that the question of whether or not the certificates speak the truth "is foreign to this case," upon the ground that the bonds belong to the state of Texas, and their validity cannot be impeached. Both parties seem to acquiesce in the proposition that approval by the Attorney General and purchase by the state preclude attacks upon the bonds. Assuming this to be true, the inquiry is not an improper one, for it could not have been the duty, nor within the authority, of the board to issue bonds to purchase a building, or for any other purpose, if the necessary tax was not authorized. That cannot be a ministerial duty, or a duty of any character, which is a violation of law.

(2) The effect of the contract made by the school board with the C. B. Live Stock Company in the form of a purchase of the building and grounds was to release (or was intended and assumed to release) three of the members voting for the measure from personal financial obligations. Six members only were present when the resolution authorizing the contract was adopted. The action of the board was void, unless the effect of the election was to make the action of the trustees merely ministerial, and to take away from them entirely any character of discretion. It is not possible to give the language of the law under which the school trustees were acting a construction that would authorize or enable the voters to relieve the school board of the duties and obligations thereby imposed. Article 2857, Rev. St. Tex. 1911, provides that the trustees of a school district shall have the power—

"to levy and collect an annual ad valorem tax not to exceed fifty cents on the one hundred dollars valuation of taxable property of the district, for the maintenance of schools therein, and a tax (within the fifty cents) not to exceed twenty-five cents on the one hundred dollars for the purchase of sites and the purchasing, construction, repairing or equipping public free school buildings within the limits of such districts."

A number of provisos or limitations are placed upon this power, among them being:

"No such tax shall be levied, and no such bonds issued until an election shall have been held, wherein a majority of the taxpaying voters voting at said election shall have voted in favor of the levying of said tax and the issuance of said bonds, or both, as the case may be: Provided that the specific rate of taxes need not be determined in the election."

The exercise of the power of taxation is in the trustees, and not in the voters. Before the power can be exercised by the trustees, the voters must indicate their willingness that it be exercised. The purpose of the law is to limit the taxing power in any event, and not to permit its exercise without the concurrence of the qualified voters. But, under the terms of the law, the discretion is in the board. The authority which they are given by the law and the action of the voters need not be exercised, and, if exercised, the limit of the authority need not be reached. Under the Constitution the total amount of the tax can never exceed 50 cents on the $100, and the building tax cannot exceed 25 cents on the $100. It may be practicable to so reduce the building tax that a considerable part of the maximum of 25 cents may be available for the maintenance of the schools, or the conditions may be such that the maximum tax of 50 cents need not all be utilized.

When, therefore, the people of the district registered their willingness that bonds should be issued, and that a tax should be levied providing for their payment (if they did), and making the issuance possible, this action did not take away from the trustees the duty and obligation to determine whether bonds should be issued, and to what amount, and whether a bond tax should be levied, and the amount required.

Nor did it take away the duty to administer the property of the district to the best advantage. There is nothing in the language of the act to indicate that the general power of management by the trustees is limited by a right of the voters to name some specific building to be purchased, or to specify some particular plan for the erection of the building. Nor is there anything in the act which would suggest that a certain price must be paid for a building, if one is to be purchased, or that a building to be erected should reach a certain cost. The voters place a maximum to be expended, and the duty remains in the board to do the best possible for the district, without exceeding this maximum. When in this case the people registered a willingness to issue bonds for a school building, and pay taxes to liquidate the bonds, they expressed themselves as far as the law will permit. If by their vote they undertook to do more, the effort was entirely without effect.

It is argued that the views here expressed are in conflict with Grayson County v. Harrell (Tex. Civ. App.) 202 S. W. 160. This case involved the duty of the commissioners' court, when an issue of bonds was voted by a county for road purposes. The difference between that act and the one under consideration is that the commissioners' court of the county is, with reference to the particular matter, without discretion. The voters of a county having voted bonds for the construction of roads, the law specifically, distinctly, and in mandatory language indicates what shall be done by the commissioners' court. All of the cases cited to sustain appellee's proposition deal with laws distinguishable from the law under which the trustees in this case acted, by the fact that, instead of removing a limitation upon the authority of the board, the election imposed, in terms, mandatory duties. There is, of course, no discretion upon the part of a governing body, when the discretion is, in terms, taken away by the law.

Parol evidence was introduced as to the purpose and understanding of the voters. The people acting at the polls (the only manner in which they may indicate their wishes under the laws of Texas) can express themselves only in the terms of the law. No amount of parol evidence can add to or take away from the results of the election. The parol evidence was specific as to a very limited number only of the electors, and if the intentions or understanding of the voters, or a majority, were a material matter, it would be properly held that the evidence was insufficient. If the good faith of the trustees were properly an issue, the evidence admitted would authorize the conclusion that each of them believed that a majority of the voters believed that the district should relieve the note signers of their liability, and voted to accomplish that end. While it may be true, and, indeed, is doubtless the case, that in voting upon the issuance of bonds the voters in the Crosbyton school district expected and intended that the bonds

should be used in discharging their fellow citizens from obligations which they had incurred for the general benefit, yet this action on their part could not have such effect, and could not place upon the school board any duty they did not theretofore have, and could not furnish an excuse for the school board if, acting upon this assumed authority, it did that which the law did not authorize.

All of the members of the school board testify that at the time the schoolhouse was purchased it did not have value equal to the bonds. There was, indeed, no effort made to determine its value, and the sum agreed upon as the purchase price included items having no relation to its value. The building was in bad condition, and has since been abandoned. It was constructed of cement building blocks made by the C. B. Live Stock Company, and most of the lumber and hardware was furnished by the company. The concrete foundation was not properly put in, the roof was not properly designed, and the cement blocks do not appear to be a satisfactory material. There is, however, nothing in the record to indicate that the C. B. Live Stock Company, or any of the persons who signed the note, have been guilty of any character of fraud or graft, and the evidence indicates that that which was done was by all the parties intended to be for the common benefit.

At the election a number of the citizens felt that there was a moral obligation to discharge the indebtedness. Another considerable number, signers of the note, not only recognized this moral obligation, but realized that, if the community did not discharge its moral obligations, they would be under the necessity of discharging the legal obligations of the note. These considerations in no sense change the law. If the citizens of the independent school district feel sufficiently the moral obligation to discharge this debt, the law does not prevent them from doing so. School districts, however, are not organized for the purpose of discharging moral obligations; and the law does not authorize all of the voters to relieve some of the voters of the consequences of handling in a way not authorized by law the affairs which they have undertaken for the public. An independent school district is a governmental unit, devised by the state for locally discharging a governmental duty. Its powers are strictly defined by the law, and strictly limited by the law. Everything which may be done is, in terms, defined, and nothing may be done for which direct and express authority is lacking. It gets all its authority from the state of Texas. Its taxing power is not even within the control of the Legislature.

All taxing power within the state is immediately and directly indicated by the Constitution. The limit of every tax is defined, and the purpose for which it may be levied is specified. The debt-making power is likewise defined and limited by the Constitution. No school district has a right to make a debt, except as the power is given by the Constitution. No school district has a right to levy a tax, except as the power is given by the Constitution. No school district may make a debt allowed by the Constitution, unless provision is made to discharge it by the tax authorized by the Constitution.

The district may incur a debt only for a building and equipment. The debt which the appellee has gotten the benefit of was incurred

only in part for a building, and this part had no relation to the value of the building. More than $3,000 of the amount is interest, at a rate not authorized to be paid by a school district, on obligations which the school district had not incurred, and which it had no right to incur. Another considerable item going to make up the total amount was to meet deficiencies in the current operations of the school. The law does not authorize the issuance of interest-bearing bonds to meet obligations of this character, and does not authorize the incurring of such obligations.

The proposition is made that, however invalid the action of the board might otherwise have been, it was directly authorized and affirmed by the voters. To sustain this proposition, appeals are made to the principles of law applied to private corporations. It is manifest that if, by concerted and unanimous action, the voters in any municipal corporation could impose upon themselves obligations which the law did not permit, they would be able to substantially and effectively repeal all limitations upon their taxing power or their debt-making power, and all limitations upon any other power which the Legislature or the Constitution makers may have thought proper to impose. Private corporations are made by individuals for their individual ends. When those individuals act, they are bound, even if they go further than they expected to go when they limited themselves by the powers given to the corporation. They are the source of authority, and the authority given may be enlarged, or an unauthorized act may be ratified. The voters of a school district are not the source of power of the district. The source of power is in all the people of Texas, who, through their Constitution and laws, give a strictly limited agency to the voters of the district.

In this matter it is not even suggested that liability has been imposed by unanimous action of the persons affected. Of the persons who voted, 37 voted against the levy of the tax (if a vote was had upon that proposition) and 34 voted against the issuance of the bonds. The majority of 13 in favor of the bonds was not equal in number to the persons who had an immediate and direct interest in their issuance, and the evidence is that many of these interested persons were active in their efforts to carry the election. It is not shown that a majority of the disinterested voters favored the bond issue. But, if all the voters had voted in favor of the bond issue and the taxation, there would still be many interested persons affected by the taxation and the bonds who cannot be said to have given their concurrence. The tax to be levied was made applicable to 120 sections of land, together with all personal property within that area. The area to be affected was nearly five times as large as is ordinarily thought proper to put within a school district. It is more than probable that many taxpayers within the district were without a right to vote. It is very probable that the owners of much of the property resided outside of the district. The women within the district, greatly interested in the prosperity of the schools, had nothing to say about whether or not a useless piece of property should be purchased. The children of the dis-

trict, more interested than any one else, were without a voice in the decision that would affect their own children.

The testimony is to the effect that within the town of Crosbyton there were 800 or 900 people. If the insistence of the appellee is to be effective, 47 of the number are to bind all of the 800 or 900, and all that are to follow them for 40 years, although many of the 47 are adversely interested to the general good. It is indeed true that this small minority may, to the extent authorized by law, speak for all the citizens. They can remove one of the limitations imposed upon the board. But the power which they exercise is not inherent. It does not come from the school district, but from the Constitution, made by all the people of Texas, and the laws made by the representatives of all the people. This minority, being a majority of the taxpaying citizens, may, with reference to the bonding and taxing power, do all that may be done by unanimous action. But neither a minority, nor a majority, nor all the people of the district, can change the laws of Texas—substitute a new plan for effecting the education of the children of the state, or in any degree increase the powers or diminish the duties of the trustees selected in accordance with law to represent, not alone the district, but all the state.

The school board was charged with the duty of determining how the $18,000 in bonds voted by the majority of the taxpayers should be expended. It was the duty of those of the members of the board who had interests adverse to the district to abstain from voting; and, there not being a quorum of persons who could exercise the free, independent, unbiased judgment which the law requires, it was not possible for this particular board to make the contract which they undertook to make with the C. B. Live Stock Company. Efforts upon the part of city and county officials to deal with themselves are denounced by the penal statutes of Texas. While the penal provision is not specifically applicable to school trustees, the absence of the penalty does not prevent the inherent illegal character of the transaction. It is not necessary to determine whether such a transaction is void, or merely one which may be voided. It is fundamentally and definitely opposed to public policy, and should, perhaps, be looked upon as having no character or standing—as being void. But, if the contract is merely voidable, the result is the same. This is, in effect, a direct action to set aside the transaction and restore the parties to the status which they had prior to the illegal contract.

For the respective reasons indicated, the contract with the C. B. Live Stock Company is held invalid, and judgment is reversed and the cause remanded, with directions that judgment be rendered for the Crosbyton independent school district against that company for the amount sued for, with interest and costs.

Reversed and remanded.

THE KANAWHA.

THE CAMINO.

(Circuit Court of Appeals, Second Circuit. November 13, 1918.)

No. 24.

1. SALVAGE ⊂=38—RIGHT UNDER CHARTER PARTY.
Provisions of a charter of a vessel *held* to make a charterer a joint adventurer with the owner in any salvage service undertaken by the master, and to require the charterer to pay for coal and charter hire while it was being rendered.

2. SALVAGE ⊂=51—AWARDS—APPEAL.
The appellate court can reduce or increase salvage awards of the trial court; but, as they are matters of discretion, practice is not to interfere when trial judge has correctly found facts, even if the appellate court disagrees with him as to amount, unless it be such as to indicate abuse of discretion.

3. SALVAGE ⊂=26—AMOUNT AWARDED—EXPENSES.
Expenses may be included in a salvage award, or added to the award, as the court sees fit; these being matters of discretion, depending upon the circumstances of each case.

4. SALVAGE ⊂=26—AMOUNT AWARDED—EXPENSES.
Where, under the charter party, the charterer was a joint adventurer with the owner in any salvage service undertaken by the master, and bound to pay for coal and charter hire while it was being rendered, *held*, that the cost of the time employed in the salvage service was an expense, the same as the coal, and, being a direct expense to the charterer, should be added to the salvage award, as was the expense for coal.

5. SALVAGE ⊂=26—AMOUNT AWARDED—EXPENSES.
A charterer of a vessel, which performed salvage service, *held* not entitled to recover the cost of feeding a cargo of horses during the time they were awaiting the arrival of the vessel which was to transport them; such expense being too remote.

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

Libel by Furness, Withy & Co., Limited, owner, and R. Laurence Smith, Incorporated, charterer, of the steamship Kanawha, against the steamship Camino, her cargo and freight, claimed by the Western Steam Navigation Company. From the decree, libelants appeal. Remanded, with instructions to modify the decree.

Harrington, Bigham & Englar, of New York City (D. Roger Englar and T. Catesby Jones, both of New York City, of counsel), for appellant Furness, Withy & Co., Limited.

Austin, McLanahan & Merritt, of New York City (Willard U. Taylor and Alfred H. Strickland, both of New York City, of counsel), for appellant R. Laurence Smith, Inc.

Kirlin, Woolsey & Hickox, of New York City (J. Parker Kirlin and Mark W. Maclay, Jr., both of New York City, of counsel), for appellee.

Before WARD, HOUGH, and MANTON, Circuit Judges.

WARD, Circuit Judge. January 14, 1915, about 4 p. m., the American steamer Camino, built of steel, bound with cargo to Rotterdam as

a Belgian relief ship, met a violent storm, which disabled her rudder and put her entirely out of control. The port side of the forward end of her amidships house was smashed, and a strongback running fore and aft on top of the tarpaulins on each hatch, No. 1 and No. 2, was carried away, but the cargo was substantially undamaged, and the steamer was thereafter sound and water-tight, except for one or two slight leaks in the forward peak.

January 15, about noon, the steamer Ocean Monarch hove in sight, and the Camino hoisted her flag upside down as a signal of distress. January 16 the Ocean Monarch, which had no towing hawser, took on board the Camino's manilla hawser, 120 fathoms long, which parted at the middle after towing about 15 minutes. The Ocean Monarch stayed by and subsequently signaled that she would proceed on her voyage unless the master and crew would abandon the Camino, but at the request of the master of the Camino continued to stand by until the next morning. In the meantime the Camino had got into wireless communication with the British steamer Kanawha, bound in ballast to New York, which promised to come to her aid. The Ocean Monarch proceeded on her voyage.

January 17, about 6 a. m., the Kanawha arrived. She was owned by the libelant Furness, Withy & Co., Limited, and was chartered to the libelant R. Laurence Smith, Incorporated. She was the second vessel to come to the relief of the Camino, and stood by through the whole proceeding. Her master undertook to tow the Camino to Halifax, about 385 miles northwest of the point at which he picked her up. The great difficulty of towing was that the Camino was deep in the water, whereas the Kanawha was very high out of the water, and so was blown further to leeward and unable to keep in line. This gave a bad lead of the hawser and great strain on it. After two attempts, the master of the Kanawha succeeded in passing her own 4-inch steel hawser to the Camino; but it parted immediately and seems to have been in bad condition.

January 18 the Kanawha took on board the Camino's 12-inch manilla hawser, which parted in a very short time.

January 19 the small steamer Lady Laurier, belonging to the Dominion of Canada, arrived and passed a hawser to the Camino's stern, so that she could act as a rudder. After the Kanawha had towed for eight hours, the hawser parted again.

January 20 the United States revenue cutter Androscoggin, a small steamer, arrived and passed her hawser to the Kanawha, which was taken aboard the Camino and parted on the 21st at 1 p. m.

January 21, at 5 p. m., the Androscoggin took the Camino in tow until January 23 at 8 p. m. when she left on account of the weather, and the Camino drifted.

January 24 the Kanawha towed from 9:20 p. m. to 9 a. m. of January 25, when the hawser parted. The Lady Laurier then towed until 4 p. m. when the hawser parted. The Camino anchored about six or seven miles from the entrance to Halifax harbor. On the morning of January 26 the Camino was towed into the harbor by several tugs.

The weather was very bad on January 17, and also on the night of

the 24th; the Camino's boilers being out of commission for five hours on that day. The rest of the time the weather was moderate. There was no great danger to the Camino, and very little to the Kanawha. The master of the Kanawha rendered the services promptly and skillfully, and the officers and crew performed them heartily, with some danger and a good deal of exposure.

The foregoing is an outline of the services rendered by all the vessels, omitting many details. All the salvors seem to have been necessary to the result. The Ocean Monarch and the tugs have been paid, either in pursuance of a judgment of the court in Nova Scotia or by compromise, to an aggregate sum of $4,650. The Lady Laurier and Androscoggin being government property, no claim was made for their services, and what they did is to be considered only for the purpose of fixing the value of the entire service.

The District Judge found $34,650 to be the proper compensation for the whole service; the unpaid balance of $30,000 to be apportioned, $9,000 to the Androscoggin, $3,000 to the Lady Laurier, and $18,000 to the Kanawha, $4,500 thereof to go to the master and crew.

[1] The charter of the Kanawha was not a demise, and it contained the following articles:

"2. That the charterers shall provide and pay for all the coals except as otherwise agreed. * * *

"15. That in the event of the loss of time from deficiency of men or stores, fire, breakdown, or damages to hull, machinery, or equipment, grounding, detention by average accidents to ship or cargo, dry-docking for the purpose of examination or painting bottom, or by any other cause preventing the full working of the vessel, the payment of hire shall cease for the time thereby lost; and if upon the voyage the speed be reduced by defect in or breakdown of any part of her hull, machinery, or equipment, the time so lost, and the cost of any extra coal consumed in consequence thereof, and all extra expenses shall be deducted from the hire. * * *

"19. That all derelicts and salvage shall be for owners' and charterers' equal benefit, after deducting owners' and charterers' expenses and crew's proportion. * * *

"31. Except for loss of time arising as provided in article 15, hire shall continue hereunder notwithstanding any detention of said vessel by reason of restraints of princes, rulers or peoples, the act of God, enemies, fire, or any other cause whatsoever."

The effect of these provisions was to make the charterer a joint adventurer in any salvage service undertaken by the master of the Kanawha, and bound to pay for coal and charter hire while it was being rendered. The District Judge held that both these items were expenses which the charterer was entitled to recover, but awarded the value of the coal to it in addition to the salvage award, while he deducted the charter hire from the award.

[2-4] There can be no doubt whatever of our right either to reduce or increase salvage awards of the District Court; but, as they are matters of discretion, our practice has been not to do so when the District Judge has correctly found the facts, even if we disagree with him as to the amount, unless it be such as to indicate an abuse of discretion. We cannot say so in this case.

The value of the Camino, deducting the cost of repairs at Halifax, $25,823.46, was	$289,376.54
Of the cargo	248,492.00
Aggregating	$537,858.54

The value of the Kanawha was $250,000.

The parties have recognized the right of the charterer to intervene as a party pro interesse suo, and the court has allowed it a recovery for the coal and charter hire. Expenses may be included in the award or added to the award, as the court sees fit. These are all matters of discretion, depending upon the circumstances of each case. In this particular case the District Judge allowed both the cost of the coal and the cost of the time employed in the service. We see no difference between them. Both were expenses which would not have been incurred, but for the delay of 10 days occupied in performing the salvage services. Therefore in this particular case, while adopting the items and amounts as found by the District Judge, we will allow the item of charter hire as a direct expense, like the item of coal payable to the charterer, and add it to, instead of deducting it from, the salvage award.

Let the decree be as follows:

Salvage		$18,000.00
Owner's expenses		1,960.47
Charterer's expenses		7,257.35
Costs		379.45
Total		$27,597.27
Deducting from this amount—		
For the master and the crew	$4,500.00	
For the owner's expenses	1,960.47	
For the charterer's expenses	7,257.35	
For costs	379.45	
		14,097.27
The balance of		$13.500.00

—to be equally divided between the owner and the charterer.

[5] The charterer also claimed to be entitled to recover $6,600, the cost of feeding a cargo of horses for 10 days awaiting the arrival of the Kanawha, to be transported to Bordeaux. The District Judge regarded this as too remote, and we think he wisely exercised his discretion in rejecting it. If it were a real loss to the charterer, it was not such a direct contribution by it to the salvage operation as required it to be treated as a recoverable expense.

The cause is remanded to the court below, with instructions to modify the decree in accordance herewith; costs of this court to the appellants.

THE M. MORAN.

THE COLERAINE.

(Circuit Court of Appeals, Second Circuit. November 13, 1918.)

Nos. 52, 53.

1. COLLISION ⊂⊃107—STARBOARD HAND RULE—SPECIAL CIRCUMSTANCES.
The starboard hand rule does not apply to a steamer backing out of a slip before she gets on her definite course; but the special circumstance rule (article 27 [Comp. St. § 7901]) applies to steamers maneuvering to get on their course.

2. COLLISION ⊂⊃102—RIVERS—FAULT OF BOTH VESSELS.
Where a tug, backing from a slip between piers in the North River, came into collision with the port side of a tug bound down the river, *held*, that both were at fault and that the damage should be divided; the tug proceeding down the river being at fault for coming at a high speed close in to the ends of the piers, etc., and the tug backing out being at fault for failure to blow the usual slip whistle, etc.

Appeals from the District Court of the United States for the Eastern District of New York.

Libel by Thomas Tracy against the steam tug M. Moran, her engines, etc., claimed by the Moran Towing & Transportation Company, together with a libel by the Moran Towing & Transportation Company against the steam tug Coleraine, her engines, etc., claimed by Thomas Tracy. From a decree for the libelant in the first cause, and for the claimant in the latter (238 Fed. 636), the claimant in the first cause and libelant in the second appeals. Reversed and remanded, with directions.

Park & Mattison, of New York City (Samuel Park, of New York City, of counsel), for appellant.

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

Before WARD, HOUGH, and MANTON, Circuit Judges.

WARD, Circuit Judge. This is an appeal from a decree of the District Court of the United States for the Eastern District of New York in favor of the owner of the tug Coleraine against the steam tug M. Moran and dismissing the cross-libel of the owner of the M. Moran.

August 29, 1915, on a dark night, good for seeing lights, at about 1:30 a. m. the tide being ebb along the piers and flood in the middle of the river, the tug Moran, backing out from the slip between the piers at the foot of Ninety-Fifth and Ninety-Sixth streets, North River, came into collision with the port side of the tug Coleraine, bound down the river to Fiftieth street, injuring her so that she was beached near Ninety-First street.

[1] The District Judge fell into the same error as to the sailing and steering rules in this case as he did in the case of Flannery v.

Tug Bouker No. 2, 254 Fed. 579, — C. C. A. —, our opinion in which is handed down herewith. He said:

"The Moran had the Coleraine on her starboard hand, and, as the collision must have occurred some distance outside the piers, the failure of the lookout and the neglect to give whistle signals would further fix liability upon the Moran."

The starboard hand rule does not apply to a steamer backing before she gets on her definite course. The special circumstance rule (article 27, Act June 7, 1897, 30 Stat. 102, c. 4 [Comp. St. § 7901]) applies to steamers maneuvering to get on their definite courses, The Servia and Noordland, 149 U. S. 144, 156, 13 Sup. Ct. 877, 37 L. Ed. 681; our own decisions in the The John Rugge, 234 Fed. 861, 148 C. C. A. 459, and The William A. Jamison, 241 Fed. 950, 154 C. C. A. 586. The decisions of this court, on which the District Judge relied—The Reliable, 183 Fed. 116, 105 C. C. A. 406, and The Columbia, 205 Fed. 898, 124 C. C. A. 230—were cases of steamers going ahead; the former falling within the reasoning of The Breakwater, 155 U. S. 252, 263, 264, 15 Sup. Ct. 99, 39 L. Ed. 139, and the latter being decided on its special circumstances.

[2] The District Judge also found the Moran at fault for not blowing the usual slip whistle and for not having a lookout. Upon the first point we agree with him, but think the second immaterial, because in the view we take of the situation the absence of a lookout did not contribute to the collision. If it were a fault, the Coleraine was as much to blame as the Moran, because her lookout was sitting on the bitts forward with his back to New York, smoking a cigarette, and did not see the Moran until the Coleraine blew her whistle, when he looked around.

We are quite satisfied that when the vessels first saw each other the Moran was backing slowly, with her stern to port, clearing the end of the covered pier at the foot of Ninety-Sixth street. The Coleraine blew one whistle and an alarm, rang an extra jingle, because as her master said, there was no time to reverse, and hard-aported, while the Moran immediately went full speed ahead, yet the vessels came together. This convinces us that the collision was unavoidable when the vessels first began to navigate with reference to each other and must have happened close to the pierhead. The District Judge made no finding as to the location.

The Coleraine was at fault for coming down the river at high speed close in to the ends of the piers between Ninety-Fifth and Ninety-Seventh streets. If we were to adopt the account of her witnesses that the collision took place some 300 feet out in the river, she would have been clearly at fault, because she could have easily avoided the Moran by porting with her steam steering gear.

The decree is reversed, with costs, and the cause remanded to the District Court, with instructions to enter the usual decree for half damages.

CHAPMAN v. HUNT.

(Circuit Court of Appeals, Second Circuit. November 13, 1918.)

No. 39.

1. BANKRUPTCY ⟸161(2)—PREFERENCES—TRANSFER.
Where a corporation, solvent at the time a stockholder and director severed his connection, agreed to assign outstanding accounts receivable to secure him against loss by virtue of his accommodation indorsement of notes of the corporation, *held*, though the corporation became insolvent nearly a year later, and the holder and accommodation indorser, when the agreement was performed, had reasonable cause to believe the corporation insolvent, the agreement was not invalid, nor was the performance of it obnoxious to the Bankruptcy Act.

2. BANKRUPTCY ⟸161(2)—PREFERENCES—WHAT ARE.
Where a corporation, while solvent, agreed to protect a stockholder, who severed his connection therewith, against loss by virtue of his accommodation indorsement of corporate notes, by assigning accounts to him and to execute further papers for that purpose, and corporation, after it became insolvent and within a month of bankruptcy, paid notes, so indorsed, with funds largely advanced by the indorser, and deposited new accounts as security, *held*, the transaction must be deemed a consummation of the earlier agreement, and not an independent transaction, open to attack under Bankruptcy Act, §§ 60, 67 (Comp. St. §§ 9644, 9651), as preferential, or as working fraud on creditors.

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

Suit by George D. Chapman, as trustee in bankruptcy of the Syracuse Candy Works, Incorporated, against Edward A. Hunt. From a decree for complainant (248 Fed. 160), defendant appeals. Reversed and remanded, with directions.

Levi S. Chapman, of Syracuse, N. Y. (Chapman, Newell & Crane, of Syracuse, N. Y., of counsel), for appellant.

Lee & Brewster, of Syracuse, N. Y., for appellee.

Before WARD, ROGERS, and MANTON, Circuit Judges.

WARD, Circuit Judge. George D. Chapman, trustee in bankruptcy of the Syracuse Candy Works, Incorporated, filed a bill in equity against Edward A. Hunt, praying that he be decreed to hold in trust for the complainant certain moneys collected by him upon accounts receivable assigned to him by the Candy Works.

January 13, 1915, Hunt, who had been an incorporator, director, and stockholder of the Candy Works, ceased all connection therewith and was given a written agreement with the Candy Works, which was then entirely solvent as follows:

The Candy Works assigned to Hunt good outstanding accounts receivable to the amount of $6,000 to secure Hunt against loss by virtue of his accommodation indorsement of its notes held by the City Bank of Syracuse for $9,100 and any renewals thereof. It was further agreed that this should be a continuing collateral security, and that to such end the treasurer of the Candy Works should collect the

assigned accounts for Hunt and turn over the proceeds to the Candy Works for use in its business, upon assigning to Hunt an equal amount of new accounts, so that he should always be secured in the sum of $6,000. A list of assigned accounts was to be furnished him monthly, stamped as follows:

"For value received the undersigned, Syracuse Candy Works, Incorporated, does hereby sell, assign, and transfer the within mentioned accounts to Edward A. Hunt in accordance with the terms and conditions of our agreement with said Hunt, bearing date January 13, 1915.

"Syracuse Candy Works, Inc.,
"By G. F. Rowe, President.
"Thelma M. Smith, Treasurer."

The Candy Works finally covenanted for additional assurance as follows:

"We do also agree that we will execute any other or further papers or agreements that may be necessary to carry this assignment or the assignments of any other accounts substituted for these accounts or substituted for any accounts that may be substituted for these accounts."

This agreement was carried out until April 16, 1916, when Hunt was given a list of accounts receivable aggregating $3,369.74.

[1] The Candy Works had been insolvent since December, 1915, and both Hunt and the City Bank had reasonable cause to believe it to be so throughout the month of April, 1916. This, however, did not make the agreement of January 13, 1915, invalid, or the performance of it by the Candy Works obnoxious to the requirements of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 544). Sexton v. Kessler, 225 U. S. 90, 32 Sup. Ct. 657, 56 L. Ed. 995. And so the District Judge held.

[2] April 18, 1916, when only one of the Candy Works' notes held by the City Bank was due, an arrangement was made between it, Hunt, and the Candy Works that all the notes should be taken up. To this end Hunt gave the Candy Works his check for $8,600, with which funds and others in the hands of the Candy Works all the outstanding notes indorsed by Hunt, then aggregating $9,100, were taken up; the Candy Works giving Hunt its own demand note for $8,600, and under a written agreement of that date assigning to him accounts theretofore assigned to the amount of $1,003.56 under the agreement of January 13, 1915, together with new accounts amounting to $1,998.62, or $3,002.18 in all, as collateral security for its demand note to him of $8,600.

May 13, 1916, an involuntary petition in bankruptcy was filed against the Candy Works and an adjudication followed. The District Judge held that the transaction of April 18, 1916, was an entirely new and independent one, constituting a transfer within four months of the filing of the petition to Hunt, a creditor by virtue of his indorsement, who knew the Candy Works was insolvent, voidable by the trustee as a preference under section 60b (Comp. St. § 9644), and also void as a fraud upon creditors under section 67e of the Bankruptcy Act (Comp. St. § 9651). We cannot so regard it. It was, indeed, a new writing of a new date, but more in pursuance of the Candy Works' covenant of further assurance than as a new and independ-

ent contract. Hunt, because of his liability as indorser, took up the Candy Works' notes, not directly from the bank, but to the extent of $8,600 through the Candy Works. Its demand note to him for $8,600 was only the measure and evidence of the loss he sustained by virtue of his accommodation indorsements. The security he received was the same as he had been entitled to since January 13, 1915. He could perfectly well have acted without any further writing at all, and we think he should not be deprived of his security because of this wholly unnecessary circuity of action. The writing should be read in the light of the foregoing history and of all the circumstances. The intention of the parties is to be discovered. It cannot be supposed that they intended to make any substantial change in their relations.

The decree of the District Court must be modified in the following respects: Hunt is entitled to retain the proceeds of all the accounts assigned to him under the writing of April 18, 1916, which he has received, and to recover from the trustee the proceeds of such accounts as he has not received, which can be traced into the funds in the hands of the trustee, and, when these amounts have been ascertained, to be permitted to file his claim for the balance due him.

The decree is reversed, and the cause is remanded to the District Court, with instructions to enter a decree in accordance herewith.

In re A. BOLOGNESI & CO.

Petition of GILBERT et al.

(Circuit Court of Appeals, Second Circuit. November 13, 1918.)

No. 15.

1. BANKRUPTCY ⟸446—PETITION TO REVISE—SCOPE.
   On petition to revise, the appellate court takes the facts as found below; its power being limited to correction in matters of law.

2. BANKRUPTCY ⟸140(3)—CREDITORS—RIGHTS OF.
   Claimants, who deposited funds with a bankrupt, who was engaged in the banking business, for investment in a particular manner, are entitled to subject to their claims a deposit in the name of the bankrupt, where they could trace their funds into such deposit; it appearing the bankrupt, though he assumed toward claimants a fiduciary relation, did not carry out his undertaking.

3. BANKRUPTCY ⟸140(3)—CREDITORS—RIGHTS OF.
   Claimants, who bought from the bankrupt, who was engaged in the banking business, drafts which they used to send funds abroad, cannot assert a claim against a deposit to the account of the bankrupt, because the drafts were not paid; it appearing that claimants obtained the drafts which they bargained for, and no circumstances of active fraud or deception being shown.

4. BANKRUPTCY ⟸140(3)—CLAIMS—SPECIFIC FUND.
   Where claimants asserted that by reason of the bankrupt's breach of fiduciary relation they were entitled to trace their funds into a deposit to the account of the bankrupt, it is necessary, in order to identify the money, to trace it into the specific fund.

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

5. BANKRUPTCY ⟸140(3)—TRUST FUNDS—RIGHT OF BENEFICIARIES.
Where several claimed a fluctuating deposit to the account of the bankrupt, on the theory that their funds, which had been impressed with a trust because of his breach of fiduciary relations, were commingled therewith, the several claimants are equitably entitled to an allowable preference in the inverse order of the times of their respective payments into the fund.

6. BANKRUPTCY ⟸140(3)—FUNDS—TRUST FUND—RIGHT TO.
Where a number of claimants delivered moneys to the bankrupt for particular investment, and he failed to make the investment, thus violating the fiduciary relations, and deposited the funds to his own account, claimants are entitled to assert the trust against the deposit only to the extent of the smallest amount such deposit contained subsequent to the commingling.

Petition to Revise Order of the District Court of the United States for the Southern District of New York.

In the matter of A. Bolognesi & Co., bankrupts. Petition of Francis Gilbert and others, trustees in bankruptcy, to revise an order of the District Court distributing a fund among special claimants. Order reversed, and matter remanded for further proceedings.

See, also, 223 Fed. 711, 139 C. C. A. 351.

Bolognesi was a banker doing business largely with Italians, who in divers ways wished to transmit funds to Italy. He made a general assignment on February 11, 1914, and subsequently became bankrupt. The moneys received by him from customers and depositors he placed in his own bank accounts with sundry chartered banks and trust companies. On the day of assignment he had on deposit in the Central Trust Company $11,469.67, composed of his own moneys, as well as those of his customers for deposit. Certain persons, who had deposited funds with Bolognesi for the specific purpose of purchasing drafts and money orders payable in Italy, succeeded in tracing their funds into Bolognesi's said account with the Central Trust Company, and demanded from the trustee in bankruptcy preferential payment in whole or in part out of the moneys so as aforesaid in said trust company and turned over to the trustee.

Thereupon the trustee brought this proceeding, wherein all parties making any claim against the Central Trust Company fund were required to appear and make proof before a special master. Numerous claimants appeared, who (so far as they were successful below) are divisible into two classes: (1) Those who handed their moneys to Bolognesi for a specific purpose, with which the bankrupt never complied; i. e., he never bought any drafts or money orders as directed; and (2) those who did the same thing, but who obtained, prior to failure, drafts or the like, which, however, when presented in Italy, were not paid.

The special master, having found these facts, held that as to both classes of claimants Bolognesi occupied a "quasi trust relationship," and ordered (the whole amount of claims proven being in excess of the Central Trust Company account) the whole of that fund to be distributed pro rata among all the claimants who had traced their moneys into said fund. Thereupon the trustee in bankruptcy took this petition.

Olcott, Bonynge, McManus & Ernst, of New York City (Irving L. Ernst, of New York City, of counsel), for petitioner.

Sporborg & Connolly, of Port Chester, N. Y., for claimant Scranton Trust Co.

Maurice W. Monheimer, of New York City, for claimant Rescigno.

Daly, Hoyt & Mason, of New York City (Ralph Atkins, of New York City, of counsel), for claimant Lagnese.

Isidore E. Green, of New York City, for claimant Verrili.
Samuel Hoffman, of New York City, for claimant Gualtiere.
Daniel E. Delavan, of New York City, for claimant Lazzari.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [1] This being a petition to revise, we take the facts as found below. Our power is limited to correction in matters of law. Therefore we do not consider the suggestion that some at least of the sums claimed were received by Bolognesi during insolvency and under circumstances raising a trust ex maleficio. The master has found the evidence the other way, and we cannot say that such finding amounted to error of law upon the testimony.

[2] In so far as any claimant gave money to the bankrupt for investment in a specified manner, the bankrupt undoubtedly, by accepting the deposit, undertook to act in the interest of the depositor claimant, and thereby assumed toward him a fiduciary relation (Johnson v. Brooks, 93 N. Y. at page 342); and in so far as such claimants traced their funds into the Central Trust Company account they stand in the position recognized and enforced in Re Hallett, 13 Ch. D. 696, followed in National Bank v. Insurance Co., 104 U. S. at page 68, 26 L. Ed. 693. It follows, under the findings, that the Scranton Trust Company, Lagnese (to the admitted extent of $1,687.06), Gualtiere, Verrili, and Rescigno (to the extent of $550.70), were prima facie entitled to share in the fund, because Bolognesi had not fulfilled his duty as a fiduciary in respect of them.

[3] But those claimants who came to the bankrupt to buy drafts and the like, and got what they bargained for, cannot claim against the fund, for their bargains were completed; they got what they asked for, and, in the absence of any circumstances of active fraud or deception, the fact that the commercial paper issued to them remains unpaid does not change their status as general creditors. Strohmeyer v. Guaranty Trust Co., 172 App. Div. at page 20, 157 N. Y. Supp. 955. It was therefore error to allow Lazzari, Rescigno (in respect of his deposit of $288.31), and Lagnese (in respect of all his deposits exceeding $1,687.06) to participate in the fund at all.

[4-6] From the time when these claimants began placing with the bankrupt the deposits which are the subject of this litigation (approximately January 20, 1914) down to the date of assignment, the Central Trust Company fund fluctuated considerably, and down to the date of the last deposit with Bolognesi traceable into said fund was never higher than about $8,000, and fell as low as about $4,400, while the amounts traceable into the fund, and flowing from the claimants whom we have held entitled to share, greatly exceed $8,000. Yet the entire trust company account, which was swollen by more than $5,000 of deposits put in on the day of assignment, and consisting, so far as this record shows, of Bolognesi's own money, has been awarded to the claimants pro rata.

The record is extremely imperfect in matters of detail. It is impossible therefrom to adjust all the rights of the parties, and we can do no more than indicate the method that should be pursued.

The holding of the lower court is based on the theory that the entire trust company account is to be treated as were unallocated certificates of stock in Gorman v. Littlefield, 229 U. S. 19, 33 Sup. Ct. 690, 57 L. Ed. 1047, and Duel v. Hollins, 241 U. S. 523, 36 Sup. Ct. 615, 60 L. Ed. 1143. The cases have no application to the tracing of earmarked money or money's worth through a bank account. It is necessary, in order to identify money, to trace it into some specific fund or property. In re See, 209 Fed. at page 174, 126 C. C. A. 120; In re Brown, 193 Fed. 24, 113 C. C. A. 348; affirmed as Schuyler v. Littlefield, 232 U. S. 707, 34 Sup. Ct. 466, 58 L. Ed. 806. We have recently reviewed these cases in Re Matthews, 238 Fed. 785, 151 C. C. A. 635, and pointed out that a replenishing of a depleted trust account cannot (per se) be considered as restoring the trust; and it follows that when it appears that the moneys impressed with a trust have been "mingled with the [trustee's] general account, and a certain amount remains in the account at the end of the period, and the account has not been, in the interval, depleted below the trust amount or final amount, that final amount will be presumed to include the trust money." Southern Cotton Oil Co. v. Elliotte, 218 Fed. 571, 134 C. C. A. 299. But, where such commingled fund comes into the hands of a receiver, trustee in bankruptcy, or the like, what is responsible for the claims of the cestuis que trustent is the remainder so coming into the hands of the officer of the court, "not exceeding the smallest amount the fund contained subsequent to the commingling." Empire, etc., Co. v. Carroll County, 194 Fed. at page 605, 114 C. C. A. 447, and cases cited. See, also, our own decision in Re Berry, 147 Fed. at page 211, 77 C. C. A. 434.

The unusual feature of this case is that there are several claimant depositors who put in money at different times, which money has been traced into a fluctuating account. Among such claimants the rule (prima facie) is not a pro rata equality. As stated in Empire, etc., Co. v. Carroll County, supra, the separate "cestuis que trustent are equitably entitled to any allowable preference in the inverse order of the times of their respective payments into the fund." This is the rule of In re Hallett, supra, supplementing Clayton's Case, 1 Meri. 572.

The operation of these principles may be illustrated from this record, imperfect as it is. It would appear to be true that on the day when the Central Trust Company account was lowest (January 27th) there was $4,414.57 in it, and on or before that day moneys of these claimants went into the account to the extent of $4,457.85. This was the first day when the account was smaller than the trust moneys shown to have been placed there. If the transaction stopped there, the various claimants should be awarded the fund on the theory summarized in the quotation from the Empire Company's Case, supra.

But thereafter, at dates and in amounts as to which we cannot be certain, the claimants furnished to Bolognesi other moneys, which he put into the trust company account and never applied to the purposes of his fiduciary undertaking; and this continued until February 10th, when the last of the claimants' moneys went into the fund and the fund itself was $6,519.04, or $2,104.47 more than the low tide of January

27th. In the meantime the account on February 3d was no more than $5,082.61. But we cannot ascertain from this record exactly when the various claimants' moneys went into this fund after January 27th.

Therefore the account must be stated, and the various priorities awarded, beginning on the first day when the fund was less than the trust money, and then on the next day when the new deposits in the fund were insufficient to cover the new trust money, and so on.

The order under review is reversed, and the matter remanded for further proceedings not inconsistent with this opinion. The trustee will recover the costs of this petition against so much of the fund as is found to be awardable to the claimants recognized in this opinion.

OEHRING et al. v. FOX TYPEWRITER CO.

(Circuit Court of Appeals, Second Circuit. October 23, 1918.)

No. 179.

APPEAL AND ERROR ⇐833(3)—PETITION FOR REHEARING—TIME OF FILING.

Where petition for rehearing was filed with the clerk of the Circuit Court of Appeals and noticed for hearing before the expiration of the term at which decision was handed down, *held*, that the filing was within time, although, as the court had no session practically between June and October, the petition could not be heard until the next term.

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

On petition for rehearing, together with motion for leave to court below to reopen. Petition and motions denied.

For former opinion, see 251 Fed. 584, — C. C. A. —.

Fred L. Chappell, of Kalamazoo, Mich., and Phillips, Sawyer, Rice & Kennedy, for defendant.

Before WARD and MANTON, Circuit Judges.

PER CURIAM. These motions have been heretofore made and denied on the same papers. They were served, filed with the clerk, and noticed for hearing before the expiration of the term, and, as the court has no session practically between June and October, could not have been heard before the next term. We think this filing was in time; otherwise, such motions could only be made during the first eight months of the term. The Supreme Court has expressed a similar view as to applications for certiorari by amending its rule 37, § 4 (37 Sup. Ct. v).

The question in this case is not one of damages recoverable by the complainant, but one of a credit to defendant. The master allowed the same proportion of the salesmen's alleged expenses as he allowed of the investment. The evidence was vague and meager, but in our opinion justified the master's findings.

The motions are denied.

In re SAMUELS.

Petition of COHEN.

(Circuit Court of Appeals, Second Circuit. November 13, 1918.)
No. 1.

1. BANKRUPTCY ⟸143(12)—LIFE POLICIES—"SURRENDER VALUE."
Life policies, which allowed the insured bankrupt to change the beneficiary at his option, and which severally provided that on default the insured, on surrender of the policy, might receive its cash value, or that, in event the policy should lapse on nonpayment of premiums, the insured might at his option obtain paid-up insurance or the cash value, have a "surrender value," within Bankruptcy Act, § 70 (Comp. St. § 9654), although at the time of the bankruptcy premiums were fully paid to date, so that there was no default.

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

2. BANKRUPTCY ⟸143(12)—LIFE POLICIES—RIGHT OF BENEFICIARY.
The wife of a bankrupt, who was named beneficiary in policies on his life, cannot claim the same as an exemption recognized by Bankruptcy Act, § 6 (Comp. St. § 9590), for, as the beneficiary could be changed by the bankrupt in invitum, she was not the owner of the policy, within Domestic Relations Law N. Y. § 52, declaring the same exempt.

Petition to Revise Order of the District Court of the United States for the Southern District of New York.

In the matter of Jacob W. Samuels, bankrupt. Petition by Samuel C. Cohen, as trustee, to revise an order denying the application of the trustee for an order requiring the bankrupt either to pay him the value of certain life policies or to turn over the policies. Order reversed, and matter remanded.

On the day when Samuels' petition in bankruptcy was filed he was the insured under five life policies, in three insurance companies. By all the contracts he had absolute right to name the beneficiary and change such designation as often as he chose, without the co-operation or consent of any beneficiary or any one else.

One of the policies provided for a surrender value by that name; two of them contained the clause that "in case of default" the insured may "surrender the policy, and with the written assent of the person to whom it is made payable receive in cash its value at the time of default"; and the two remaining policies provided that "this policy shall lapse * * * on the nonpayment of any premium * * * except that" the assured can at his option obtain therefor either paid-up insurance or "the cash value" of the policy.

At date of bankruptcy Samuels' wife or daughter was the beneficiary named in every policy, and all premiums had been paid by the bankrupt, so that no policy could "lapse for nonpayment of premium" or be "in default" until varying lengths of time after adjudication. Every policy, however, conferred the right on the insured at any time to borrow on the policy as collateral up to the "loan value" thereof, and value for loan or for surrender or "cash value" all meant the same thing—i. e., the present worth of the contract on actuarial principles accepted by the insurer.

The trustee applied for an order requiring the bankrupt either to pay him said value or turn over the policies. The referee found in substance the foregoing facts, and denied the application. His order was affirmed by the District Judge, whereupon the trustee brought this proceeding.

Lawrence B. Cohen, of New York City (Adolph Boskowitz and Jacob Shientag, both of New York City, on the brief), for petitioner.

Samuel Sturtz, of New York City, for bankrupt.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [1] This record raises nearly the same questions as were disposed of in the case of this bankrupt's brother (In re Samuels, 237 Fed. 796, 151 C. C. A. 38, reversed in Cohen v. Samuels, 245 U. S. 50, 38 Sup. Ct. 36, 62 L. Ed. 143), and in so far as "surrender value" is shown in any of the policies in question, the ruling of the Supreme Court suffices.

While admitting that under Hiscock v. Mertens, 205 U. S. 202, 27 Sup. Ct. 488, 51 L. Ed. 771, that phrase, as used in section 70 of the Bankruptcy Act July 1, 1898, c. 541, 30 Stat. 565 (Comp. St. § 9654), has a very wide signification, this respondent still contends that not all these policies had any surrender value at date of adjudication, because they were not then "in default" and had not "lapsed" for nonpayment of premiums.

The point is without substance for several reasons: (1) It was in effect urged in the Hiscock Case, supra, and disposed of with the remark that "this is tantamount to saying that no policy can ever have a surrender value"—meaning no live active policy; (2) it appears by the proof here that if the insured wished either to sell his policy to the insurer or borrow upon it he could always do so at any time, and get the value at the last premium date; and (3) the test of "surrender value" under the act is whether the policy has a present cash value available to the insured bankrupt in accordance with fixed method, and by the exercise of his own unassisted will. In re Gannon, 247 Fed. 932, 160 C. C. A. 122.

This is, we believe, the result of the most recent ruling decisions, and in so far, as Re Hammel, 221 Fed. 66, 137 C. C. A. 80, conflicts therewith, it must be regarded as overruled.

[2] Respondent further urges that policies inuring to the bankrupt's wife at date of adjudication are exempt under section 6 of the act (Comp. St. § 9590), recognizing the state exemption contained in section 52 of the Domestic Relations Law of New York (Consol. Laws, c. 14).

The claim would have been good, had the wife been the owner of the policies; but she was not. No beneficiary removable by the insured in invitum could be. The matter is one of state law, and we followed rulings of the state courts in so interpreting the New York statute in Re White, 174 Fed. 333, 98 C. C. A. 205, 26 L. R. A. (N. S.) 451. The more recent case of Grems v. Traver, 87 Misc. Rep. 644, 148 N. Y. Supp. 200, affirmed 164 App. Div. 968, 149 N. Y. Supp. 1085, is not in conflict. There as between husband and wife the latter was proved the absolute owner.

The trustee in bankruptcy is entitled to whatever cash value the policies in question had on the day of adjudication. Therefore the order under review is reversed, with costs, and the matter remanded for further proceedings not inconsistent with this opinion.

ROESSLER & HASSLACHER CHEMICAL CO. v. STANDARD SILK DYEING CO.

(Circuit Court of Appeals, Second Circuit. November 13, 1918.)

No. 4.

1. COURTS ⟸356—FEDERAL COURT—FINDING OF FACT—WAIVER OF JURY.
Under Rev. St. § 649 (Comp. St. § 1587), where the parties waived a jury, the appellate court, on writ of error, is limited to the inquiry whether the findings of the referee, as altered and amended by the District Judge, justify his conclusions of law.

2. APPEAL AND ERROR ⟸842(8)—REVIEW—QUESTIONS PRESENTED.
In an action tried to the court without a jury, a question as to the construction of a provision in a written contract is one of law.

3. SALES ⟸172—PERFORMANCE BY SELLERS—EXCUSES.
Where a contract for the sale of prussiate of soda, a German product, providing that the sellers should not be liable for causes beyond their control, including war, was made after declaration of war between Germany and Great Britain, performance was excused by the British order in council which in effect placed an embargo on shipments from Germany, for such provision cannot be deemed applicable only to embargoes or restraints in some future war to which the United States should be a party.

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

Action by the Standard Silk Dyeing Company against the Roessler & Hasslacher Chemical Company. There was a judgment for plaintiff (244 Fed. 250), and defendant brings error. Reversed, and new trial ordered.

Creevey & Rogers, of New York City (George C. Holt, Garrard Glenn, William B. Walsh, and William S. Creevey, all of New York City, of counsel), for plaintiff in error.

Hugh Gordon Miller, of New York City, for defendant in error.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

WARD, Circuit Judge. This is a writ of error to a judgment in favor of the plaintiff in an action at law for breach of a contract by the defendant to deliver 30,000–35,000 pounds of imported German prussiate of soda to the plaintiff in equal installments over the year 1915. A jury was waived in writing and an order of reference agreed to directing the referee to make special findings of fact and conclusions of law and incorporate the same in his report. The referee recommended a judgment in favor of the plaintiff for $175.60, but upon exceptions to his report the District Judge filed an opinion, stating his conclusions of law, and entered a judgment in favor of the plaintiff for $12,042.09, to which the defendant took this writ of error.

[1] We are limited to the inquiry whether the findings of the referee as altered or amended by the District Judge justify his conclusions of law. Rev. Stat. U. S. § 649 (Comp. St. § 1587), provides:

"Issues of fact in civil cases in any Circuit Court may be tried and determined by the court, without the intervention of a jury, whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury. The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury."

See Milwaukee & St. Paul Ry. Co. v. Clark, 178 U. S. 353, 20 Sup. Ct. 924, 44 L. Ed. 1099.

January 13, 1915, the Rossler Company, defendant below, entered into contract with the Standard Silk Company, plaintiff below, the material provisions of which were as follows:

"Sold to: The Standard Silk Dyeing Co., Paterson, N. J.

"Through: Mr. E. Schwarzenbek,

"Article: Imported German prime yellow prussiate of soda (standard technical quality).

"Quantity: Thirty thousand (30,000) to thirty-five thousand (35,000) pounds.

"Price: Ten and one-quarter cents (10¼¢) per pound freight paid Paterson, N. J.

"The price is based on prevailing usual import charges (transportation and marine insurance, etc.). Any increase or decrease of such charges on all deliveries so affected for buyer's account. An additional charge for all rail shipments if water or rail and water transportation be closed from European works to seaport. War risks extra. All deliveries under this contract are subject to any alteration of U. S. tariff and revenue laws, as also any correction of value assessment by the U. S. appraisers.

"Terms: Net thirty (30) days or less one-half of one per cent. (½ of 1%) for cash in ten (10) days.

"Delivery: In equal installments over the year 1915.

"Payments in gold or its equivalent in current funds with exchange on New York. Deliveries, unless otherwise specified, in equal quantities at approximately uniform intervals during the contract period; each proportionate delivery as due, if not called for, sellers' option to postpone or cancel without tender on their part to buyers. Each delivery to stand as a separate sale; the irregularity of any delivery not to vitiate the contract as to the remaining installments. The usual leeway of fifteen (15) days for each delivery. Seller's liability ceases on making delivery to carrier at shipping point in good condition. Carrier acts as buyers' agent. Sellers not liable for nonarrival of any shipment lost in transit at sea or on land, or for losses or damage or delays due to causes beyond their control, including in such causes strikes, lockouts, floods, fires, accidents to work where the goods are manufactured, war, or insurrection. In addition to these causes, should sellers be delayed or cut off in whole or in part from their supply of raw materials by any other cause or reason, they shall not be liable to buyers for failure to deliver, or delay in delivery of the whole or any part of said merchandise. Suspended deliveries resumed after the cause of such suspension has been removed, at the same rate and at like intervals assigned under the contract, or canceled, at seller's option."

The District Judge found that the defendant was, among other things, an importer of chemical products from Germany, and was known to the trade as importing prussiate of soda from Germany for sale in this country; that it had March 30, 1915, outstanding contracts for importation of 815,702 pounds of prime yellow prussiate of soda (standard technical quality), and had made 12 contracts, including the plaintiff's, for delivery here during the year 1915 of 366,872 pounds of such prussiate of soda; this product the defendant continued to import from Germany in sufficient quantities to enable it to fulfill accruing installments under its outstanding contracts until on or about March 30th, when it had notice of an order in coun-

cil dated March 15th of the British government requiring its land and naval forces to prevent any goods whatever reaching Germany from other countries or reaching other countries from Germany; that this order was enforced against the protests of the government of the United States, with the result that there were no general importations of prussiate of soda after that date; that after March 30th the defendant had not enough prussiate of soda to fulfill its 12 outstanding contracts, each of which contained the same exception which the plaintiff's contained; that the subject-matter of the contract was prussiate of soda to be imported by the defendant from Germany; that it did not make any effort to obtain German prussiate of soda from any other place than Germany during the year 1915; that it appropriated all the prussiate of soda it then had ratably among the 12 outstanding contracts and performed its contract with the plaintiff down to the month of May; that from the month of May, and for each succeeding month covered by the contract, the defendant refused to honor the plaintiff's requisitions; that the only exception the defendant made in this appropriation of its stock on hand was the sale of 7,457 pounds to noncontract customers.

The referee found that the defendant's failure to deliver from May on was due to war conditions excepted in the contract except as to this 7,457 pounds, the plaintiff's ratable proportion of which was 9½ per cent. Accordingly he awarded damages in the sum of $175.60, being the difference between the contract price, 10¼ cents per pound, and 35 cents per pound, the price as of May 31, 1915.

Upon exceptions to the report of the referee, the District Judge declined to pass upon the questions whether war conditions were the proximate cause of the defendant's failure to deliver, or whether any apportionment of the defendant's stock on hand was made, and, if so, whether it was properly made, holding that the exception in question did not apply at all. Accordingly he directed judgment to be entered in favor of the plaintiff for $10,716.20, being the difference between the contract price, 10¼ cents per pound, and the market price, for each of the plaintiff's monthly requisitions thereafter, together with interest from January 1, 1916, and costs, aggregating $12,042.09.

[2, 3] The exceptions contained in the contract divide naturally into two categories, as follows:

"Sellers not liable for nonarrival of any shipment (1) lost in transit at sea or on land or (2) for losses or damage or delays due to causes beyond their control including in such causes strikes, lockouts, floods, fires, accidents to works where the goods are manufactured, war, or insurrection."

The first category does not apply at all, because no shipment was lost, nor do any of the exceptions in the second category relating to manufacture. This leaves for consideration only the exception of war.

The question involved is one of law, viz. whether the facts found by the District Judge sustain his conclusion of law, which was that the exception of losses due to war does not apply at all. His view was that, as the war between Germany and England existed when the contract was made, the parties must have intended relief in some

future war in which the United States should be involved. We cannot agree to this. The exception was not of war, but of losses or damage or delays due to war. Embargoes or restraints coming from the United States would be a defense, whether excepted or not. In our opinion the exception applied as much to the existing war between Germany and England as to any war which might subsequently arise and cause such damage, losses, or delays, whether the United States was a party to it or not. It was evidently more important and appropriate to the existing war than to wars that might subsequently arise. This particular war had continued for over five months when the contract was made, and for all that time and for three months later the defendant had been importing enough prussiate of soda from Germany to satisfy its outstanding contracts as they accrued. Both parties, of course, must be held to have had notice of the possibility of embargoes and restraints, and the exception was intended to cover just such possibilities. No one could have anticipated that this British order in council would be proclaimed, and it was this change of condition that caused the loss.

Many cases cited by the plaintiff do not contain an exception of war conditions and are therefore inapplicable. There is, of course, no doubt that a foreign war is no defense to a party who does not carry out his contract, unless there is an exception to that effect in his favor. The only federal case relied upon by the court below is Balfour Co. v. Steamship Co. (D. C.) 167 Fed. 1010, which is clearly distinguishable. In it the steamship company, during the Russo-Japanese war, had agreed in writing to reserve space in one of its steamers for a shipment of flour to Japan; all parties then knowing that flour had been declared contraband by Russia. The carrier's bill of lading, which would have been issued, had the flour been carried, contained the usual exception of restraints of princes, rulers, or peoples; but the court held that, the carrier having agreed to carry such contraband flour, which was a perfectly legal contract, this exception would be held to apply only to actual restraints or seizures, and would not excuse the carrier from refusing to carry because of possible seizures.

The judgment is reversed, and a new trial ordered.

AMERICAN TRUST & SAVINGS BANK v. DUNCAN.

In re LUM.

(Circuit Court of Appeals, Fifth Circuit. December 16, 1918.)

No. 3252.

BANKRUPTCY ⊂=142—CREDITORS—RIGHTS OF.

Where, years before bankruptcy, the bankrupt conveyed property to his wife, though he was then indebted, and after bankruptcy the trustee, suing under Bankruptcy Act, § 70e (Comp. St. § 9654), recovered a judgment or decree against the wife to the amount of a debt incurred prior to the conveyance and still existing, *held*, in view of the difference between section 70e and section 67f (section 9651), the creditor whose debt ante-

dated the conveyance was entitled to receive from the trustee the amount of the recovery, and such sum should not go into the general estate.

Appeal from the District Court of the United States for the Northern District of Alabama; William I. Grubb, Judge.

In the matter of the bankruptcy of George E. Lum. Petition by the American Trust & Savings Bank against Charles K. Duncan, trustee in bankruptcy of George E. Lum, praying that the trustee be directed to pay over to the petitioner the sum of $1,000, recovered by the trustee in an action against the bankrupt's wife. From a decree dismissing a petition for the review of the referee's order dismissing the original petition, petitioner appeals. Reversed.

Forney Johnston, W. R. C. Cocke, and Victor Smith, all of Birmingham, Ala., for appellant.

Claude D. Ritter, of Birmingham, Ala., for appellee.

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

WALKER, Circuit Judge. The appellee, as trustee in bankruptcy of George E. Lum, filed a bill in the chancery court of Jefferson county, Ala., against the bankrupt and his wife, Carrie E. Lum, alleging that about nine years prior to the bankruptcy certain described real estate was conveyed to the bankrupt's wife, part of the purchase money for which and part of the cost of valuable improvements thereon were paid with the bankrupt's money, as a mere gift to his wife, while he was indebted to the American Trust & Savings Bank (hereinafter referred to as the appellant) in a considerable sum, $1,000 of which remained unpaid when the bill was filed. The bill prayed that the real estate mentioned, with the improvements thereon, be subjected to the payment of the debts of the bankrupt, that the real estate and improvements be sold for that purpose, and the proceeds thereof be paid to the trustee in bankruptcy, and for general relief. That suit resulted in the rendition of a judgment or decree of the Supreme Court of Alabama which adjudged that the real estate mentioned be subjected to the satisfaction of the claim of the appellant to the extent of $1,000 and accrued interest, declaring and establishing a lien upon said real estate to said extent, and that unless said amount is paid into court within sixty days said real estate be advertised and sold for the satisfaction of said indebtedness. Pursuant to that decree the sum of $1,000, with accrued interest, was paid to the trustee in bankruptcy. Thereafter the appellant filed in the bankruptcy proceedings its petition, alleging the facts above set out, and that the petitioner was the only creditor of the bankrupt whose debt was in existence at the time the bankrupt made the alleged gifts to his wife, and praying that the trustee be ordered and directed to pay over to the petitioner the said sum of $1,000 and accrued interest, less the costs and expenses of said suit and of the court in which the petition was filed. The referee made an order denying the prayer of the petition, "but without in any manner affecting the proof and allowance of the claim of the said petitioner, American Trust & Savings Bank, filed and allowed in this proceeding as an unsecured claim not entitled to preference or priority

of payment." The appellant's petition for the review of the referee's order was dismissed by the District Court. The appeal is from the decree to that effect.

The right of the trustee to bring and maintain the above-mentioned suit existed by virtue of the following provision of the Bankruptcy Act:

"The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a bona fide holder for value. For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction." Bankruptcy Act July 1, 1898, c. 541, § 70e, 30 Stat. 565 (Comp. St. § 9654).

The decree rendered enforced the right of the sole remaining creditor whose debt was in existence at the time the debtor made the donation of money to his wife, or for her benefit, to have that money treated as received by the donee in trust for such creditor, and to have the amount of the donation, or so much thereof as was required to satisfy the demand of such creditor, charged against the property of the donee in which it was invested. Lockard v. Nash, Adm'r, 64 Ala. 385; Cartwright v. West, 185 Ala. 41, 64 South. 293. The questioned transaction was binding as between the debtor and his donee, the former retaining no right to the money he gave and acquiring no interest in the property into which it went, but was voidable as against creditors whose debts were in existence when the gift was made. An effect of the statute is to give the debtor's trustee in bankruptcy the right to assert and enforce the right of such creditors. The appellant's petition raised the question whether the amount recovered by the trustee, less costs incurred, belonged to the creditor whose right was enforced by the decree, or was received and held by the trustee as part of the bankrupt's estate for the common benefit of his creditors. Other creditors would be benefited by the trustee's recovery, though the net amount recovered is applied on the appellant's demand alone, as a result of such application is the extinguishment of a claim which, but for such recovery, would share in the part of the bankrupt's estate which is available for general distribution among his creditors. Nothing contained in the above-quoted provision of the Bankruptcy Act forbids the application of an amount so recovered by the trustee to the satisfaction of the one debt of the bankrupt which was in existence when the transaction brought into question by the trustee's suit occurred. That suit being the assertion by the trustee of a right possessed by only one of the bankrupt's creditors, other creditors have no right to share in the amount so recovered, unless that right is given by some provision of the Bankruptcy Act. In behalf of the appellee it is contended that the decision in the case of Globe Bank v. Martin, 236 U. S. 288, 35 Sup. Ct. 377, 59 L. Ed. 583, shows that the amount recovered by the trustee was held by him as a part of the bankrupt's estate to which the appellant has no prior right.

The fund which was in question in the case just mentioned was acquired by the trustee in bankruptcy under the following circumstances: Some time prior to the debtor's bankruptcy, and while he owed debts to the Globe Bank and others, he made voluntary conveyances to his son. Within four months prior to the bankruptcy, creditors whose debts existed at the time such conveyances were made brought suits to subject the conveyed property to their demands and had attachments levied on that property. After the debtor was adjudged bankrupt, the bankruptcy court entered an order that the attachment lien be preserved for the benefit of the bankrupt estate, and that the trustee intervene in the suits in which the attachments issued. This the trustee did by petition, and it was adjudged that enough of the attached property be sold to realize the amount of the debts in existence when the attacked conveyances were made. The trustee received the proceeds of such sale. It was held that the fund so obtained should be distributed between all the creditors as a general asset of the bankrupt estate, and not between those creditors who alone would have shared in the fund, had their attachment been obtained more than four months prior to the filing of the petition in bankruptcy. The opinion rendered makes it plain that the conclusion reached was the result of applying the provisions of section 67f of the Bankruptcy Act to the facts disclosed. In the course of the opinion it was said:

"That section distinctly provides that all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, within four months of the filing of the petition in bankruptcy, shall be deemed null and void, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, as was done in this case, order that the right under the levy, judgment, attachment or other lien be preserved for the benefit of the estate in which event the same shall pass to and be preserved by the trustee for the benefit of the estate. Except for the attachments, the appellant banks had no specific lien upon the estate." Globe Bank v. Martin, 236 U. S. 288, 298, 35 Sup. Ct. 377, 381 (59 L. Ed. 583).

The ruling was to the effect that, where a judicial lien obtained against an insolvent debtor within four months prior to the filing of the petition in bankruptcy against him is preserved and enforced for the benefit of the estate, as authorized by section 67f of the Bankruptcy Act, the fund coming into the possession of the trustee as the result of such action belongs to the bankrupt estate, and not to those creditors only in whose behalf the lien originally was obtained. That decision was the result of applying the provision mentioned to a state of facts to which it was held to be applicable.

Section 70e of the Bankruptcy Act differs from section 67f of that act, in that the former does not contain any provision to the effect that property, or its value, recovered by the trustee in a suit which that section authorizes him to bring when he elects to avoid a transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, shall "pass to the trustee as part of the estate of the bankrupt." It may be that property or its value so recovered by his trustee might have been made a part of the bankrupt's estate, not

subject to any priority in favor of the creditor or creditors who alone had had the right to avoid the transfer brought into question. But it is significant that the statute does not so provide, while it does provide for the passing to the trustee, as a part of the estate of the bankrupt, of property, or its value, acquired by him as a result of the preservation and enforcement of a lien obtained through legal proceedings against an insolvent within four months prior to the filing of a petition in bankruptcy against him, without making any exception based upon the circumstance that the lien so preserved and enforced was obtained by a creditor or creditors who alone had the right to obtain it; the right being one not possessed by other creditors. The statute gives notice to any one obtaining a lien by legal proceedings against an insolvent person that, if the insolvent's bankruptcy occurs within four months after the lien is obtained, it may be preserved and enforced for the benefit of the bankrupt's estate, the proceeds of such enforcement to pass to the trustee as part of the estate of the bankrupt. The provision having this effect deals with "levies, judgments, attachments, or other liens" obtained through legal proceedings against an insolvent within four months prior to his bankruptcy, and with property affected by a lien so obtained. It does not deal with the rights of creditors who have not so obtained a lien.

Under the circumstances disclosed in the instant case the appellant alone had the right to subject to the satisfaction of its demand against the bankrupt the property of the bankrupt's donee in which the sum donated was invested. The appellant had not obtained any lien through legal proceedings instituted for the enforcement of such right. There has not been called to our attention, and we have not discovered, any provision of the Bankruptcy Act indicating an intention to treat as a general asset of the bankrupt's estate an amount recovered by the trustee in a suit brought by him, as authorized by section 70e of that act, for the enforcement of the right possessed by a creditor situated as the appellant was. As above pointed out, it does not follow from the fact that the trustee was authorized to bring and maintain such a suit that the recovery in it is to be distributed between all the creditors as a general asset of the bankrupt's estate, as other creditors may be benefited by the recovery—though it belongs to the one creditor whose right the trustee asserted—having the effect of extinguishing a claim against the general assets of the bankrupt's estate, thereby increasing the pro rata shares of other creditors in the assets to be distributed between them.

In view of the differences above pointed out between section 67f and section 70e of the Bankruptcy Act, and of the absence of anything indicating that the lawmakers intended that a debtor's bankruptcy should have the effect of impairing rights possessed by one or some only of his creditors who had not, prior to the bankruptcy, obtained any lien through legal proceedings, we conclude that the decision last above cited does not foreclose the question raised by the facts of the instant case; that the proceeds realized from the suit brought to enforce the demand of the appellant against property not liable to be subjected to the demands of any other existing creditor of the bank-

rupt did not pass to the trustee as a part of the estate of the bankrupt, though the recovery was in a suit brought by the trustee under the authority conferred by section 70e of the Bankruptcy Act; and that the appellant was entitled to the net amount of the fund so realized.

It follows that the decree appealed from was erroneous. That decree is reversed.

ST. TAMMANY BANK & TRUST CO. OF COVINGTON, LA., v. WINFIELD.

(Circuit Court of Appeals, Fifth Circuit. December 19, 1918.)*

No. 3228.

1. ESCROWS ⟸14(1)—WRONGFUL DELIVERY OF BILL OF SALE—PETITION.
A petition setting up that plaintiff delivered mules to a third person under a contract requiring such person to pay $60 per head, and to give a chattel mortgage, which averred that the defendant bank to which the bill of sale had been delivered wrongfully delivered it to the third person, etc., enabling him to dispose of the mules without paying plaintiff, *held* to state a cause of action.

2. ESCROWS ⟸14(1)—MEASURE—WRONGFUL ACT.
Where plaintiff delivered mules to a third person under a contract requiring such third person to pay a stipulated sum per head, and defendant bank delivered to such person a bill of sale for the mules, though he did not make payment as required, *held*, that plaintiff could not recover from the bank as part of damages the expense he was put to in recovering possession of those mules not sold by such third person.

3. ESCROWS ⟸14(1)—RECOVERY—EVIDENCE.
Where plaintiff delivered mules to a third person under a contract requiring him to pay a fixed sum per head and to give a chattel mortgage, and defendant bank wrongfully delivered to such third person a bill of sale for the mules, though he did not make payment, *held*, such person having disposed of part of the mules to his damage, plaintiff could not recover for the bank's wrongful act, without proving the value of such mules when they were wrongfully disposed of.

In Error to the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

Action by James S. Winfield against the St. Tammany Bank & Trust Company of Covington, La. Judgment for plaintiff, and defendant brings error. Reversed.

H. W. Robinson, of New Orleans, La. (Lewis L. Morgan, of Covington, La., on the brief), for plaintiff in error.

Lewis R. Graham and Henry Mooney, both of New Orleans, La., for defendant in error.

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

WALKER, Circuit Judge. [1] This was an action by the defendant in error, James S. Winfield, against the plaintiff in error, St. Tammany Bank & Trust Company, which will be referred to as the bank. The plaintiff's petition, as it was amended, disclosed the following state of facts:

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

*Rehearing denied February 1, 1919.

Winfield, who lived at El Paso, Tex., and H. C. Wertz entered into a written contract, under which the former was to deliver to the latter 71 head of Texas mules of various brands, and the latter was to receive the mules at Covington, La., where he lived, and feed and sell the same, pay the former $60 per head, and give a chattel mortgage on the mules. The contract contained a provision to the effect that, if Wertz failed to dispose of the mules within 60 days from the date of the contract, then the mules remained the property of Winfield. Wertz did not give a chattel mortgage on the mules as provided for in the contract. Under an arrangement made with the bank it received from Winfield the bills of sale for the mules given to the latter when he acquired them, and agreed not to turn over such bills of sale to Wertz, except as he paid to it $60 for each mule sold, the amounts so paid to be remitted or credited by the bank to Winfield. It was made known to the bank that both Winfield and Wertz understood that the latter would not be able to sell the mules unless he had the bills of sale for them which had been given to Winfield. The bank delivered the bills of sale to Wertz, without receiving any payment for or on the mules, and Wertz sold a number of the mules for which he did not pay.

We think the court properly ruled that the petition, as it was amended, disclosed a cause of action, and was not subject to the exception or demurrer interposed to it. It fairly appears from the averments that the action of the bank in delivering to Wertz the bills of sale mentioned was effective in bringing about the wrongful disposition of some of the mules by Wertz, which resulted in the loss by Winfield of those mules, or the value of them. Whether it was or was not legally necessary for Wertz to have possession of such bills of sale to be enabled to sell the mules they represented, so long as his conduct was controlled by the understanding that it was not safe for him to dispose of the mules without having in possession the bills of sale given to Winfield, the conduct of the bank in delivering those instruments contrary to instructions properly might be regarded as proximately contributing to the loss caused to Winfield by Wertz's wrongful disposition of some of the mules. The question whether the wrongful delivery of the bills of sale had the effect attributed to it was one of fact.

Several of the mules died while they were in the possession of Wertz. As a result of a suit brought by Winfield, he recovered 26 of the mules which were not sold by Wertz.

[2] Over objections interposed in behalf of the defendant the court permitted the introduction by the plaintiff of evidence of the amounts of attorney's fees and court costs expended by him in the suit brought for the recovery of the mules not sold by Wertz. Error was committed in the admission of that evidence. Whatever, if any, liability was incurred by the bank in consequence of its delivery to Wertz of the bills of sale contrary to instructions was based upon that action having the effect of enabling Wertz to sell the mules without paying for them. The bank incurred no responsibility in reference to the mules which remained unsold. In no way did it become liable for a noncompliance by Wertz with his undertakings to care for and redeliver the mules not sold by him. Winfield's outlays for attorney's fees and court costs

in the suit for the recovery of the mules were not attributable to any misconduct of the bank. Because of the error mentioned the judgment is reversed.

[3] In view of a retrial of the case, attention is called to an instruction of the court which was not excepted to. The court charged the jury:

"That if they believed that Winfield sent to the bank bills of sale for the mules, with instructions not to deliver them to Wertz, except as Wertz paid for each mule, and that, contrary to these instructions, the bank did deliver the bills of sale to Wertz, and that Wertz was accordingly able to sell certain of the mules, the jury should then find a verdict for the plaintiff for the number of mules disposed of by Wertz at the rate of $60 per head, and should also allow the items of attorney's fees, $300, and court costs of $149.75."

There was no evidence of the value of the mules sold when the bills of sale were delivered to Wertz, or when he disposed of those mules. The instruction quoted improperly assumed that their value at those times was what Wertz had agreed to pay for them. To sustain a recovery based on the bank's delivery of the bills of sale having the effect of enabling Wertz to sell some of the mules without paying for them, it was incumbent on the plaintiff to prove the value of the mules sold when they were wrongfully disposed of.

Reversed.

HESTER v. EAST TENNESSEE & W. N. C. R. CO.

(Circuit Court of Appeals, Fourth Circuit. December 5, 1918.)

No. 1659.

1. COMMERCE ⟸27(7)—EMPLOYERS' LIABILITY ACT—EMPLOYMENT IN "INTERSTATE COMMERCE."
   A brakeman, killed while on a train of empty hopper cars being moved by a switch engine to another point within the same state, their destination, however, being a further point in another state, to which they were taken the next day for loading with ore, *held* to have been employed in interstate commerce.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]
2. COMMERCE ⟸27(6)—INTERSTATE COMMERCE—MOVING EMPTY CARS.
   The hauling of empty cars from one state to another is interstate commerce.
3. COMMERCE ⟸27(6)—INTERSTATE COMMERCE—INTERSTATE TRAIN.
   The presence of interstate cars in a train makes it an interstate train.

In Error to the District Court of the United States for the Western District of North Carolina, at Asheville; James E. Boyd, Judge.

Action at law by Odie Hester, administratrix of Charlie Hester, deceased, against the East Tennessee & Western North Carolina Railroad Company. Judgment for defendant, and plaintiff brings error. Reversed.

Mark W. Brown, of Asheville, N. C. (J. W. Ragland, of Newland, N. C., and Thomas A. Jones, of Asheville, N. C., on the brief), for plaintiff in error.

A. Hall Johnston, of Asheville, N. C., and John W. Price, of Washington, D. C. (James H. Epps, of Jonesboro, Tenn., and Price & Dulaney, of Washington, D. C., on the brief), for defendant in error.

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

KNAPP, Circuit Judge. [1] Plaintiff in error, plaintiff below, brought this action under the federal Employer's Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. §§ 8657–8665]) to recover damages for the death of her husband, Charlie Hester, who was killed while in defendant's service in February, 1915. Upon the evidence adduced in her behalf the trial court directed a verdict for defendant, on the ground that Hester was not engaged in interstate commerce when he lost his life, and the correctness of that ruling is the only question to be decided.

Defendant operates a narrow gauge railroad running easterly from Johnson City, Tenn., to Cranberry, N. C., a distance of 34 miles. From Cranberry an affiliated road, known as the Linville River Railway, extends to Shulls Mills, N. C., a further distance of 24 miles. The only outlet for these lines is Johnson City, where connection is made with the Southern Railway and with the Carolina, Clinchfield & Ohio. A third rail has been laid from Johnson City to Elizabethton, Tenn., about 10 miles, and standard gauge cars can be transported to and from that point. At Cranberry there is a large output of iron ore, which moves in "hopper" cars to Watauga Point, near Johnson City, where a smelting furnace is located.

Hester was a brakeman and one of the crew which operated a switch engine in the yard at Johnson City. On the day of the accident the regular freight train is said to have been "off"—that is, not running—and this switching crew was called upon to move a number of cars with a switch engine to Blevins, Tenn., some 20 miles distant. They started out with 16 empty narrow gauge cars, and one standard gauge car, which was dropped at Elizabethton. Among the 16 cars were several hopper cars at the front end of the train. The switch engine was running backwards, and Hester had been sitting on the pilot beam facing the first car. Shortly before reaching Blevins he in some manner and from some cause fell from the engine under the cars, receiving the injuries from which he died not long afterwards. In order to get him quickly to a doctor, the rear cars were left at Blevins, and the engine with 6 or 7 hopper cars went on a few miles further to Roan Mountain, Tenn., near the North Carolina border. Six of these cars were taken to Cranberry the following morning by an engine and crew of the Linville Valley road, which came to Roan Mountain for that purpose, and the same 6 cars were loaded with ore at Cranberry and hauled back to Watauga Point within the next three or four days. In short, the testimony indicates that there was a regular and frequent movement of empty hopper cars to Cranberry and their return loaded to the smelter. It also appears that when the regular train was "off," as at the time in question, it was usual for defendant's switch engine to haul empty hoppers and other cars to

Blevins, and from there the Linville Valley would take them to Cranberry and points beyond in North Carolina.

[2, 3] It is enough to say of these and other facts of record that in our opinion they fully warrant the inference, if they do not conclusively show, that defendant and Hester were both engaged in interstate commerce when he met his death. The recited circumstances tend strongly to refute the contention that Blevins was in any sense the destination of the hopper cars hauled in the fatal train. It was customary to take empty hoppers to Cranberry, and there was no traffic at Blevins or other Tennessee point for which such cars were required. The employés of defendant could not have supposed that the hopper cars in question were to be moved only to Blevins, but must have understood that they were destined for Cranberry, where in fact they were taken almost directly. In a word, the evidence justifies a finding that the movement of the train on which Hester was killed was an interstate movement, because it carried cars which, as defendant well knew, were going through to Cranberry, N. C. The hauling of empty cars from one state to another is interstate commerce. N. C. R. Co. v. Zachary, 232 U. S. 248, 259, 34 Sup. Ct. 305, 58 L. Ed. 591, Ann. Cas. 1914C, 159. The presence of interstate cars in a train makes it an interstate train. Southern Ry. Co. v. United States, 222 U. S. 20, 32 Sup. Ct. 2, 56 L. Ed. 72. It is not needful to expand the argument. Upon the question here considered we deem it clear that a case was made for submission to the jury, and it was therefore error to direct a verdict for defendant. Pederson v. D., L. & W. R. Co., 229 U. S. 151, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153; St. L. & San Francisco Ry. Co. v. Seale, 229 U. S. 156, 33 Sup. Ct. 651, 57 L. Ed. 1129, Ann. Cas. 1914C, 156; N. Y. C. & H. R. R. Co. v. Carr, 238 U. S. 261, 35 Sup. Ct. 780, 59 L. Ed. 1298; Chicago, R. I. & P. Ry. Co. v. Wright, 239 U. S. 548, 36 Sup. Ct. 185, 60 L. Ed. 431; Louisville & Nashville R. Co. v. Parker, 242 U. S. 13, 37 Sup. Ct. 4, 61 L. Ed. 119.

In this brief review we have referred only to such facts as bear upon the question now before us, but it may not be improper to add that in our judgment the questions of defendant's negligence and Hester's assumption of risk were also questions for the jury.

Reversed.

AMERICAN CENTRAL INS. CO. et al. v. ISAACS. *

(Circuit Court of Appeals, Ninth Circuit. January 6, 1919.)

No. 3105.

PRINCIPAL AND AGENT ⇐79(5)—LIABILITY OF AGENT—FRAUDULENT CONDUCT OF PRINCIPAL'S BUSINESS.

Evidence *held* sufficient to show that defendant, as agent for insurance companies for the sale of a salvaged stock of goods, was chargeable with fraud in selling the larger part of the goods in bulk to himself through a partner.

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

*Rehearing denied February 10, 1919.

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

Suit in equity by the American Central Insurance Company and others against David Isaacs. Decree for defendant, and complainants appeal. Reversed and remanded, with directions.

Jesse Olney, of San Francisco, Cal., for appellants.

Leon E. Prescott and Bert Schlesinger, both of San Francisco, Cal., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. We have examined the record in this case attentively, and are of the opinion that the judgment of the court below, dismissing the bill, cannot be sustained. The complainants were insurers in varying amounts, aggregating more than $20,000, on a stock of merchandise in the city of Seattle, owned by one Bridge, doing business under the name of A. Bridge & Co. While so insured, to wit, on August 11, 1913, a fire occurred in his store, almost immediately after which he made an assignment for the benefit of his creditors to one Truax, a representative of the Seattle National Bank. For the adjustment of the loss occasioned by the fire, Bridge and his assignee employed an insurance adjuster named Mason, and the insurance companies employed a like adjuster named Main. After some differences regarding the loss, Mason finally reduced the claim on behalf of the insured and his assignee to $16,200; Main conceding that the loss amounted to $13,588.65, but refusing to concede that it was more. It was agreed between them that the sound value of the insured stock before the fire was $34,300, and that the insurance companies would take over the stock and pay that amount therefor, which they did, having, through their adjuster, Main, made an agreement with Isaacs, the defendant to the suit, who, according to the evidence, was an expert salvage man, by which he agreed to sell the insured stock for the benefit of the insurance companies, guaranteeing that they should receive from such sale $18,100, which latter sum he agreed to and did advance to them, and upon the further agreement that he should receive for his services, so stipulated for, a commission of 20 per cent. on the gross amount realized on the sale. The result of this arrangement, therefore, manifestly was to insure the complainants against any loss in excess of $16,200 and Isaacs' commission of 20 per cent. on the gross amount realized on the sale.

Isaacs at once entered into possession of the storeroom and stock, advertised, and commenced on the 7th day of September, what is spoken of by the witnesses as a fire sale, and continued it for 19 days with marked success throughout, according to all of the evidence, excepting only the testimony of the defendant Isaacs, who, while admitting that it was wholly successful in the beginning, testified that the sales decreased from day to day, running down as low as $400 to $500 a day—the average daily expenses being over $200. Isaacs also testified as follows:

"About a week before the retail sale ended, I spoke with Mr. Main about discontinuing it. I told him we couldn't afford to continue the sale much longer, and that the best thing to do would be to finish the rest of the week, and then sell the stock out in bulk. He said: 'Go ahead; use your own judgment. Isaacs, you know what will happen to that stock if you sell it in bulk to the merchants here; they will steal it; I don't think you will get 30 per cent. for the stock.' I informed him that I anticipated going in business in the Northwest, and that, provided I could get a lease on the premises, I suggested that I would put in a bid on this stock myself in the name of some other person, and that, if any one is willing to pay more than I, they are welcome to the stock. Mr. Main asked me how I would conduct that sale, and I said, 'I will notify all the merchants in Seattle and the surroundings, accustomed to buying and dealing in that class of merchandise.' He said, 'Very well; go right ahead;' and I immediately notified all the merchants who I thought were interested, Wasserman & Schirmer, Kessler, Colsky, Cone, and Buttnick. I received about eight or ten bids. Wasserman & Schirmer bid 25 per cent.; Colsky, $4,200; Cone bid between 25 per cent. and 30 per cent.; Kessler's bid was 30 per cent.; and Buttnick bid between 25 per cent. and 30 per cent. Branner Bros., of Bellingham, Wash., made an offer of $10,000, conditioned that they could get the premises for continuing the sale, which I could not accept under those conditions. These bidders came up to the store before the sale. I showed them the original inventory given to me by Main. I told them they would have to examine the goods and judge by that inventory. I told them I would take an inventory of the goods that were left at the close of the sale, but I could not guarantee the amount of the goods that would be left. I also put an ad in the Times on Sunday. I did not think this would do any good, but thought it was the proper thing to do."

Isaacs stopped the sale Saturday evening, September 27th, and the advertisement so inserted in the Seattle Times the next morning—Sunday—was as follows:

"The balance of the A. Bridge & Co. stock, 103-05 First Ave. South, will be offered for bids Monday, September 29th, at 3 p. m.

"Coast Fire & Marine Insurance Co.,
"D. Isaacs, Manager."

Without conflict the evidence shows that, without waiting for such bidders as might have been attracted by such notice as was given by the advertisement, Isaacs sold the remaining stock in bulk at about 11 o'clock in the morning of September 29th to himself for 45 cents on the dollar of the invoice, aggregating $11,094, which he paid, less 20 per cent. thereof, which he deducted as his commission, pursuant to a bid, written out by himself with his own hand, in these words and figures:

"Mr. D. Isaacs, 103 First Ave., South, Seattle, Washington—Dear Sir: I hereby submit to you the following bid of the A. Bridge stock: Forty-seven cent ($.47) on the dollar of the invoice price. Hoping this meets with your approval, I remain, yours truly"

—and had his then employé, H. C. Seynei, sign it, with which employé, the evidence clearly shows, he had entered into a secret agreement, a few days after the commencement of the trust sale, to establish a partnership business with the stock so sold in the name of H. C. Seynei & Co., which was done; there being entered against that firm on its books a charge in the said sum of $11,094.

It is thus apparent that this trustee not only sold the trust property

to himself for 2 cents less on the dollar of the invoice than he himself bid therefor in writing, but that from the proceeds he deducted 20 per cent. thereof as a commission to himself, thus paying to his cestui que trust but $8,876. For the stock so purchased by him he charged upon the books of the firm of H. C. Seynei & Co., in which, according to the uncontradicted evidence, he continued a secret partner, the aforesaid full amount of $11,094. The evidence further shows that during the Sunday intervening between the close of the fire sale and the following day, on which he gave the public notice that the sale in bulk of the remaining stock would be made, he took an inventory thereof, aggregating $24,653; and the evidence shows without dispute that in the evening of the day on which said bulk sale was made, at a meeting between the two partners held in the Hotel Herald in Seattle, Isaacs, with his own hand, made in writing a list of the various articles of merchandise so sold in bulk, aggregating in value $24,603.39.

While it is true that he testified, as has been above set out, that he notified all the merchants he thought would be interested of the bulk sale, and enumerated the bids he said were made to him by the parties he named, such testimony is not only in direct conflict with that of a number of his employés who were in the store at the time, but is wholly inconsistent with that of the witness Bailey, an attorney at law, whose testimony, we think, bears upon its face every indication of truthfulness. That witness testified, among other things:

"As I had been told this sale in bulk was coming off Monday morning, by Mr. Isaacs, I went down at that hour, and was there when the bids were opened. Two men whom I did not know were complaining to Mr. Seynei that they would like to have bid, had they time to examine the goods before the bids were opened, but could not do it. I do not know how many bids were in, nor what any of them called for; but a few minutes afterwards Mr. Seynei came back and told me he had got the goods, but that he knew he would all the time. Before I left the store at this time Mr. Isaacs told me that: 'We have got the goods and they are all in perfect shape. Now we will put on a sale and make plenty of money.'"

Moreover, it appears that to the very brief and unusual notice that Isaacs caused to be inserted in the Sunday edition of the Seattle Times he affixed the fictitious name "Coast Fire & Marine Insurance Co.," and deliberately testified that he did not think the advertisement "would do any good, but thought it was the proper thing to do"; whereas, it is a matter of common knowledge that notice of such sales is deemed by the commercial world as not only highly useful, but is almost always, if not universally, published, not only once, but for such reasonable time as will enable prospective purchasers both to examine the stock to be sold, as well as to attend the sale; and such is the effect of the testimony of all of the numerous witnesses upon the subject, except the defendant Isaacs.

When to all of this is added the most pregnant fact that in the advertisement he expressly stated and notified the public that the sale would not be made until 3 o'clock of the afternoon of Monday, he in fact made it to himself, through his employé, Seynei, about 11 o'clock in the morning of that day, for the consideration and under the circumstances that have been stated, we are of the opinion that it is im-

possible to resist the conclusion that such sale was grossly fraudulent, and that the court below erred in dismissing the bill.

The judgment is reversed, and the case is remanded, with directions to that court to decree the sale in bulk fraudulent and void, and to compel the defendant to the suit to account for his proceedings as trustee, with leave to the respective parties to introduce such further evidence as they may desire and as may be proper.

ANDERSON v. FOREST CITY NAT. BANK OF ROCKFORD, ILL.

(Circuit Court of Appeals, Seventh Circuit. December 10, 1918.)

No. 2613.

BANKRUPTCY ⟸408(4)—RIGHT TO DISCHARGE—CONCEALMENT OF ASSETS.

Failure of a bankrupt to schedule his interest in his deceased father's estate, where, after payment of a note which he owed the estate, he had no valuable interest, is not a fraudulent concealment of assets, which will defeat his right to a discharge.

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

In the matter of C. L. Anderson, bankrupt. From an order denying his discharge, the bankrupt appeals. Reversed.

Roy F. Hall, of Buffalo, N. Y., for appellant.

Before BAKER, MACK, and ALSCHULER, Circuit Judges.

ALSCHULER, Circuit Judge. The subject-matter of this appeal is the denial of appellant's application for discharge in bankruptcy. The ground of the denial was that the bankrupt, in fraud of his creditors, failed to schedule an interest in the estate of his father, a resident of Iowa, who had died a short time before the filing of appellant's petition in bankruptcy. It appears from the record that the father left a will in which he bequeathed a farm in Iowa, one-third to his wife and two-thirds to his three children. But it further appears that some time before his death, and after making the will he sold the farm, making no provision in the will for disposition of the proceeds in such case, whereby the proceeds of the farm, the large bulk of the estate, became intestate estate, which descended one-third to the mother and the rest to the three children equally.

The record shows that the estate of deceased consisted of a purchase-money mortgage on this farm for about $11,000, and a note, which the bankrupt owed his father, of nearly $3,000, with interest at 6 per cent. for about nine years. Appellant testified that he did not know what his father's will contained, but assumed all along that his father had left all his property to his mother. The will, while filed in the court in Iowa some time in May, was not admitted to probate until November, which was after the petition in bankruptcy was filed. It seems that shortly thereafter the trustee in bankruptcy had a copy of the will, and that he knew of its contents, before the bankrupt says

he found it out; but he took no steps to recover for the creditors any part of the estate of deceased. Bankrupt's mother and the county clerk in Iowa and the attorney in charge of the estate all testified that they had not informed Anderson, who resided at Rockford, Ill., of the contents of the will. One Waterman testified that before the bankruptcy Anderson had told him that he expected to build a house in Rockford with some money he would get from Iowa, and that it was his impression that Anderson said the money would come from his father's estate, but Waterman was not certain about this. Anderson said that he did say to Waterman that he would get some money from Iowa, but that he expected the money was to come from his mother, who had told him that, when she got the money, she would let him have some to build a house with.

But, apart from the evidence of appellant's knowledge or want of it upon this subject, the undisputed evidence of the actual value and extent of the bankrupt's interest in his father's estate makes it plain that, after deduction of the note he owed the father's estate, he had no valuable interest remaining which could be the subject of concealment or of fraudulent withholding from the trustee. His failure to schedule any interest in his father's estate, if in fact he had none, will not sustain the objection made to his discharge in bankruptcy.

The order of the District Court denying plaintiff's discharge is reversed, with direction for further proceedings not inconsistent herewith.

UNITED STATES v. ST. JOHN.

(Circuit Court of Appeals, Seventh Circuit. December 21, 1918.)

No. 2695.

1. BAIL ⊂⊃44—CRIMINAL PROSECUTION—RIGHT TO RELEASE ON BAIL PENDING PROCEEDINGS IN ERROR.
   Under rule 34 of the Circuit Court of Appeals (235 Fed. xiv, 148 C. C. A. xiv) it is discretionary with the court or judge to accept bail from a defendant pending proceedings in error after conviction and sentence, although his right to bail is not the same as before conviction.

2. BAIL ⊂⊃49—PENDING PROCEEDINGS IN ERROR.
   In cases where the granting of bail after conviction pending proceedings in error is opposed by the government, and no bill of exceptions has been settled, application should first be made to the trial judge.

3. BAIL ⊂⊃44—BAIL PENDING PROCEEDINGS IN ERROR.
   Admission to bail denied to a defendant convicted of violation of the Espionage Law (Comp. St. 1918, §§ 10514a–10514d), pending proceedings in error.

Criminal prosecution by the United States against Vincent St. John and others. On application to a Circuit Judge by defendant St. John for bail pending proceedings in error. Denied.

Clarence Darrow, of Chicago, Ill., for plaintiff in error.

Charles F. Clyne, of Chicago, Ill., and David S. Cook, of Salt Lake City, Utah, for the United States.

EVAN A. EVANS, Circuit Judge. Defendant, together with some 100 others, was convicted on four counts of an indictment, each count charging conspiracy to violate the so-called Espionage Act (Act June 15, 1917, c. 30, 40 Stat. 231 [Comp. St. 1918, §§ 10514a–10514d]), and was sentenced to serve a term in the penitentiary. He has sought and secured a writ of error, and now seeks to be enlarged on bail pending the hearing of his writ of error by the Circuit Court of Appeals.

[1] That a judge of this court may grant bail pending the hearing on a writ of error, in a proper case, is recognized by rule 34 of this court (235 Fed. xiv, 148 C. C. A. xiv) which reads as follows:

"2. Where such writ of error is allowed in the criminal cases aforesaid, the Circuit Court or the District Court before which the accused was tried, or the District Judge of the district wherein he was tried, within his district, or the Circuit Justice assigned to this circuit, or any of the Circuit Judges within the circuit, shall have the power, after the citation has been duly served, to admit the accused to bail and to fix the amount of such bail."

While assignments of error must be filed before any writ of error is allowed (rule 11, C. C. A., 150 Fed. xxvii, 79 C. C. A. xxvii), there is no requirement that the bill of exceptions shall be settled prior to the issuance of the writ. Paragraph 2 of rule 34 contemplates the issuance of the writ of error prior to any enlargement on bail. In the present case, while assignments of error have been filed and the writ of error issued, there has been presented no transcript of the testimony and no bill of exceptions.

The government opposes defendant's motion for bail on the ground that there is no bill of exceptions from which the court can determine whether the assignments of error are well supported by the record.

An examination of the authorities warrants the conclusion that the right of the defendant to bail prior to conviction is quite different from his right after conviction and sentence. Prior to a verdict of guilty, defendant is presumed innocent. The return of the indictment against him is not even prima facie evidence of guilt. It creates no presumption against him, and he is, excepting, perhaps, in a few offenses covered by legislation, entitled to bail as a matter of right. In many states a defendant's right to bail prior to conviction is safeguarded by constitutional provisions, and, where neither statutory nor constitutional provisions are found, bail is allowed under the common-law rule, it being a matter of discretion with the court. In re Thomas, 39 L. R. A. (N. S.) 754, notes.

But defendant stands in a different position after conviction. In fact, in some states it has been considered necessary to enact legislation conferring power upon courts to allow bail after conviction and sentence. In the federal courts this power has been given by a rule of the Supreme Court. See United States v. Simmons (C. C.) 47 Fed. 575. In this court a similar rule (34) has been adopted.

Aside from any authorities, it must be apparent that, inasmuch as bail is allowed almost as a matter of course before conviction, largely because of the presumption of innocence which prevails in defendant's behalf, a different practice should prevail where the reason for the

rule disappears. After conviction and sentence, the burden is upon the convicted party to show error in the conviction.

However, in view of the fact that bail is granted in the discretion of the court, not alone because of the existence of this presumption of innocence, courts have, with great liberality, allowed defendants to be enlarged on bail notwithstanding conviction. Considerations affecting the determination of this question are severity of the punishment, the nature of the offense of which the defendant stands convicted, the health of the prisoner, the character of the evidence, the good faith back of the assignments of error, the public welfare, the conduct of the accused after indictment and up to and including the time of his sentence, as well as many other matters.

In fact, bail has been so frequently granted after conviction that an erroneous impression has obtained with the bar that it is allowed as a matter of right. A few authorities, therefore, might well be examined. In 3 Ruling Case Law, p. 15, we find the following:

"After conviction, no constitutional right to bail exists and the granting of bail rests in the sound discretion of the court. In cases of misdemeanor this discretion is exercised freely in favor of bail, but in felonies bail is allowed with great caution, and only where the peculiar circumstances of the case render it right and proper."

In 6 Corpus Juris, p. 965, we find the following statement supported by many authorities:

"As a general rule, the conviction of the accused does not deprive the court of the power to admit him to bail pending an imposition of sentence; but its allowance continues a matter of judicial discretion until the accused is finally committed in execution; and in some jurisdictions this power is expressly regulated by constitutional or by statutory provisions. There is, however, no constitutional right to bail after conviction; and, although in cases of misdemeanor this discretionary power is exercised freely in its favor, in cases of felonies bail after conviction should be allowed with great caution and only where the extraordinary or peculiar circumstances of the case render it right and proper."

To the same effect, see 5 Cyc. 72.

In the federal courts we find the right to bail after conviction early recognized. In United States v. Simmons (C. C.) 47 Fed. 577, the court says:

"Were it not for rule 36 of the Supreme Court [32 Sup. Ct. xiii] of the United States, it might well be argued that no bail should be accepted from a person already convicted and under sentence to be imprisoned for a term of six years."

In Re Schriber, 19 Idaho, 531, 114 Pac. 29, 37 L. R. A. (N. S.) 693, the appellate court considered a situation where the trial court refused to enlarge the defendant after conviction. I quote from the opinion:

"It would certainly be disastrous if we should hold that this provision of the Constitution grants to a person convicted of crime the absolute right to be admitted to bail pending appeal, irrespective of the merits of the case. * * * For some reason the judge subsequently concluded that he should no longer be admitted to bail. * * * We would not feel justified in interfering with the discretion of the trial judge under the facts and circumstances as they present themselves to us in this petition. * * * We are

not familiar with the situation and the circumstances of the petitioner, and we think that is a matter with which the trial judge can deal more justly and wisely. He is familiar with the parties and their ability to give bail, and also knows the facts surrounding the commission of the offense for which he was convicted."

Extended notes appear in the report above referred to, as well as in the case of In re Thomas, supra.

Whether the court properly traces its authority to the Supreme Court rule or not is immaterial. Federal courts have exercised unhesitatingly the power to admit to bail defendants convicted and sentenced. In Ex parte Harlan (C. C.) 180 Fed. 119, 135, the question is considered at some length. I quote therefrom:

"It is needless to say that there is no constitutional right to bail in any case, after conviction. After all that has been said and written on the subject, the only rule which can be deduced from the authorities is that bail should be granted or denied as best effects exact justice between the government and the defendant according to the character and urgencies of the instant case, determined in the light of the principles of the common law as affected by the enactments of Congress. It is due to social order and proper regard for the majesty of the law, that a sentence, especially when affirmed by an appellate court, should be executed without undue delay, and courts should be careful not to give countenance to factious resistance to the orderly operation of the law by lightly admitting a convicted prisoner to bail. On the other hand, it is also to be borne in mind that the law is quick to afford opportunity and means to the citizens to redress wrongs at its hands, and delighting as it does, in the liberty of the citizen, will not, except in rare instances, compel the prisoner to undergo sentence before the final court has spoken, when he is honestly pursuing legal means to avoid a conviction."

See, also, Rose ex rel. Carter v. Roberts, 99 Fed. 952, 40 C. C. A. 203.

In the present case the trial was concluded about August 17. Defendants were sentenced on August 30. A large number of defendants were joined in the indictment and most of them are serving their sentences in the penitentiary. Defendant St. John claims that his business interests will suffer if he be not enlarged on bail. His excuse for not presenting the bill of exceptions or the transcript of the record is that the trial was so long (the taking of testimony covering some 85 days), so many exhibits were offered, that it has been impossible to prepare the bill of exceptions within the last 3½ months or to get it ready for settlement.

The absence of the bill of exceptions in the present case only emphasizes what, in my mind, is essential to the intelligent disposition of this or any similar motion. The judge who heard the case knows the attitude of each of the defendants, observed them throughout the trial and particularly while on the witness stand, understands the nature and the character of the offense, the reasonableness of defendant's claim of innocence, the strength or weakness of the government's case, the possibility of injury to defendant by reason of confinement pending the disposition of the writ of error, as well as the injustice to the public, if any, should the defendant be enlarged, and is therefore best qualified to determine whether defendant should be admitted to bail, as well as the amount of the bail.

[2] To illustrate this court's difficulties: Defendant asserts, and the

government denies, that error was committed in the trial of the case. Defendant asserts that he had no part in the conspiracy charged and that he was not even a member of the organization commonly called the I. W. W. This claim the government denies, and asserts that defendant was one of the leading officers of the organization and an actor who played a leading role in the conspiracy. Defendant assigns error because of the alleged unlawful seizure of papers, but this court is at a total loss to know whether any papers (seized lawfully or unlawfully) belonged to, or were in the custody of, the defendant St. John. It appears to me that in all cases where the granting of bail is opposed by the government, and there is no bill of exceptions settled, the District Judge who heard the case should first be given the opportunity to hear the request and judicially exercise his discretion in the matter. His conclusion would be much more intelligent than mine and doubtless controlling on review.

There is danger lurking in the too liberal exercise of the power to admit to bail as well as in the arbitrary refusal to grant bail. Too frequently, after the defendant has been admitted to bail, his interest apparently lags, the appeal drags, the bill of exceptions is not promptly settled, and the record does not reach the appellate court as promptly as it should. There are inexcusable delays in securing the printing of the transcript—more delays in printing and serving the briefs.

The present rules of the Circuit Court of Appeals invite a very early disposition of any appeal or writ of error prosecuted in good faith and with vigor. There are three annual sessions of the court—October, January, and April. Causes may be advanced or set down specially. Writs may be heard without the testimony being printed. The clerk is able to print transcripts of great length in less than a week, while any brief of reasonable length will be printed in a day. Orders may be obtained dispensing with the printing of exhibits. In a word, the rules and the practice of the court combine to accomplish the purpose of assisting the litigants to an early disposition of their cases. Court reporters are obtainable who will provide daily transcripts of testimony, and bills of exceptions can be presented almost on the day the verdict is received.

Frequently the delays in these cases are due to the desire of the parties to avoid a hearing rather than to any other cause. In the present case, no application for bail has been made to the judge who tried the case since the assignment of errors has been filed. The offenses of which this defendant and others have been found guilty are serious and menacing to the public. Defendant has been tried and presumably lawfully convicted. The interest of the public demands the execution of the sentence unless some special reasons be shown for defendant's enlargement.

[3] Realizing that defendant is entitled, under the rules above quoted, to a determination of his application on its merits by a judge of this court, I have studied the record and such facts as do appear, and my conclusion is not clouded in doubt. While the transcript of testimony of the trial is not before me, I am favored with a full statement of the case made by the District Judge when sentence was pronounced

This statement shows that acts were committed, and a policy pursued. by many members of the organization known and referred to as the I. W. W. that were wholly at variance with the policy of this government during the war, and equally hostile to the welfare of people and industries entirely free from blame or responsibility for this country's part in the war. In large sections of the country, members of this organization not only attempted to cripple business, but to a certain extent, at least, accomplished their object. Certainly members of the organization known as the I. W. W. are not in an enviable position to urge the impairment of their property rights now, in view of their attitude towards property during the past year. Whether defendant participated in this conspiracy—whether this defendant, or any defendants, were fairly convicted of this crime—are questions that each one has the right to present and the right to have fully and fairly determined. But the court cannot and should not ignore this statement of the District Court in determining whether bail should be allowed pending the determination of these questions.

Upon the entire showing, I conclude the request for bail should be and is hereby denied.

MANSON et al. v. MESIROV.

(Circuit Court of Appeals, Third Circuit. January 15, 1919.)

No. 2415.

BANKRUPTCY ⊜467—REVIEW—FINDINGS.

Conclusion of referee in bankruptcy, concurred in by the District Court, should not be disturbed on appeal, unless for plain error.

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

In the matter of the bankruptcy of Max Manson and Samuel F. Manson, copartners, individually and trading as Max Manson & Son and Adelphia Waist Company. On petition of Harry S. Mesirov, trustee in bankruptcy, the bankrupts were directed to turn over a sum of money, and, the order having been affirmed on certificate to the District Court, the bankrupts appeal. Affirmed and remanded.

Bertram D. Rearick, of Philadelphia, Pa., for appellants.

Edwin Fischer, Byron, Longbottom & Pape, and Jacob I. Weinstein, all of Philadelphia, Pa., for appellee.

Before BUFFINGTON and WOOLLEY, Circuit Judges.

PER CURIAM. In the course of the administration of the bankrupt estate of Max Manson and Samuel F. Manson, the referee, after hearing proofs, made findings and entered an order that said bankrupts "pay over within 10 days to Harry S. Mesirov, as trustee herein, the sum of $2,467, belonging to their estate in bankruptcy, found to be in their possession or under their control." On certificate to it,

the District Court reconsidered the case, and thereafter entered its opinion and decree as follows:

"When a trustee seeks to obtain a turn-over order, the established practice in this circuit is to be followed. Epstein v. Steinfeld (C. C. A. 3) 210 Fed. 236, 127 C. C. A. 54. The present proceeding is in its first stage, and I shall only say that an attentive examination of the record discloses no reason for disagreement with the referee's report. But the concluding words of his order should be slightly modified, so as to read, 'found at the time the petition in bankruptcy was filed to be in their possession or under their control.' And, as the time for payment fixed by the referee has now expired, the date of August 15 is now substituted.

"Thus modified, the order is affirmed."

Thereupon this appeal was taken by the bankrupts to this court. No principles or questions of law, or procedure, are involved. The simple issue is one of fact, and those facts are fully discussed in the opinion of the referee. The contention, in substance, now is that the referee erred in his finding of facts, and the District Court erred in adopting those findings. We have carefully examined the testimony, and find the case had the careful and considerate attention of the referee, and we see no reason to differ from the conclusions he reached. As the referee's conclusions were concurred in by the District Court, we have a case where their joint judgment should not be disturbed unless for plain error.

The order below is affirmed, and the case remanded for further procedure by the court below.

FREEDOM OIL WORKS CO. v. PITTSBURGH, C., C. & ST. L. RY. CO.

(Circuit Court of Appeals, Third Circuit. January 15, 1919.)

No. 2424.

APPEAL AND ERROR ⊂=1106(4)—REVIEW—DETERMINATION.

In action by railway company to recover alleged storage charges on interstate shipments, where the case was one of far-reaching importance, a judgment entered on motion for judgment for want of sufficient affidavit of defense may, in the discretion of appellate court, be reversed without opinion on the questions involved, so as to allow proofs to be placed of record before the case is reviewed.

In Error to the District Court of the United States for the Western District of Pennsylvania; W. H. Seward Thomson, Judge.

Action by the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, now for use of Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company, against the Freedom Oil Works Company. There was a judgment for plaintiff, entered on motion for judgment for want of sufficient affidavit of defense (247 Fed. 573), and defendant brings error. Reversed and remanded.

Forest G. Moorhead, of Beaver, Pa., for plaintiff in error.

John G. Marshall and Moorhead & Marshall, all of Beaver, Pa., and Gordon Fisher, of Pittsburgh, Pa. (Dalzell, Fisher & Hawkins, of Pittsburgh, Pa., of counsel), for defendant in error.

Before BUFFINGTON and WOOLLEY, Circuit Judges.

PER CURIAM. In this case the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company brought suit against the Freedom Oil Works Company to recover for alleged storage charges on interstate shipments. The court below entered judgment on a motion for judgment for want of a sufficient affidavit of defense. Thereupon the oil company sued out this writ.

On the argument it became evident that the case was one of far-reaching importance, and this court being, as it was in Paterlini v. Memorial Hospital, 232 Fed. 360, 146 C. C. A. 407, unwilling to pass on the questions involved until, "by the proofs rather than from the uncertain averments of pleadings, we are precisely informed of the facts upon which our judgment should rest," we follow this course there indicated, namely, without expressing in any way any opinion upon the questions here involved, we deem it the exercise of wise discretion to reverse the judgment and allow the proofs to be placed of record before the case is reviewed by this court.

FARRELL et al. v. FIRST NAT. BANK OF PHILADELPHIA.

(Circuit Court of Appeals, Third Circuit. January 15, 1919.)

No. 2422.

1. APPEAL AND ERROR ⟸977(3)—GRANT OF NEW TRIAL—DISCRETIONARY POWERS OF COURT.

The grant of a new trial is one of the most useful discretionary powers of the trial court, and such step is only taken with reluctance, and, when done, there is every presumption that it is done in pursuance of a wise discretion, and in furtherance of justice.

2. APPEAL AND ERROR ⟸110—REVIEW—DECISIONS APPEALABLE.

A writ of error will not lie to review an order granting a new trial, and that matter can be reviewed only when the case is before the appellate court on writ of error after entry of final judgment.

In Error to the District Court of the United States for the Eastern District of Pennsylvania; J. Whitaker Thompson, Judge.

Action between J. Walter Farrell, Charles Weil, Sumner S. Weil, and John McKay, trading as Weil, Farrell & Co., and the First National Bank of Philadelphia. There was an order granting the latter a new trial, and the former bring error. Writ dismissed.

Henry A. Rubino and Van Vechten Veeder, both of New York City, and J. Howard Reber, of Philadelphia, Pa., for plaintiffs in error.

Joseph S. Clark and Owen J. Roberts, both of Philadelphia, Pa., for defendant in error.

Before BUFFINGTON and WOOLLEY, Circuit Judges.

PER CURIAM. [1, 2] The error assigned in this case is the granting by the court below of a new trial. The grant of a new trial is one of the most useful discretionary powers of a trial court. It is not often exercised by the experienced District Judges of this circuit,

and when done it is only, as they conceive, in furtherance of the due administration of justice. In no case in this circuit has it been held that a writ of error will lie to such grant of a new trial by the trial judge. Such step is only taken with reluctance, but when it is done there is every presumption that it was done in pursuance of a wise discretion, and in furtherance of justice, as the trial judge conceives.

It is alleged in this case that there was an abuse of discretion, because the trial judge, it is contended, granted the new trial on a mistaken view of the law. We do not deem it wise, at the present stage of this case, to express or indicate any view on that question, but confine ourselves to quashing the writ and allowing the whole case to come before us upon entry of final judgment, if error be then assigned.

GALLET et al. v. R. & G. SOAP & SUPPLY CO.

(Circuit Court of Appeals, Second Circuit. December 11, 1918.)

No. 87.

1. TRADE-MARKS AND TRADE-NAMES ⊂=58—INFRINGEMENT—MARKS—CORPORATE NAME.

   Complainants, French manufacturers of high-grade soaps and toilet preparations, with a registered trade-mark of "R. & G." in monogram, *held* not entitled to an injunction restraining defendant, R. & G. Soap & Supply Company, from using the letters "R. & G.," which are the initials of its organizers, in its corporate name; there being no claim of fraud, and no proof of interference with complainants' trade, the soap made by defendant being a low-priced article.

2. TRADE-MARKS AND TRADE-NAMES ⊂=73(2)—SIMILARITY OF CORPORATE NAMES—RIGHT TO INJUNCTION.

   Where the right to relief depends exclusively upon comparison of the corporate names of the parties and the inferences to be drawn from such comparison alone, without reference to extrinsic facts, and there is no evidence of confusion or injury, the courts will not grant injunctive relief.

3. TRADE-MARKS AND TRADE-NAMES ⊂=70(1)—UNFAIR COMPETITION—RIGHT TO INJUNCTION.

   A court should not interfere by injunction to restrain alleged unfair competition, when ordinary attention by the purchaser of the article would enable him at once to distinguish the one from the other.

4. TRADE-MARKS AND TRADE-NAMES ⊂=98—SUIT FOR INFRINGEMENT—ACCOUNTING.

   An accounting for infringement of trade-mark will not be ordered, unless it is clear that on the evidence in the case, or evidence which might be presented to the master, there could be a substantial recovery.

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

Suit in equity by Edmund Gallet and another against the R. & G. Soap & Supply Company. From the decree, complainants appeal. Affirmed.

Maurice Leon, of New York City, for appellants.

J. Robert Rubin, of New York City (Milton Frank, of New York City, on the brief), for appellee.

Before WARD, ROGERS, and MANTON, Circuit Judges.

MANTON, Circuit Judge. [1] The appellants are partners trading under the name of Roger & Gallet, with their principal place of business in France. They trade, however, in this country through duly authorized agents here. They have obtained in the United States trade-marks No. 30,439, registered July 27, 1917; No. 35,737, registered January 8, 1901; No. 96,880, registered May 5, 1914; No. 101,629, registered January 5, 1915.

Under these trade-marks, the appellants and their predecessors conducted their business since the 2d of January, 1891, which business consists of the sale of high-grade soaps and toilet preparations. The letters "R." and "G." have their origin in the initials of the appellants, and are combined in a monogram described in trade-mark registered No. 101,629. The appellee, R. & G. Soap & Supply Company, is the successor of the R. & G. Supply Company. This firm began a premium business in the city of Binghamton, N. Y., in 1901, and is now engaged in the manufacturing, buying, selling, importing, and exporting of, and dealing generally in, soaps, teas, coffee, groceries, cloaks, suits, furniture, and all kinds of supplies for individuals. Two men, Simon Rosenthal and Maurice Gutman, citizens of Binghamton, using their initials as part of their corporate name, organized the corporation R. & G. Supply Company, which was later changed to the present name of the appellee.

The appellee conducted its business by selling these articles directly to the consumer from its manufacturing plant in Binghamton, giving premiums and stamps, which could be redeemed at its home office, for furniture and household articles. It is essentially a premium business, as well as a mail-order business. The bulk of its business is done in the mining districts of Pennsylvania; it deals in low-priced goods, and consequently does not reach the same high-class trade as do the appellants. On the other hand, the appellants' business was world-wide; they dealt in more costly commodities, and consequently to a higher-grade trade. The appellants expressly eliminated any charge of fraud.

There was no proof that the appellants' business was interfered with; that is to say, that any actual loss was sustained or trade diverted by reason of the use of these initials in the appellee's trade name. These facts were all stipulated.

The special master granted an injunction restraining the appellee from using the letters "R." and "G." either separately or in a monogram, or in the form "R. & G." or "R. and G." on labels, but did not enjoin the use of "R. & G." or "R. and G." in the corporate name; the latter use, however, to be employed only with the same size print as the balance of the corporate name.

The appellants, feeling aggrieved by the scope of this injunction, have appealed, and urge upon us that the court below erred in refusing to absolutely forbid the use of the letters "R. & G." in the corporate name of the appellee, and further in failing to grant an accounting.

Upon these stipulated facts, nothing appears except the mere use of the letters "R." and "G." by the appellee, and such use in its corporate name could not constitute an infringement of the appellants'

trade-mark. Indeed, the use of similar trade-marks, standing alone, does not constitute infringement. Wherever aid has been had from a court of equity, there has been some evidence of unfair competition in the sale of the goods by the infringer. If the appellee had the right to use the letters "R." and "G." as it did, in its corporate name, by the grant of such name from the state, and did so conduct its business as not to palm off its goods as those of the appellants, and there is no evidence of fraud in the conduct of its business which would be calculated to reach the same result, equity will not enjoin it as an infringer. Howe Scale Co. v. Wyckoff, Seaman & Benedict, 198 U. S. 118, 25 Sup. Ct. 609, 49 L. Ed. 972.

[2] Where the right to relief depends exclusively upon the comparison of the corporate names of the parties and the inferences to be drawn from such comparison alone, without reference to any extrinsic facts, and there is no evidence of confusion and injury, the courts will not grant injunctive relief. Higgins v. Higgins, 144 N. Y. 470, 39 N. E. 490, 27 L. R. A. 42, 43 Am. St. Rep. 769.

It was held in Cement Co. v. Le Page, 147 Mass. 207, 17 N. E. 304, 9 Am. St. Rep. 685, that the right to use one's own name in all legitimate ways, or as a whole or part of a corporate name, in the absence of contract, fraud, or estoppel, will not be enjoined, and one may use his own name with equal right in a business in which others are associated with him, as in a partnership or corporation, if it appears that such corporate or partnership name is not selected for the purpose of unfair competition. Such absolute right to use a man's own name honestly in his own business, for the purpose of advertising it, even though it may interfere and injure the business of another having the name, unless he resorts to artifice or some action calculated to mislead the public as to the identity of the business, and thus cause injury to the others, beyond that which results from the similarity of names, should not be enjoined.

Applying these rules to the facts in this record, we are of the opinion that the appellants have been accorded the fullest protection to their trade-mark rights.

[3] None of the labels which the appellee used with the name "R. & G. Soap & Supply Company, Binghamton, N. Y.," are likely to mislead the average purchaser to take the appellee's goods for those of the appellants. No ordinary purchaser would be misled by the similarity of the initials used as restricted by the decree appealed from. A court of equity should not interfere when ordinary attention by the purchaser of the articles would enable him at once to discriminate the one from the other.

The appellants used the initials "R." and "G." in a monogram, with the words "Paris, France," and the appellee the name "R. & G. Soap & Supply Company, Binghamton, N. Y." We are at a loss to understand how the ordinary purchaser could be confused or deceived.

[4] Nor are the appellants entitled to an accounting. There is no concession nor evidence which indicates that a single sale was made as a result of any misconception or misleading advertisements with the use of the initials "R." and "G." on the labels of the commodities sold by the appellee, and there can be no damage in connection with

the violation of the appellants' rights, which have now been restrained, except there was injury to the business and good will of the appellants. Such damage could only be demonstrated by loss of sales which otherwise would have accrued to the injured business. An accounting will not be ordered, unless it is clear that either upon the record, or upon a record which the appellants might present to the master, there could be a substantial recovery. Merriam v. Saalfield, 198 Fed. 369, 117 C. C. A. 245.

We are satisfied that the appellants present no such case. Concluding, as we do, that the initials "R." and "G.," followed by the words "Soap & Supply Company, Binghamton, N. Y.," distinguished the appellee's goods from those of the appellants, so as to avoid confusion, and that there was no effort on the part of the appellee to palm off its goods for those of the appellants, the appellants are not entitled to the further relief which they ask for.

Decree affirmed.

ROYAL INS. CO., Limited, v. TAYLOR et al.

(Circuit Court of Appeals, Fourth Circuit. October 11, 1918.)

No. 1633.

1. EVIDENCE ⟸253(2)—CONFESSION OF COCONSPIRATOR.
   In action on fire policy, confession of one who was convicted of burning property is not admissible against insured, on theory property was burned as part of a conspiracy, and confession was a declaration of insured's coconspirator, for confession was not made pending the conspiracy, or in furtherance of its purpose.
2. EVIDENCE ⟸253(1)—CONSPIRACY—DECLARATIONS AGAINST INTEREST.
   Where insurer claimed that property was burned as result of conspiracy between insured and one who fired the property, latter's confession is not admissible against insured, in an action on the policy, on the theory it was a declaration against interest; the rule applying only to declarations against pecuniary interest.
3. INSURANCE ⟸658—ACTIONS—EVIDENCE.
   Where insurer claimed that property was burned as a result of a conspiracy between insured and one who fired the property, latter's confession is not admissible against insured, in an action on the policy, on the theory that he was an accessory to the burning.
4. EVIDENCE ⟸317(2)—HEARSAY.
   Mere hearsay as to declarations by a third person is not admissible in evidence.
5. APPEAL AND ERROR ⟸1066—HARMLESS ERROR—INSTRUCTION.
   In action on fire policy, where there was no evidence property was incumbered or belonged to any one other than those insured, policy was prima facie evidence of their ownership; so an instruction refusing to submit the question whether property was incumbered, etc., was harmless, if erroneous, under Code W. Va., c. 125, § 64 (sec. 4818).
6. INSURANCE ⟸665(1)—FIRE INSURANCE—OWNERSHIP.
   In action on fire policy, where there was no evidence property was incumbered or belonged to any one other than those insured, policy was prima facie evidence of their ownership.
7. APPEAL AND ERROR ⟸977(5)—REVIEW—NEW TRIAL.
   Denial of motion for new trial cannot be reviewed on writ of error.

In Error to the District Court of the United States for the Southern District of West Virginia, at Charleston; Benjamin F. Keller, Judge.

Action by J. S. Taylor and another against the Royal Insurance Company, Limited. There was a judgment for plaintiffs, and defendant brings error. Affirmed.

George E. Price and Price, Smith, Spilman & Clay, all of Charleston, W. Va., and Steptoe & Johnson, of Clarksburg, W. Va., for plaintiff in error.

L. H. Kelly, W. E. Hines, and Van B. Hall, all of Sutton, W. Va., for defendants in error.

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

PRITCHARD, Circuit Judge. The defendant in error will hereinafter be referred to as the plaintiff, and the plaintiff in error will be referred to as the defendant; such being the relative positions the parties occupied in the court below.

This is an action of assumpsit brought by J. S. Taylor and A. E. Messenger against the Royal Insurance Company, Limited, of Liverpool, England, on a fire insurance policy for $5,200, issued by the defendant on the 24th day of August, 1915, on certain lumber of the plaintiffs on a lumber yard where there had been a mill located. The suit was originally brought in the circuit court of Braxton county, W. Va., and was removed on application of the defendant into the United States District Court for the Southern District of West Virginia, and the defendant set up defense that the policy in question had become void, and the plaintiffs could not recover, because the property insured was set fire to and burned on the 2d day of November, 1915, by one Jerry White, and that said White was moved, incited, hired, and procured to set fire to and burn said property by the plaintiff A. E. Messenger, with intent and design to injure and defraud the defendant.

It was also alleged that both of the plaintiffs had in the proof of loss sworn falsely that the fire did not originate by any act, design, or procurement on the part of the insured, or in consequence of any fraud or evil practice done or suffered by the insured. An amended specification or defense was afterward filed, which, in effect, set up that the property was burned on the 2d day of November, 1915, pursuant to a conspiracy entered into between the plaintiffs with each other and with Jerry White and one Ona Conrad to set fire to and destroy the property insured by the policy, and that it was burned by the said Jerry White in accordance with the plan of said conspiracy and while it was in existence. A trial by jury was had, and a verdict rendered in favor of the plaintiffs against the defendant for $5,334.28.

The case comes here on a writ of error. The assignments of error relate to the refusal of the court below to permit the introduction of certain evidence and the giving of plaintiffs' instructions Nos. 2, 3, and 4, except the tenth assignment, which relates to the court's refusal to set aside the verdict and award a new trial, on the ground that the verdict was contrary to the law and evidence.

By the first assignment of error it is contended that the court erred in its ruling upon the admissibility of the record of the criminal prosecution of State of West Virginia v. Jerry White. The court, in referring to this phase of the question, said:

"The record of the conviction of White was admitted for the purpose of showing that Jerry White was in the penitentiary, and was therefore disqualified as a witness under section 17 of chapter 152 of the West Virginia Code. Evidence was also admitted of the fact that Jerry White had admitted in the presence of a witness or witnesses that he had burned this property. The written confession of Jerry White was not admitted; it having been offered as a whole, and containing statements not germane to the question of White having burned the property, but containing statements prejudicial to plaintiffs in this case as to his being employed by them for that purpose. It seems to me quite clear that this written confession of Jerry White was inadmissible as a whole (which was the only way in which it was offered) for any purpose in this case. The defendant was undoubtedly entitled to show, and did show, that this property was intentionally burned; it was also entitled to show, if it could, by any proper evidence, that the insured (the plaintiffs in the case) had caused the property to be intentionally burned, and a volume of evidence, circumstantial in its nature, was introduced, which, coupled with the confession of White that he had burned the property, might well have induced the jury so to find, and there was abundant evidence to go to the jury upon the issue as to whether or not the plaintiffs were entitled to recover anything, and, if so, how much; but I am unable to see any view as to the admissibility of evidence in such a case, upon what theory the statement made by White that he had been hired by the plaintiffs to burn this property could be admissible."

It is insisted by counsel for the plaintiff that the record in the case of State of West Virginia v. Jerry White is not incorporated as part of the record of this court, and that therefore the court cannot determine as to what such record contains. This position is untenable, in view of the fact that this court entered an order, upon suggestion of diminution of the record, directing that same be sent up as addenda, and, as such, same is now part of the record in the case before us. Therefore, in passing upon the questions involved herein, we will treat the addenda as part of the record.

[1] It is urged by counsel for the defendant that there was a conspiracy entered into by the plaintiffs and Jerry White to defraud the defendant, in which it was agreed that White was to burn the property of the plaintiffs. It is contended by counsel for the defendant that, where a conspiracy has been formed, the declaration of a coconspirator in the absence of the others, made pending and in furtherance of its purpose, is competent as against the other parties to the conspiracy. However, this rule does not apply in view of the facts of the instant case. Here the alleged confession was not made pending the conspiracy, nor in furtherance of its purpose.

[2] It is insisted, however, that this evidence should have been admitted upon the theory that the declaration of White was contrary to his own interests. This rule only applies where the declaration is contrary to the pecuniary interests of the party making the same.

In the case of Donnelly v. U. S., 228 U. S. 243, 33 Sup. Ct. 449, 57 L. Ed. 820, Ann. Cas. 1913E, 710, the Supreme Court, in referring to this case, among other things, said:

"One of the exceptions to the rule excluding it is that which permits the reception, under certain circumstances and for limited purposes, of declarations of third parties made contrary to their own interest; but it is almost universally held that this must be an interest of a pecuniary character, and the fact that the declaration, alleged to have been thus extrajudicially made, would probably subject the declarant to a criminal liability is held not to be sufficient to constitute it an exception to the rule against hearsay evidence. So it was held in two notable cases in the House of Lords—Berkeley Peerage Case (1811) 4 Camp. 401; Sussex Peerage Case (1844) 11 Cl. & Fin. 85, 103, 109, 8 Eng. Reprint, 1034, 1042—recognized as of controlling authority in the courts of England.

"In this country there is a great and practically unanimous weight of authority in the state courts against admitting evidence of confessions of third parties made out of court and tending to exonerate the accused. * * * West v. State, 76 Ala. 98, Davis v. Commonwealth, 95 Ky. 19 [23 S. W. 585, 44 Am. St. Rep. 201], and People v. Hall, 94 Cal. 595, 599 [30 Pac. 7], are precisely in point with the present case, in that the alleged declarant was shown to be deceased at the time of the trial. In West v. State the defendant offered to prove by a witness that he heard one Jones say on his deathbed that he had killed Wilson, the deceased. The Supreme Court sustained the ruling of the trial judge excluding the evidence. In Davis v. Commonwealth, the offer excluded was to prove by a witness that one Pearl confessed to him on his deathbed that he had killed the person for whose murder Davis was on trial. The Court of Appeals of Kentucky affirmed the conviction. In People v. Hall it appeared that defendant and one Kingsberry were arrested together for an alleged burglary, attempted to escape, were fired upon, and wounded by one of the captors; that a physician was sent for to treat them, and that Kingsberry died from the effects of his wound before any complaint was filed against either of the parties. 'In his own behalf the defendant offered to prove that after a careful examination the physician was satisfied that Kingsberry's wounds were necessarily fatal, and that he so informed him at the time; that Kingsberry admitted to the physician that he fully realized that he was mortally wounded and was on the point of death, and had given up all hope of ever getting well; that he was conscious of death, and that, thus having a sense of impending death, and without hope of reward, he made a full, free, and complete confession to said physician in relation to this alleged crime, stating that he himself had planned the entire scheme, and that Hall had nothing to do with it and was not connected with the guilt, and was in all respects innocent of any criminal act or intent in the matter.' This evidence was excluded, and the Supreme Court of California sustained the ruling, saying: 'The rule is settled beyond controversy that in a prosecution for crime the declaration of another person that he committed the crime is not admissible.'"

In the case of Fonville v. Atlanta & C. Air Line Ry. Co. et al., 93 S. C. 287, 75 S. E. 173, the court, among other things, says:

"The general rule that the records in criminal cases are not admissible in civil cases as evidence of the facts upon which a conviction was had is well settled. There are some exceptions, but the general rule is as stated, and it is founded upon sound principles, to wit, the want of mutuality, arising out of the fact that * * * the course of the proceedings and the rules of decision in the two courts are different. A higher degree of proof is required in criminal than in civil cases. 1 Gr. Ev. § 537; 7 Enc. Ev. 850; Miller v. Sou. Pac. R. Co., 20 Or. 285, 26 Pac. 70; Chamberlain v. Pierson, 87 Fed. 420, 31 C. C. A. 157."

It clearly appearing that these declarations were not against the pecuniary or proprietary interests of White, we think the case just cited is conclusive as to this point.

[3] It is further urged that the declarations, admissions, and confession of White were admissible upon the theory that plaintiffs were

accessories. In the case of Donnelly v. U. S., supra, the exception to the rule that evidence against the principal upon the trial of such accessory does not apply to civil trials, and only where one is on trial charged with a criminal offense, is clearly stated. Therefore this evidence was incompetent, under the rule as contended for by counsel for defendant.

[4] By the second assignment of error it is insisted that the court below erred in—

"refusing to permit the plaintiffs to prove by the witnesses Morrison, Cutlip, and Cherrington, from White's statements and admission to them, the details of the burning of the lumber, White's reason for burning the lumber, and the facts and circumstances surrounding the burning."

This evidence is purely hearsay, and, for the reasons already stated as to the admissibility of the written confession, we think that the ruling of the court below as respects admission of this testimony was eminently proper.

The seventh assignment of error is substantially the same as the first, and we have already disposed of the point involved therein.

[5, 6] By the eighth assignment of error it is insisted that the court below erred in giving to the jury plaintiff's instructions Nos. 2, 3, and 4. We think that the exceptions to instructions 2 and 3 are without merit, inasmuch as the judge clearly and explicitly stated the law applicable to the facts of this case. Therefore we do not deem it necessary to enter into a discussion of the same.

In instruction No. 4 the court instructed the jury as follows:

"The court instructs the jury that no specifications of defense having been filed by the defendant, charging or alleging that the property insured was not the property of both Taylor and Messenger, or charging or alleging that there was a lien or other incumbrance on the property insured, at the time the insurance was effected, or from that time until its destruction by fire, or charging or alleging that there was any change in the ownership of the property from the time the insurance was effected until the property was destroyed, no issue is raised in the case as to the ownership of the property specified in the policy of insurance sued upon."

Section 64 of chapter 125 of the Code of West Virginia (sec. 4818) is in the following language:

"To any declaration or count on a policy of insurance, whether the same be in the form prescribed by the sixty-first section of this chapter or not, and whether the action be covenant, debt or assumpsit, the defendant may plead that he is not liable to the plaintiff as in said declaration is alleged. But if in any action on a policy of insurance, the defense be that the action cannot be maintained because of the failure to perform or comply with, or violation of any clause, condition or warranty in, upon or annexed to the policy, or contained in or upon any paper which is made by reference a part of the policy, the defendant must file a statement in writing specifying by reference thereto, or otherwise, the particular clause, condition or warranty in respect to which such failure or violation is claimed to have occurred, and such statement must be verified by the oath of the defendant, his officer, agent or attorney at law, to the effect that the affiant believes the matter of defense therein stated will be supported by evidence at the trial."

We fail to find any evidence tending to show that the property burned was incumbered or did not belong to the plaintiffs. On the other

hand, we think it was clearly established that this was the property of the plaintiffs, and the jury passed upon that question. There not being sufficient evidence to sustain the contention of the defendant, the instructions, even though incorrect, would be harmless error. The policy which was introduced in evidence was prima facie evidence of the ownership of the same by the insured, and, as we have stated, there being no evidence to the contrary, the defendant was not entitled to have the jury consider this question; there not being sufficient evidence to show that White did the burning.

[7] The assignment of error which relates to the refusal of the court to set aside the verdict and award a new trial is without merit. We have discussed this phase of the question so often in the past, holding that the refusal to grant a motion for a new trial is not reviewable, that we do not deem it necessary to enter into a further discussion of this point.

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

ALWOOD et al. v. LEWIS et al.

(Circuit Court of Appeals, Fifth Circuit. November 16, 1918. Rehearing Denied February 1, 1919.)

No. 3169.

1. WILLS ⟸693(5)—POWER OF DISPOSITION—EXERCISE—BURDEN ON ESTATE.
Where a will devising land to one for life, remainder to others, authorized the life tenant to sell and dispose of timber on the lands, *held*, that the life tenant, as he had no right to destroy the estate in remainder, could not burden such estate by giving the purchaser more than a reasonable time for removal, which is a question of fact dependent on the circumstances, and the ability on part of purchaser to impose conditions on the life tenant did not increase the powers of life tenant.

2. APPEAL AND ERROR ⟸1175(7)—DETERMINATION.
Where the facts in an equity case were fully developed, and the trial court disregarded the advisory verdict of jury, *held*, where the litigation has been long drawn out, the appellate court was warranted in determining the issues of fact.

3. LIFE ESTATES ⟸23—POWER TO SELL TIMBER—REMOVAL OF TIMBER—REASONABLE TIME.
Where a life tenant, who was authorized by will to sell timber, disposed of it in 1902, and died in 1905, *held* that, by the time litigation was instituted in the federal courts in the year 1914, the purchaser had had a reasonable time for removal, and a grantee of the remaindermen should not thereafter be enjoined from cutting timber.

Appeal from the District Court of the United States for the Southern District of Georgia; Emory Speer, Judge.

Bill by George S. Lewis and others, receivers of the Hilton-Dodge Lumber Company, against William Alwood and others. From a decree for complainants, defendants appeal. Affirmed in part, and in part reversed and rendered.

W. W. Osborne, A. A. Lawrence, and E. H. Abrahams, all of Savannah, Ga., and A. S. Anderson, of Millen, Ga., for appellants.

Robert J. Travis and Wm. Garrard, both of Savannah, Ga., for appellees.

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

BATTS, Circuit Judge. Among the provisions of the will of Benjamin L. Lane, probated in 1885, was one devising to Geo. W. C. Lane land "for and during his natural life, with remainder to the living children at the time of his death." It was further provided:

"That my children, to whom I have heretofore given life estates in the lands in this will given them, shall have full power and authority to sell and dispose of the timber on all said lands, and shall have the full use and enjoyment of said lands without impeachment of waste."

On the 6th of February, 1902, George W. C. Lane, the devisee, "did bargain, sell, grant, and convey" to the Hilton-Dodge Lumber Company "all the cypress timber and trees of every sort and description, standing, lying or being upon" land, a life estate in which had been to him devised. In the instrument of sale it is provided:

"That the time limit of this conveyance, as above set forth, shall be 20 years from the date of this conveyance, but the first parties [naming them] agree that said time limit may be extended from year to year thereafter, not exceeding 10 years' extension, upon the payment by the second party to the first party or his heirs of interest on the original purchase price at the rate of 6 per cent. per annum."

George W. C. Lane died in 1905. On November 11, 1911, the land was purchased from the remaindermen by appellants, who began to cut and remove the cypress. In 1913 the Hilton-Dodge Lumber Company brought its bill in equity in the superior court of Jenkins county against the purchasers of the land, making the same allegations as in the present bill, and seeking to have the respondents therein temporarily and permanently enjoined from cutting the timber. Upon a hearing before the judge of that court, an order was passed on July 25, 1914, denying the prayer of the petitioners and dissolving a temporary restraining order theretofore issued, but enjoining both parties from cutting timber. The case was appealed to the Supreme Court of Georgia. The judgment was "reversed, with direction that a hearing be had upon the right of plaintiff to injunction." Hilton, etc., Lumber Co. v. Alwood, 141 Ga. 653, 81 S. E. 1119. In the opinion it was declared:

"It is clear that the testator intended that the life tenant's living children should take the land on the death of the life tenant, and it is equally clear that in giving the life tenant a power to sell the timber off the land he did not intend to destroy the remainder estate, nor authorize the life tenant to impose upon that estate such burdens as would practically deprive the remaindermen of its enjoyment after his death."

It was further held that the purchasers were entitled to a reasonable time after the purchase in which to remove the timber, and that what

was a reasonable time was a question of fact. Upon reversal, plaintiffs (appellees) dismissed their bill and instituted the present suit.

The trial of this case was begun before Judge Lambdin, who submitted to a jury, called to aid him in passing upon the questions of fact, the issue as to what would be a reasonable time for the purchaser to remove the timber. The jury found that a reasonable time had not elapsed when the suit was instituted by the appellees in the state court, but that it had elapsed when the suit was instituted in the federal court. The effect of the verdict, if it had been followed by the trial court, would have been to hold the defendants (appellants) responsible for the timber cut, but to preclude the appellees from further taking of timber. After the death of Judge Lambdin a judgment was rendered by Judge Speer, giving to complainants the value of the timber taken, restraining appellants from removing any cypress timber, and from interfering with complainants "in the exercise by them of any of the rights conferred by the timber deed." The last clause is construed as a holding that, under the timber deed, complainants have a right to remove the timber within 20 years after the execution of the deed, with the privilege of extension for an additional 10 years.

Appellants insist that their plea of res adjudicata, based upon the opinion and judgment of the Supreme Court of Georgia, should have been sustained. The conclusion reached renders a determination of this matter unnecessary. Nor is it necessary to determine whether the construction of a contract based upon a will creating estates in land in Georgia is to be determined by general principles of jurisprudence, or is one of those matters with reference to which the federal courts will consider themselves bound by state decisions. Consideration of these matters may be pretermitted because the conclusion of this court upon the principal issue in this case is the same as that of the Supreme Court of Georgia. The devisee of the life estate was given full power to sell and dispose of the timber, but no right given him was any more definitely given than was the estate to the remaindermen.

To hold that the rights of the purchasers of the timber might be cut off immediately after the purchase by the death of the life tenant, without the possibility of removal of the timber, would be, in effect, to destroy the full power of sale and disposition given by the devise. To hold that the tenant for life could tie up the land for 20 years, and then for another 10 years, is to permit the substantial destruction of the estate of the remaindermen.

[1-3] What would be a reasonable time for the removal of the timber is a question of fact, which might be dependent upon many circumstances. No period of time, however, the allowance of which would destroy or substantially impair the estate of the remaindermen, could be regarded as reasonable. It is contended by appellees that sales at the time of the making of the will could not have been made, except upon terms of the character incorporated in the instrument of sale. If the purpose of the devisor was to destroy or seriously impair the estate in remainder, apter language could have been and should have been used. Evidence was introduced to establish customary conditions of timber "leases." It rather tended to establish that the Hil-

ton-Dodge Lumber Company, at the time of the sale, enjoyed a kind of monopoly of purchase. Ability of the buyer to impose upon the life tenant did not enlarge the powers of the life tenant.

If the word "dispose," in the will, adds anything to "sale," it is enough to say that any other disposition was subject to the same limitations that the rights of the remaindermen imposed upon the sale.

A jury has passed upon what constituted a reasonable time for the removal of the timber. If this verdict had been adopted by the court, it would doubtless be sustained as the conclusion of a tribunal favored by the law for determining matters of fact. But it has not been adopted, and this court has the alternative of reversing the case for a trial consistent herewith, or determining from the evidence what is or was a reasonable time for the removal of the timber. There is nothing to indicate that the facts have not been fully developed; and, perhaps, a present determination of the issue would better accord with substantial justice than the further extension of litigation, which has already dragged along its lengths for a period of more than five years. We feel that if we should adopt the conclusion of the jury, to the effect that the timber cut by appellants was taken within the reasonable period to which appellees were entitled, and further find that the period ceased at the beginning of the litigation in the state court, any right to complain would not be in appellees.

Judgment is here rendered for appellees against appellants for the sum of $1,578.15, with legal interest from March 23, 1917, and otherwise for appellants against appellees, with injunction restraining interference with the cutting and removal of the timber in controversy; costs to be divided equally.

Affirmed in part, and in part reversed and rendered.

RAMSAY v. CREVLIN.

(Circuit Court of Appeals, Eighth Circuit. December 4, 1918.)

No. 5059.

1. APPEAL AND ERROR ⟸866(3)—REVIEW—SCOPE—DIRECTED VERDICT.
   Where, at close of trial, each party requested an instructed verdict, each party was estopped from reviewing issues of fact on which there was any substantial conflict in the evidence, and, where there was substantial evidence to sustain a finding in favor of plaintiff, for whom the court directed verdict, the only question reviewable on writ of error is: Was there error in the declaration or application of the law by the court below?

2. COURTS ⟸366(7)—PRECEDENCE—STATE LAWS.
   Whether Code Supp. Iowa 1913, §§ 1641b, 1641f, prohibit a corporation from selling or issuing its stock for the notes of solvent makers payable at reasonable times thereafter, is a question of state law, primarily for the decision of the Iowa courts, whose decision will be followed by the federal court.

3. CORPORATIONS ⟸92—ISSUANCE OF STOCK—NOTES.
   Conceding that Code Supp. Iowa 1913, §§ 1641b, 1641f, forbid a corporation from selling or issuing its stock for the notes of solvent makers,

an agreement by a purchaser of stock, who had given a note therefor, to reimburse the directors of the corporation if they would pay for the stock already issued, is not in violation of the statute.

4. CORPORATIONS ⟸103—STOCK—ISSUANCE—VALIDITY—"VOID."
While Code Supp. Iowa, §§ 1641b, 1641f, provide that a corporation shall not issue its stock until it has received the par value thereof, and that stock issued in violation of such provision shall be void, stock issued for a note is not wholly void, but is only voidable, and the issuance may be ratified, where the corporation receives the par value thereof; the word "void," as used by the lawmakers, being equivalent to voidable.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Void.]

5. CORPORATIONS ⟸92—SUBSCRIPTION—NOTE—VALIDITY.
A purchaser of corporate stock, who gave his note therefor, cannot defeat collection of the note on the ground of want of consideration, in that the Iowa statute requires corporations to receive the par value thereof before issuing stock, where the stock was actually issued and transferred by the purchaser for valuable consideration, particularly as the issuance of the stock might be ratified by payment.

6. CONTRACTS ⟸171(1)—LEGALITY OF CONSIDERATION—AGREEMENT TO REIMBURSE—PAYMENT OF VOIDABLE NOTE.
Though, under the laws of Iowa, a note given for the price of corporate stock duly issued to the maker was void, *held* that, the maker having transferred the stock to another, an agreement on his part to reimburse directors of the corporation if they would pay the amount of the note and take it up, is not illegal or against public policy, being separable from the original purchase and note.

7. APPEAL AND ERROR ⟸750(2)—REVIEW—DIRECTED VERDICT—ASSIGNMENT OF ERROR.
Though judgment for plaintiff was on verdict directed for him on the first cause of action, the question of the validity of the second cause of action is before the appellate court by reason of defendant's assignment of error to refusal of his general motion for directed verdict.

8. APPEAL AND ERROR ⟸854(2)—REVIEW—REASON FOR DECISION—DIRECTION OF VERDICT.
Though, on motion for directed verdict by each party, verdict was directed for plaintiff on first cause of action, when it should have been directed for him on second cause for same amount, judgment will be affirmed; the validity of second cause being before the court, under rule of wrong reason for right judgment.

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

Action by Byron Crevlin against Charles H. Ramsay. Judgment for plaintiff, and defendant brings error. Affirmed.

John T. Jacobs, of Greeley, Colo. (Herbert E. Mann, of Greeley, Colo., and H. R. Kaus, of Denver, Colo., on the brief), for plaintiff in error.

Pierpont Fuller, of Denver, Colo. (Henry T. Rogers, Daniel B. Ellis, Lewis B. Johnson, and George A. H. Fraser, all of Denver, Colo., on the brief), for defendant in error.

Before SANBORN, CARLAND, and STONE, Circuit Judges.

SANBORN, Circuit Judge. [1] The judgment here challenged rests upon an instructed verdict for Crevlin, the plaintiff below, and

each question presented is raised by the attack upon that instruction, and upon the refusal of the court to give to the jury an instruction, requested by Ramsay, the defendant, to return a verdict in his favor. As at the close of the trial each party requested the court to instruct the jury to return a verdict in his favor, each party was thereby estopped from reviewing every issue of fact upon which there was any substantial conflict in the evidence, and, as the record satisfies that there was substantial evidence at the trial to sustain a finding in favor of the plaintiff upon every material issue of fact in the case, the only question reviewable here is: Was there error in the declaration or application of the law by the court below? Beuttell v. Magone, 157 U. S. 154, 157, 15 Sup. Ct. 566, 39 L. Ed. 654; United States v. Bishop, 125 Fed. 181, 183, 60 C. C. A. 123, 125; Phenix Ins. Co. v. Kerr, 129 Fed. 723, 724, 64 C. C. A. 251, 66 L. R. A. 569.

This was the case. The Barnes Electric Light & Power Company was a corporation of the state of Iowa, with a capital stock of 400 shares, of a par value of $100 each, 360½ of which had been issued, and 39½ of which remained in its treasury. About July 2, 1912, the defendant Ramsay agreed to take, and six months thereafter to pay, $3,500, with interest at 6 per cent. per annum, for 35 shares of this treasury stock, and thereupon he delivered to the corporation his promissory note, dated July 22, 1912, whereby he promised to pay this sum to the corporation, and the latter at some time before August 8, 1912, issued to him its certificate for the 35 shares of stock, which, prior to the latter date, he sold and assigned to H. J. Stoop in exchange for stock in some other corporation. On August 8, 1912, there was a meeting of the stockholders of the corporation for the election of officers and the transaction of other business at which some of the stockholders objected to the voting by Mr. Stoop of the 35 shares of stock, on the ground that they had been issued in violation of sections 1641b and 1641f of the Supplement Code of Iowa of 1913, which provide in substance that such a corporation shall not issue its stock "until the corporation has received the par value thereof"; that if it is proposed to pay for such stock "in property, or in any other thing than money," the corporation shall cause such property or other thing than money to be appraised by the Executive Council of the state of Iowa, and shall not issue its capital stock therefor in a greater amount than the appraised value of such property or thing; that stock issued in violation of the foregoing provisions shall be void; that in a suit brought by the Attorney General a decree of cancellation thereof shall be rendered; that, "if the corporation has received any money or thing of value for said stock, such money or thing of value shall be returned" (section 1641d); and that any officer, agent, or representative of a corporation who violates any of the foregoing provisions shall be subject to fine and imprisonment.

After a discussion of this objection the stockholders signed an agreement that, if those who were directors of the corporation when the note was taken would pay to the corporation $3,500, they would turn over to the payors Ramsay's note for $3,500 without recourse, would waive any objections to the issuance of the 35 shares of stock, and would agree that those shares should be considered legal stock of the

company. Farr, one of the former directors, talked with Ramsay over the telephone, told him of the objection to the voting of the stock, and asked him if he would pay the former directors the $3,500 and interest when his note came due, if they would pay the $3,500 to the corporation then for him, and he promised Farr that he would do so. Farr testified to this contract, and Ramsay testified that he had no such conversation. Upon Farr's report of this promise, four of the former directors, Crevlin, Farr, Swigart, and Bowen, paid to the corporation $3,500. The latter indorsed Ramsay's note to them without recourse, Stoop voted the 35 shares of stock, and there is no evidence that any one but Ramsay and his counsel has ever challenged the validity of this stock since. The interests of Bowen, Swigart, and Farr in their claim against Ramsay were conveyed to Crevlin, and he brought this action against Ramsay. He stated his cause of action in two counts—one on the note, and the other on the agreement of Ramsay, made on August 8, 1912, to pay to the four former directors the $3,500 and interest when the note came due, in consideration of their then paying the $3,500 to the corporation.

At the close of the trial each party made a general motion, without more, that the court instruct the jury to return a verdict in his favor; the court granted the plaintiff's motion, denied the defendant's, instructed the jury to return a verdict for the plaintiff on the first cause of action, and a verdict and judgment accordingly were rendered. This judgment is assailed here on three grounds: (1) That the taking of the note for the stock and the issue of the latter therefor were violations of the statute cited, and were against the public policy of the state, so that the note was not collectable; (2) that the note was without consideration; and (3) that the payment of the $3,500 to the corporation by the four directors, and the agreement of Ramsay to pay that amount and interest to them, were inseparable from the first transaction, grew out of it, and were tainted with its illegality, and for that reason the agreement of August 8, 1912, was not enforceable.

[2] Whether or not the statute of Iowa which has been cited prohibits a corporation from selling or issuing its stock for the promissory notes of solvent makers, payable at reasonable times thereafter, is a question of state law, primarily for the decision of the Supreme Court of Iowa. Upon that question this court will gladly follow its lead. That court discussed the question in First National Bank v. Fulton, 156 Iowa, 734, 137 N. W. 1019, but counsel disagree as to the effect of the opinion in that case and, as it is not indispensable to the disposition of this case to decide that issue, it is here dismissed without intimation of any opinion concerning it.

[3] Conceding that the taking of the note and the issuance of the stock therefor before the note was paid constituted a violation of the statute was illegal, and contrary to the public policy disclosed by that statute, it does not follow that the payment of the corporation for that stock by the four directors, or the payment for Ramsay's note by the four directors at the request of Ramsay, whereby the corporation received payment in money for the full par value of that stock, or that the agreement of Ramsay to pay to them the $3,500 they paid,

whether that payment was made for the stock or for the note, was either immoral or illegal, or against the public policy of the state. The sole object of the statute and of the public policy it embodied was to secure to each corporation payment for its stock to the amount of its par value in money or its equivalent. It could not have been either illegal or immoral for the four former directors to effect this desired object by paying the $3,500 to the corporation in money in consideration of Ramsay's agreement to repay them that amount, with interest; nor could it have been either illegal or immoral for Ramsay, who should have paid the $3,500 in money before he took the certificate of stock to agree to pay back to them the $3,500 he induced them to pay to the corporation in consideration of that agreement. Neither the payment nor the agreement to repay, either induced, aided, or effected any violation of the statute. On the other hand, they prevented the evil effect which the statute was enacted to avoid.

[4] Again, while the statute declares that stock issued in violation of it shall be void, it does not follow that such stock is void in such a sense that there remains no locus pœnitentiæ, that such stock may not be validated by the subsequent payment and receipt of the money for it. The word "void" is often used by legislators, courts, lawyers, and laymen when its true meaning is "voidable." "It is rarely," says the Supreme Court in Weeks v. Bridgman, 159 U. S. 541, 547, 16 Sup. Ct. 72, 74 (40 L. Ed. 253), "that things are wholly void and without force and effect as to all persons and for all purposes, and incapable of being made otherwise. Things are voidable which are valid and effectual until they are avoided by some act; while things are often said to be void which are without validity until confirmed. 8 Bac. Abr. Void and Voidable; Ewell v. Daggs, 108 U. S. 143 [2 Sup. Ct. 408, 27 L. Ed. 682]; Ex parte Lange, 18 Wall. 163 [21 L. Ed. 872]; State v. Richmond, 6 Foster (N. H.) 232; Anderson v. Roberts, 18 Johns. [N. Y.] 515 [9 Am. Dec. 235]; Pearsoll v. Chapin, 44 Penn. St. 9." A conveyance in fraud of creditors was declared to be "utterly void, frustrate, and of non-effect" by the statute of 13 Eliz. c. 5, and has been uniformly declared to be void by the statutes of the states, but such a conveyance is universally held to be voidable only, to be valid until avoided and to be capable of ratification by the creditors. Anderson v. Roberts, 18 Johns. (N. Y.) 516, 527; Harvey v. Varney, 98 Mass. 118; Drinkwater v. Drinkwater, 4 Mass. 354; Oriental Bank v. Haskins, 3 Metc. (Mass.) 332, 37 Am. Dec. 140; Crowninshield v. Kittridge, 7 Metc. (Mass.) 520. A gift of goods declared by statute to be void as to creditors is voidable only, and is susceptible of ratification. Snow v. Lang, 2 Allen (Mass.) 18. A preference of a creditor within 60 days of insolvency, declared to be void as to creditors by statute, is voidable only, and is capable of ratification. Colt v. Sears Commercial Company, 20 R. I. 64, 37 Atl. 314.

Turning to the decisions of the state of Iowa, whose statute is here under consideration, in Pennypacker v. Capital Insurance Co., 80 Iowa, 56, 45 N. W. 408, 8 L. R. A. 236, 20 Am. St. Rep. 395, the

laws of the state of Pennsylvania forbade insurance on railroad property in that state by any company without a license from Pennsylvania and made the writing of such insurance punishable by fine. An insurance company of Iowa wrote such insurance without a license, it was sued upon the policy and defended on the ground that the policy was violative of the statute and of the public policy of Pennsylvania and was void, but the Iowa court sustained the action and said:

"The evident purpose of such a law is the protection of those paying for insurance upon property in that state. The prohibition and penalty is against the company only. No duty is required of the insured, and no act upon his part expressly prohibited."

Let the fact be noted here that the prohibition and the penalties of the Iowa statute in the case at bar are against the corporation and its officers, agents, and representatives only, and that no act of the subscriber or purchaser of the stock is expressly prohibited, nor is any penalty denounced against him. In Pangborn v. Westlake, 36 Iowa, 546, a statute of Iowa forbade the sale of a lot in any town or addition until the plat thereof was acknowledged and recorded, under a penalty of $50 for each lot so sold; but the Supreme Court of that state held that such a sale was not void.

Section 1753 of the Statutes of Wisconsin of 1898, provided that no corporation should issue any of its stock, except in consideration of money or labor, or property estimated at its true money value actually received by it equal to the par value thereof, nor any bonds, except for money, labor, or property estimated at its true money value actually received by it equal to 75 per cent. of the par value thereof, and that all stock and bonds issued in violation of this prohibition should be void. Corporations of Wisconsin issued their stock and bonds before they actually received the amounts of money, labor, or property required by this statute, but after the issue of these bonds and stocks the requisite amounts were paid therefor to the corporation. The Supreme Court of Wisconsin held (a) that the bonds and stocks were not void to such an extent that they could not be validated by the payment and receipt of the requisite amount of money, labor, or property before the commencement of the actions which challenged them; (b) that such payment and receipt made them valid; and (c) that one who accepts and holds or sells stock prematurely issued under such a statute cannot escape liability to pay therefor on the ground that the stock was issued before full value was actually received by the corporation for it because he cannot take advantage of his own wrong. Haynes v. Kenosha St. Ry. Co., 139 Wis. 227, 119 N. W. 568, 121 N. W. 124; Whitewater Tile Pressed Brick Mfg. Co. v. Baker, 142 Wis. 420, 125 N. W. 984–986.

The instances which have been cited illustrate the fact that the Legislatures often use the word "void" in statutes in the sense of utterly void, so as to be incapable of ratification, and also in the sense of voidable, yet capable of ratification by those whose rights are infringed, without clear distinction, and leave the courts to determine, from the terms of the statute, the nature of the subject-matter, the

purpose of the legislation, the benefit sought, the evil to be remedied, and the effect of one meaning or the other, whether it was the intention of the Legislature to use the word "void" in one sense or the other. Westerlund v. Blackbear Mining Co., 203 Fed. 599, 121 C. C. A. 627. The terms of the statute in hand indicate that the legislators used and intended to use the word "void" therein in the sense of voidable, for they provided that the stock issued in violation of the statute might be canceled by means of a suit by the Attorney General, and that in the case of such cancellation the note or other thing received for the stock should be returned to the purchaser, thereby rescinding the transaction, a useless proceeding, if they declared and intended to declare that the stock was utterly void and incapable of ratification.

The purpose of the legislators in enacting the statute was to secure to the corporation payment for its stock in money or its equivalent to an amount equal to the par value of the stock. That object will be attained more successfully and certainly if the stock issued in violation of the statute is held to be voidable than if it is adjudged to be absolutely void. If it is held to be voidable, the corporation may avoid it, if its full value is not paid when demanded, and, on the other hand, may secure that value if the purchaser is willing to pay it. If it is held to be utterly void, it can recover nothing for the stock it has sold, and must return that which it has received. Take the case in hand: The proof is that, when Ramsay gave his note for the stock, none of the parties were aware of the requirements of the statute that the stock should not be issued until the consideration for it had been fully paid in money or its equivalent. If the stock was incapable of ratification, and the note was uncollectable the corporation could not lawfully receive payment for the stock after its issue. If the stock was voidable only, the corporation could, as it did, lawfully obtain an amount of money equal to the par value of the stock it issued therefor, and the conclusion is that the true construction of that statute is that the word "void" was used and intended to be used therein in the sense of voidable, hence capable of ratification, and that by the acceptance of the $3,500 from the four former directors in payment therefor and for the assignment of Ramsay's note, the stock was ratified and validated, and the action on the note rendered indefensible.

[5] Another argument of counsel for the defendant is that the note was without consideration and uncollectable, because the stock was void and worthless; but the agreement to issue the stock, which was made before the note was delivered, and which induced its delivery, was a valuable consideration for the note, the stock subsequently issued, which was, as has been held, capable of ratification, was also a valuble consideration for the note, the defendant took and sold the stock for stock of another corporation, and he cannot now take advantage of his own wrong, and defend the action on his note on the ground that he received no consideration therefor.

[6] Finally, even if the stock had been void and the note had been originally uncollectable, the agreement of Ramsay of August 8, 1912,

to pay to the four directors the $3,500 and interest when the note should mature, in consideration that they then paid to the corporation the $3,500 which he ought to have paid before or at the time of the issue of the stock, was neither illegal, immoral, against public policy, nor unenforceable. The contention that this agreement of August 8, 1912, is illegal and unenforceable rests on the theory that it is inseparably connected with, and is in reality a part of, the illegal transaction of taking the note and issuing the stock, and that an action cannot be maintained on a contract that is illegal or against public policy; but the contract of August 8, 1912, was not inseparable from the contract of July, 1912, for the purchase of the stock. Judge Amidon, in delivering the opinion of this court in Kansas City Hydraulic Pressed Brick Co. v. National Surety Co., 167 Fed. 496, 93 C. C. A. 132, well said:

"The illegality of one contract does not extend to another, unless the two are united either in consideration or promise. Hanover National Bank v. First National Bank, 109 Fed. 421, 48 C. C. A. 482. * * * Even when a single contract embraces several agreements, some legal and others illegal, it is the duty of the court to separate the good from the bad, when that is possible. Choctaw, O. & G. R. Co. v. Bond, 160 Fed. 403, 87 C. C. A. 355; Lingle v. Snyder, 160 Fed. 627, 87 C. C. A. 529. This rule would be more readily applied when the agreements are contained in separate instruments. The plaintiff could have established its case without any aid from the illegal contracts. It is true that it pleaded those contracts in its complaint, and introduced them as part of its case upon the trial. This, however, was not necessary. * * * It is what is necessary to be shown, rather than what is in fact shown, that indicates whether the union between two contracts is such as to involve one in the illegality of the other."

The application of these indisputable rules to the contract of August 8, 1912, leaves no doubt of its independence of the contract and the transaction of July 22, 1912. In the first place, if there was any illegality or violation of public policy in the latter transaction, it was in the premature delivery of the stock before it was paid for in money, and that delivery had been made and Ramsay had sold the stock to another before the contract of August 8, 1912, was made. If there was any wrong, it had been done, and the contract of August 8, 1912, could not and did not induce, or in any way promote, the violation of the statute, or of the public policy it embodied. In the second place, it was neither a part of the contract, of the consideration, or of the promise of the contract of August 8, 1912, that the stock should be issued prematurely, and the two contracts were separate in consideration and in promise. One of the best tests of the inseparability of two contracts or transactions is the necessity of the proof of one by the plaintiff in order to maintain his action upon the other. There was no such necessity in the case at bar. All that was necessary for Crevlin to prove was his ownership of the note, Ramsay's promise to pay the amount of it when due, in consideration that the four directors would pay the $3,500 to the corporation in August, 1912, and their payment of that amount. No rational or logical way of escape is perceived from the conclusion that the contract of August 8, 1912, was separate from and independent of the contract and transaction

of July 22, 1912, and of any vice there may have been therein, and was lawful and enforceable.

[7, 8] If the objection to the affirmance of the judgment be suggested that the court below granted the motion for an instructed verdict for the plaintiff on the first, and not on the second, cause of action, the answer is, first, that the validity of the second cause of action was assailed by the defendant in its assignment of errors on the ground that the court erred, in that it failed to instruct the jury to return a verdict in his favor, and that attack invoked a consideration by this court of the validity of the second cause of action; and, second, that a judgment sustained by the law and the evidence is not reversible because the court gave a right judgment for a wrong reason.

Let the judgment below be affirmed.

STONE, Circuit Judge. Reserving expression of opinion respecting the interpretation which should be given the Iowa statute involved, I prefer to base my concurrence upon the validity of the agreement of August 8, 1912.

ARMSTRONG SEATAG CORPORATION v. SMITH'S ISLAND OYSTER CO.

(Circuit Court of Appeals, Fourth Circuit. December 5, 1918.)

No. 1635.

1. PATENTS ⟸328—INVENTION—MARKING BIVALVES.
The Armstrong patent No. 1,195,946, for marking bivalves by means of a tag attached to the lower shell of an oyster, *held* void for lack of invention.

2. PATENTS ⟸27—"INVENTION"—APPLYING OLD PROCESS TO NEW SUBJECT.
The application of an old process to a new subject for an old purpose without any change in result is not "invention."

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

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk; Edmund Waddill, Judge.

Suit in equity by the Armstrong Seatag Corporation against the Smith's Island Oyster Company. Decree for defendant, and complainant appeals. Affirmed.

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

E. Hayward Fairbanks, of Philadelphia, Pa., and S. Gordon Cumming, of Hampton, Va. (J. Bonsall Taylor, of Philadelphia, Pa., on the brief), for appellant.

Samuel O. Edmonds, of New York City, for appellee.

McDOWELL, District Judge. [1] In August, 1916, patent No. 1,195,946, for "marking bivalves," was issued to M. C. and Richard Armstrong, and on September 16, 1916, all rights under the patent

were duly assigned to the appellant, the plaintiff below. Under this patent the plaintiff claims a monopoly in a so-called invention defined as follows:

"1. Means for identifying oysters, consisting of a tag attached to that part of the shell on which the oyster is to be served at a point outside of the ligament or hinge of said oyster, whereby, when the oyster is opened, said tag remains attached to the part to be served.

"2. An improvement in the art of identifying oysters, which consists in attaching a tag to that part of the shell on which the oyster is to be served at a point outside of the ligament or hinge of said oyster, whereby, when the oyster is opened, said tag remains attached to the part to be served."

The plaintiff's method of identifying its oysters is to drill a small hole through what may be called the lobe of the lower or deep shell, outside of the hinge, through which is passed the elongated shank of a flat piece of thin, pliable metal. One end of the metal piece, octagonal in form, contains plaintiff's trade-mark, and the elongated extension or shank is clamped after being passed through the hole in the shell. The defendant has for some time been identifying its oysters by boring a hole through the lobe of the lower shell and attaching thereto a triangular flat piece of thin metal, by running a pin having an enlarged head through a hole in the metal piece and through the hole in the oyster shell, and then flattening the lower end of the pin. The litigation between these parties commenced with a suit for unfair competition, brought prior to the issue of the patent by the present plaintiff, which was decided in favor of the present defendant. Armstrong Seatag Corporation v. Smith's Island Oyster Co., 224 Fed. 100, 139 C. C. A. 656. The present suit was instituted by filing a bill in equity for infringement. The defendant moved to dismiss the bill, chiefly on the ground of invalidity of the patent. The trial court held the patent void on its face for want of invention, and the plaintiff appeals.

If the patent in suit be supposed to cover a tagged oyster, the answer is that a tagged oyster is not a machine or a composition of matter, and it is not a manufacture. A spring chicken, with an identifying tag fastened to its leg, is closely analogous. If he so desired, any fisherman could attach an identifying tag to his fish. But none of these natural products could be classed as manufactured articles, simply because of being tagged. If the method of the patentees may be considered as a process, we are unable to perceive that it involved invention. The problem was too simple, and its solution too obvious.

In adopting the method used by the patentees to identify oysters, they displayed some skill, not of high order, but nothing approaching the dignity of invention. The practice of identifying articles of commerce by attaching a tag thereto is, as a matter of common knowledge, both very old and very general. The demand for oysters grown in unpolluted water is of comparatively recent origin. It has arisen from the rather recently acquired public knowledge of the fact that oysters grown in polluted water are capable of transmitting the typhoid germ. The desire to identify oysters as having been grown in unpolluted water is therefore also recent. This is we think the chief reason why

tagged oysters have not long been common. What the patentees do is what any one would do who desired to attach a tag to an oyster shell, unless he bethought himself of a better method. There is in the patentees' process an entire absence of—

"that intuitive faculty of the mind put forth in the search of new results or new methods, creating what had not before existed, or bringing to light what lay hidden from vision." Hollister v. Benedict, 113 U. S. 59, 72, 5 Sup. Ct. 717, 28 L. Ed. 901. See also King v. Gallun, 109 U. S. 99, 102, 3 Sup. Ct. 85, 27 L. Ed. 870; Slawson v. Grand Street Railroad Co., 107 U. S. 649, 653, 2 Sup. Ct. 663, 27 L. Ed. 576; Phillips v. Detroit, 111 U. S. 604, 607, 4 Sup. Ct. 580, 28 L. Ed. 532.

Where only the skill of the workman, and not the genius of the inventor, was required, as in the case at bar, the result is not an invention.

[2] It has often been laid down in one form or another that using an old process for a new, but analogous, purpose, with no substantial change in result, is not invention. Brown v. Piper, 91 U. S. 37, 41, 43, 23 L. Ed. 200; Pennsylvania R. Co. v. Safety Truck Co., 110 U. S. 490, 494, 498, 4 Sup. Ct. 220, 28 L. Ed. 222; Blake v. San Francisco, 113 U. S. 679, 683, 5 Sup. Ct. 692, 28 L. Ed. 1070; Miller v. Foree, 116 U. S. 22, 27, 6 Sup. Ct. 204, 29 L. Ed. 552. But it seems hardly necessary to here invoke this doctrine. What the patentees here have done is to apply an old process to a new subject, for an old purpose, without any change in result. The purpose and the result of tagging articles of commerce was identification. This is the purpose and the result of the patentees' practice. In its entirety the thought of the patentees was only an extension of the thought of the first producer who attached a mark of identification to his goods. To apply this old practice to oysters required at the utmost some degree of skill, but no invention.

The decree of the trial court must be affirmed, with costs to the appellee.

Affirmed.

GOLD et al. v. NEWTON, Commissioner of Patents.

(Circuit Court of Appeals, Second Circuit. November 13, 1918.)

No. 45.

PATENTS ⟸114—REFUSAL BY PATENT OFFICE—REMEDY IN EQUITY.

Where the Patent Office denied a patent to an applicant, and its decision was affirmed by the Court of Appeals of the District of Columbia, *held* that, in a suit under Rev. St. § 4915 (Comp. St. § 9460), begun in federal District Court, the Circuit Court of Appeals will not render judgment requiring the Commissioner of Patents to issue patent, where there was diversity of opinion between its members as to whether patent should issue, and there was no testimony materially changing the record before the Court of Appeals of the District of Columbia.

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

Suit by Edward E. Gold and another against James T. Newton, as Commissioner of Patents, substituted for Thomas Ewing, as Commissioner of Patents. From a decree for defendant, complainants appeal. Affirmed.

Appeal from a decree in equity entered in the District Court for the Southern District of New York, dismissing a bill originally brought by plaintiffs against Hon. Thomas Ewing, then Commissioner of Patents, under the provisions of section 4915, U. S. Revised Statutes (Comp. St. § 9460), and continued against his successor in office, Mr. Newton.

Suit was brought in the district of Mr. Ewing's residence by his consent. Barrett Co. v. Ewing, 242 Fed. 506, 155 C. C. A. 282. The object of action is to obtain decree that plaintiff Edward E. Gold is entitled to a patent, containing eight claims, of which the first and second are broad and vital, and are as follows:

"1. In a car heating apparatus, the combination with a train pipe and a radiator in the car with an intervening admission valve, and an outlet valve at the discharge from the radiator, of thermostatic means for controlling said valves, and manually operated means for rendering either valve inoperative whereby the heating system is convertible at will into an admission pipe pressure system or an atmospheric pressure system.

"2. In a car heating apparatus, the combination with a train pipe and a radiator in the car with an intervening admission valve, and an outlet valve at the discharge from the radiator, of a single thermostat with connections for controlling either of said valves alone, and manually operated means for determining which valve shall be controlled by said thermostatic means, whereby the heating system is convertible at will into an admission pipe pressure system or an atmospheric pressure system."

Gold filed his application in 1904, since which time the subject-matter of this suit has been continuously fought over both in the Patent Office and the courts. The contest has been triangular, between the applicant, Edward E. Gold, one Egbert H. Gold, and a succession of Commissioners of Patents.

The questions litigated have been:

(1) Is any patentable invention over the prior art disclosed by the application and defined by (e. g.) the above quoted claims?

(2) If such invention exists, is Edward or Egbert Gold entitled to priority?

The history of litigation down to 1909 is related in Gold v. Gold, 34 App.

D. C. 229, where the Commissioner's decision awarding priority to Edward was upheld. No judgment as to patentability was necessary, and none was made.

Thereupon in 1910 Egbert sued both Edward Gold and the Commissioner, under R. S. § 4915 (Comp. St. § 9460)—Gold v. Gold (C. C.) 181 Fed. 544, affirmed 187 Fed. 273, 109 C. C. A. 615—and was defeated again, without, however, touching the matter now before this court.

Meantime the plaintiff Edward was involved in a new interference with one Fulton, while Egbert proceeded ex parte in the office with his attempt to get a patent that may fairly be called something as near to Edward's disclosures as could be suggested without interfering.

He was met by a reference to Weber's patent, 403,162, and rejected, whereupon, in 1912, he appealed to the Court of Appeals of the District, which held with the Commissioner that "an apparatus built in accordance" with Weber's disclosure is "operable at atmospheric pressure or at practically steam admission pipe pressure at will, and that such capability is an inherent characteristic" of Weber. In re Gold, 38 App. D. C. 544. To this proceeding Edward Gold was no party; he was involved in the Fulton interference.

That interference was dissolved on the ground that the single claim in contest was unpatentable over Weber, whereupon Edward amended his specification by adding what is really an argument for differentiating Weber, and changed the language of his claims. The application took its present shape in 1913, and was later finally rejected, whereupon this plaintiff appealed to the District Court of Appeals, which had already, on Egbert's appeal, found in effect that the substantial thing which both the Golds wanted to do might be done with an apparatus made in accord with Weber's disclosure. The rejection of Edward on Weber, was affirmed in 1916. In re Gold, 45 App. D. C. 294.

This present action was then brought, and bill dismissed by L. Hand, J., because, although plaintiff had made "a discovery of great value," to be patentable, it must be "incorporated into a machine which as a juxtaposition of related parts is new in the art."

But Weber had shown an apparatus—or machine—that "can be made to work"; therefore, especially in an action of this nature, invention could not be so positively asserted as to lead (substantially) to a reversal of repeated findings by authorities both executive and judicial in the District of Columbia. Consequently the bill was dismissed and plaintiffs took this appeal.

William A. Redding and Arthur C. Fraser, both of New York City, for appellants.

Francis G. Caffey, of New York City (L. D. Underwood, of Washington, D. C., of counsel), for appellee.

Otto R. Barnett, of Chicago, Ill., amicus curiæ.

Before WARD, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). This record reveals no difference of opinion as to the nature of plaintiff's thought, its application to or embodiment in a useful mechanical contrivance, and his priority in time is no longer open to question.

It was well known that railway cars could be and had been heated by steam piped from the engine; prior to Gold there were two leading and contrasted systems in actual use. What plaintiff calls the "high pressure" appliance received steam at train pipe pressure into the car pipes, which had an outlet thermostatically closed when the condensation water was expelled and the hot steam took effect. Then the cars were heated by direct steam as hot as the engine supplied it; when the car got too hot, the steam was turned off. This is the "steam admission pipe pressure" referred to by the Court of Appeals (ut supra).

The second or so-called "vapor system," throttled the train pipe pressure at the inlet valve, and reduced it nearly to zero. The outlet is open, containing, however, a thermostat which regulates or maintains the inlet valve at the desired approximate closure. This is the "atmospheric pressure" apparatus above referred to by the Court of Appeals.

Each of these heating methods has advantages, and drawbacks. The high pressure system makes the car warm with a small radiating surface; the vapor system gives a mild heat grateful in cool weather, but for a really cold winter day requires a great radiating surface. Consequently with one apparatus the car is often overheated, and with the other it is at times too cold, unless a great extra weight of pipe is carried, and required perhaps only a dozen days a year.

Gold shows and claims as his invention the combination in a car-heating apparatus of train pipe, radiator, admission and outlet valves, with "thermostatic means for controlling said valves," to the end that the same pipes, etc., may by the turn of a handle be changed from one system to the other, according to the weather; and he was the first man to suggest this or do it, as has been held by the Office and the appellate court of the District of Columbia.

But plaintiff Gold was refused a patent on the sole ground that what Weber disclosed could without any substantial change of construction, and without any additions or changes that could be called improvements, be made to do what Gold discloses and claims as his invention.

The Patent Office authorities went into this matter with such care that one of the examiners was deputed to attend and witness experiments with a device said to have been made in compliance with Weber's specification and drawing. In the opinion of that examiner the machine was fairly made and fairly operated, and the experiment proved "that it was an inherent characteristic of [Weber's] apparatus that it could be converted"—i. e., changed at will—from a high pressure to a vapor supply of steam.

On this evidence the patent was rejected, because to grant it would be to patent a double use. And to this view several Commissioners and the Court of Appeals of the District of Columbia have adhered, although it seems to have been shown in the Office proceedings, and therefore to the appellate court, that both Weber's patent and Weber himself had ended their lives without ever being heard of in the art of heating railway cars, without the patented device ever receiving commercial development, and although the exact apparatus described and claimed by Weber could never, for mechanical reasons, be used in or about railway cars. It remains doubtful to what useful purpose Weber's patented apparatus could be put. The probability is that it was intended to be used in the steam heating of houses.

It is much pressed upon us that this suit is an original action, in which evidence has been adduced not previously shown either to the Commissioner or to the appellate court of the District of Columbia (Greenwood v. Dover, 194 Fed. 91, 114 C. C. A. 169; General Electric Co. v. Steinberger, 214 Fed. at 784, 131 C. C. A. 193), and it is

not an appeal from the Patent Office (Butterworth v. Hoe, 112 U. S. 61, 5 Sup. Ct. 25, 28 L. Ed. 656).

In form this is true, but in substance we do not think it is. This record contains no reason for granting Gold a patent that was not shown to the Commissioners, and no reason why he should not have one except the Weber reference. We do not overlook the fact that, since the experiments above referred to, plaintiffs have made another embodiment of Weber, and conducted experiments with it, in our judgment with substantially the same results. Perhaps the second embodiment did not work quite as well as the first, but the principle is plain in both. We find the fact to be that the first Weber embodiment worked better than the second, because the exact limits of adjustment in order to produce the convertible feature were permanently indicated on the device as first constructed—something not shown or suggested in Weber's disclosure. This we regard as unimportant.

On these facts a majority of this court are of the same opinion as the court below—that Gold made "a discovery, and a discovery of great value." That majority also thinks that, if the language of Potts v. Creager, 155 U. S. 608, 15 Sup. Ct. 194, 39 L. Ed. 275, can ever be held to justify finding patentable invention in the use of an old device to produce a new result, this is an instance of the applicability of that rule. The same majority are of the opinion that Weber's device "was not designed by its maker, nor adapted nor actually used, for the performance of the functions of the patent" now sought by Gold. Topliff v. Topliff, 145 U. S. 156, 12 Sup. Ct. 825, 36 L. Ed. 658.

On the other hand, we are all of opinion that the fact of difference among ourselves is reason the more for adhering to the rule of Morgan v. Daniels, 153 U. S. 120, 14 Sup. Ct. 772, 38 L. Ed. 657, and especially so in a case where we have no testimony materially changing the record that was before (and indeed repeatedly before) the court authorized equally with ourselves (though in a somewhat different manner) to deal with questions of this kind, viz. the Court of Appeals of the District of Columbia.

In respect of actions like this, solely against the Commissioner, the jurisdiction still existing under R. S. § 4915 (Comp. St. § 9460), is, to say the least, a singularity in law making. While the statute exists, jurisdiction must be exercised; but we entirely concur with the court below that, in order to advise or direct the Commissioner to issue a patent which he has refused and had his refusal approved by the District Court of Appeals, there must be introduced substantially new and persuasive testimony, not adduced before the tribunals with which we are invited to differ. Here we have nothing but an argument, persuasive to a majority only of this court, and even that argument seems to have been the same throughout this long and tangled litigation.

Further, a court appealed to under section 4915 must by the evidence shown it, whether new or old, be very fully and amply persuaded of plaintiff's merits before granting relief. The fact of our disagreement on the question of invention leads to a unanimous belief that there exists no such certainty of right as should lead, not only to the

attempted upsetting of so long a line of considered decisions, but to the present granting of a basic and fundamental patent, which for the next 17 years would dominate an art that has now obviously advanced beyond anything reduced to practice by Gold at or about the time he framed his disclosure.

We have not overlooked the difficult position produced for this plaintiff by the course of litigation in Washington. It seems quite true that both the Golds were in substance trying to get patent protection for the same thing. When priority was awarded to this plaintiff (Edward), Egbert continued his application ex parte, proposing claims expressed in terms of process, but covering the same thought that Edward has persistently expressed in terms of apparatus—e. g., in the proposed claims first above quoted.

It may be true, as argued, that if Egbert's claims had been allowed after he had lost his demand for priority he would have been compelled to pay tribute to the fundamental claims advanced by Edward, and that therefore he sought to create a precedent against himself in the courts of the District by taking an appeal, which, if successful, would still have left him an infringer, had Edward also succeeded. But when Egbert lost in the appellate tribunal, as he did, he had rendered it impossible, without new evidence or an overruling of solemn judgment once given, for anybody else to get what he (Egbert) had failed to obtain. It may also be true that this was the reason why Commissioner Ewing gave that consent which is the only excuse for jurisdiction in this circuit.

Even if we admit all the foregoing, we remain of opinion that the decent and seemly administration of the law does not permit a court of (in this matter) substantially co-ordinate jurisdiction to (in effect) overrule or disregard all that has hitherto been done, unless and except this whole court is very sure of the matter after considering evidence that is not only persuasive but new.

Not being able to arrive at that degree of certainty, the decree appealed from is affirmed, without costs.

TODD PROTECTOGRAPH CO. v. HEDMAN MFG. CO. et al.

(District Court, N. D. Illinois, E. D. January 8, 1919.)

No. 733.

1. PATENTS ⊂=66—ANTICIPATION—WHAT CONSTITUTES.
   Though an inventor might have put the suggestions of previous patents together, and possibly evolved his conception in that way, the previous patents are not anticipations, although such previous disclosures necessarily limit the subsequent patent.
2. PATENTS ⊂=328—CONSTRUCTION—VALIDITY—INFRINGEMENT.
   The Todd patent, No. 793,249, for a printing apparatus for protecting checks from alteration, *held* valid, and claims 3, 4, and 5 infringed, while claims 1, 6, and 8 were not infringed.
3. TRADE-MARKS AND TRADE-NAMES ⊂=68—UNFAIR COMPETITION.
   For trusted employés of a manufacturer to make preparations for a competing business while they were in his employ, and to obtain advertising matter from such manufacturer to use in the competing business, is unfair competition.
4. EQUITY ⊂=65(1)—DOCTRINE OF CLEAN HANDS—AGENCY.
   The principal is not chargeable with the unjust conduct of its salesmen in pursuing its business, so as to preclude it, under the clean hands maxim, from equitable relief against an unfair competitor, where knowledge of the practices of the salesmen is not brought home to responsible officers of the corporate principal.
5. TRADE-MARKS AND TRADE-NAMES ⊂=78, 97—UNFAIR COMPETITION—ADVERTISEMENT—INJURY—INJUNCTION.
   For defendants, who were competitors of plaintiff, to advertise its machines for sale under a fictitious name and address, is improper, and should be restrained; for, as customers could not find any such concern or street number, plaintiff would be discredited and injured.
6. TRADE-MARKS AND TRADE-NAMES ⊂=73(1)—UNFAIR COMPETITION—ADVERTISEMENT.
   Where defendants, engaged in making a competing machine, sold plaintiff's patented machine, designed to protect checks from alteration, *held*, that defendants should make it clear in advertisements that plaintiff's machines were used or rebuilt ones.
7. TRADE-MARKS AND TRADE-NAMES ⊂=68, 97—UNFAIR COMPETITION.
   Where trusted agents of plaintiff joined a competitor and laid plans to compete with plaintiff, *held*, that advertising matter obtained by such agents from plaintiff should not be used by defendants, and its use may be enjoined.

In Equity. Suit by the Todd Protectograph Company against the Hedman Manufacturing Company and others. Decree for complainant.

Edward Rector and Albert H. Meads, both of Chicago, Ill., and Frederick F. Church, of Rochester, N. Y., for plaintiff.

Lynn A. Williams and Robert M. See, both of Chicago, Ill., for defendants.

SANBORN, District Judge. Suit for infringement of patent and unfair competition. Plaintiff is a citizen of New York and defendants are citizens of Illinois, and the amount involved exceeds the jurisdictional limit. The patent action rests on patent No. 793,249, issued

to L. M. Todd June 27, 1905, on a printing apparatus for protecting checks from alteration.

[1, 2] *The Patent.*—The Todd invention is described in Whitaker v. Todd, 232 Fed. 714, 146 C. C. A. 640 (Third Circuit), where the patent was sustained and held infringed. The following description is taken from plaintiff's brief:

"The inventive concept underlying Mr. Todd's invention, as clearly set forth in his patent, consisted in the thought that by first forming type characters of the full face and outline of the characters to be printed (whether they be figures or letters or other characters), and then impressing or forming, upon the printing surfaces or faces of such type characters, ridges and grooves (or equivalent projections and depressions) corresponding to the ridges and grooves of a co-operating universal platen, it would be possible to print upon a sheet of paper inserted between the type and platen the complete and perfect characters represented by the type (and not merely a crude and irregular outline thereof), and at the same time to so shred the paper that the ink absorbed by it would produce an indelible and ineradicable record.

"This was an absolutely new thing in the art, never before conceived or suggested, so far as the record shows, and involving not merely a novel and more efficient means for obtaining an old result, but in fact producing an absolutely new result.

"It was not only a new thing in the art of check-protecting devices, but it was an absolutely new thing in the printing art, for no such thing as either the combination of the type and platen of the Todd machine, or the sort of printing effected by that combination, was known to the printing art prior to Mr. Todd's invention, so far as the present record discloses.

"The nearest approximation was in certain prior check-protecting devices, such as those disclosed in the Beebe patents, Nos. 554,613 and 594,319. In such prior devices a series of projections or 'indenting points,' as they are termed in the patent (of various suggested forms), were so arranged upon a type block or support as to form the mere outline of a type figure, and arranged to co-operate with a platen having correspondingly arranged depressions or recesses to receive such projections. In order that the platen might be a 'universal' one, capable of co-operating with a number of different type characters formed in outline by such projections (such, for instance, as a cipher and the nine digits), it was necessary that such projections, and the corresponding depressions or recesses in the platen, should be arranged in certain definite geometrical relations to each other, which consequently determined the outlines of the type figures which could be formed by the projections, and limited them to the corresponding geometrical positions and relations.

"While it was possible, under such an arrangement, to form the crude outlines of a cipher and the nine digits, and have the projections forming such outlines co-operate with a universal platen, it was not possible to form even such simple type figures in either full face or perfect outline, so as to print upon the paper a full and perfect figure; and it was not possible at all to form letters and other characters—even the letters of the alphabet in plain English type—and cause them to co-operate with a universal platen in such manner as to produce a readable and intelligible impression.

"If we consider, as an illustration, so simple a legend as that printed by defendants' machine—for instance, 'Pay $999 and 99 cts.'—it would practically be impossible to print such a legend, in readable and intelligible fashion (and at the same time properly shred the paper) with any combination of type characters and platen known to the art prior to Mr. Todd's invention; and it would be wholly impossible to print it in the symmetrical and perfect fashion of defendants' machine with anything known to the prior art.

"And when we come to more complicated and difficult type characters, such as those involved in any extended use of the letters of the alphabet, even in English, and still more so in various other languages, it would be impossible to print them in legible fashion and shred the paper by means of any combination of type characters and universal platen known to the prior art.

"With a printing device embodying the inventive concept and underlying idea of Mr. Todd's invention, on the other hand, any and every conceivable sort of type figures and characters may be employed to co-operate with a universal platen in such manner as to print the full and perfect outlines of such type characters upon a sheet of paper, and at the same time so 'shred' the latter as to produce an indelible and ineradicable record. There is no limit to the use and application of the invention. If the characters to be printed are numerals, they may be in Arabic, or Roman, or any other form in which numerals are expressed. If they be letters and words, they may be in any known language, and if they be characters other than numerals or letters they may be of any conceivable form, without affecting the use and application of Mr. Todd's invention."

It would appear from the patent itself that this is the patentee's own idea. He says the object is to impress limiting markings on negotiable paper, so that the limiting amount is embossed and cut into its surface, the ink absorbed by the disrupted fibers, and an inked impression made on its face, so as to avoid fraudulent alterations.

In the Whitaker Case the principle of the Todd patent is differently described. The court say:

"The essential principle of this universal coaction is the maintenance of perfect alignment of the complementary ridges and grooves just before and at the instant of contact, and this principle is reduced to practice in the device of the patent by snugly fitting the revoluble type wheel and the platen against the side walls of the casing in a manner to obtain perfect alignment and prevent lateral motion at this critical point. This was the capital conception of the patentee."

In another case in the same circuit, also before Judge Dickinson at Philadelphia, against the New Era Manufacturing Company, a preliminary injunction was issued. In the New Era machine the ridges and grooves were diagonal, much the same as in Hedman.

The registry or mating of the ridges and grooves of the one part of the die with those of the other in the Todd patent is thus stated by Mr. Williamson:

"Todd in the patent in suit was the first one in the art to have devised a machine in which the projections on the one part would inevitably mate or register with the depressions on the other part, and in which the means for effecting the exact and circumstantial alignment of the moving part relative to the stationary part could be done away with or dispensed with; and he accomplished that result by a very simple, but very effective, means. What he did was to make the surface of the type member in the form of a continuous die. But he ran those ridges and grooves, not crosswise with respect to the direction of rotation or at some angle with respect to the directions of rotation, but ran those grooves in the very direction of rotation of the moving type-carrying member—circumferentially in the case of the drum machine; that is to say, the ridges and grooves ran around the drums continuously, with the result that, although he retained the advantages of mating or registration of die and counter die, he was enabled to dispense with the means of bringing an exact circumferential alignment of one member with respect to the other. Employing that circumferential grooving, ridging and grooving of his type-carrying member, ridges and grooves which would run continuously through all the several lines, he was obviously enabled to employ, as he did, a single or universal platen; that is to say, he did not have to have a separate platen or counter die member for each line of type, but one single counter die member with which any one of the several lines of type would properly mesh."

It was this feature which was made the gist of the Todd patent in the Philadelphia litigation, which certainly was novel. It was held infringed by the Whitaker device, although the direction of the ridges and grooves in that device was not quite parallel to the axis of rotation, so that when the drum and platen were not in action the diagonal ridges of the respective parts were out of alignment, and when in action the parts were made to register by a cam, by which the drum was moved sidewise. So it appears that the supposed true principle of the Todd invention, that of perfect alignment at all times, was not present in the Whitaker device; but the court decided that it was sufficient to produce infringement that the parts were properly aligned "just before the time of contact," and until contact was complete.

Now, inasmuch as every efficient machine of the kind must bring about complete meshing or mating, it follows that there can be no distinction in principle between a small deviation and a large one as between those of 1 minute or 85 or 90 degrees; the Todd principle of accurate registry "with the impressionable surface of the platen at every degree of rotation of the wheel, thereby avoiding the necessity of precisely centering the type characters opposite the platen in order to secure a proper register," is departed from as soon as the complementary lines are to any extent in different planes. The Circuit Court of Appeals of the Third Circuit having held that a 1-degree departure, which destroyed the alignment except at the very time of contact, and really departed from the Todd principle, was an infringement, Judge Dickinson was logically bound to decide in the next case (that of Todd v. New Era Co. [D. C.] 236 Fed. 768) that there was infringement in a 45-degree deviation, although the depressions are just as much horizontal or axial as longitudinal; and if in the case now under consideration the Philadelphia decisions are to be followed the Hedman machine infringes, because it cannot be distinguished from the New Era device, so far as the centering feature is concerned. Therefore, unless Hedman has different means or mode of operation, comity would suggest a decree for plaintiff, unless the device is distinguished in other respects.

It appears that plaintiff's counsel appreciate the situation, and realize that Todd cannot continue to dominate the trade for the three years the patent has to run by adherence to the principle of the Whitaker Case. They now take the position that, while they do not expressly abandon that principle, yet they do not predicate the case on the prior adjudications. They still rely on them, and think they should have great weight, but present the case on what they conceive to be its full merits. Their position now is that the true novel principle in the Todd conception was forming the type characters, impressing upon them ridges and grooves corresponding to those of a co-operating universal platen, inking them, and then, by bringing the surfaces together, to shred or macerate the paper.

It is true that one of the plaintiffs' counsel said on oral argument that he thought the construction of the court in the Whitaker Case placed upon the patent was entirely too narrow (in this I agree), and that plaintiff was not asking the court to be controlled by the rule

of comity. But the above nevertheless represents the ultimate position of both counsel for plaintiff. Counsel for defendants, on the other hand, take this position:

"For the purpose of this brief, and for the purpose of a decision by the court, at least, we accept the propriety of your honor's intention to follow the decision of the Court of Appeals of the Third Circuit. It has been our hope and expectation, however, that this court would follow the decision of the Third Circuit Court of Appeals. The reasoning of the decisions in the Whitaker Case, following as they did the arguments of counsel for plaintiff, leads inevitably to the conclusion that the Hedman Manufacturing Company does not infringe."

Then counsel proceed to argue that Hedman does not infringe the feature of parallelism, which was the only point of the Whitaker decision.

The respective devices may be generally described as follows: In the Todd "Protectograph," the first form built and sold under the patent, there was a revolvable drum or type support, on which were arranged 30 rows of serrated type, bearing the legends, "Not over twenty dollars," "Not over five hundred dollars," etc. When a check for $19 was to be drawn, the latter was inserted in the machine, the proper line of type turned into position, when a lever was operated to force the "twenty dollar" line against the platen to print the amount and shred the paper. There was, of course, a pad to keep the type properly inked by revolution of the drum. In the later model, called the "Check Writer," the operation is quite different. This is an "exact number" machine, having the following characters mounted on the drum longitudinally of its axis, in a narrow row, one above the other: "hund., ninety, eighty, seventy, sixty, fifty, forty, thirty, twenty, nineteen, eighteen, seventeen, sixteen, fifteen, fourteen, thirteen, twelve, eleven, ten, nine, eight, seven, six, five four, three, two, one, thous., dol'rs., cents," followed by a type "⌣⌣" to be struck before the first word and after the last to prevent additions to the amount written.

The drum is axially loosely mounted upon a rod twice its length, revolving on the rod to ink the type, and sliding lengthwise upon it to bring the proper type word into position for printing. The corrugated platen is located under the drum through its whole length. On the upper surface of the casing is a dial, representing all the word types on the drum, with an indicating point for locating the proper word and for sliding the drum back and forth on the central rod. If it is desired to fill up a check for "twenty dollars and twenty cents," the indicating point is pushed along to "twenty," a lever is worked to print the word on the paper and shred it, then the point is placed opposite "dollars," and that word printed, and so on for the rest of the legend.

Defendant's machine is quite different. In size it corresponds with the first form of Todd (the "Not Over" machine). It contains the Todd principle of first printing on the paper and then shredding, but does not contain the parallelism of ridges and grooves, being similar to the New Era machine held to infringe by Judge Dickinson. It uses only figures, so for a check of $20.20 it prints "Pay $20 and 20

cents," all done by one impression of the type on the platen. There is a different mode of operation. Instead of the drum, with lines of words parallel to the axis, as in Todd's first machines, or separate words at right angles to the axis, as in later models, Hedman has no cylinder at all, but slices up what would be the Todd drum into seven or more thin sectors, each having the zero and all the prime numbers 1 to 9, raised in proper order, and provided with ridges and grooves, on part of sector's edge, registering with a platen below, and each provided with a finger piece for rotating it. When the appropriate sectors are revolved into position to indicate the dollars and cents, the sectors or marking elements are lined up with the "Pay $," "and," and "cts.," and held in position by detents. A universal lever then serves to press the type against the paper and platen to print the legend and shred the paper.

The difference of operation will be readily perceived. In Todd the whole line of type in the "Not Over" machine, and the separate words in the other, are swung into printing position by movement of the whole drum, while in Hedman separate sectors of the drum are independently operated to bring the single figure carried by each one into printing position. The operation is thus described by Mr. Williamson, plaintiff's expert witness:

"In defendants' machine there are several side by side rotary devices, which for convenience I will term wheels, although they are but segments of a complete circle, which bear upon their peripheries a circular or circumferentially extending series of numerals, and there are two groups of these segments or wheels, one for designating dollars and the other for designating cents; and between the two groups of wheels there is a stationary logotype consisting of the letters 'a-n-d,' and to the right of the segments or wheels of the cents value there is a logotype consisting of the letters 'c-t-s,' and on the left of the dollars group of wheels there is a third logotype in the form of a sliding block, and it carries on its outer face the word 'Pay' and the dollar sign. So that, considering the two groups or segments, we have in effect a cylinder or drum which is divided into separate parts on planes at right angles with the axis of rotation, and aligning with any one axially extending row of numerals on the rotary segments when the latter are in printing position are the three logotypes, so that at the time of making the impression upon a check there is a line of type consisting of words and numerals extending parallel with the axis of rotation of the rotary type carrying member. On the type found on both the wheels or segments and the logotypes there are ridges and grooves."

The difference in the mode of operation is simply that one turns the whole solid cylinder into a certain position by one movement, while the other turns sectors of a like cylinder into a like position by several movements. The Todd single operation is merely divided up into several, with a similar result. It is like writing a name with a rubber stamp compared with writing it in the usual way. Three of the Todd claims in issue specify only a "type support," the form shown in the patent being only the preferred one, and there is nothing in the statement of the object of the invention which suggests a type drum.

The Beebe patents in evidence, including No. 554,613, do not contain the Todd principle of forming a word or letter on paper and then shredding the body of the paper, but use indenting points showing

merely the outline of the type characters, instead of forming their full face. The Parvin British patent of 1899, No. 3750, is a shredding machine, to be used upon paper on which the legend has first been written. But it is claimed that Parvin also disclosed the Todd conception. His device simply consists of a stamp, without cylinder or type characters, designed to shred paper previously written upon. In the specification, however, he says:

"The serrations can be made to any suitable design, so as to denote devices or words, or devices or words marked across serrations."

In his claim he counts on—

"preventing fraudulent alterations on checks or the like by crimping or stamping a series of serrations over the figures or letters whose alteration it is intended to render impossible without detection."

It is obvious that he had not thought out the problem, since his figures show only a stamp with only a single line of serrations, so that he could have had only a single line of words or figures. Evidently he never grasped Todd's idea. It is true that Todd might have put Hendrick's (No. 104,148), Beebe's and Parvin's suggestions together, and possibly evolved his conception; but that does not make them anticipations. By reason of these prior disclosures it is necessary to limit Todd more than it would be if they did not exist; but that is the full extent of their influence.

Coming, now, to the claims relied on, being 1, 3, 4, 5, 6, and 8, the elements of 3, 4, and 5 are substantially the same. They are (1) a type support provided with printing characters; (2) ridges and grooves on the printing faces; (3) an inking device; (4) a platen cooperating with the characters, with an impression surface registering with the ridges and grooves. Claims 1, 6, and 8 are narrower, and include a revolvable type wheel and circumferentially arranged grooves. The machine of defendants has all the elements of 3, 4, and 5, but instead of a type wheel has sectors of such a wheel, and the ridges and grooves are not circumferentially arranged. They are arranged diagonally to both the circumference and axis of the wheel or the sector. They might just as well be described as axially arranged as circumferentially. Claims 3, 4, and 5 are infringed, but not the others relied on. Defendants use what is thought to be the principle of the Todd invention, and any difference in operation is immaterial. Such difference is not a substantial or material one. The drum sectors used by defendants embody the Todd conception as fully as in the drum type of machine.

[3] *Unfair competition.*—The pleading and proofs relate to alleged breach of trust and violation of legal and moral obligation, disloyalty and treachery on the part of the defendants Fesler and Evans while in plaintiff's service, fraudulent sales of plaintiff's secondhand machines, impersonation of plaintiff's agents, advertising and selling such machines under a fictitious name, using plaintiff's advertising matter, alienation of loyalty of salesmen, and molestation of plaintiff's contracts of sale.

Another issue of unfair competition of plaintiff against defendants, mainly by misrepresentation of this suit by plaintiff's selling agents to the injury of defendants, was brought by counterclaim, and defendants sought a temporary injunction to restrain such misrepresentation. The suit was set for prompt trial, and the injunction accordingly denied. No claim is now made by defendants on this counterclaim, which should therefore be dismissed.

It appears that, after defendants' competition commenced by the sale of the Hedman machine, very strenuous sales methods were used by agents of defendants, and to some extent by agents of plaintiff, which, although reprehensible, were simply intense, as distinguished from unfair, competition. But there are other acts on the part of defendants for which they bear the whole responsibility, apart from anything done by their salesmen, which give an entirely different aspect to the case, although in some respects they may be bound by the acts of their agents, though specific knowledge of the particular acts is not proved.

Without attempting to detail the specific facts, the testimony shows that, while Fesler and Evans were important and trusted agents of plaintiff, they took up the Hedman machine (after first trying to sell it for a fair price to plaintiff), kept their connection with it a secret as long as possible, leased a building for manufacture and office purposes, and got as far along as possible to make and sell the device, meanwhile continuing in plaintiff's service. While owing the utmost fealty to plaintiff, and making more than the usual number of sales of the Todd machine, they used what time they could to make all preparations for their own plans, and alienating some of the Todd agents. They apparently thought they owed plaintiff no duty beyond keeping up the normal amount of sales, and that while they were thus serving two masters they were free to conceal the situation, and embezzle plaintiff's advertisements, some of which had been accumulating for a long time, were acquired at great expense, and were of the utmost value. This refers especially to the large collection of raised checks, which they photographed and later used in the Hedman business. This is probably damnum absque injuria, except that defendants may be restrained from using such advertising matter. In respect to disloyalty, and the use of advertising matter, see Merchants' Syndicate Catalog Co. v. Retailers' Factory Catalog Co. (D. C.) 206 Fed. 545.

The evidence also shows that defendants have sold Todd exchanged machines without distinctly stating to the purchasers that they were not new—have advertised sales of old machines without making the advertising matter clearly to show that they were not new machines. It further appears that they have sold such old machines to persons who they knew, or had good reason to believe, would sell them as new, and who would represent themselves as Todd agents. They used a fictitious business address and name in order to sell such old machines, which necessarily tended to discredit the Todd machine. It is also shown that they have in a few instances molested plaintiff's clients by inducing them to violate their purchase contracts for plain-

tiff's machines. They should be restrained from using advertising matter belonging to plaintiff, and from doing the other things referred to.

[4] The evidence shows that agents of the plaintiff in selling the Todd machine, and so far as they sold Hedman exchanged machines, have to some extent used similar reprehensible methods of competition; and it is claimed that the plaintiff, seeking equity in its favor, has not done equity towards the defendants, and therefore is not entitled to a decree against unfair competition, upon the equitable rule of "clean hands." This leads to an examination of the law in respect to how far the acts of sales agents bind their principals in a situation like this. Sales agents may charge their principal with liability for their unfair competition, although the latter is ignorant of their methods, because they are agents to sell, and their sales methods are as a matter of law those of the principal. Their agency, however, does not extend to direct injury of the principal, by charging it with unjust conduct in pursuing its business.

"The doctrine that he who comes into equity must come in with clean hands does not recognize mere imputations of guilt based upon technical theories of agency. To invoke it a knowledge must exist on the part of the principal of the facts upon which the charge of unconscionable conduct is based, and in the case of a corporation those facts must be brought home to the persons exercising general control over its affairs. * * * On the other hand, * * * the liability of the defendant for the acts of its agents exists entirely irrespective of knowledge of its officers" (citing Vulcan Detinning Co. v. American Can Co., 72 N. J. Eq. 387, 67 Atl. 339, 12 L. R. A. [N. S.] 102). Associated Press v. International News Agency (D. C.) 240 Fed. 983; Id., 245 Fed. 244, 157 C. C. A. 436; certiorari granted, International News Service v. Associated Press, 245 U. S. 644, 38 Sup. Ct. 10, 62 L. Ed. 528, affirmed December 23, 1918, opinion by Mr. Justice Pitney, Justice Brandeis dissenting.

The finding of the lower courts that plaintiff was not chargeable with unfair competition was accepted. The fact that both parties were accustomed to take news items from each other as tips to be investigated, and, if verified, the result of the investigation to be sold, the practice having been followed by news agencies generally, was held not to show an unconscientious or inequitable attitude toward defendant, so as to fix upon the plaintiff the taint of unclean hands. There is no evidence that plaintiff authorized or had knowledge of any acts of its agents which would deprive it of the right to an injunction against unfair methods of competition on the part of defendant's salesmen, nor is there very much evidence of such unfair methods. Unfair methods of plaintiff's agents might, indeed, be so general and persistent as to require the inference of knowledge by the principal, but the evidence fails on this point. And there is no evidence that plaintiff took an unconscientious or inequitable attitude toward defendant, but, so far as unfair conduct of its salesmen appears, it was rather by way of retaliation.

[5] In respect to defendants' advertising plaintiff's machines for sale under the name of "The Check Writer Emporium," which had no real existence, giving its address as "No. 655 North Franklin Street, Chicago," an entirely fictitious address, it seems clear that, as customers could not find any such concern or such street number,

plaintiff was bound to be discredited and injured, and that such advertisement should be restrained.

[6] It seems only fair to require defendants to make it clear in advertisements that the Todd machines offered for sale are used or rebuilt ones. Walter Baker & Co. v. Saunders, 80 Fed. 889, 26 C. C. A. 220, Ludlow Valve Co. v. Pittsburgh Co., 166 Fed. 26, 92 C. C. A. 60, Stix v. American Piano Co., 211 Fed. 271, 127 C. C. A. 639, Waterman Co. v. Modern Pen Co., 235 U. S. 88, 35 Sup. Ct. 91, 59 L. Ed. 142.

[7] Defendants have no right to the continued use of advertising matter obtained by it through the acts of Fesler or Evans while they were in a confidential relation to plaintiff, however free they might be to take or use uncopyrighted matter obtained since they were plaintiff's agents. Merchants' Syndicate Catalog Co. v. Retailers' Factory Catalog Co., supra.

There should be a decree dismissing defendants' contention, deciding the Todd patent valid, claims 3, 4, and 5 infringed, and claims 1, 6, and 8 not infringed, and for an accounting of damages and profits on account of the patent infringement, and that an injunction issue as above indicated, against further unfair competition, with costs.

I have assumed that damages or profits resulting from the unfair competition may be incapable of proof, but the matter may be deferred until the decree is settled.

UNDERHILL et al. v. BELASCO.

(District Court, S. D. New York. November 25, 1918.)

No. 13–181.

COPYRIGHTS ⊜65—INFRINGEMENT—DRAMATIC COMPOSITIONS.

A copyrighted play, in large part depicting convent life, *held* not infringed by a play the theme of which is entirely different, although relating to some extent to convent life and with somewhat similar convent scenes.

In Equity. Suit by John G. Underhill and Gregorio Martinez Sierra against David Belasco for infringement of copyright of the play "The Cradle Song" by the production of defendant's play "Marie Odile." Bill dismissed.

1. The Cradle Song.

The story is that of a community of Sisters. A baby is sent into the convent on the wheel at the door, by an unknown mother. The receipt of the infant and the decision of the Sisters to keep it form the climax of the first act. In making this decision, it is apparent that the natural love of the female for a child is what is dominating them. The simple inner life of the convent is portrayed.

An interval of 18 years elapses between the first and second act, and the child, who has led a happy, normal life, is now a girl of 18. It is her wedding day, and the Sisters are busily engaged in attending to the final details of her trousseau. It is apparent that she has won their hearts, that she is tenderly loved by them, and that all are keenly interested in her future welfare. When she departs to be married to an estimable young man, all are

left sad because of her going away; but it is evident that all recognize her right to be a wife and mother and to live her own life. Her departure at the end of the second act ends the play.

2. Marie Odile.

The story is that of Marie Odile, a girl of 16, who has grown up in a convent, in which she is a lay sister. The first act shows that she was left on the doorstep when an infant, and that the Sisters have brought her up. In doing so they have kept her in ignorance of the world in every sense, and she has seen no men, except an aged priest and an old gardener. Marie Odile has heard of the immaculate conception. As a consequence she regards maternity as something holy, but she has no knowledge as to how maternity is achieved. A foreign foe invades the country (France) in which the convent is situated, and the Sisters take flight. Through mistake, Marie Odile is left behind in the company of the old gardener. Marie Odile sees one of the invading soldiers. He is the first young man she has ever seen, and she thinks he is St. Michael, whose portrait hangs in the convent. This ends the first act.

In the second act the soldiers are in possession of the convent, and Marie Odile is attending to their wants. The one whom she regarded as St. Michael is especially kind to her, and they are mutually attracted. She permits him to embrace her.

In the third act, which is a year later, it is revealed that the young soldier went his way and Marie Odile now has a child. She thinks the fact of her having had a child places her on the same plane as the Virgin Mary. The Sisters return to the convent, and when they find what has happened are shocked, and Marie Odile is dismissed from the convent and sent out into the world with her infant.

Paul Bonynge, of New York City, for plaintiff.
A. J. Dittenhoefer, of New York City, for defendant.

MAYER, District Judge (after stating the facts as above). This suit is the usual infringement suit in equity, brought by the plaintiffs, Underhill and Sierra, against the defendant, Belasco. Sierra is evidently a Spanish author of repute, who has written a considerable number of successful productions. Underhill is Sierra's representative in the United States, and is an educated and accomplished Spanish scholar, who translated the work of Sierra which it is claimed defendant has infringed. Defendant is a theater owner, producer, and manager. The difficulty in the case, which doubtless led to the institution of the suit, was the failure of defendant promptly to return to Mr. Underhill the manuscript of "The Cradle Song," which had been delivered to defendant by plaintiff Underhill. This, together with the acceptance shortly thereafter and production of the alleged infringing play "Marie Odile," doubtless created in the mind of Mr. Underhill the feeling that the defendant had availed of the subject-matter of "The Cradle Song," and that the play "Marie Odile" was not an original conception.

As has been frequently pointed out in reported cases, and as is matter of common knowledge, most of the incidents that happen in the world may be availed of in plays or books, and the question essentially is in what manner they are availed of. Except for some extraordinary developments, such as, for instance, have happened in the way of instruments of war in the present war, there is rarely anything that is physically new. Convents are old. The theme of a foundling in some relation or another is old. The conduct of persons

in any given walk or department of life—that is to say, the normal conduct—is ordinarily old and well known. The task which is presented to the playwright is to weld together these old elements with some fundamental or controlling theme in such a manner as to make a successful appeal, either artistically or financially, or both. Except for the fact that the scene of both plays is in a convent, and that of necessity there are some similarities of dialogue and language, the two plays are essentially and fundamentally different.

"The Cradle Song," as stated by Mr. Belasco himself, is a sweet and gentle story, presumably of marked literary merit, disclosing in part the life within a covenant, representing the nuns as being sympathetic and kindly women, dedicated to good works and offices. The foundling in "The Cradle Song" is left at the convent with a note from its unknown mother, and grows up, to all intents and purposes, as a normal female child, and in due course falls in love with the traditional hero, although this particular person is not in any sense a hero from the standpoint of heroics, but just a perfectly sane, normal, male human being. The man Antonio and the girl are to be married, and she leaves the convent with the good will of the Sisters who have brought her up, and with their best wishes. It is perfectly plain that such a play, so far as the American public is concerned, would in all probability not have any strong dramatic appeal, although it might be highly regarded for the purpose it contains. The evidence is that it was a great success in Spain, and, as I understand it, in some other countries, which Mr. Sierra in his deposition has spoken of as Catholic countries. The reason for this, it seems to me, is quite simple. In a country where great numbers of the inhabitants are devout members of a faith, such a play might readily appeal as showing the life within one of the cherished institutions of that faith. In answer to a question, I think asked by the court, Mr. Underhill stated that the play had not been produced in England, nor has it yet been produced in this country, and while I do not pretend to any dramatic knowledge, I assume it is because the play is a simple, normal tale along the lines that I have already indicated.

In respect of "Marie Odile," the play, if not so designed, at least had the result of appealing to the desire of a good many audiences to give themselves the luxury of sorrow. This seems to be a well-known result of which the managers are entirely cognizant. In this play the playwright attempted what at the time of his first conception, and so far as seems to me since, was a bold notion, namely, that a child should be brought up in a convent so thoroughly ignorant of the affairs of the world that, even after a child was born, she would not understand what had happened. In order to produce this situation, it was necessary, as the witnesses have testified, to have a convent entered by man, a condition ordinarily not possible. To bring this about it was necessary that a war should be going on, and that the man entering the convent should be a soldier. Once the fundamental thought of the play is understood, the unexpected feature of the girl imagining that the Prussian soldier was St. Michael is a conception of marked originality from the play-writing standpoint. This play, also, instead

of ending happily and comfortably, ends tragically, when this unfortunate woman is sent out into the world with her child. The whole theory of this play is utterly different from that of the play of Sierra, and in its striking and main points it is completely to be differentiated. It is not enough that both plays are similar in respect of some of the convent scenes. To be an infringement, defendant's play must have been essentially suggestive of the theme of plaintiff's play.

As to the good faith of Mr. Knoblauch, I think there can be no question from the evidence. Mr. Le Guerre testified in effect that the fundamental conception of the play was stated to him by Mr. Knoblauch in the latter part of 1906 or the early part of 1907. He impressed me as a truthful man, who had no reason of any kind for stating other than the truth. But in addition we have in this case the rather extraordinary incident that the memorandum book which Mr. Knoblauch then had has been preserved. It seems to me that I can see perfectly how Knoblauch happened to have this book and keep the book. He was a young playwright, so far as the evidence discloses, having then produced his first play. He had this notion of "Marie Odile" in his mind. He was obviously, according to Le Guerre and according to his own testimony, unfamiliar with the technique of convent life, and he was seeking from Le Guerre at that time as much information as he could possibly obtain in regard to the technique surrounding convent life; and thus it was that this book came to be kept. Miss Mercer substantiates, not at all in detail, but in a general way, the fact that at that time Knoblauch was considering some play of this character, and her testimony is quite useful, because she did not attempt to remember, nor did she remember, all of the details, thus indicating the perfectly natural recollection of a limited character of a truthful witness. There is no doubt that Miss Kauser also had conversations with Knoblauch back in these early days in respect of substantially the basis of the play. That Miss Kauser or Mr. Knoblauch may forget some details or have some dates misplaced is perfectly natural.

The fundamental point is that the conception of the play is in 1906 or 1907, and, as one might expect, such a play was developed over a long period of years, until the time came when the playwright was ready to put his thoughts into concrete form and through his agent dispose of the play commercially. I cannot presume to guess, when there is no evidence on the subject, whether Mr. Knoblauch saw this play in Spain, or did not see it. In any event, it is quite clear to me that the fundamental theme of the play is his own. Mr. Belasco has taken the stand, and subjected himself to examination and cross-examination, and from that examination it appears entirely clear that he did not avail of plaintiff's play; but he was at once impressed with the play of Knoblauch, after he had read the first act. The defendant is an experienced theatrical producer, and from his point of view he saw the dramatic possibilities which were quite well disclosed in the first act to a manager of his experience, and really are well disclosed even to a layman, because the first act indicates the outline of the bold conception of the play, bold in the sense of novel for play purposes,

although, of course, the fundamental thought in a way was undoubtedly obtained from one of the great events in religious history.

However, I feel that the case is quite different from some of the cases that have been in this court. In this case I think plaintiffs have acted in perfect good faith. They were entitled to their contention on the law side of the case, and they were quite justified in supposing that some unfortunate event had occurred by reason of the collocation of dates and the failure promptly to return the play.

Finally, I may say that I have read with care the parallels prepared by plaintiffs and their counsel. As was pointed out in Bachman v. Belasco, 224 Fed. 817, 140 C. C. A. 263, such parallels are very likely to occur. Given life in a convent, there must be in any two productions a certain amount of similar conversation and a certain amount of similar acts. There probably is not a play in the history of the world that has not something that is to be found in some previous publication, either in drama, or in fiction or poetry, or some form of literary endeavor; but infringement cases are never decided upon so narrow a basis. The safest guide is always to determine what the fundamental theme is, and to see whether it has been appropriated.

In the circumstances, as I think the defendant has not infringed, the bill will be dismissed, but without costs. Settle the decree on two days' notice.

UNITED STATES v. RAMSHORN DITCH CO. et al.

(District Court, D. Nebraska, North Platte Division. December 20, 1918.)

1. WATERS AND WATER COURSES ⟸130—RIGHT OF APPROPRIATION—SEEPAGE WATERS.

   Under Rev. St. Neb. 1913, §§ 3426, 3427, and in view of the general statutory scheme for the acquisition of water rights, as well as the repeal of Acts 1895, p. 260, § 44, relating to the appropriation of seepage waters, *held*, that defendant water company, which had the right to appropriate from the Platte river, was not entitled to appropriate seepage waters escaping from an interstate canal constructed by the United States under the reclamation acts and with the consent of state of Nebraska, which water had been impounded by the United States.

2. WATERS AND WATER COURSES ⟸130—APPROPRIATION—ACTION OF STATE BOARD.

   Where, under the Nebraska statutes, defendant was not entitled to appropriate seepage waters belonging to plaintiff, *held*, that the action of the state board sustaining an attempted appropriation gave defendant no rights.

In Equity. Suit by the United States against the Ramshorn Ditch Company and others. Decree for complainant.

Ethelbert Ward, Sp. Asst. U. S. Atty. Gen., of Denver, Colo., A. R. Honnold, Dist. Counsel, U. S. Reclamation Service, of Scottsbluff, Neb., and T. S. Allen, U. S. Dist. Atty., of Lincoln, Neb.

Morrow & Morrow and Fred. A. Wright, all of Scottsbluff, Neb., Willis E. Reed, Atty. Gen. Neb., Charles S. Roe, Deputy Atty. Gen. Neb., and George W. Ayres, Asst. Atty. Gen. Neb., all of Lincoln, Neb., for defendants.

LEWIS, District Judge. This suit was brought to determine whether the defendant, the Ramshorn Ditch Company, had and has the right, as it claims, to divert and apply to irrigation forty-five and four-sevenths second feet of water, or any part thereof, flowing in a ditch or canal constructed by, in the possession and under the control of the plaintiff. All of the defendants, other than the Ramshorn Ditch Company, are State and Water Division and Water District officials who have to do under the State statute with the distribution of water for irrigation between different claimants thereto. The complaint alleges that the Ditch Company has not that claimed right, and prays for injunctive relief.

The facts are these: The plaintiff constructed, maintains and operates a large irrigation system in the valley of the North Platte, a part of which is in and covers lands lying in Wyoming, and the remainder is in this State. Its acts in this respect were authorized by the Reclamation Act approved June 17, 1902 (32 Stat. 388, c. 1093 [Comp. St. §§ 4700–4708]), and the so-called Warren Act approved February 21, 1911 (36 Stat. 925, c. 141 [Comp. St. §§ 4738–4740]). The dam constructed by the plaintiff to impound the flood waters of the North Platte is in the State of Wyoming, and has a capacity of something more than one million acre feet, which expressed otherwise, in cubic contents, signifies a body of water twenty miles long, one and a quarter miles wide, and sixty-four feet deep. As this storage water is released it is permitted to flow down the river to the head gates of large canals on both sides, into which it is taken and carried to the vicinity of lands to be irrigated in both States, from which it is then taken into laterals and delivered to landowners who distribute it over their lands in ditches made for that purpose. The canal with which we are now concerned has a capacity, in Wyoming, of sixteen hundred feet, which gradually becomes less as it extends eastward into this State. It is known as the Interstate Canal. It is taken out of the Platte River on its northerly side in Wyoming about thirty miles west of the State line, and its total length in the two States is one hundred and eighty miles. The laterals constructed by plaintiff have a total length of eight hundred miles. In addition to the lands in Wyoming to be irrigated by the waters in this canal it was contemplated and believed that more than one hundred thousand acres in Nebraska could also be irrigated, consisting of about eighty thousand acres of Government lands, ten thousand acres of State lands, the remainder, lands in private ownership. The territory to be furnished by the canal on the south side of the river is not so extensive, but the project in its entirety is a very large one, and has required several million dollars in its construction and development. The Interstate Canal crosses the State line about the westerly edge of Sheep Creek Valley, and then runs almost due north about five miles before crossing that Creek, thence in a southeasterly direction, and again loops north around the main valley of Dry Sheep Creek. The distance thus covered by the canal as it traverses the two valleys is about twenty miles, so that water escaping in any manner from the canal in that distance would naturally tend to pass down into the troughs in those valleys by surface flow or seepage, the strata under-

lying the soil in that country being sand or gravel. Water from the canal was first applied in this State in 1908, and in 1909 forty-eight thousand acres of growing crops were furnished water under the canal in this State. The lands in the two valleys were irrigated from this source.

Following the trough of Sheep Creek Valley in its course a little to the east of south the distance from the loop of the canal around it to the Platte River is about twenty miles. Dry Sheep Creek Valley, which runs more directly south, comes in to Sheep Creek Valley some four or five miles from the river. There is no evidence that there was ever any natural flow of water in Dry Sheep Creek. In the early days, and up to some twenty years ago, there was a small flowing stream in the upper part of Sheep Creek, but at no time did it reach the river on the surface. Its visible flow accumulated in what are called sinks, just above the sand hills or mounds which lay across the valley about a third of the way down it from the loop of the canal. Below the sand hills and on to the river there was no natural channel. The country there was grassed over. The sinks and the small stream above flowing into them were utilized in the early days by stockmen as watering places, but the flow, and the water in the sinks, gradually grew less and began to disappear several years before the canal was constructed, and stockmen resorted to the sinking of wells, both above and below the sinks, and in this way found water for their cattle. A year or so after water was turned into the canal, and lands in the two valleys were begun to be irrigated, wet places in the two valleys appeared upon the surface. This condition increased from year to year until large pools or small lakes were formed both above and below the sand hills, and these accumulating waters, as they increased, began to form connecting channels and to cut a way in which to flow downward toward the river. This condition of course rendered much of the land which had been irrigable in the two valleys unfit for cultivation. It became marshy and increasingly saturated. Thereupon the plaintiff, at an expense of about $45,000.00, constructed ditches in Sheep Creek Valley, both above and below the sand hills, and thus brought the saturating waters into a common channel directed toward the river. It first turned the waters into a privately owned irrigating ditch, and they were thus carried to the river. Later they increased in volume and spread over the country below. A drainage district was organized to receive the waters from the ditch constructed in the valley by the plaintiff, and it carried them direct to the river, the plaintiff bearing a part of the expense of the drainage ditch. By series of contracts, made in 1912 and 1915, between the plaintiff and the owners of the Farmers' Ditch, the plaintiff obtained the asserted right to turn these waters into the Farmers' Ditch and to use them in irrigating lands under that ditch, and extensions of it to be made, on contracts with landowners, which it claimed the right to make and fulfill by virtue of the Warren Act. For that purpose it constructed concrete Diversion Works at a cost to it of $1450.00, and thus diverted the water in June, 1914, from its ditch into the Farmers' Ditch, and continued to do so during each irrigation season thereafter up to July 21, 1917, on which

day the local Water Commissioner, at the direction of the State Engineer, his superior, came upon the Diversion Works and cut the water out of the Farmers' Ditch, turned it into the District Drainage Ditch, and posted written notices thereat, signed in his official capacity as Water Commissioner, warning the U. S. Reclamation Service and its officers, particularly its Project Manager, that in accordance with the provisions of the Irrigation Laws of the State of Nebraska the head gate of that diversion into the Farmers' Ditch had been opened (closed) "for the purpose of delivering water to appropriation 1465" (Ramshorn Canal Company), and that the head gate must not be opened or interfered with until permission should be received from some officer of the State Board of Irrigation, Highways and Drainage. The Ramshorn Canal was below the Farmers'. It crosses the District Drainage Ditch; and as the water thus turned into the District Drainage Ditch by the Water Commissioner came down to the point of crossing it was turned in to the Ramshorn Canal and used for the irrigation of lands under it.

The Interstate Canal carries about twelve hundred second feet of water where it reaches Sheep Creek, and the evidence leads to the conclusion that the loss from the canal by seepage in the twenty miles around the heads of the two Sheep Creeks is from thirty-eight to forty second feet, and that the loss in the irrigation laterals under the canal in the same vicinity is about forty second feet. In addition, the amount of seepage in the two valleys was increased by irrigation, but there is no testimony from which that can be approximately estimated. The flow in the ditch constructed by the Government varies from thirty-five to eighty second feet at the Diversion Works. Ordinarily it amounts to about forty to fifty second feet. The plaintiff did nothing in the way of draining the seeped lands in Dry Sheep Creek Valley. That work was done by private landowners, and the flow in plaintiff's ditch above the Diversion Works is considerably augmented from that source.

Section 8 of the Reclamation Act accepts the requirements of local laws "relating to the control, appropriation, use or distribution of water used in irrigation," and it requires that "the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws."

The State Constitution has no provision relating to the appropriation and use of water, but the legislature, by various acts, has completely covered the subject. By Act of 1895:

"The water of every natural stream not heretofore appropriated within the State of Nebraska is hereby declared to be the property of the public and is dedicated to the use of the people of the state, subject to appropriation as hereinbefore provided" (Rev. Stat. 1913, § 3370); "as between appropriators, the one first in time is first in right" (section 3371); "the right to divert unappropriated waters of every natural stream for beneficial use shall never be denied * * *" (section 3372); "the priority of such appropriation shall date from the filing of the application in the office of the State Board" (section 3373); "it shall be the duty of the Board to make proper arrangements for the determination of priorities of right to use the public waters of the state, and determine the same" (section 3400); "as the adjudication of a stream progresses, and as each claim is finally adjudicated, it shall be the

duty of the State Board to make and cause to be entered of record in its office an order determining and establishing the several priorities of right to use the water of said stream, and the amount of the appropriation of the several persons claiming water from such stream and the character and kind of use for which such appropriation shall be found to have been made" (section 3403); "each appropriation shall be determined in its priority and amount by the time at which it shall have been made and the amount of water which the works are constructed to carry" (section 3404); "the State Board of Irrigation, Highways and Drainage is given original jurisdiction over all matters pertaining to water-rights for irrigation" (section 3407).

Appeal from the action of the Board to the Supreme Court is provided for. Section 3412 provides that application must be made to the State Board before the appropriator commences the construction, enlargement or extension of any works for the purpose of appropriating any of the public waters of the State. It expressly provides that the United States of America, and every person, association or corporation may make the appropriation. These provisions of the local statute have express reference to the "waters of every natural stream," also designated as "the public waters of the state." The Board does not ordinarily deal with flood water that, unless stored and held for use during the irrigation season, would otherwise pass on down the stream. The State Legislature, by section 3455, Rev. Stat. 1913, expressly authorizes the United States to appropriate and store such waters in conformity with the Reclamation Act (32 Stat. 388), and also recognizes the right of the United States to dispose of such waters in accordance with the provisions of the Warren Act. The United States made its original application (No. 768) to the State Board on September 9, 1904, in conformity with the eighth section of the Reclamation Act and the State statutes, for a permit to construct its reservoir in the State of Wyoming and to store therein the unappropriated waters of the North Platte River, to bring them into this State in its canals and to distribute them therefrom for irrigation; and it was by that Board allowed a priority for that purpose under that number and of that date. By subsequent orders of the Board the time for completing the canals under said application was extended to September 1, 1919, and for completing the application of water to the land, to September 1, 1924. The application is voluminous. It sets forth a description, by legal subdivisions, of many thousand acres of land in both States, and in addition contains this:

"Interstate Canal. This canal contemplates the enlargement of the Whalen Falls Canal and continued easterly to the limit of irrigable land, and the right to irrigate all the irrigable lands on the north side of the North Platte River, supplementing those without adequate supply at any season and furnishing full right to all others."

The application discloses the entire project in the two States. The order of the State Board approving and allowing the application, made on February 14, 1905, recites, among other things:

"The lands to be irrigated under this permit being all lands described in said application which lie within the State of Nebraska and are not covered by prior existing rights."

On April 3, 1911, the plaintiff filed with the State Board its application to appropriate the waters in the ditch which it had constructed in Sheep Creek Valley. The State Engineer, acting as secretary of the Board, made objection to the application that it was not specific in some respects, and gave thirty days to the plaintiff for amendment. At that time section 44 of the Legislative Act of 1895 was in effect. It was as follows:

"All ditches constructed for the purpose of utilizing the waste, seepage, swamp, or spring waters of the State shall be governed by the same laws relating to the priority of right as those ditches constructed for the purpose of utilizing the waters of running streams; provided, that the person upon whose lands the waste, seepage, swamp, or spring waters first arise shall have the prior right to the use of such waters for all purposes upon his lands."

Pending the time given to amend the application that section of the Act of 1895 was repealed, and thereupon, and before the thirty days expired, the application was dismissed and the Board declined to further hear the applicant. This course taken by the Board appears to be due to its opinion at that time that since the repeal of the statute there was no provision under which such waters could be appropriated, and that the statutes in that respect were applicable to the waters of natural streams only.

The Ramshorn Ditch Company has an old appropriation from the North Platte, which is known as Docket No. 945. Its date is March 20, 1893, and is for forty-five and five-sevenths second feet. The head gate of that ditch is on the north bank of the river at the lower edge of the two Sheep Creek draws or valleys. The river is broad and shallow, and owing to the formation of sand-bars or islands opposite the head gate, due to the shifting river sands, it is difficult and expensive for the Ramshorn Company to maintain diversion works in order to receive the amount of its appropriation into its head gate and ditch. But the evidence does not disclose that the amount of the natural flow in the river is not sufficient at all times to supply the Ramshorn priority. On the contrary it appears that it is at all times ample for that purpose. But the Ramshorn Company was constantly put to great expense in maintaining its diversion works. It saw that if it could get the water in plaintiff's ditch it would be rid of that expense. So on June 13, 1913, it filed its application with the State Board for an appropriation of the waters in controversy. Among other things which it sets forth in its application is this:

"That the source of the proposed appropriation is seepage water accumulating in the Sheep Creek basin or draw which does not naturally connect with the North Platte River. That the amount of the appropriation desired is forty-four (44) cubic feet per second of time. That it is proposed to locate the head gate on the east bank of a ditch which will collect the seepage water and convey it to said Ramshorn Ditch"

—and that the total cost would be $3,100.00. On February 23, 1914, the Board dismissed the application—

"for the reason that a prior appropriation has been granted and is in use on the lands that are asked to be irrigated under this application."

The Ramshorn Company filed with the Board on May 11, 1914, a petition for a rehearing of its application; and notwithstanding the fact that the District Drainage Ditch, which was constructed by the plaintiff and the Morrill Drainage District to carry these waters to the river when they were not turned into the Farmers' Ditch was ample for that purpose, and had been completed in July, 1913, the verified petition for a rehearing, among other things, recites:

"Your petitioner further represents that it is necessary to collect and drain away these seepage waters to prevent serious damage to adjacent farms and other property. That drainage is an expensive burden unless the water can be used so as to compensate therefor. That the water in question is not public waters of the state and is not taken from a natural stream."

There is no proof that the rehearing was granted; but the Ramshorn Company filed its second application for an appropriation of these same waters, on September 12, 1916, in which it represented that the source of the appropriation is "seepage water rising in the Sheep Creek basin." The amount desired is forty-five and five-sevenths second feet, and "that it is proposed to locate the head gate of the said water collected in drain ditch at siphon under Tri-State (Farmers') Canal." (This is near the point at which the waters can be interchangeably turned through plaintiff's concrete Diversion Structure either into the Farmers' Canal or taken down under that Canal and thence into the District Drainage Ditch on to the river.) This application was granted on September 22, 1916, subject to certain limitations and conditions, among which are:

"The prior rights of all persons who by compliance with the laws of the State of Nebraska have acquired a right to the use of the waters of this stream must not be interfered with by this appropriation. The amount of the appropriation shall not exceed $45^4/_7$ cubic feet per second of time. * * * This appropriation shall be supplementary to and part of the original appropriation covered by Docket No. 945, Ramshorn Ditch Company, and shall take the same priority as Docket No. 945."

It is on this action of the Board that the Ramshorn Company claims the right to take and use this water; and the Water Commissioner, in taking the steps which he took in diverting the water from the Farmers' Ditch so that it could go down the District Drainage Ditch to the Ramshorn Ditch, justifies his action under the same order.

The foregoing are all of the material facts necessary for consideration in reaching a conclusion on the merits of the controversy.

[1, 2] In addition to the foregoing legislative acts, wherein provision is made for the appropriation of "the water of every natural stream," it is necessary to consider, in determining the rights of the parties, two sections of the Act of 1913, now embodied as sections 3426 and 3427, in Nebraska Revised Statutes, as follows:

Sec. 3426. Any person, persons, district, company or corporation owning, constructing or operating an irrigation canal in this state, are hereby authorized to collect or assist to collect any seepage water thereunder or under any adjacent irrigation canal by the construction of drainage ditches and to apply said waters to irrigate with on the lands covered by the original appropriation of such canal, while said seepage waters are being conducted by said drainage ditches toward the natural streams.

Said use to be subject to limitations as follows:

(1) The right of any land owner to raise, pump, develop and use on his own land water percolating thereunder shall not be impaired.

(2) Seepage waters so collected by the canal owner or operator shall be treated as supplemental to and part of the original appropriation of such canal, the total quantity of which shall not be increased nor exceed an aggregate of three acre feet in any calendar year for each actually irrigated acre of land.

Sec. 3427. When any seepage or drain water is mingled with that of any natural stream, it shall become part of the public waters of the state, subject to diversion among existing appropriators of the State of Nebraska, in the order of their respective priorities and rights based upon preferential use as defined by the laws of the State of Nebraska.

These are special provisions on the subject of seepage water. This statute gives the first right to him who may develop them on his own land, to use them and to use all of them, if he so desires, on his own land, and any water that he may so develop and use is not charged against an appropriation that he may have of water from a natural stream. They are not counted as a part of his appropriation, if he have one. They do not supplement it. The owner of an irrigation canal has the right to collect seepage water from it "by the construction of drainage ditches and to apply said waters to irrigate with on the lands covered by the original appropriation of such canal while said seepage waters are being conducted by said drainage ditches toward the natural streams." If seepage waters under a canal are thus collected and used they "shall be treated as supplementary to and part of the original appropriation of such canal."

Section 3426 is silent of any intention to require applications to the State Board in the same manner that is required to perfect an appropriation of water from a natural stream before the right given by the statute attaches. Certainly the landowner who develops water under the provisions of that section is not required to take action before the Board before he obtains the right to use the developed water on his land. And as to the canal owner who collects the water for use, it is expressly provided that the water so collected shall be treated as a part of the original appropriation of such canal. It does not contemplate a proceeding before the State Board through which an applicant canal owner may obtain an original and independent right to the use of additional water over and above his prior appropriation. Its sole purpose, by its terms, is to grant him the right to collect and use such water, charging him with it, in the event he does so, against his original appropriation. It was a practical view to take of the subject-matter. Seepage, leakage, waste and return waters are all of uncertain quantities, variable from season to season. They may disappear altogether, and cannot be depended upon. If their source be leakage from the canal or laterals, that may be wholly stopped by an impervious structure at a later date; if their source be irrigated lands, irrigation may be suspended or wholly stopped, and the seepage would consequently cease. The other sections of the statute in relation to proceedings before the State Board all have to do with stream flow, denominated public waters, and declared to be the property of the public, and provide for the acquisition of the individual's right to use them by having them respectively determined and adjudicated by the

Board and a permanent record made fixing priorities. The rights thus to be fixed by the Board are permanent in character, and can be exercised by the owners according to their priorities during each season. The difference between the right thus acquired and that given by section 3426 is obvious. Seepage water is not dependable; its permanent flow and use cannot be expected. The Legislature treated it in this view. If collected and used, the amount used is charged against the original appropriation of the canal. Whether or not it is being used is constantly under the eye of the Water Commissioner, whose duty it is to see to the distribution and use of water in his district. Section 44 of the Act of 1895, repealed in 1911, had to do only with possible disputes between those using seepage from the same source, and there may have been an implication that those disputes were subject to adjudication by the Board in the same manner as the right to take water from a natural stream should be determined. There is no basis for such an implication in Section 3426, enacted two years later to cover the same subject-matter. I am of the opinion that this section gives the right and defines the conditions under which it can be acquired, and the limitations to which it can be applied, that the statute, ex vi termini, grants the right on compliance with its requirements; and that it is not within the jurisdiction of the State Board to pass upon and determine in whom or when it attaches. The plaintiff collected the seepage waters and was using them to fulfil its Warren-Act contracts. The lands on which they were being applied by it, and the ditch in which it was being conducted to those lands, brought them nearer to the natural stream which they, if unobstructed, would have finally reached. The Ramshorn Company, after it induced the Water Commissioner to turn them into its canal, also applied them to irrigate lands on the same water-shed. But the Ramshorn Company took no part in developing and collecting the seepage water. It did nothing and spent nothing for that purpose. It never complied with the requirements of section 3426. When they reached the line of its canal, after being turned down the District Drainage Ditch by the Water Commissioner, it diverted these waters into its canal at a nominal expense. The amount of water which it claimed a right to appropriate from the ditch of the plaintiff, in its petition to the Board, is identical with the amount of its original appropriation from the river. Its purpose is obvious. It was seeking to obtain water from some other source than the source of its original appropriation so that it could avoid the expense of maintaining diversion works in the river's shifting sands. Considering both of its applications, the one dismissed and the one finally granted, it represented to the Board that it had collected, or intended to collect, the waters in controversy at great expense to it. It sought to make the Board believe that it had complied with the requirements of section 3426, and the action of the Board in granting its last petition must have been on the assumption that it had done so, but confessedly this is not true.

Counsel for the Ramshorn Company devote a large part of their brief and argument in support of the proposition that seepage water is a part of the natural stream which it would, in natural course, finally

reach and add to the stream flow; and cite, among other cases, Irrigation Co. v. Campbell, 2 Idaho, 411, 18 Pac. 52; McClintock v. Hudson, 141 Cal. 275, 74 Pac. 850; Los Angeles v. Hunter, 156 Cal. 603, 105 Pac. 755; Irrigation Co. v. Irrigation Co., 31 Colo. 62, 72 Pac. 49; Josslyn v. Daly, 15 Idaho, 137, 96 Pac. 568; Comstock v. Ramsay, 55 Colo. 244, 133 Pac. 1107; and Durkee Ditch Co. v. Means (Colo.) 164 Pac. 503. The proposition is relied upon in refutation of the plaintiff's claim that the right to collect and use these waters belongs to it because they are flood waters and were brought in by it through its canal, that before it brought them in the seeped water here in controversy did not exist, and that by virtue of these facts the water should be considered as developed or new water, to which plaintiff should be given the first right until the seepage in fact reaches the river flow. The rule for which counsel contend is undoubtedly established beyond controversy by the authorities they cite, on the state of facts developed in those cases. The facts in each of those citations were alike. The question presented to the courts was, Whether or not leakage, seepage, waste, return and percolating waters could be collected and then diverted and used for irrigation so as to decrease the natural flow of the stream, to the detriment of prior appropriators below, whose appropriations had been fed by the underground waters before they were diverted. The specific question here involved, Has the canal owner the right to collect and use on his original appropriation waters which leak from his canal and laterals? was not up. The Comstock case is typical. The court said:

"That appropriators of water out of a natural stream for irrigation purposes with priorities decreed are entitled to have the conditions substantially maintained on the stream as they were when the appropriations were made and have existed during the continuance and perfection of such appropriations"

—and the court held that to cut off such waters by intervening works between the point where they escaped and where they would naturally reach the stream, from the lower appropriators, was the same thing in practical effect as to cut off a natural tributary to that stream. It announced the principle, and cited much authority in support, that seepage waters which contribute to the natural flow and thereby supply appropriators farther down are not subject to new and independent appropriation and diversion when there is thereby an interference with the right of use by prior decreed appropriators from the stream. And it was declared in that case, and in the others cited, in effect, that seepage waters are a part of the natural stream which they would finally reach from the moment they escape from control, for the protection of rights there under consideration. But the Ramshorn Company presents no facts here calling for the application of that principle in its behalf. The right of a canal owner like the one here claimed by plaintiff was not involved or considered in any of those cases, and there is no complaint here by the Ramshorn Company that the use that the plaintiff was making of these waters at the time it caused them to be turned into its ditch decreased or lessened the flow of the stream above the Ramshorn head gate, to its injury, so that it was thereby not able to

get from the river its appropriation. It may be seriously questioned whether the doctrine of these cases can be accepted in this jurisdiction in view of Section 3427, but the facts here presented are such that a definite construction of that section is not required. The State Supreme Court may later have occasion to give us its full effect. We will wait until it speaks on the subject, unless it become unavoidable that we construe it. Furthermore, the contention puts the Ramshorn Company in a doubtful attitude. It can hardly be heard to say that the seepage water is a part of the stream and must be permitted to find its way to the body of its flow, in the absence of proof of damage to some appropriator by its interception, and at the same time claim a right to participate and become a beneficiary in the obstruction of that flow, and to make a new diversion and use of the water. Its attitude is contradictory. The legal proposition it advances is sound, when confined to a condition of facts on which it rests, but has no application here. To carry that principle to the length of holding that because seepage waters under certain conditions are considered a part of the stream, and the State statute gives a right to appropriate waters of the stream, therefore seepage waters may be appropriated within the literal terms of the State statute, cannot be acceded to. The State statute did not give the right to appropriate and take the waters in the plaintiff's ditch. The action of the State Board on September 27, 1916, was no more than a declaration on its part that the Ramshorn Company had, in the opinion of its individual members, complied with the requirements of section 3426, and inasmuch as it had no authority to take official action on that subject-matter its order did not give to or establish any right in the Ramshorn Company. The conclusion follows that the Ramshorn Company has no right to take the water from the plaintiff's ditch against its objection and protest, and that the Water Commissioner acted beyond his official authority and without right when he went upon the plaintiff's diversion structures on the ditch and turned the water flowing therein into the Ramshorn Ditch; that as against the Ramshorn Company the plaintiff has the right to be unmolested in the possession of its ditch, the right-of-way thereto and the diversion structures thereon, and to use or dispose of the flow in such a way as it may desire.

A decree as prayed in the bill may be prepared and submitted.

SALAMANDRA INS. CO. v. NEW YORK LIFE INS. & TRUST CO.

(District Court, S. D. New York. December 16, 1918.)

1. INSURANCE ⟹80—INSURANCE AGENTS—PREMIUMS.

Where a Russian fire insurance company, which did business in the United States, was represented by a German partnership, which in turn engaged local agents in the United States, *held*, that the local agents, who did not fully agree to a contract of agency submitted directly to them by the Russian fire company after relations with Germany were forbidden on account of the war, were not bound, under New York Insurance Law, § 38, to deposit to the credit of the Russian company com-

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

missions which had previously been paid to the German partnership, and which the agents themselves might be conditionally entitled to.

2. WAR ⟸12—ENEMIES' PROPERTY—TRUST FUNDS—COMMINGLING PROPERTY.
The alien character of a fund is not divested because the custodian mixed it with other funds, which were unquestionably impressed with a trust for the benefit of American citizens.

3. WAR ⟸11—TRADING WITH ENEMY—POWER OF CONGRESS.
Congress, by virtue of its war powers, has power to declare unlawful trading with enemy aliens, as it has done by Act Oct. 6, 1917 (Comp. St. 1918, §§ 3115½a-3115½j).

4. WAR ⟸12—TRADING WITH ENEMY—POWER OF CONGRESS.
Under Trading with the Enemy Act Oct. 6, 1917, § 7, subd. (c), as amended by Act Nov. 4, 1918, § 1, the determination of the Alien Property Custodian, made in good faith, entitles him to the possession of alleged enemy property, and such possession will not be interfered with by injunction; the act providing methods for relief of those whose property was improperly taken.

5. CONSTITUTIONAL LAW ⟸278(1)—DUE PROCESS OF LAW—TRADING WITH THE ENEMY ACT.
In view of Trading with the Enemy Act Oct. 6, 1917, § 9 (Comp. St. 1918, § 3115½e), such act is not invalid as violating Const. Amend. 5; there being no deprivation of the property of citizens, or friendly aliens, without due process of law.

6. WAR ⟸12—TRADING WITH ENEMY—ARMISTICE.
Where the Alien Property Custodian determined funds were alien property, the signing of an armistice does not entitle adverse claimants to the fund, on the theory that the war had ceased, Trading with the Enemy Act Oct. 6, 1917 (Comp. St. 1918, §§ 3115½a-3115½j) itself declaring that the end of the war shall be deemed to mean the date of proclamation of exchange of ratifications of the treaty of peace, unless the President shall by proclamation declare a prior date; it appearing no such prior date has been declared.

7. WAR ⟸12—TRADING WITH ENEMY—APPLICATION OF ACT.
Trading with the Enemy Act, § 9 (Comp. St. 1918, § 3115½e), providing a method for relief of any person claiming any interest, right, or title in any money or other property, etc., is extensive enough in its provisions to give relief to a claimant who asserted that it wholly owned, to the exclusion of all other persons, funds detained as alien property by the Alien Property Custodian, and hence such person is not entitled to equitable relief, etc.

In Equity. Suit by the Salamandra Insurance Company against the New York Life Insurance & Trust Company. On motion to make permanent pendente lite an injunction previously issued restraining the defendant from paying to A. Mitchell Palmer, as Alien Property Custodian, certain funds. Injunction heretofore granted, and bill, dismissed for want of equity.

Charles A. Towne, Leon O. Bailey, and William S. Thomson, all of New York City, for complainant.

Emmet & Parish, of New York City, for defendant.

Francis G. Caffey, U. S. Atty., of New York City (Earl B. Barnes, Asst. U. S. Atty., of New York City, and Lee C. Bradley, General Counsel to Alien Property Custodian, of counsel), amicus curiæ.

KNOX, District Judge. This is a motion to make permanent, pendente lite, the injunction issued herein upon November 4, 1918,

wherein the defendant was restrained from paying to A. Mitchell Palmer, as Alien Property Custodian, certain funds in the hands of the defendant, and for which funds the said custodian made formal demand upon the defendant upon October 15, 1918.

The complainant is a fire insurance company organized under the laws of Russia, and since 1899 has been engaged in the business of writing fire insurance within the United States. Pursuant to the provisions of the law of the state of New York, the complainant had deposited with the defendant cash and securities of the approximate value of $500,000. This sum has fluctuated in a manner dependent upon the amount of insurance from time to time in force and the losses sustained upon the risks of the complainant. At the present time the defendant, as trustee under a deed of trust executed by the complainant, holds the sum of about $4,072,787.89 in cash and securities for the purpose of securing the complainant's liabilities to its policy holders. The last-mentioned amount includes the sum of $115,013.19 which is the subject-matter of this litigation; said sum having been deposited with the said defendant in July, 1918.

Ever since the complainant engaged in business in the United States, and until October 29, 1916, the complainant was represented, by way of general agents, by the copartnership of H. Mutzenbecher, Jr., which copartnership it is admitted is a German concern, and consequently takes on the character of an enemy. This copartnership received by way of compensation for its services in the United States 3½ per cent. of the net premiums on business written in this country, which compensation was paid from Petrograd.

From 1899 to 1913 a local firm, in which William G. Willcox and William Y. Wemple were members, acted within the United States as agents of the complainant. This firm, however, received its compensation from the general agent of the company, viz. H. Mutzenbecher, Jr. In March, 1913, Meinel & Wemple, Incorporated, became the local agents of the complainant, and for its services received, by direct remittance from the Mutzenbecher firm, a commission of three-fourths of 1 per cent. of the net premium income of the complainant in the United States, together with the expenses incurred by Meinel & Wemple, Incorporated; the amount of said commissions being payable out of the sum of 3½ per cent. of said premiums earned by and paid to the firm of Mutzenbecher, Jr.

About October 29, 1916, the Russian government being then at war with the Imperial German government, there was promulgated at Petrograd an edict or ukase forbidding business relations between subjects of the Russian government and those of Germany, whereupon the complainant undertook to cancel the agency agreement of Mutzenbecher, Jr. Thereupon Meinel & Wemple, Incorporated, were forwarded an agency contract by the complainant, under which Meinel & Wemple, Incorporated, should, if the contract were accepted, become the complainant's agent and manager within the United States, and should, for its services, receive commissions of 3½ per cent. based upon the net premiums, which it will be borne in mind is the same rate of commissions formerly paid to Mutzenbecher, Jr.

This contract, which was accepted by Meinel & Wemple, Incorporated, also required that concern to do all the work formerly done by Mutzenbecher, Jr., and this involved, if the work was to be done, the purchase of insurance maps, the keeping of records, etc., formerly possessed and kept by Mutzenbecher, Jr. These consequent expenses, if incurred, would involve a considerable outlay.

Owing to the uncertainty of conditions in Russia, Meinel & Wemple, Incorporated, acted upon the theory that such expenditures were not presently necessary, and, having a contract which provided for additional services, endeavored to communicate with the home office of the complainant with a view of modifying the contract. While awaiting a response to these communications, Meinel & Wemple, Incorporated, deducted from the net premiums of the complainant 2½ per cent. thereof, and deposited said sum in the name of Meinel & Wemple, Incorporated, and from said account paid, monthly, to itself, three-fourths of 1 per cent. of said net premiums, together with the expenses incurred. In other words, Meinel & Wemple, Incorporated, received compensation at the same rate previously received by it during the life of the Mutzenbecher, Jr., agency; it being the expectation of Meinel & Wemple, Incorporated, that the balance of said commissions, calculated at the rate of 2½ per cent., should, after the deductions referred to, be permitted to accumulate, to the end that it might form a fund from which to purchase the equipment, etc., contemplated by the agency agreement between the complainant and Meinel & Wemple, Incorporated. This disposition, however, was contingent upon the approval of the complainant, which might request the payment of such balance to it.

In passing, it may be remarked that upon January 5, 1917, H. Mutzenbecher, Jr., cabled Meinel & Wemple, Incorporated, assenting to the execution by that concern of the American agency agreement. It is also asserted that since October 31, 1916, the German concern of Mutzenbecher has had nothing to do with the complainant's affairs, that said German firm has received, not only all the moneys to which it was entitled as of October 31, 1916, but in addition thereto an overpayment of $4,100.

No further word has been received from the complainant with respect to the Meinel & Wemple, Incorporated, contract, and the last-mentioned corporation has accordingly continued to represent the complainant, setting aside the said 2½ per cent., and deducting the said commission of three-fourths of 1 per cent. and expenses. The balance remaining constitutes the said sum of $115,013.19 which the Custodian demands as being enemy alien owned property.

The foregoing, in a general way, represents the situation as presented by the bill and the complainant's affidavits, and to the allegations so made there is nothing before me to show the contrary, saving and excepting the formal demand of the Custodian, wherein it appears that—

"I, A. Mitchell Palmer, Alien Property Custodian, * * * after investigation, do determine that the following money and other property * * * belong to and are by you held for, on account of, or for the benefit of H. Mutzenbecher, Jr., whose address is Hamburg, Germany, and whom, after

investigation, I determine to be an enemy, not holding a license granted by the President. * * *"

It appears that in June, 1918, the Custodian, through one of his agents, began an investigation of the office of Meinel & Wemple, Incorporated, for the purpose of ascertaining if said corporation held any enemy owned funds or property. Upon the completion of the inquiry it was suggested that the fund of $115,013.19 had been set aside for H. Mutzenbecher, Jr., and that there was a secret agreement or understanding whereby the fund would be turned over to Mutzenbecher, Jr., at the end of the war.

Upon the expression of such conclusion, Meinel & Wemple, Incorporated, placed at the disposal of the Custodian all of its books and papers and the statements of its managing officers, and said corporation also notified the Custodian that it felt it its duty to the complainant to turn the fund in question into the account held by the defendant under the trust agreement hereinbefore referred to.

[1] No answer being received to this communication addressed to the Custodian, Meinel & Wemple, Incorporated, did deposit the fund with the defendant pursuant to the permissive terms of said trust agreement. It may be remarked that, so far as I am informed, the only provision of law which by any construction could require such disposition of the fund is section 38 of the Insurance Law of the state of New York (Consol. Laws, c. 28), which provides:

"Every person appointed or acting in this state as agent of any insurance corporation, who receives or collects any moneys as such agent, shall be responsible in a trust or fiduciary capacity to such corporation therefor."

It is my judgment that this provision of law did not make it incumbent upon Meinel & Wemple, Incorporated, to dispose of the fund in the manner in which it has been disposed of.

[2] I am also of opinion that, granting for the moment that the determination of the Alien Property Custodian is correct as to the alien character of the fund in question (which fact I do not find), such alien character is not divested by reason of the mixing of the fund with another fund which unquestionably is impressed with a trust for the benefit of American policyholders of the complainant. A voluntary and gratuitous increase of a trust fund will not be permitted to continue to the prejudice of a third party, when the fund is of such nature that the voluntary and gratuitous increase may be followed and segregated, all without the diminution or impairment of any security theretofore held for the benefit of the cestuis que trustent of the original fund. A tainted fund may not be given immunity from the penalties attaching thereto by an unlawful and unauthorized mixture with a fund enjoying immunities.

With the foregoing observations and the preliminary matters disposed of, I may proceed to determine if the injunction should be continued or vacated, and also whether the bill should be dismissed for want of equity.

[3, 4] Before doing so, it is only fair to Messrs. Willcox, Meinel, and Wemple, who are the managing officers of Meinel & Wemple,

Incorporated, to say that the conclusion which I shall reach must in no wise be taken as a reflection upon the integrity, loyalty, and honor of those men, or any of them. There is absolutely nothing before me which will serve to impeach their character even remotely; indeed, from the affidavits on file the conclusion is inevitable that they are men of high probity and unquestioned loyalty and devotion to this government, and the position they have assumed is altogether consistent with such conclusion. However, the Alien Property Custodian having determined that the fund in question is alien owned, and even though that conclusion may be founded upon evidence which would appear to this court to be insufficient, the determination of the Custodian, so long as it is not reached in bad faith, must determine the possession of the fund.

Subsection (c) of section 7 of the Trading with the Enemy Act, approved October 6, 1917 (40 Stat. 416, c. 106), reads:

"If the President shall so require, any money or other property owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian."

Upon November 4, 1918 (chapter 201, § 1), two days after the filing of the bill herein, the above section was amended to read as follows:

"(c) If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade-marks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this act.

"Any requirement made pursuant to this act, or a duly certified copy thereof, may be filed, registered, or recorded in any office for the filing, registering, or recording of conveyances, transfers, or assignments of any such property or rights as may be covered by such requirement (including the proper office for filing, registering, or recording conveyances, transfers, or assignments of patents, copyrights, trade-marks, or any rights therein or any other rights); and if so filed, registered, or recorded shall impart the same notice and have the same force and effect as a duly executed conveyance, transfer, or assignment to the Alien Property Custodian so filed, registered, or recorded.

"Whenever any such property shall consist of shares of stock or other beneficial interest in any corporation, association, or company or trust, it shall be the duty of the corporation, association, or company or trustee or trustees issuing such shares or any certificates or other instruments representing the same or any other beneficial interest to cancel upon its, his, or their books all shares of stock or other beneficial interest standing upon its, his, or their books in the name of any person or persons, or held for, on account of, or on behalf of, or for the benefit of any person or persons who shall have been determined by the President, after investigation, to be an enemy or ally of enemy, and which shall have been required to be conveyed, transferred, assigned, or delivered to the Alien Property Custodian or seized by him, and in

lieu thereof to issue certificates or other instruments for such shares or other beneficial interest to the Alien Property Custodian or otherwise, as the Alien Property Custodian shall require.

"The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act, and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States."

As to the power of Congress to address itself to legislation looking to the seizure of alien enemy owned property, there is no need of discussion. The war legislation of Congress, from the time of the Revolution to the present, indicates the power of Congress in the premises.

I am unable to see any difference in principle between the seizure of the person of an alien enemy in our midst and the seizure of his property; the latter may, by the use to which it may be put, be quite as dangerous as the former. The seizure of both may be essential to the safety of the community. If we assume this to be true, and Congress has by appropriate action provided for such contingency, the haste and speed which are exercised in the seizure become of the highest importance, and it would be an incongruous situation—indeed, it would be intolerable—that, pending a determination of a dispute between the possessor of property determined by a responsible official to be alien owned and the officer making the demand, the property in question should remain in the possession of him against whom the demand is made. The effectiveness of a seizure in such circumstances would be greatly impaired, if not wholly destroyed.

I do not apprehend that any one would argue that this court should exercise its extraordinary powers of injunction to restrain the marshal from executing a presidential warrant issued for the arrest of an alleged alien enemy, even though it was asserted by such person that he was a citizen or a friendly alien. Once the warrant was executed, the person arrested would, upon habeas corpus, be heard upon the question of his citizenship. If the determination of the Executive can, in the first instance, deprive an individual of his liberty, I am unable to see why it should be that property should enjoy any greater rights as respects its possession, once the Executive has determined it to be alien owned. And in the above illustrations I do not believe it could fairly be said there was not due process of law merely because the arrested individual was not heard prior to his arrest.

The power exercised by Congress in the enactment of the Trading with the Enemy Act (Act Oct. 6, 1917, c. 106, 40 Stat. 411 [Comp. St. 1918, §§ 3115½a–3115½j]) is, I suppose, by reason of its dealing with the subject-matter of alien enemies, who exist only in times of war, based upon the war power of Congress. The power of Congress to declare war carries with it all the powers which are necessary to make the war so declared effective. In McCulloch v. Maryland, 4 Wheat. 316, 4 L. Ed. 579, Chief Justice Marshall said:

"Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

That case also declares that—

"Where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court," it was said, "disclaims all pretensions to such a power."

What, can it be asked, is, in the present days, more appropriate to the effective carrying on of war than to seize, and thus render impotent, the money and property determined by the Executive to be owned by alien enemies?

In Brown v. United States, 8 Cranch, 110, 3 L. Ed. 504, Chief Justice Marshall in unequivocal language declared the existence of the power of the sovereign to take the persons and confiscate the property of the enemy wherever found. It follows that wherever the enemy is present, and where his property is situate, Congress may determine there exists the element of danger, and to the extent of the jurisdiction of Congress the power exists, not only of seizure, but of disposition to the limits of the necessity. Miller v. United States, 11 Wall. 268, 20 L. Ed. 135.

[5] And in the present legislation, at least so far as it affects the case at bar, there is no contravention of the Fifth Amendment of the Constitution. The very act, in section 9 thereof (Comp. St. 1918, § 3115½e), contemplates the possibility of mistaken action upon the part of the Custodian, and to the end that no loyal citizen or friend shall be deprived of his property without due process of law the section reads:

"Sec. 9. That any person, not an enemy, or ally of enemy, claiming any interest, right or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian hereunder, and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy, or ally of enemy, whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian hereunder, and held by him or by the Treasurer of the United States, may file with the said Custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may, with the assent of the owner of said property and of all persons claiming any right, title, or interest therein, order the payment, conveyance, transfer, assignment or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or of the interest therein to which the President shall determine said claimant is entitled: Provided, that no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application, or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may, at any time before the expiration of six months after the end of the war, institute a suit in equity in the District Court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal

place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if suit shall be so instituted then the money or other property of the enemy, or ally of enemy, against whom such interest, right, or title is asserted, or debt claimed, shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant or by the Alien Property Custodian or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant, or suit otherwise terminated.

"Except as herein provided, the money or other property conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian shall not be liable to lien, attachment, garnishment, trustee process, or execution, or subject to any order or decree of any court.

"This section shall not apply, however, to money paid to the Alien Property Custodian under section 10 hereof."

Under the provisions of this section the rights of a person who is not an enemy or ally of enemy are adequately protected. If the property which has come into the hands of the Custodian belongs to a citizen of the United States, or indeed to a friendly alien, the title of such person thereto is not finally divested. Any title which vests in the Custodian will be defeasible in its nature. Whether the defeasance, if it may be called such, shall operate, will depend upon the outcome of the proceedings to be instituted by the citizen or friendly alien, who, in appropriate proceedings under section 9, asserts title to the property. Pending a determination of the issues arising in such proceedings, the possession at least, and perhaps a defeasible title, is in the Custodian, and as an administrative matter I do not see where else it could be, if the act is to have any salutary effect in the way of rendering enemy property unavailable for the purposes of the enemy.

That a citizen or friendly alien will, by such an enforced surrender of property wrongly determined by the Custodian to be enemy in its character, be subjected to inconvenience, annoyance, and possible expense, goes without saying—the justification for these considerations must be the purpose intended to be served. They are, in the final analysis, but incidents to the operation of a protective and preventive measure which has for its purpose the protection of the nation.

The situation presented by this case, assuming the contention of the complainant to be justified, is no more rigorous, I may say harsh, than it would be if the taxing authorities of the government should assess a tax against the complainant, the authority for which assessment the complainant disputed. The collector, for instance, of internal revenue, would issue a warrant, under which the chattels of the complainant would be distrained and pass into the hands of the collector, and the complainant, however just its claim for immunity from the tax so assessed and collected might be, nevertheless, in order to recover the chattels distrained, would be forced to bring suit against the collector, and thus subject itself to inconvenience, annoyance, and expense. However, by decisions too numerous to cite the courts have uniformly held that the revenues of the government are too im-

portant for the carrying on of governmental activity to permit, prior to the collection of the tax, of lawsuits in which the correctness of the construction of the tax gatherer of the provisions of the statute under which he acts is determined. The insolvency of the sovereign is unthinkable. Money wrongly collected may be recovered, and as a matter of policy the interests of the government in such matters take precedence over the rights of the citizen. If this be true, even in times of peace, it certainly should be true, and I think it is, in time of war, when the subject-matter is property asserted by a responsible government officer to be that of an enemy. As was said in the Legal Tender Cases, 12 Wall. 457, 551 (20 L. Ed. 287), with respect to the Fifth Amendment of the Constitution:

"That provision has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing upon, or to inhibit, laws that indirectly work harm and loss to individuals. A new tariff, an embargo, a draft, or a war may inevitably bring upon individuals great losses—may, indeed, render valuable property almost valueless. They may destroy the worth of contracts. But whoever supposed that, because of this, a tariff could not be changed, or a nonintercourse act or an embargo be enacted, or a war be declared?"

It was said upon the argument that the Custodian now holds in property or money determined by him to be enemy owned upwards of three-quarters of a billion dollars. The power of this fund in the hands of enemies might be stupendous, so far as its ability to work injury to the country is concerned. Suppose that, upon the seizure of this vast sum, objections had been interposed by citizens or friendly aliens upon the ground that they claimed title to the whole or part thereof. It seems to me that it is inconceivable that the claimants of such property should during the trial and appeal be permitted to remain in possession of the funds and property.

[6] It is urged upon me that I should not now uphold the authority of the Custodian, even if such authority exists, to have the possession of the fund, owing to the fact that an armistice with the enemy has been signed and is now in effect, and the declaration of the President, when he addressed Congress upon November 11, 1918, to the effect that "the war thus comes to an end," indicates that the necessity of the legislative enactment is past. With this I cannot agree. At this moment the armed forces of the government are occupying the territory of the enemy; they are there not as friends, but as an army of occupation, to enforce and make secure the terms of the armistice pending the negotiations for peace; and the very act provides that "the end of the war," as used in the act, "shall be deemed to mean the date of proclamation of exchange of ratifications of the treaty of peace, unless the President shall, by proclamation, declare a prior date, in which case the date so proclaimed shall be deemed to be 'the end of the war' within the meaning of this act." Such proclamation has not been made. Until it shall be made, or until Congress repeals or modifies the statute in question, judicial tribunals will question neither the authority nor the necessity of the act, provided it does not transgress the provisions of the Constitution. Political pol-

icies, and the wisdom thereof, are not within the purview of my jurisdiction.

[7] It is urged upon me that the fund being, as it is asserted by the complainant, wholly owned by it to the exclusion of the property interests of all other persons, the complainant is not and cannot be a person "claiming any interest, right or title in any money or other property." In other words, it is said section 9 is available only to persons who claim in the property seized something less than the entire title thereto. With this contention I cannot agree. In my judgment an interest in property may comprehend the entire title thereto as well as something less than the entire title. If a man owns the fee simple of certain real estate, he certainly has an interest in it, and that interest is the equivalent of his title "to" the property.

I have already gone beyond the limits of propriety in the length of my discussion of the matters here involved, and, interesting and important as are the remaining points raised by the able arguments and briefs of which I have had the benefit, I must bring this opinion to an end. It will therefore be the order of the court that the injunction heretofore granted herein will be vacated, and the bill filed herein will be dismissed for want of equity. There can be no equity in the complainant until the fund in question has passed into the possession of the Custodian, and the complainant has taken the jurisdictional steps provided in section 9 of the act.

Submit order in accordance with the foregoing opinion.

WATTS et al. v. ELY REAL ESTATE INV. CO.

(District Court, D. Arizona. January 2, 1919.)

No. E–55.

1. PUBLIC LANDS ⟸198—MEXICAN GRANTS—CONSTRUCTION OF TREATY.
   The provision of the treaty of Guadalupe Hidalgo of 1848 (9 Stat. 922) relating to Spanish and Mexican land grants did not operate to reserve any lands within the Gadsden Purchase, all of which remained subject to disposal by Congress until claims for such grants were presented, located, and approved.

2. PUBLIC LANDS ⟸220—DECREE OF COURT OF PRIVATE LAND CLAIMS—MATTERS CONCLUDED.
   Under Act March 3, 1891, c. 539, 26 Stat. 854, creating the Court of Private Land Claims, a decree of that court in a suit between the United States and a claimant under a Mexican grant could not affect the title of a prior grantee, who was not a party to the suit.

3. PUBLIC LANDS ⟸223(3)—CONFLICTING GRANTS—PRIORITY.
   A grant by Congress of lands in New Mexico, to be selected by the grantee, and which were so selected, and the selection approved by the Surveyor General and confirmed by the Land Department, cannot be displaced as to any of the lands by a Mexican grant, claim to which was not made until long afterward.

4. LIMITATION OF ACTIONS ⟸44(1)—ACCRUAL OF RIGHT OF ACTION—ACTION TO RECOVER GRANTED LANDS.
   Where a survey of a large grant of public lands was necessary to segregate the lands granted, limitation does not begin to run against

an action for their recovery by the grantee until such survey is made and approved.

5. DEEDS ⟸114(1)—LANDS CONVEYED—SUFFICIENCY OF DESCRIPTION.
Description in deeds *held* sufficient to include land in controversy.

In Equity. Suit by Cornelius C. Watts and Dabney C. T. Davis, Jr., against the Ely Real Estate Investment Company. Decree for complainants.

Kingan & Campbell, of Tuscon, Ariz., for plaintiffs.
Selim M. Franklin, of Tuscon, Ariz., for defendant.

SAWTELLE, District Judge. This is an action brought by Cornelius C. Watts and Dabney C. T. Davis, Jr., against the Ely Real Estate Investment Company, to quiet title to a tract of land containing approximately 2,000 acres, located in Santa Cruz county, Ariz. Plaintiffs are citizens of the state of West Virginia, and the defendant is a corporation organized and existing under the laws of the state of Missouri.

The bill alleges that by an Act of Congress of June 21, 1860 (12 Stat. 71, c. 167) authority was given the heirs of Luis Maria Baca to select approximately 500,000 acres of vacant land, not mineral, in the then territory of New Mexico, to be located by them in square bodies not exceeding five in number; that—

"on June 17, 1863, pursuant to the provisions of said act, the said heirs selected and located as the third of said bodies a tract of land, then situated in the said territory of New Mexico, and now in the county of Santa Cruz, state of Arizona, described as follows, to wit: 'Commencing at a point one mile and a half from the base of the Salero Mountain in a direction north 45 degrees east of the highest point of said mountain, running thence from said beginning point west 12 miles, 36 chains, and 44 links; thence south 12 miles, 36 chains, and 44 links; thence east 12 miles, 36 chains, and 44 links; and thence north 12 miles, 36 chains, and 44 links, to the place of beginning.' On April 9, 1864, said selection and location were approved by the Commissioner of the General Land Office, and a survey ordered, which survey was thereafter made, approved, and filed in the office of the Commissioner of the General Land Office, and in the offices of the register and receiver of the land office in Arizona. The plaintiffs, by mesne conveyances, acquired the title in fee simple to the whole of the south half of said land, and became and are now the owners thereof in fee simple, and entitled to the possession thereof."

The defendant makes some claim adverse to the plaintiffs to said land or some part thereof.

The defendant filed its answer, alleging therein, amongst other things, that the defendant—

"is the owner in fee simple of all that certain tract and parcel of land situate in the county of Santa Cruz, state of Arizona, known and called the Rancho San Jose de Sonoita, being a confirmed Mexican land grant, * * * a portion of which grant is within the limits of the tract of land mentioned, described, and claimed by plaintiffs in their bill of complaint, the said portion of said Mexican grant, so included within the limits of the said lands claimed by plaintiffs and described in their bill of complaint, being described and platted in that certain survey which plaintiffs allege was made of the said tract described in the complaint, and approved and filed in the office of the Commissioner of the General Land Office and in the office of the register

and receiver of the land office in Arizona; that this defendant does not have or make and never has had or made, any claim adversely to the plaintiffs to the lands described in the complaint herein, except that part or portion thereof which is within the limits and a part of the said Rancho San Jose de Sonoita aforesaid; * * * that defendant does claim to be the owner in fee, and avers that it is the owner in fee simple, and does claim adversely to plaintiffs, all that part or portion of the tract of land described in plaintiffs' complaint, which is within the limits and boundaries of the confirmed Mexican land grant aforesaid, and does allege that plaintiffs have not, nor has either of them, any right, title, or interest in or to any part thereof. Defendant further avers that the plaintiffs, and each of them, are barred and estopped to litigate the matters and things set forth and complained of in their said bill of complaint, in so far as the same affects the title of this defendant in and to that portion of the lands described in said complaint, which are within the limits and boundaries, and are a part of the said Rancho San Jose de Sonoita, the confirmed Mexican grant aforesaid."

The defendant further alleges, in substance: That during the year 1892 the United States of America did file in the United States Court of Private Land Claims its bill against Santiago Ainsa, as administrator of the estate of Frank Ely, deceased, and others, as defendants, wherein the United States, by its attorney, alleged, amongst other things, that the said Ainsa, as such administrator, claimed to be the owner through mesne conveyances to that certain tract of land situate in the then territory of Arizona, known and called the "Rancho San Jose Sonoita" by virtue of a grant made by the officers of the republic of Mexico, when said lands were a part of said republic, and afterwards ceded to the United States by what was known as the "Gadsden Purchase"; that said grant was void—and did pray for a decree of said court that the title to said grant be adjudicated and further be decreed to be invalid and void. That said Ainsa, as such administrator, did file his answer to the said bill, wherein, amongst other things, he did aver that as such administrator he was the owner in fee of the said tract of land known as the San Jose de Sonoita grant, and that he deraigned his title from the grantees of the republic of Mexico, and that the said republic of Mexico did on or about May 15, 1825, sell and grant the said tract of land to one Leon Herreras; that the title or grant was a complete and perfect title and grant—and did pray for a decree of said court adjudging his title to the said lands to be a complete and perfect title in fee, and that he be adjudged to be the owner thereof. That on August 6, 1902, the said Court of Private Land Claims rendered its judgment and decree in favor of the said Ainsa, as administrator as aforesaid, and against the United States of America, wherein said court did adjudge and decree that the said grant, called "Rancho San Jose de Sonoita," and in said decree described, constituted a valid title, and that the said title was perfect and complete at the date of the acquisition of the territory by the United States, and did further decree the confirmation of the title to said grant to the said Herreras, and his heirs, successors and assigns. That the said judgment and decree at all times since has been, and now is, in full force and effect. That the said plaintiffs herein deraigned their title from the United States of America, and therefore are barred and forever estopped, by the said judgment and decree of the said Court

of Private Land Claims aforesaid, from claiming any of the lands within the limits of said San Jose de Sonoita grant to be, or to have been, the lands of the United States, or to be, or to have been, subject to sale, gift, or disposal by the United States. That for more than ten years prior to the commencement of this action defendant and its grantors were, and the defendant now is, in the peaceable and adverse possession of all of the said confirmed Mexican land grant aforesaid, cultivating and using the same and paying taxes thereon, and claiming title under deeds duly recorded. That plaintiffs' cause of action against the defendant as to all of the lands within the limits of said confirmed Mexican land grant aforesaid, which are within the limits of the tract of land claimed by plaintiffs, and described in their bill of complaint, is barred by the provisions of sections 695, 696, 697, and 698 of the Revised Statutes of Arizona of 1913.

The lands embraced within the Baca grant have been the source of much litigation, and numerous controversies involving the title thereto have occupied the attention of the courts and the Land Department since Congress passed the Act of June 21, 1860, authorizing the Baca heirs to select, instead of the land claimed by them, upon which was situated the town of Las Vegas, New Mexico, an equal quantity of vacant land in the then territory of New Mexico. The history of this grant has become a part of the history of Arizona, and the reported cases, including the cases of Ely's Administrator v. United States, 171 U. S. 220, 18 Sup. Ct. 840, 43 L. Ed. 142, Faxon v. United States, 171 U. S. 244, 18 Sup. Ct. 849, 43 L. Ed. 151, Lane v. Watts, 234 U. S. 539, 34 Sup. Ct. 965, 58 L. Ed. 1440, and Wise v. Watts and Davis, 239 Fed. 207, 152 C. C. A. 195, furnish interesting reading.

Five questions are presented by the record in this case:

First. Whether the judgment of the Court of Private Land Claims, in the case of United States v. Ainsa, Administrator, is res adjudicata as between the United States and plaintiffs, its grantees, on the one hand, and Ainsa, administrator, and defendant, his grantee, on the other hand, and whether plaintiffs are estopped by said judgment from litigating the question of title to that portion of said tract of land located within said Sonoita grant.

Second. Whether the lands selected by the Baca heirs were, at the time of selection, vacant lands of the United States, or whether that portion thereof within the limits of the said Sonoita grant was private property.

Third. Whether the Contzen survey and field notes show upon their face that the lands within the limits of said Sonoita grant, as confirmed, are excluded from the limits of the lands described in the complaint herein.

Fourth. Whether plaintiffs' cause of action against defendant is barred by the statute of limitations.

Fifth. Whether plaintiffs have title to, or interest in, any of the lands described in the complaint herein.

[1] 1. It is my opinion that the judgment of the Court of Private Land Claims in the case of United States v. Ainsa, Administrator, is not res adjudicata as between plaintiffs and defendant, and that plain-

tiffs are not estopped by said judgment from litigating the question of title to the lands here involved. At the time said cause was initiated in the Court of Private Land Claims, neither the United States nor the said Ainsa, administrator, or his grantee, had any title or valid claim to the said lands.

The San Jose de Sonoita grant was made by the Mexican government to one Leon Herreras in the year 1824, and is within the limits of the Gadsden Purchase, which was acquired by the United States under the terms of the treaty of Guadalupe Hidalgo of 1848. The defendant herein deraigns title under said Herreras and the Mexican government. It is claimed that under the terms of said treaty and the provisions of the act of July 22, 1854, the lands embraced within said Sonoita grant were reserved from entry and sale. In the case of Lockhart v. Johnson, 181 U. S. 516, 21 Sup. Ct. 665, 45 L. Ed. 979, the Supreme Court said that the mere fact of a claimed Mexican grant did not reserve the lands covered by it.

"It was only after their presentation to the Surveyor General of New Mexico for his report thereon that the lands were reserved 'until the final action of Congress.' There was no reservation except by this statute and it related only to lands covered by a claim presented to the Surveyor General. There is no language in the treaties which implies a reservation." Lane v. Watts, 235 U. S. 22, 35 Sup. Ct. 5, 59 L. Ed. 104.

There being no language in the treaty which implied a reservation, Congress had the right to dispose of the lands as it saw fit, and in my opinion the Act of June 21, 1860, "effected a repeal pro tanto of the reservation of the act of 1854." In pursuance of the Act of June 21, 1860, the Baca heirs, on the 17th day of June, 1863, selected a tract of land containing 100,000 acres, of which the Sonoita grant is a part.

"A petition for confirmation of the San Jose de Sonoita grant was not presented to the Surveyor General until December, 1879. It will be seen, therefore, that there was no disclosure of these claims until after the selection of the Baca grant and its location by the Land Department, the consummation of which was accomplished by the approval of the location April 9, 1864." Lane v. Watts, supra.

"The title having passed by the location of the grant and the approval of it, the title could not be subsequently divested by the officers of the Land Department." Wise v. Watts and Davis, 239 Fed. 207, 212, 152 C. C. A. 195, 200.

Neither could the title be divested by the proceeding in the Court of Private Land Claims, to which proceedings the owners of the lands were not made parties.

"The title to the lands involved passed to the heirs of Baca by the location of the float and its approval by the officers of the Land Department and order for survey in 1864, in pursuance of the Act of June 21, 1860." Lane v. Watts, supra.

[2] A careful examination of the Act of March 3, 1891, c. 539, 26 Stat. 854, creating the Court of Private Land Claims, discloses that that court was authorized to determine the validity of titles and the right of claimants to lands which had not theretofore been sold or granted by the United States to other persons; and the title to the lands in controversy having, as we have seen, passed to the heirs of Baca on April 9, 1864, the judgment of that court could not effect or

invalidate the same. Said Act of March 3, 1891, contains the following provisions:

Section 13, subd. 6: "No confirmation of or decree concerning any claim under this act shall in any manner operate or have effect against the United States otherwise than as a release by the United States of its right and title to the land confirmed, nor shall it operate to make the United States in any manner liable in respect of any such grants, claims, or lands, or their disposition, otherwise than as is in this act provided."

Section 8: "That any person or corporation claiming lands in any of the states or territories mentioned in this act under a title derived from the Spanish or Mexican government that was complete and perfect at the date when the United States acquired sovereignty therein, shall have the right (but shall not be bound) to apply to said court in the manner in this act provided for other cases for confirmation of such title; and on such application said court shall proceed to hear, try and determine the validity of the same and the right of the claimant thereto, its extent, location and boundaries, in the same manner and with the same powers as in other cases in this act mentioned.

"If in any such case, a title so claimed to be perfect shall be established and confirmed, such confirmation shall be for so much land only as such perfect title shall be found to cover, always excepting any part of such land that shall have been disposed of by the United States, and always subject to and not to affect any conflicting private interest, rights or claims held or claimed adversely to any such claim or title, or adversely to the holder of any such claim or title. And no confirmation of claims or titles in this section mentioned shall have any effect other or further than as a release of all claim of title by the United States; and no private right of any person as between himself and other claimants or persons, in respect of any such lands, shall be in any manner affected thereby."

Section 14: "That if in any case it shall appear that the lands or any part thereof decreed to any claimant under the provisions of this act shall have been sold or granted by the United States to any other person, such title from the United States to such other person shall remain valid, notwithstanding such decree, and upon proof being made to the satisfaction of said court of such sale or grant, and the value of the lands so sold or granted, such court shall render judgment in favor of such claimant against the United States for the reasonable value of said lands so sold or granted, exclusive of betterments, not exceeding one dollar and twenty-five cents per acre for such lands; and such judgment, when found, shall be a charge on the Treasury of the United States. * * *"

[3] 2, 3. As above stated, no claim was presented to the Sonoita grant until 1879, and when Congress passed the Act of June 21, 1860, authorizing the Baca heirs to make selection of certain lands, it had a right to assume, as did also the Baca heirs when they located the same, and the Surveyor General when he reported said location, and the Commissioner of the General Land Office when he approved the same on April 9, 1864, that the lands were vacant lands of the United States and subject to selection and location under said Act of June 21, 1860. It was made the duty of the Surveyor General of New Mexico to pass upon the character of the lands and to determine whether they were vacant and nonmineral. He did determine that these lands were vacant and nonmineral, and his report was adopted by the Commissioner of the General Land Office on April 9, 1864, at which time, as we have seen, the title passed. This finding of the Surveyor General and of the Land Department was and is conclusive. Lane v. Watts, 234 U. S. 525, 540, 34 Sup. Ct. 965, 58 L. Ed. 1440.

The Act of 1860 authorized the Baca heirs to locate a certain quantity of land "in square bodies." It was so located, and the surveyor, upon locating the initial or starting point, evidently encountered little difficulty in fixing the exterior boundaries of the lands so selected and located. Having located the initial point, it was incumbent upon such surveyor to survey the outboundaries thereof in accordance with the description contained in the location of 1863.

I attach no importance whatever to the action of Mr. Contzen, the engineer who made the survey, in indicating on his map and survey of Baca float No. 3 the location of the two Mexican grants, Tumacacori and Calabazas, and San Jose de Sonoita. It is true that he was instructed by the Land Department to survey these two grants, but such instructions on the part of the Land Department were without authority of law, and could not affect or invalidate the title which became vested in the Baca heirs in 1864. Besides, in the case of Faxon v. United States, 171 U. S. 244, 18 Sup. Ct. 849, 43 L. Ed. 151, the Tumacacori and Calabazas claim was, by the Supreme Court, held to be void, and the claim of the San Jose de Sonoita grant was never presented to the Land Department until long after the title to the lands embraced therein became vested in the Baca heirs.

[4] 4. A further defense asserted is that of the statute of limitations. A complete answer to this contention is that a survey was necessary to segregate the lands from the public domain; that this survey was not made until 1905, and not filed in and approved by the Land Department until December, 1914; therefore the statute of limitations did not commence to run until the latter date.

[5] 5. The last point made in the case is, to quote counsel, as follows:

"That the plaintiffs are not the owners of the land in controversy, and that is based upon the fact that the deed to Robinson, nor the deeds from Robinson on down, do not convey, either to these plaintiffs, or to their grantors, the land in controversy."

This raises the question as to the sufficiency of the description of the lands contained in each of the several deeds, above referred to, to convey the title to the lands set forth in the complaint herein. A similar objection was made to said deeds in the case of Watts and Davis v. Wise et al. It was there contended that said deeds did not convey the lands described in the 1863 location, but conveyed other and different lands. This court held that said deeds described and conveyed the 1863 location. This ruling was assigned as error on appeal to the Circuit Court of Appeals, and was by that court approved and affirmed; that court holding that the false description of 1866 should be rejected and effect given to the true description of 1863.

I think the deeds admitted in evidence herein convey the specific land here involved. A decree will be entered in accordance with the foregoing.

UNITED STATES v. COLLINS.

(District Court, W. D. Louisiana, Shreveport Division. January 20, 1919.)

No. 2524.

1. INTOXICATING LIQUORS ⟸138—REED AMENDMENT—"OR."
Reed amendment to postal appropriation made by Act March 3, 1917 (Comp. St. 1918, § 8739a), making it offense to order, purchase, or cause intoxicating liquors to be transported in interstate commerce into any state whose laws prohibit their manufacture or sale, applies if either manufacture or sale is prohibited; conjunctive construction of "or" not being permissible.

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

2. COURTS ⟸366(27)—FOLLOWING STATE DECISIONS—REED AMENDMENT.
Transportation of intoxicating liquors into Texas, which has prohibited their manufacture for beverage purposes, is violation of Reed amendment of postal appropriation made by Act March 3, 1917 (Comp. St. 1918, § 8739a), though there is some ground to believe court of last resort in Texas will hold state prohibitory law unconstitutional, as the federal court will not anticipate and be guided by what the state court might thereafter hold.

3. INTOXICATING LIQUORS ⟸138—REED AMENDMENT—NECESSITY FOR STATE-WIDE PROHIBITORY ACT.
Condition of Reed amendment to postal appropriation made by Act March 3, 1917 (Comp. St. 1918, § 8739a), prohibiting transportation of intoxicating liquors in interstate commerce into any state whose laws prohibit manufacture or sale, is that state shall have prohibited manufacture or sale within entire territory, not merely in parts under local option.

4. INTOXICATING LIQUORS ⟸138—REED AMENDMENT—TRANSPORTATION "INTO" DRY STATE.
Reed amendment to postal appropriation made by Act March 3, 1917 (Comp. St. 1918, § 8739a), is not violated unless there is actual transportation of intoxicating liquors from point without to point within state, which has prohibited their manufacture or sale; "into," as used, conveying idea of entrance, passage, or motion.

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

Gould Collins was charged with violation of the Reed amendment, and he moves to quash the indictment. Demurrer sustained.

Joseph Moore, U. S. Atty., and J. H. Jackson, Asst. U. S. Atty., both of Shreveport, La.

J. S. Atkinson and J. M. Grimmet, both of Shreveport, La., for defendant.

JACK, District Judge. The defendant in count 1 of the indictment stands charged with violation of that part of the postal appropriation act of March 3, 1917 (39 Stat. 1069, c. 162 [Comp. St. 1918, § 8739a]), known as the "Reed Amendment," which is as follows:

"Whoever shall order, purchase, or cause intoxicating liquors to be transported in interstate commerce, except for scientific, sacramental, medicinal, and mechanical purposes, into any state or territory, the laws of which state or territory prohibit the manufacture or sale therein of intoxicating liquors

for beverage purposes, shall be punished as aforesaid: Provided, that nothing herein shall authorize the shipment of liquor into any state contrary to the laws of such state"

—in that he did, in the parish of Caddo,

"unlawfully, knowingly and willfully, and with intent to transport the intoxicating liquors hereinafter described, from the said parish of Caddo, state of Louisiana, to Texarkana, in the state of Texas, the said state then and there being a state wherein the manufacture of intoxicating liquors for beverage purposes was prohibited by law, order, purchase, and cause to be transported in interstate commerce, a certain shipment of intoxicating liquor, to wit, ten cases of whisky; that is to say, did order, purchase, and cause the said intoxicating liquor to be transported in interstate commerce, from the city of Monroe, Louisiana, and into the parish of Caddo, Louisiana, and with said state of Texas as the destination of said transportation, by transporting the same in an automobile from the said city of Monroe, Louisiana, to the parish of Caddo, and which said intoxicating liquor was not then and there being transported for sacramental, scientific, medicinal, or mechanical purposes, contrary to the form of the statute," etc.

In count 2 of the indictment the same offense at the same time and place is charged, the only difference being that in this count the intended destination of the liquors transported was the county of Bowie, which county was a county wherein, under the local option law of Texas, the sale of intoxicating liquors was prohibited.

The second count is based on the assumption that, even though the state of Texas has not legally adopted state-wide prohibition, the Reed amendment is applicable to an interstate shipment of intoxicating liquors into a "dry" county of that state.

The defendant has moved to quash the indictment. It is contended that the Reed amendment is applicable only to those states where both the sale and the manufacture of intoxicating liquors is prohibited throughout the state, and that under a recent decision of the Texas Court of Criminal Appeals (Ex parte Myer, 207 S. W. 100, not yet officially reported), that section of the state-wide prohibition law of Texas prohibiting the sale of intoxicating liquors has been declared unconstitutional. The section prohibiting the manufacture of such liquors was not at issue and so was not passed on.

[1] As will be noted by reference to the Reed amendment previously quoted, it is applicable to any state the laws of which prohibit "the manufacture or sale therein of intoxicating liquors for beverage purposes." Thus it is sufficient if either the manufacture or the sale is prohibited. The attention of the court is called to a line of decisions in which the disjunctive "or" is sometimes construed as "and," but I do not think such a construction applicable in this case. Congress had the authority to prohibit the shipment of intoxicating liquors into states which prohibit the manufacture of liquors, or which prohibit the sale of liquors, either one or the other, or both, and there is no good reason to conclude that Congress did not intend exactly what it said.

It is further argued, however, that under the recent Texas statute, not only is the manufacture and sale of intoxicating liquors prohibited, but likewise their importation from another state, and that if the Legislature of Texas, as held by the Court of Criminal Appeals of that

state, was without authority to prohibit the sale of intoxicating liquors, it could not do so indirectly by prohibiting their manufacture in the state and their importation from without the state, as this would necessarily make the sale impossible after the limited supply on hand was exhausted; consequently, that while the Court of Criminal Appeals had before it only the question of the sale of intoxicating liquors, it would necessarily follow that the remainder of the law was likewise unconstitutional and that that court, to be consistent, would have to so hold whenever the question was brought up.

[2] While this court will accept the ruling of the highest state court of criminal jurisdiction as to the constitutionality of a statute of that state, even though it may itself entertain a contrary view, it will not anticipate and be guided by what that court might hereafter hold. The state law, as it now stands, prohibits the manufacture of intoxicating liquors in Texas for beverage purposes, and thus brings transportation of such liquors within the Reed amendment. In the recent case of United States v. Dan Hill, 248 U. S. 420, 39 Sup. Ct. 143, 63 L. Ed. ——, the Supreme Court of the United States held the Reed amendment applicable to liquors intended for personal use, although under the state law they might be shipped in. Thus the purpose of the Reed amendment is not merely to assist the various states in enforcing prohibition to the limited extent provided by their statutes. It is a law unto itself, passed under the authority of Congress to regulate interstate commerce, and its applicability to intoxicating liquors shipped into a state for beverage purposes is conditioned only on that state's having prohibited the manufacture or having prohibited the sale of such liquors for beverage purposes.

[3] This condition, however, that the state shall have prohibited the manufacture or sale of liquors clearly means such prohibition within the entire state. This is made plain by the provision in the act immediately preceding the Reed amendment which forbids the mailing of any letter or newspaper containing advertisements of intoxicating liquors addressed to—

"any place or point in any state or territory of the United States, at which it is, by the law in force in the state or territory at that time, unlawful to advertise or solicit orders for said liquors."

Congress was careful to make this inhibition applicable, not only to advertisements mailed to any point in a state in which state-wide prohibition prevails, but also to such advertisements mailed to any point in the state at which point the sale of such liquors is prohibited. If in the Reed amendment, immediately following, it had been intended to make it likewise applicable to "dry" sections of a "wet" state, it would, as in the preceding section, have been so specifically provided. In the case of McAdams v. Wells Fargo Express Co. (D. C.) 249 Fed. 175, cited by counsel as holding the contrary, the sole issue presented appears to have been whether the act was applicable to liquors shipped for personal use and not for sale. No contention was made, as in the case at bar, that the Reed amendment did not apply to intoxicating liquors shipped into prohibition territory of a

local option state. In the case of State ex rel. Brewing Co. v. Quincy, etc., Railway Co. (Mo. App.) 204 S. W. 584, the expressions of the court relative to the Reed amendment were obiter dicta.

[4] While the indictment, following the language of the statute, charges that the defendant ordered, purchased, and caused to be transported the liquor in question, the closing part of the indictment particularly describing the offense restricts it to the charge that defendant caused the transportation of the liquor from Monroe, La., to Shreveport, with the intent of continuing the transportation into the state of Texas. It is finally urged in the demurrer that, if the Reed amendment is applicable to Texas, it is necessary that the intoxicating liquors should have been actually transported into that state, as the transportation in interstate commerce forbidden by the act is—

"into any state or territory, the laws of which state or territory prohibit the manufacture or sale therein of intoxicating liquors for beverage purposes."

The case of United States v. Chavez, 228 U. S. 525, 33 Sup. Ct. 595, 57 L. Ed. 950, is relied on by counsel for the government in support of the contention that it was not necessary that the liquors transported with Texas as their destination should have actually crossed the border and been taken into that state. In the Chavez Case the defendant was indicted under a statute, the first section of which provides that, whenever the President shall find that in any American country domestic violence exists which would be promoted by the use of arms or munitions of war procured from the United States, and shall make proclamation thereof, it shall be unlawful to export, except under certain limitations, any arms or munitions of war from any place in the United States to such country. The second section provides that "any shipment of material hereby declared unlawful shall be punishable," etc. The defendant, charged with violation of the statute, while carrying Winchester cartridges from the city of El Paso to Mexico, was arrested before he crossed the border. The court held that, while the term "export" technically means the shipment from this country and the entry into another, yet in common speech the shipment of goods from this to a foreign country, without regard to their landing in such country, is often spoken of as an export, and that Congress used the word in this sense. This the court thought was made clear by the second section of the act, which it held does not purport to punish the act of exporting, but in express terms "only punishes any shipment." The contrary construction of the act would have made it wholly inoperative in such cases, as, after a party intending to violate the law actually crossed into Mexico with the forbidden munitions of war, he would be beyond the jurisdiction of the court. Such, however, fortunately is not the case with prosecutions under the Reed amendment. Had the defendant, Collins, completed his journey into Texas with the prohibited liquors, he might still have been prosecuted in a United States court in that state.

Webster defines "into" as meaning:

"To the inside of; within; expressing entrance, or a passage from the outside of a thing to its interior parts; following verbs expressing motion, as 'come into the house,' 'go into the church,' etc."

The language of the act is plain and unambiguous, and it must be read and enforced as it is written. The transportation must be "into" a state, "the laws of which prohibit the manufacture or sale of intoxicating liquors for beverage purposes." There must be a transportation from a point without the state to a point within the state.

As the indictment does not charge that the intoxicating liquors were transported from Louisiana into the state of Texas, but only that they were transported from Monroe, La., to Shreveport, with intent to continue the transportation on into the state of Texas, the facts alleged do not constitute an offense under the statute, and the demurrer is sustained.

CENTRAL R. R. OF NEW JERSEY v. NEW YORK CENT. R. CO.

(District Court, E. D. New York. December 21, 1918.)

WHARVES ⊜20(1, 5)—WHARFINGER—DUTY OF.

Respondent *held* at fault for the sinking of a car float at a float bridge; it appearing that respondent's conductor, in charge of a switching engine which should have unloaded cars on the float, left and began other work after moving the cars, so that the float was thrown out of equilibrium, while the floatman was not guilty of negligence.

In Admiralty. Libel by the Central Railroad of New Jersey against the New York Central Railroad Company. Decree for libelant.

Macklin, Brown, Purdy & Van Wyck, of New York City (William F. Purdy, of New York City, of counsel), for libelant.

Alexander S. Lyman and William Mann, both of New York City, for respondent.

CHATFIELD, District Judge. Float 29, on September 2, 1917, was taken by the tug Jersey Central from Jersey City to the float bridges at Sixty-Eighth street, North River, arriving there at about 9:50 p. m. On the way another float had been taken in tow and left at Weehawken, and the Jersey Central had stopped at Fifty-Ninth street for some time, as the float bridges at Sixty-Eighth street were in use. An attempt was made to place the float at the middle float bridge, but this was too high, and so the float was pulled out and put in at the southerly float bridge, where it was fastened by four toggles, two lines to the drums, two lines to cleats, one line to the rack, and a breast line. The Jersey Central then left, and the work of unloading was not begun until 1:30, when an engine with two pulling cars started to draw the loaded freight cars from the float. One of the pulling cars broke loose during the operation, but this seems to have had nothing to do with the later occurrences. It appears that the float had three cars upon the middle track, four upon the port or northerly track, and five upon the starboard or southerly track. The engine succeeded in taking from the float but one car, as the tide had then fallen so that the slope of the bridge made it impossible to pull the cars up, for the couplings unfastened when the cars struck the slope.

The engine, then, according to the libelant's witnesses, left the other cars at the toggle end of the float, without shifting either the port or starboard lines of cars back to the middle, so as to restore balance.

The testimony shows that before leaving Jersey City the captain sounded and found 8 or 9 inches of water. The vessel had been pumped by a tug three days before, which operation could reduce the water to between 6 and 7 inches before the pump sucked. Further pumping by tug would not be resorted to until some 14 or 15 inches of water had collected. Evidently the result of leaving the tug moored to the float bridge, with the loaded cars toward the forward or toggle end, caused the water in the float to settle at that end, and thus gradually to increase the strain of the extra load. In addition, it appears by a preponderance of evidence that one car had been withdrawn from the port side, leaving but three upon that side to five upon the starboard. This caused some list to starboard, with the result that the starboard forward corner was down, giving a twist to the entire boat. Evidently the seams were thus opened, and after a time the accumulation of water was sufficient to force out (by the strain resulting from suspension to the float bridge) two of the planks, which, after the float was placed upon dry dock, were found loose, in such a manner as to show that they had been forced away from their proper position before the vessel sank.

Dispute arises as to the conversation between the conductor of the switching train and the floatman, when the engine left to do other work after failing to pull the cars up the slope. The conductor admits that it would have been possible to have removed the cars one at a time by the use of a cable, and that he did not attempt this because he had other work to do, but states that the floatman told him that the float had been leaking before leaving Jersey City and that it had taken in a lot of water, which caused it to list. An attempt to corroborate this testimony was made by a former employé of the Central Railroad of New Jersey, who testifies that the boat was listed badly to starboard while crossing the river, and that he sounded and found considerable water on the way over. The testimony of the other witnesses shows that this man was not upon the float in question, but had been upon the one which was left at Weehawken, and his attention was not called to the matter until the following day, when he heard of the accident, so that his testimony is not convincing, particularly in view of his manner of testifying and his certainty that this float is over 30 years old, as opposed to the definite testimony that she was built 14 years ago.

But the testimony of the conductor is made improbable by the very circumstances of the case. It is admitted that the floatman had no means of pumping the float, and that if pumping was needed a tug had to be called therefor. If the conductor knew that the float was leaking to such an extent as to have acquired a list from the presence of the water, and not from the extra weight of the cars on the starboard forward corner, and if the amount of water in the float was such as to be a probable source of danger, it was the duty of the men in charge of the float bridges to remove the freight cars, so as to avoid undue straining of the boat, or, if the convenience of their work required

delay, to see that the accumulated water was removed by summoning a tug to do the pumping. Even careful watching of the condition of the float might not have avoided the accident, if the presence of this water forced out two planks, and thus caused a sudden inrush of a considerable quantity of water. The condition of the float was in fact discovered by one of the attendants at the float bridges, who testifies that the floatman was in his cabin asleep. The floatman contradicts this, and states that he was around the float most of the time. But, as the floatman could not tell when the engine would return to remove the cars, and if the condition of the float was such that the conductor in charge of the train saw fit to go about other work rather than to remove the cars, or restore the equilibrium of the float, it cannot be held as negligence on the part of the floatman to have failed to sound an alarm, or to apprehend that the float would be left for such a length of time that damage would result. The floatman denies the conversation attributed to him, as to the leaky condition of the boat, and testifies, on the other hand, that the attention of the conductor was called to the twist upon the float by a brakeman, and that the conductor replied that the float was all right.

Of the two stories, that of the floatman is much more probable, for, as has been said, it would be culpable on the part of the conductor to leave the float, unless he thought it was all right, and there would have been difficulty in bridging the float if it had been then badly listed. This accident, evidently, was the result of the usual assumption that extraordinary injury is not apt to occur, and to the casual indifference to possible dangers which is exhibited by workmen in the ordinary performance of their duties.

The New York Central Railroad Company should be held responsible for the situation which resulted and the damage which occurred.

FRIESEN v. CHICAGO, R. I. & P. RY. CO.

(District Court, D. Nebraska, Lincoln Division. December 27, 1918.)

No. 248.

RAILROADS ⟸5½, New, vol. 6A Key-No. Series—FEDERAL COURTS—DISTRICT OF SUIT—RAILROAD ADMINISTRATION.

Under Act March 21, 1918, §§ 8, 10 (Comp. St. 1918, §§ 3115¾h, 3115¾j), and despite section 9 (section 3115¾i), *held*, that orders of the Director General of Railroads, through whom the President assumed control of the railroads pursuant to Act Aug. 29, 1916 (Comp. St. 1916, § 1974a) that suits against carriers while under federal control, should be brought in the county or district where the plaintiff resided at the time of the accrual action, were not effective to so limit that right, and, where authorized by state law, a plaintiff might sue in a district other than that in which he resided at the time of accrual of the action, upon a cause of action not arising out of the railway company's duties as a common carrier.

At Law. Action by Klaas N. Friesen against the Chicago, Rock Island & Pacific Railway Company, begun in the state court and removed to the federal court. On motion to dismiss. Denied.

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

Fawcett & Mockett, of Lincoln, Neb., for plaintiff.
E. P. Holmes, of Lincoln, Neb., for defendant.

MUNGER, District Judge. This action was begun in the state court on May 21, 1918. The petition alleged acts of negligence of the defendant railway company, on May 21, 1916, causing personal injuries to the plaintiff. The action was removed to this court and on June 10, 1918, the defendant moved to dismiss the action because the cause of action arose in Kansas and because the plaintiff resided in Kansas at the time of the accrual of plaintiff's cause of action. This motion was supported by an affidavit showing that the defendant would need a number of the railway employés as witnesses at the trial and it would inconvenience the operation of the railroad and cause great expense to require them to appear as witnesses at the trial. In support of its motion the defendant referred to General Orders No. 18 and No. 18a, dated April 9, 1918, and April 18, 1918, issued by the Director General of Railroads, providing that such suits against carriers, while under federal control, shall be brought in the county or district where the plaintiff resided at the time of the accrual of the cause of action or in the county or district where the cause of action arose. The plaintiff shows that he made a bona fide change of residence from Kansas to Nebraska immediately after the date of his injuries. He claims that the statute of limitations barred his beginning his action in Kansas from a few days after this action was begun.

The underlying question in the case is whether or not the Director General has authority to make the orders restricting the districts in which such a suit may be brought. The action, as begun in the state court, was against the defendant railway company as a corporation, and service of summons was made upon an agent of the company in the county wherein the suit was instituted, in accordance with the state statutes, permitting such service of process. Comp. St. Neb. 1913, §§ 7636, 7638.

The plaintiff's cause of action, as alleged in his petition, is based on negligent acts of the engineer of a railway train in running his train and thereby causing it to strike the plaintiff, when he was at a station and signaling to it to stop, so that he might board it as a passenger.

By Act Aug. 29, 1916, c. 418, 39 Stat. 619 (Comp. St. 1916, § 1974a), the President was empowered, "through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable." The President by his proclamation of December 26, 1917, took possession of the railways and directed that they should "remain subject to all existing statutes and orders of the Interstate Commerce Commission and to all statutes and orders regulating commissions of the various states in which said systems

or any part thereof may be situated" until and except so far as the Director General should from time to time otherwise by general or special orders determine, and that any orders, general or special, thereafter made by said Director General should have paramount authority. He also declared that suits might be brought by and against such carriers and judgments rendered as hitherto until and except so far as said Director General might by general orders otherwise determine. The orders of the Director General complained of in this case were made on April 9, 1918, and April 18, 1918. Before they had been made, an Act of Congress had been approved on March 21, 1918 (40 Stat. ——, c. 25). This act was the subject of long debate in each house of Congress. It limited in many ways the powers that had previously been conferred on the President to control the railways. By section 10 (Comp. St. 1918, § 3115¾j), it was provided:

"That carriers while under federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the federal government. Nor shall any such carrier be entitled to have transferred to a federal court any action heretofore or hereafter instituted by or against it, which action was not so transferable prior to the federal control of such carrier; and any action which has heretofore been so transferred because of such federal control or of any act of Congress or official order or proclamation relating thereto shall upon motion of either party be retransferred to the court in which it was originally instituted. But no process, mesne or final, shall be levied against any property under such Federal control."

By reference to section 1 of the act (Comp. St. 1918, § 3115¾a) we are informed that the word "carriers" in the act refers to certain railroads and systems of transportation of which the President had theretofore taken possession and control.

The plaintiff claims that the words of section 10, "actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law," authorized him to bring suit against the defendant in the manner then authorized; that is, on March 21, 1918, when this act was approved, and that his action was so brought conformably to the laws of Nebraska then in force.

On behalf of the defendant, it is contended that these words, when viewed together with the whole act, and its scope and purpose are considered, merely allow the carrier to be named as a defendant, notwithstanding the fact that the United States is in control and operating the railways; that this was meant to give relief to claimants, so that they could express their grievances by suits in court instead of by appeals for executive or congressional clemency. It is also contended that by the preceding words of this section, which read:

"That carriers while under federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or federal laws or at common law, except in so far as may be inconsistent with the provisions

of this act or any other act applicable to such federal control or with any order of the President"

—the President is given authority to make orders limiting the place where suits may be brought. The contention is that federal or state laws must give way when they are inconsistent either with the provisions of that act or with any order of the President, and that an order of the Director General of Railways is an order of the President by virtue of the terms of section 8 (Comp. St. 1918, § 3115¾h), as follows:

"That the President may execute any of the powers herein and heretofore granted him with relation to federal control through such agencies as he may determine."

It will be noted that by the terms of section 10, the carriers are not made subject to all federal and state laws, but are subject only to all laws and liabilities "as common carriers." In many relations to the public, carriers are governed, not by the rules applicable to common carriers, but by rules relating to them merely as corporations, as contracting parties, or as owing duties apart from the carriage of goods or passengers. The use of the words "common carriers" is thus distinguished from the word "carriers" which is used in the first sentence of this section and in many places in the same section and in other sections of the act. The probable effect of the discrimination in the use of these words was pointed out in the debate in the Senate (56 Cong. Rec. 3576, 3580). If Congress had desired to leave to the President the entire control and management of the railways of the United States by executive orders, the former act of Congress did not require amendment; or, if Congress desired to continue the grant notwithstanding the careful restrictions in the second act, it could have employed the words "carriers" or "railway companies," instead of the words "common carriers," and omitted the words "except so far as may be inconsistent with the provisions of this act."

The plain meaning of the words used in this section is that the laws then existing governing the relationship of the railways as common carriers were to remain in effect except when they were inconsistent with the terms of that act of Congress or of any other act applicable to federal control or with any order of the President. Orders of the President relating to the carriers' duties and liabilities, other than as common carriers, were not authorized by this portion of section ten. The authorization of the bringing of an action at law as then provided by law, against the railway company upon a cause of action, not arising against it as a common carrier, was therefore not subject to an order of the President limiting the districts in which such an action could be commenced, because of anything contained in this section of the act of Congress. Authority for the orders in question, as applied to an action of this kind, is sought in the provisions of section 9 (Comp. St. 1918, § 3115¾i), as follows:

"That the provisions of the act entitled 'An act making appropriations for the support of the army for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes,' approved August twenty-

ninth, nineteen hundred and sixteen, shall remain in force and effect except as expressly modified and restricted by this act; and the President, in addition to the powers conferred by this act, shall have and is hereby given such other and further powers necessary or appropriate to give effect to the powers herein and heretofore conferred."

It may be conceded that the President would have been authorized to make these orders under the broad grant of power in the act of August 29, 1916, but by the terms of section 9 this grant thereafter remains in force "except as expressly modified and restricted in this act," and the President is granted further powers "necessary or appropriate to give effect to any of the powers herein and heretofore conferred." These words are a restriction of the powers previously vested in the President, so that he may not take action contrary to the provisions of this act of Congress. It was manifestly not the purpose of Congress in the elaborate provisions of this act to give authority by which the President might abrogate any or all of it. The provisions for financial management of the roads while under federal control and for the reimbursement of the owners; the right of the Interstate Commerce Commission, under the terms of section 10, to hear complaints of the justness of an order of the President establishing or changing rates, regulations, and practices of the carriers; the creation of a criminal offense, by the terms of section 11 (Comp. St. 1918, § 3115¾k), for violation of the act or interfering with the possession or use of the property of the carrier; the declaration in section 12 (Comp. St. 1918, § 3115¾l) that moneys and other property derived from the operation of the carriers during federal control are the property of the United States; and the declaration in section 14 (Comp. St. 1918, § 3115¾n), that the period of federal control shall not extend beyond 21 months after the proclamation of the President of the exchange of ratifications of the treaty of peace—are illustrations of powers, liabilities, and limitations that were not subject to annulment by an executive order. The general grant of power in section 9 is to give effect to the powers "herein and heretofore granted," and not to the powers herein or heretofore granted, and the prior act remains in force "except as expressly modified and restricted by this act."

The conclusion is that the plaintiff was authorized by the act of March 21, 1918, to bring his action at law according to the laws then in force, and that General Orders Nos. 18 and 18a of the Director General of Railroads were not effective to so limit that right as to require that a suit be brought only in the county or district of his residence or where the cause of action arose. This conclusion has not been reached without respectful consideration of the views of Judge Trieber in an unpublished opinion in the case of Wainwright v. Pennsylvania Railroad Company; but I am unable to concur in his conclusion that the statute authorizing suits to be brought as now provided by law may be limited by an executive order to the use of a part of the methods provided by law.

An order in accordance with these views will be entered in this case.

RUTHERFORD v. UNION PAC. R. CO.

(District Court, D. Nebraska, Hastings Division. January 11, 1919.)

1. RAILROADS ⟸207—RECEIVERS—LIABILITY AS CARRIERS.
The receiver of a railroad company is a carrier as to goods and passengers transported.

2. RAILROADS ⟸5½, New, vol. 7A Key-No. Series—OPERATION UNDER GOVERNMENTAL CONTROL—"CARRIER."
As the Director General is the carrier since the President has taken control and possession of railroads under Act Aug. 29, 1916, § 1 (Comp. St. 1918, § 1974a), Order No. 50 of the Director General providing for his substitution in case of actions against railroad company for causes of action arising since governmental control is warranted notwithstanding Act March 21, 1918, c. 25, § 10 (Comp. St. 1918, § 3115¾j), providing that actions or suits may be brought against such carriers, for the Director General is the carrier, being analogous to a receiver, and it is proper that he be substituted in place of the railroad company.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Carrier.]

At Law. Action by Alfred T. Rutherford against the Union Pacific Railroad Company. On motion of the defendant to substitute William G. McAdoo, Director General of Railroads, as the defendant. Motion sustained.

Tibbets, Morey, Fuller & Tibbets, of Hastings, Neb., for plaintiff.

C. A. Magaw, of Omaha, Neb., and Ragan & Addie, of Hastings, Neb., for defendant.

MUNGER, District Judge. The defendant, the Union Pacific Railroad Company, has presented a motion to substitute William G. McAdoo, Director General of Railroads, as the defendant in this action in the place of the railway corporation. The action is one for damages for personal injuries inflicted on the plaintiff by the defendant while he was being transported as a passenger by the railroad company, and occurring since December 31, 1917, and was begun on October 26, 1918.

[1, 2] The defendant supports its motion by that part of Order No. 50 of the Director General of Railroads, dated October 28, 1918, which reads as follows:

"The pleadings in all such actions at law, suits in equity, or proceedings in admiralty, now pending against any carrier company for a cause of action arising since December 31, 1917, based upon a cause of action arising from or out of the operation of any railroad or other carrier, may on application be amended by substituting the Director General of Railroads for the carrier company as party defendant and dismissing the company therefrom."

The plaintiff claims that by the terms of section 10 of the act of Congress approved March 21, 1918 (Comp. St. 1918, § 3115¾j), "actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law," and therefore he is entitled to bring and maintain his action and to prosecute it to judgment against the railroad company named as defendant, and

that the order of the Director General is not effective, because it is violative of this provision of the statute.

The question involved is the proper meaning of the word "carriers" as used in this statute. Before the enactment of this statute the President by his proclamation of December 26, 1917, had taken possession and control of the railroads of the United States, acting under the authority granted to him by the act of Congress approved August 29, 1916 (39 Stat. 645, c. 418, § 1 [Comp. St. 1918, § 1974a]). The proclamation had directed that this possession, control, and operation should continue to be exercised by William G. McAdoo, as Director General of Railroads, and unless he should otherwise provide by order, that the board of directors, receivers, officers, and employés should continue the operation of the railroads in the names of their respective companies. From and after the taking of possession of the railroads by the President, the corporations or persons who had previously controlled them ceased their functions and obligations as carriers. While goods and passengers continued to be carried, the carriage was conducted by the Director General. The acts of the former officers and employés, who retained their positions and conducted the details of operation, were the acts of the Director General. The part of section 10 of the act of March 21, 1918, on which the plaintiff relies, did not provide that actions at law might be brought by and against the railway corporations, but did provide that they might be brought against "such carriers," and this referred to the "carriers while under federal control" mentioned in the first part of the section. It would have been an anomaly to have given the actual control of the railroads to the Director General, and to have provided that suits arising out of his acts should be brought against the corporations who had been divested of authority over those acts. Moreover, the language which immediately follows that portion of the statute relied on by plaintiff demonstrates that the "carrier" who is subject to suit is the agent of the President who is operating the railroads. The language is:

"And in any action at law or suit in equity against the carrier no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the federal government."

The corporations or persons who had lost control and possession of the railroads would have no occasion to assert the defense that they were instrumentalities or agents of the government as to acts which occurred after their control had terminated.

Under these acts of Congress and the proclamation of the President the Director General is a carrier. He conducts the business of receiving and transporting goods and passengers for hire. A receiver of a railway company is a carrier as to the goods and passengers transported, (United States v. Nixon, 235 U. S. 231, 234, 35 Sup. Ct. 49, 59 L. Ed. 207; United States v. Ramsey, 197 Fed. 144, 146, 116 C. C. A. 568, 42 L. R. A. [N. S.] 1031), and the office of the Director General is analogous to that of a receiver of the railway companies.

By the acts of Congress, the President was given authority to exercise the control of the railroads by such agencies as he should deter-

mine. He may appoint one or many persons, or one or many partnerships or corporations to carry out his will and to perform the business of carriage of goods and passengers over the several railroads. The purpose of Congress in the giving the right to bring suits against the carriers was to give the right of suit by or against any of such agencies as should be engaged in the actual control of the operations of the railroad after the President assumed control. The order of the Director General therefore does not conflict with the language of this statute, but is pursuant to and in execution of it, and was authorized by the power conferred on him.

The motion will be sustained.

DERBY v. STATEN ISLAND RAPID TRANSIT RY. CO. et al. DALY v. STATEN ISLAND RAPID TRANSIT RY. CO. DAILEY v. STATEN ISLAND RAPID TRANSIT RY. CO. et al.

(District Court, E. D. New York. June 18, 1918.)

NAVIGABLE WATERS ⊂⇒20(5)—BRIDGES—INJURY TO VESSELS FROM OPERATION OF DRAW.

A railroad company, operating a drawbridge across Arthur Kill, *held* in fault for a collision between barges in tow and the bridge on a night when the bridge lights could be seen only a short distance, where the tug signaled for opening the draw when a mile distant and at intervals thereafter without answer until so close that it could not turn in time to avoid collision.

In Admiralty. Suits by Michael J. Derby and by Stewart J. Dailey against the Staten Island Rapid Transit Railway Company and the Lehigh Valley Transportation Company, and by Bartle Daly against the Staten Island Rapid Transit Railway Company. Decree for libelants against the Railway Company.

Herbert Green and Leo J. Curren, both of New York City, for libelants Derby and Daly.

Macklin, Brown & Purdy and Pierre M. Brown, all of New York City, for libelant Dailey.

Cravath & Henderson and Lyle H. Hall, all of New York City, for Staten Island Rapid Transit Ry. Co.

Harrington, Bigham & Englar and T. Catesby Jones, all of New York City, for Lehigh Valley Transp. Co.

GARVIN, District Judge. Three cases have been tried together. They arise from an accident occurring early February 1, 1917, when a tow of loaded coal boats swung around and collided with a drawbridge of the Staten Island Rapid Transit Railway Company, which connects Staten Island with New Jersey.

The tug Mahanoy, owned by the Lehigh Valley Transportation Company, with a tow loaded with coal, was coming through Arthur Kill, bound for New York, from Perth Amboy, N. J. The weather, if not actually foggy, was far from clear, and lights could not be distinguished for any great distance. The Mahanoy, proceeding east,

in the direction of the bridge, upon reaching Buckwheat Island, about a mile from the bridge, according to credible testimony which I believe, blew four whistles, to indicate an intention to go through the draw. According to the pilot, no reply was received from the bridge. When he first blew the whistle, he could see no lights on the bridge; he continued on his course, slowing down and blowing four whistles at intervals without receiving any reply. Finally, when the lights of the bridge came in sight, through the haze, his whistles were then answered by the bridge. He saw that the draw was closed, and that he would not be able to take his tow through. Whereupon he turned toward the Jersey shore, apparently as quickly as he could, but was unable to make the turn safely, and a part of the tow crashed into the bridge. Two boats were injured as a result, the Michael J. Derby, owned by Michael J. Derby, and the Clara B. Follette, owned by Stewart J. Dailey, and a third boat, the Columbia, owned by Bartle Daly, was injured, when the tow was swung around by the turning of the Mahanoy toward the Jersey shore. Each of the owners has brought an action, and each is now seeking to hold the Staten Island Rapid Transit Railway Company and the Lehigh Valley Transportation Company for the damage which his boat has sustained.

Considerable testimony was introduced to explain why the draw was closed. It appears that a freight train had stopped on the bridge, and that as soon as the engineer in charge of the bridge heard the four whistles of the tug, according to his testimony, he gave two whistles in reply, then blew an alarm, indicating that the bridge was closed. In view of the fact that the night was cloudy and a boat might approach the bridge without being able to see that it was closed, it was the duty of the engineer, upon finding that the bridge could not be opened for several minutes, to exercise greater care than usual. Under these circumstances, I am of the opinion that the Staten Island Rapid Transit Railway Company was at fault. The Lehigh Valley Transportation Company was not negligent. The authorities amply justify these conclusions. Dillon v. Pennsylvania R. R. Co. No. 32 and Staten Island Rapid Transit Co. (E. D. N. Y. Dec. 23, 1915), oral opinion; McCaffrey's Sons v. Staten Island Rapid Transit Ry. Co. and Lehigh Valley Railroad Co. (S. D. N. Y. Jan. 21, 1916), 256 Fed. ——.

In Clement v. Metropolitan West Side E. Ry. Co., 123 Fed. 271, 59 C. C. A. 289, it was held:

"A bridge spanning a navigable river is an obstruction to navigation, tolerated because of necessity and convenience to commerce upon land. Such a structure must be so maintained and operated, that navigation may not be impeded more than is absolutely necessary; the right of navigation being paramount. It is incumbent upon the owner that the bridge be so constructed that it may be readily opened to admit the passage of craft, and maintained in suitable condition thereto. It is also his duty to place in charge those who are competent to operate the bridge, to watch for signals, and to open the bridge for the passage of vessels, and for the performance of such delegated duty he is responsible. It is also his duty to equip the bridge with proper lights, giving warning of the position of the bridge and of its opening and closing. If for any reason the bridge cannot be opened, proper signals should be given to that effect, such as will warn the approaching vessel in time to heave to. A vessel, having given proper signal to open

the bridge and prudently proceeding under slow speed, has, in the absence of proper warning, the right to assume that the bridge will be timely opened for passage. She is not bound to heave to until the bridge has been swung or raised and locked, and to critically examine the situation before proceeding (City of Chicago v. Mullen, 54 C. C. A. 94, 116 Fed. 292), but may carefully proceed at slow speed upon the assumption that the bridge will open in response to the signal, and may so proceed until such time as it appears by proper warning, or in reasonable view of the situation, that the bridge will not be opened (Manistee Lumber Company v. City of Chicago [D. C.] 44 Fed. 87; Central Railroad Company of New Jersey v. Pennsylvania Railroad Company, 8 C. C. A. 86, 59 Fed. 192), when it becomes the duty of the vessel, if possible, to stop, and, if necessary, to go astern."

Decree accordingly, in each case.

UNITED STATES v. SWELGIN.

(District Court, D. Oregon. May 22, 1918.)

No. 7700.

ALIENS ⊂⊃71½, New, vol. 7 Key-No. Series—NATURALIZATION—SETTING ASIDE CERTIFICATE OF CITIZENSHIP.

In suit to cancel certificate of naturalization issued to defendant on ground that, at time defendant was naturalized and during the five-year period immediately preceding, he was not attached to the principles of the Constitution of the United States or well disposed to the order and happiness of the same, and that he had been and was a member of an organization commonly called the I. W. W., evidence *held* to show that the I. W. W. advocated anarchy and the overthrow of established order, and to warrant the annulment of the certificate of naturalization; defendant admitting his adherence to such principles.

In Equity. Bill by the United States against Carl Swelgin to vacate and annul a certificate of naturalization. Decree entered annulling certificate.

Bert E. Haney, U. S. Atty., and Robert R. Rankin, Asst. U. S. Atty., both of Portland, Or.

C. H. Libby, of Portland, Or., for defendant.

WOLVERTON, District Judge. This is a suit to vacate and annul a certificate of naturalization. The defendant, Carl Swelgin, is a native of Germany. On January 3, 1913, he filed a petition in the circuit court of the state of Oregon for the county of Coos, praying for his naturalization as a citizen of the United States. On April 25, 1913, an order of the court was made and entered admitting him as a citizen, and on May 27th a certificate of admission was issued by the clerk of the court.

The bill for vacation of the certificate alleges, that upon the dates named, and during the five-year period immediately preceding the date of the filing of said petition for naturalization—

"the said defendant, Carl Swelgin, was not, has not been, and is not now attached to the principles of the Constitution of the United States, nor is the said defendant well disposed to the good order and happiness of the same, nor is said defendant of good moral character, and that said defendant has been

since the year 1911, and now is, a member of the organization known and entitled 'Industrial Workers of the World,' which organization is more commonly known as and called the 'I. W. W.'; that defendant has been an organizer in said organization, and that said organization has advocated and does advocate resistance to the existing governmental authority of the United States, and the complete control and ownership of all property in the United States through the abolition of all other classes of society; and that such purposes of said organization are to be accomplished without regard for right or wrong, but by the use of such unlawful means and methods known as 'sabotage' and direct action."

Then the preamble is set out, which I will not read. It is then further alleged that defendant's certificate of naturalization was procured by deception and fraud practiced upon the court, consisting of false representations and concealment of facts, by which the court was misled and imposed upon, and induced to make and render its order and judgment directing the issuance of said certificate of naturalization.

The proofs show, and the defendant admits, that he became a member of the organization known as the "Industrial Workers of the World" in December, 1911, and was such member at the time he was admitted as a citizen of the United States, and ever since has been a member thereof. I should qualify that, because the witness has said that there was a time following August, 1913, for a period of two or three years, that he was not a member; but he thereafter did become a member, and has continued such ever since. Not only this, but he has been active in the order, in promoting its propaganda and furthering the cause that the order espouses. He asserts his firm belief in the principles enunciated by the preamble and constitution of the order, and admits that he is in full sympathy with the propaganda and practices thereof. Among other things, he indorses the sabotage recently practiced upon the timber and lumber industries in the Northwest, and when asked if he was willing to join the military forces of this country against Germany, he answered, in effect, that he entertained conscientious scruples against entering the army. He further states that the views he entertained respecting these subjects at the time and previous to his naturalization were the same as he now holds and adheres to. So that it appears that his attitude of mind then respecting the principles and practices of the order of the Industrial Workers of the World was the same as his attitude now, to which he firmly adheres.

No further evidence is necessary for establishing his purposes and designs as it relates to organized government and the peace and tranquility of society, and we have only to inquire, touching the doctrine and principles of the organization, whether they are promotive of or inimical to the maintenance and stability of organized government, and whether they are calculated to promote peace and good order in society, or whether they are adapted by design to the demoralization and degradation thereof.

I should say in this connection that the defendant has said that he indorses the preamble and constitution of this organization, and that further than that he is not acquainted with its principles and purposes; but, having actively engaged in the organization, and having been actively engaged in the furtherance of the cause in which the organiza-

tion is embarked, taking into consideration his intelligence, there can be no question in the mind of the court that he was thoroughly acquainted with all its principles and propaganda. Let us therefore recount some of the doctrines, principles, and practices of the order. The preamble makes this enunciation:

"Between these two classes [the working class and the employing class] a struggle must go on until the workers of the world organize as a class, take possession of the earth and the machinery of production, and abolish the wage system."

The pledge is in these words:

"I do solemnly pledge my word and honor that I will obey the constitution, rules, and regulations of the Industrial Workers of the World, and that, keeping always in view its fundamental principles and final aims, I will, to the best of my ability, perform the task assigned to me. I believe in and understand the two sentences, 'The working class and the employing class have nothing in common,' and 'Labor is entitled to all it produces.'"

The tactics or methods of the I. W. W. are given by Vincent St. John, an adherent of the cause. I read only slight excerpts:

"As a revolutionary organization the Industrial Workers of the World aims to use any and all tactics that will get the results sought with the least expenditure of time and energy. The tactics used are determined solely by the power of the organization to make good in their use. The question of 'right' and 'wrong' does not concern us.

"It aims, where strikes are used, to paralyze all branches of the industry involved, when the employers can least afford a cessation of work—during the busy season and when there are rush orders to be filled.

"Failing to force concessions from the employers by the strike, work is resumed and 'sabotage' is used to force the employers to concede the demands of the workers.

"All supplies are cut off from strike-bound shops. All shipments are refused or missent, delayed and lost if possible. Interference by the government is resented by open violation of the government's orders, going to jail en masse, causing expense to the taxpayers—which are but another name for the employing class.

"In short, the I. W. W. advocates the use of militant 'direct action' tactics to the full extent of our power to make good."

Sabotage is defined by its authors and adherents to be:

"Any conscious and willful act on the part of one or more workers intended to slacken and reduce the output of production in the industrial field, or to restrict trade and reduce the profits in the commercial field, in order to secure from their employers better conditions or to enforce those promised or maintain those already prevailing, when no other way of redress is open.

"B. Any skillful operation on the machinery of production intended not to destroy it or permanently render it defective, but only to temporarily disable it and to put it out of running condition in order to make impossible the work of scabs and thus to secure the complete and real stoppage of work during a strike."

And again:

"Sabotage means either to slacken up and interfere with the quantity, or to botch in your skill and interfere with the quality of capitalist production or to give poor service. Sabotage is not physical violence; sabotage is an internal, industrial process. It is something that is fought out within the four walls of the shop. And these three forms of sabotage—to affect the quality, the quantity and the service—are aimed at affecting the profit of the employer. Sabotage is a means of striking at the employer's profit for the pur-

pose of forcing him into granting certain conditions, even as workingmen strike for the same purpose of coercing him. It is simply another form of coercion."

I read from a pamphlet entitled "On the Firing Line":

"The program of the I. W. W. offers the only possible solution of the wage question whereby violence can be avoided, or at the very worst, reduced to a minimum. To all opponents of the organization wherever found, we desire to state that this organization will to the best of its power and ability, bend every effort towards making that program effective. We also desire to serve notice upon the ruling class and all its defenders, that whatever form the struggle may take, we are determined to continue in spite of all odds until victory has been achieved by the working class. If the ruling class of to-day decide as its prototypes of the past have decided, that violence will be the arbiter of the question, then we will cheerfully accept their decision and meet them to the best of our ability and we do not fear the result.

"The Industrial Workers of the World is without doubt the most revolutionary body in the world to-day.

"Being propertyless and landless they have no patriotism nor reason for patriotism.

"The abolition of the wage system and the creation of a new social order is its ideal. For this ideal the members will suffer hunger, brave the blacklist, rot in the bastile, and fight—ever fight—for the freedom that awaits them when the rest of the workers awaken.

"To it has come the knowledge that justice, liberty, rights, etc., are but empty words, and power alone is real. Refusing to even try to delegate its power, it stands committed to the policy of direct action.

"It strives to have the workers realize the tremendous power tied up in their muscle and mind—a power that represents the measure of the masters' weakness. The workers are asked to withhold their labor power, to refuse to apply it to the machine, or to apply it so that the machine does not function properly, and thus defeat the masters.

"They [the workers] will seize and hold the machinery of production and distribution and operate it in their own interests."

Again, from a pamphlet entitled "Why Strikes are Lost":

"Thus organized the workers will use all means that may be at their command in their battle for control. Strikes, irritation strikes, passive resistance strike, boycott, sabotage, political action, and general strikes in industrial plants, will all be means applied with precision, and changed whenever conditions so dictate."

The "Social General Strike," to which the order is committed, is thus defined:

"The profoundest conception of the general strike, however, the one pointing to a thorough change of the present system; a social revolution of the world; an entire new organization; a demolition of the entire old system of all governments—is the one existing amongst the proletarians of the Roman race (Spain and Italy). For them the general strike is nothing less than an introduction to the social revolution. Therefore we call this the general strike, to distinguish it from general strikes for higher wages, or for political privileges (political mass strikes)—'The Social General Strike.' This conception of the general strike will be dealt with in this treatise.

"It is therefore not of such great importance for the propagandists and followers of the general strike theory (as, for instance, the Spanish and French workers understand it) to get all the workers to lay down their tools at the same time, as it is to completely interrupt production in the whole country, and stop communication and consumption for the ruling classes, and that for a time long enough to totally disorganize the capitalistic society, so that after the complete annihilation of the old system, the working people can

take possession through its labor unions of all the means of production, mines, houses, the land—in short, of all the economic factors."

This pamphlet then deals with divers subjects illustrating the application of the doctrines, and culminates with this climax:

"With a free society, without class rule and exploitation, a society of free co-operation, we have that which corresponds with the absence of government, 'Anarchism.' "

I read a stanza which purports to be one of the songs of the order. It is styled "The Red Flag":

"The People's flag is deepest red,
It shrouded oft our martyred dead;
And ere their limbs grew stiff and cold
Their life-blood dyed its every fold.

"Chorus:

"Then raise the scarlet standard high
Beneath its folds we'll live and die,
Though cowards flinch and traitors sneer,
We'll keep the red flag flying here."

"The Lumber Jack," a publication of the order, in an editorial exclaims:

"The 'Red Flag,' and sing it always to the courts while the people stare and wonder."

In this relation, it may be stated that the doctrine of the order carries its adherents to a disregard of and a resistance to the orders and judgments of the courts, through organized protest and calumny, and violence, if need be, to accomplish their purposes.

I read further a few extracts from the "Industrial Worker," published at Spokane, Wash. This is the issue of April 4, 1912, and the excerpt is found in column 2, page 2, of that issue. It is an editorial under the title, "Our Labor Problem":

"We accept what benefits us from the socialist propaganda, we accept that portion of anarchist action that is of value, and we retain that which experience proves to be an aid in the class struggle."

In the issue of May 8th it is declared:

"The I. W. W. opposes the institution of the state. It holds that state or governmental control of industry would merely introduce a different form of slavery. Government implies governors and governed, a ruling and a subject class. No man is great enough or good enough to rule another.

"The I. W. W. is creating its own ideas of morality and ethical conduct; as opposed to the current conceptions of what constitutes 'right' and 'wrong.' "

I have read only a very meager number of these excerpts which have been introduced in evidence; but they serve to illustrate the principles and the practices of the order. They are thoroughly indorsed, evidently, by the adherents of the order and by those who seem to be able to expound its doctrines. Other expressions may be found, such as these:

"Towards the existence of government the I. W. W. is openly hostile.

"It is anti-patriotic.

"The kernel of evil lies in the very existence of the state, and violence is an economic factor."

No one can read these pamphlets and pronunciamento of the order without concluding, by fair and impartial deduction, that it is not only ultra socialistic, but anarchistic. It is really opposed to all forms of government. It advocates lawlessness, and constructs its own morals, which are not in accord with those of well-ordered society. Its adherents are anti-patriotic. They own no allegiance to any organized government. And I am unable to understand by what right such of them as come from another country can claim that they are entitled to be admitted to citizenship under the Stars and Stripes. The very oath they take, avowing their allegiance to this government, is to them a worthless ceremony, for they do not intend to submit themselves to its Constitution, laws, rules, and regulations, nor to defend it in time of insurrection, or against an aggression from abroad, or when it is at war with other nations.

When, therefore, the defendant declared that he was attached to the principles of the Constitution of the United States, and was well disposed to the good order and happiness of the same, he made avowal of that which was not in his heart, and thereby deceived the court. And, further, he was a disbeliever in and opposed to organized government, and he fraudulently misled the court as to that.

So that the government's case is clear that defendant's certificate of naturalization was procured by fraud and deception imposed upon the court which directed its issuance, and the annulment of the certificate must follow.

UNITED STATES v. NELSON.

(District Court, E. D. New York. June 24, 1918.)

1. INDICTMENT AND INFORMATION ⟸3—NECESSITY OF INDICTMENT—NATURE OF PUNISHMENT—REQUIRING CONVICTS TO LABOR—FEDERAL CONVICTS.
   Greater New York Charter, § 700, requiring inmates of all criminal jails of the city to be employed in labor, does not apply to federal convicts sentenced to such jails, unless their sentence includes hard labor; any other construction necessarily meaning that no crime against the United States involving imprisonment in a New York City penal institution could be prosecuted otherwise than by indictment.
2. INDICTMENT AND INFORMATION ⟸3—SELECTIVE DRAFT LAW—SALE OF LIQUOR TO SOLDIERS—PROSECUTION.
   A prosecution for selling liquor to soldiers in uniform, in violation of Selective Draft Act May 18, 1917, § 12 (Comp. St. 1918, § 2019a), may be instituted by information.

Criminal prosecution by the United States against Oscar Nelson. On motion to set aside verdict. Denied.

Melville J. France, U. S. Atty., of Brooklyn, N. Y., for the United States.

Robert H. Elder, of New York City, for defendant.

GARVIN, District Judge. Defendant has been convicted of the crime of violating section 12 of the act of Congress known as the Selective Service Law approved May 18, 1917 (40 Stat. 82, c. 15

[Comp. St. 1918, § 2019a]). The prosecution was based upon an information. Defendant moves to set aside the verdict of the jury, claiming that the penalty, which may be imprisonment for not more than 12 months, is an infamous punishment, because it may be at hard labor, and that a crime which may be punished by a sentence of that character must be prosecuted by indictment.

The Fifth Amendment to the Constitution of the United States reads:

"No person shall be held to answer for a capital, or other infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger."

Defendant claims that in the state of New York, where the United States Court sentences to a state penal or reformatory institution, it is necessarily a sentence at hard labor. Rev. St. § 5539 (Comp. St. St. § 10523), provides:

"Whenever any criminal, convicted of any offense against the United States, is imprisoned in the jail or penitentiary of any state or territory, such criminal shall in all respects be subject to the same discipline and treatment as convicts sentenced by the courts of the state or territory in which such jail or penitentiary is situated; and while so confined therein shall be exclusively under the control of the officers having charge of the same, under the laws of such state or territory."

Section 171 of the New York Prison Law (Consol. Laws, c. 43) provides:

"The superintendent of state prisons, the superintendents, managers and officials of all reformatories and penitentiaries in the state, shall, so far as practicable, cause all the prisoners in said institutions, who are physically capable thereof, to be employed at hard labor for not to exceed eight hours each day. * * *"

Section 5541 of the Revised Statutes (Comp. St. § 10527) provides:

"In every case where any person convicted of any offense against the United States is sentenced * * * for a period longer than one year, the court by which the sentence is passed may order the same to be executed in any state jail or penitentiary within the district or state where such court is held, the use of which jail or penitentiary is allowed by the Legislature of the state for that purpose."

As a sentence for more than one year cannot be imposed in the case at bar, and as the commitment, therefore, cannot be executed in any state jail or penitentiary within the district or state where this court is held, the commitment must be to some county jail or institution in the city of New York.

[1] Defendant claims, further, that if the court is of the opinion that the only institution to which it has power to sentence the defendant is to some local institution within the city of New York, that, too, is necessarily a sentence at hard labor, because of section 700 of the Charter of the City of New York (Laws N. Y. 1901, c. 466) which provides:

"Every inmate of an institution under the charge of the commissioner of correction, and this includes all the criminal jails in the city, whose age and health will permit, shall be employed in quarrying or cutting stone, or in

cultivating land under the control of the commissioner, or in manufacturing such articles as may be required for ordinary use in the institutions under the control of the commissioner, or for the use of any department of the city of New York, or in preparing and building sea walls upon islands or other places belonging to the city of New York upon which public institutions now are or may hereafter be erected, or in public works carried on by any department of the city, or at such mechanical or other labor as shall be found from experience to be suited to the capacity of the individual."

Section 702 of the Charter provides:

"The hours of labor required of any inmate of any institution under the charge of the commissioner shall be fixed by the commissioner. In case any person confined in any institution in the department shall refuse or neglect to perform the work allotted to him by the officer in charge of such institution, * * * it shall be the duty of the officer in charge of such institution in which such person or persons is or are confined to punish him or them by solitary confinement, and by being fed on bread and water only, for such length of time as shall be considered necessary. * * *"

The only punishments provided by Congress for a violation of section 12 of the Selective Service Law are a fine, or imprisonment for not more than 12 months, or both. Nothing whatever is said about hard labor being a part of the punishment, and therefore the court has no power to include it in the sentence.

In view of the foregoing, I am of the opinion that the provisions of sections 700 and 702 of the Charter of the City of New York, are not intended to authorize the employment of federal prisoners at hard labor unless the sentence so directs. Federal prisoners must of course be subject to the discipline of local jails, but they cannot be there confined at hard labor under a sentence imposed as a result of having committed the crime of which the defendant herein has been convicted. Any other construction of the Charter would necessarily mean that no crime against the United States involving imprisonment in a penal institution of the city of New York may be prosecuted except by indictment.

It was said by Hughes, J., in United States v. Smith (C. C.) 40 Fed. 755, at page 760:

"I do not agree with counsel, who resist the filing of this information, that the term 'state prison' was used by the Supreme Court in the general sense of any jail or lockup of a county or city owned by the state. Such a construction would lead us to the absurd conclusion that the Supreme Court meant to hold that no offense involving confinement, however brief, in a state or city jail or station house could be prosecuted by information."

Not decisive of the point involved, but indicating the attitude of the court, is the decision of Paul, J., in United States v. Cobb (D. C.) 43 Fed. 570, at page 571:

"Section 5541 of the Revised Statutes provides that: 'In every case where any person convicted of any offense against the United States is sentenced * * * for a longer period than one year, the court by which the sentence is passed may order the same to be executed in any state jail or penitentiary within the district or state where such court is held, the use of which jail or penitentiary is allowed by the Legislature of the state for that purpose.' Under this provision, when a statute prescribes a punishment by confinement not exceeding one year, the convict cannot be confined in any state prison or penitentiary.

"In the case against T. A. Fox, who is prosecuted under the provisions of section 5512 of the Revised Statutes, in which the punishment defined may be confinement for a period of three years, and under which, if convicted, he may be confined in a state prison or penitentiary, according to the provisions of section 5541, Rev. St., above quoted, it is clear that he cannot be prosecuted by information, but only on a presentment or indictment of a grand jury. The demurrer in this case is therefore sustained. In the case against John Smith and H. A. Cobb, who are prosecuted under the provisions of section 5506 of the Revised Statutes, the imprisonment prescribed by the statute cannot exceed one year; and therefore, if convicted, their confinement in any state jail or penitentiary is inhibited by the provisions of section 5541, quoted above.

"Counsel for the defendants contend that section 5546 of the Revised Statutes [Comp. St. § 10547] removes the inhibition prescribed in section 5541, and allows the court to send the convict to a state prison or penitentiary where the period of confinement prescribed by the statute is for the term of one year or less. The court does not concur in this view. Section 5546 reads as follows: 'Sec. 5546. All persons who have been, or who may hereafter be, convicted of crime, by any court of the United States, whose punishment is imprisonment in a district or territory where, at the time of conviction, * * * there may be no penitentiary or jail suitable for the confinement of convicts, or available therefor, shall be confined during the term for which they have been or may be sentenced * * * in some suitable jail or penitentiary in a convenient state or territory to be designated by the attorney general, and shall be transported and delivered to the warden or keeper of such jail or penitentiary by the marshal of the district or territory where the conviction has occurred; and, if the conviction be had in the District of Columbia, in such case, the transportation * * * shall be by the warden of the jail of that district; the reasonable, actual expense of transportation, necessary subsistence and hire and transportation of guards and the marshal, or the warden of the jail in the District of Columbia, only, to be paid by the Attorney General out of the judiciary fund. But if, in the opinion of the Attorney General, the expense of transportation from any state, territory, or the District of Columbia, in which there is no penitentiary, will exceed the cost of maintaining them in jail in the state, territory, or the District of Columbia during the period of their sentence, then it shall be lawful so to confine them therein for the period designated in their respective sentences.'

"Section 5546 neither by express words nor by implication repeals, modifies, or changes the provisions of section 5541. Section 5546 is legislation on a subject entirely different from that of section 5541. Its object is to define the duties of the attorney general when there is no jail or penitentiary in the district or state where the person is convicted in which such person may be confined. It preserves throughout the distinction between jail, as one class of prisons, and state jail or penitentiary, as another class of prisons. It could not have been contemplated that a person convicted under a statute where the punishment prescribed is confinement in jail could, by reason of being sent to another state, because there was no jail in the district or state where he was convicted where he could be confined, be confined in a state prison or penitentiary of the other state to which he is sent. The mere fact of the Attorney General engaging prisons in another state than that in which the convict is sentenced cannot change the character of the convict's punishment, or make that infamous which was not so by the sentence, nor authorize the court to confine in a state prison or penitentiary, with or without hard labor, a person who has been convicted and sentenced under a statute which prescribes imprisonment alone as the punishment, and excludes the idea of imprisonment in a state jail or penitentiary, with or without hard labor. Any other construction would lead to the unreasonable conclusion that a person convicted under a statute that imposes confinement for a term not exceeding one year, and that does not impose hard labor as a part of the punishment, and sentenced to confinement for one month, could be sent to a state jail or penitentiary. The only case where a person can be sentenced to a jail or penitentiary not exceeding one year is where the statute prescribes

hard labor as part of the punishment, and leaves the term of imprisonment in the discretion of the court, as in the Case of Robinson,[1] cited by counsel for defendants, which was an indictment under section 5406, tried at a former term of this court. In such a case, from the very character of the punishment inflicted, the convict has to be sent to a state jail or penitentiary. If the theory advanced by counsel for defendants was correct, that, under the provisions of section 5546, a person sentenced to imprisonment for a period not exceeding one year can be sent to a state prison or penitentiary, it would follow that there are no crimes against the United States the punishment for which is imprisonment, that can be proceeded against by information."

[2] In conclusion, it may be observed that the constitutional amendment relied upon by the defendant, by its very language does not require an indictment, even for a capital or otherwise infamous crime, in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger. This gives the government the right, in time of war, to prosecute by information a violation of section 12 of the Selective Service Law, even if such a violation be held to be an infamous crime, for such a crime is a case arising in the land or naval forces in actual service in time of war. The Fifth Amendment does not provide that the cases must be against the land or naval forces. It is clearly much broader and refers to such crimes as involve the land or naval forces in their origin. Section 12 of the Selective Service Law forbids the sale of intoxicating liquor to a man in uniform in the military service of the United States, and therefore a violation of its provisions is now a crime arising in the land forces in actual service in time of war.

The motion to set aside the verdict of the jury must be denied.

In re FOOD CONSERVATION ACT.

(District Court, N. D. New York. December 26, 1918.)

1. CRIMINAL LAW ⟸1209—DOUBLE PUNISHMENT.
   When a defendant has been indicted, convicted, and punished under Act Aug. 10, 1917, § 15 (Comp. St. 1918, § 3115¼*l*), for importing distilled spirits in violation of its prohibition, he cannot be proceeded against in rem for forfeiture of the vehicles used in bringing in such spirits, under Rev. St. § 3062 (Comp. St. § 5764), but the spirits, being unlawfully in the United States, may be seized and condemned.
2. CRIMINAL LAW ⟸1206(1)—STATUTE CREATING NEW OFFENSE—PUNISHMENT.
   When a statute creates a new offense and fixes the penalty, or prescribes a specific punishment, only that punishment can be inflicted which the statute prescribes.
3. JUDGMENT ⟸559—CONCLUSIVENESS—"ACQUITTAL"—"CONVICTION."
   An "acquittal," as between the same parties, establishes once for all that the acts alleged were not committed by the one charged with the offense, while a "conviction" is an adjudication, once for all, as between the same parties, that the acts alleged were committed, and in such case the consequences prescribed by law must follow.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Acquittal; Conviction.]

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

[1] No opinion filed.

In the matter of violations of Food Conservation Act Aug. 10, 1917, § 10, by bringing into the United States distilled spirits.

The question arises under section 15, chapter 53, Act Aug. 10, 1917, 40 Stat. 282 (Comp. St. 1918, § 3115¼*l*), whether or not those who violate the act by bringing into the United States from the Dominion of Canada, or any foreign country, distilled spirits, forfeit to the United States, not only such distilled spirits, but the vehicle used in so importing or bringing in such articles.

D. B. Lucey, U. S. Atty., of Ogdensburg, N. Y., for the United States.

Geo. J. Moore, of Malone, N. Y., for certain defendants.

RAY, District Judge. [1] Act Aug. 10, 1917, c. 53, § 15, 40 Stat. 282 (Comp. St. 1918, § 3115¼*l*), provides:

"That from and after thirty days from the date of the approval of this act no foods, fruits, food materials, or feeds shall be used in the production of distilled spirits for beverage purposes; * * * *nor shall there be imported into the United States any distilled spirits.* * * * Any person who willfully violates the provisions of this section, * * * or who shall import any such liquors without first obtaining a license so to do when a license is required under this section, * * * shall be punished by a fine not exceeding $5,000, or by imprisonment for not more than two years, or both."

This provision forbids and prohibits the importation—that is, bringing—into the United States of any distilled spirits, and makes such bringing in a crime punishable by fine or imprisonment, and the fine and term of imprisonment are specified. This section is not a part of the customs laws, providing for the importation of "dutiable" goods.

Section 3096, c. 11, R. S. U. S. (Comp. St. § 5808), "Provisions Applying to Commerce with Contiguous Countries," provides:

"All persons may import any merchandise *of which the importation shall not be entirely prohibited,* into the districts which are or may be established on the northern and northwestern boundaries of the United States, in vessels or boats of any burden, and in rafts or carriages of any kind or nature whatsoever."

This does not permit the importation of distilled spirits, as, since the enactment of August 10, 1917, the importation has been absolutely and wholly prohibited, and even before that a duty was imposed on distilled spirits, and they could only be imported through the custom house on payment of the duties imposed.

Section 3098, R. S. U. S. (Comp. St. § 5810), provides that:

"The * * * driver of any carriage or sleigh, and every other person, coming from any foreign territory adjacent to the United States into the United States, *with merchandise subject to duty,* shall deliver, immediately on his arrival within the United States, a manifest of the cargo or loading of such * * * carriage or sleigh, or of the merchandise so brought from such foreign territory, at the office of any collector or deputy collector which shall be nearest to the boundary line, or nearest to the road or waters by which such merchandise is brought"

—same to be verified and contain a description of the property, etc. The next section, section 3099 (section 5811), provides that if this is not done, or if the custom house be passed by—

"the merchandise *subject to duty*, and so imported, shall be forfeited to the United States, *together with the vessel, boat* * * * *or the carriage or sleigh*, * * * *drawing the same*, * * * and such master * * * or other importer shall be subject to a penalty of four times the value of the merchandise so imported."

This section, providing for the forfeiture of the vehicle in which goods are brought into the United States without entry or payment of duty, applies to vehicles drawing or transporting "dutiable goods" only.

Prior to the enactment of the law of August 10, 1917, distilled spirits were subject to duty, and hence, if brought in in violation of law—that is, without payment of duty—the spirits and vehicle in which transported could be seized as forfeited under the provisions of the statute quoted. I find no express and specific provision for the forfeiture and seizure of goods brought into the United States, where the importation is absolutely prohibited by statute, or of the vehicle, etc., by which such goods or merchandise was drawn or in which carried. Such merchandise is not dutiable. But I do find the following which I think applicable in this case. Section 3059, R. S. U. S. (Comp. St. § 5761), specifies the officers who may make searches and seizures, and section 3061 (section 5763) provides that any such officer—

"may stop, search, and examine, as well without as within their respective districts, any vehicle, beast, or person, on which or whom he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law, * * * and if any such officer or other person so authorized shall find any merchandise on or about any such vehicle, beast or person, * * * which he shall have reasonable cause to believe is subject to duty, or to have been unlawfully introduced into the United States, whether by the person, in possession or charge, or by, in, or upon such vehicle, beast or otherwise, he shall seize and secure the same for trial."

Section 3062 (section 5764) then provides:

"Every such vehicle and beast, or either, together with teams or other motive power used in conveying, drawing, or propelling such vehicle or merchandise, and all other appurtenances * * * shall be subject to seizure and forfeiture."

These sections were enacted in 1866 and are still in force. Under their provisions, standing alone, the distilled spirits brought into the United States from Canada since the act of August 10, 1917, became a law, as well as the vehicles in which same were brought, become subject to seizure and forfeiture, inasmuch as the distilled spirits were and are brought in "contrary to law." The bringing in is absolutely prohibited. But section 15 of the act of August 10, 1917, provides a punishment by fine or imprisonment for so bringing in or importing the liquors, and makes no reference directly or indirectly, or by inference, to any added punishment or penalty by way of forfeiture of the merchandise, liquors, so brought in, or of the vehicle in which transported into the United States. Is the punishment prescribed by section 15 of

the act of 1917 full, complete, comprehensive, exclusive, and final, and does it exclude or preclude the enforcement of the forfeiture prescribed by sections 3061 and 3062, R. S., above referred to? Section 3082, R. S. U. S. (Comp. St. § 5785), provides:

"If any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any merchandise, contrary to law, or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported contrary to law, such merchandise shall be forfeited and the offender shall be fined in any sum not exceeding five thousand dollars nor less than fifty dollars, or be imprisoned for any time not exceeding two years, or both. Whenever, on trial for a violation of this section, the defendant is shown to have or to have had possession of such goods, such possession shall be deemed evidence sufficient to authorize conviction, unless the defendant shall explain the possession to the satisfaction of the jury."

Here we have provisions imposing a fine or imprisonment and also a forfeiture for fraudulently or knowingly importing or bringing into the United States, or assisting in so doing, "any merchandise contrary to law." But I do not see that those who violate the act of 1917, by bringing in distilled spirits, can be punished under this section, as the punishment is prescribed by the act of 1917 itself. The offenders cannot be punished under both sections, and evidently it was the purpose to have those who bring in distilled spirits in violation of the act of August 10, 1917, punished under the provisions of that act and as therein prescribed. In Daigle v. United States et al., 237 Fed. 159, 163, 150 C. C. A. 305, it was held that potatoes and the vehicle in which transported were subject to seizure and forfeiture; such potatoes having been imported and brought into the United States contrary to law, the importation of such potatoes having been prohibited by the Plant Quarantine Act (Act Aug. 20, 1912, c. 308, § 7, 37 Stat. 317 [Comp. St. § 8758]), which is quoted (237 Fed. on page 162, 150 C. C. A. 308) in the opinion.

That act of itself did not provide for seizure and forfeiture of the potatoes, or of the vehicle in which transported into the United States, but did contain the following:

"Sec. 10. That any person who shall violate any of the provisions of this act * * * shall be deemed guilty of a misdemeanor and shall, upon conviction thereof, be punished by a fine not exceeding five hundred dollars or by imprisonment not exceeding one year, or both such fine and imprisonment, in the discretion of the court." Comp. St. § 8762.

It does not appear that any criminal proceedings had been taken against the offenders, or fine or imprisonment imposed. So far as appears, the question was not raised that the person or persons importing the potatoes contrary to law could not be punished by fine or imprisonment, and compelled also to submit to the seizure and forfeiture of the vehicles, etc., in which same were carried or transported. Nothing is said in the case on that subject.

In United States v. McKee, 4 Dill. 128, Fed. Cas. No. 15,688, the defendant had been indicted and convicted and punished for having conspired with certain distillers, in violation of the Revised Statutes of

the United States, to defraud the United States by unlawfully removing distilled spirits without payment of the taxes thereon. He was afterwards sued in a civil action by the United States under another section of the Revised Statutes to recover a penalty given thereby of double the amount of the taxes lost by such conspiracy and fraud. The transactions giving rise to the criminal prosecution and punishment and the liability to the penalty were the same. It was held that the suit for the penalty was barred by the criminal trial, conviction, and punishment, as defendant could not be twice punished for the same offense. This case is cited, quoted, and approved in Coffey v. United States, 116 U. S. 436, at page 445, 6 Sup. Ct. 437, 29 L. Ed. 684.

In United States v. One Distillery (D. C.) 43 Fed. 846, it was held that:

"After an officer and stockholder of a corporation engaged in distilling is convicted for a violation of the internal revenue law, an action cannot be maintained to enforce the forfeiture of the corporation's property for the same offense, even though the forfeiture is resisted only by the other stockholders—following U. S. v. McKee, 4 Dill. 128 [Fed. Cas. No. 15,688]."

In United States v. Olsen (D. C.) 57 Fed. 579, it is held:

"A judgment of forfeiture entered against a vessel under Act July 5, 1884, § 10 (23 Stat. 117), for an act of the master in bringing Chinese laborers from a foreign port and landing them in the United States, in violation of section 2 of the act, cannot be pleaded by the owner of the vessel in bar to an indictment for aiding and abetting the act of the master, as forbidden in section 11 of the act. U. S. v. McKee, 4 Dill. 128 [Fed. Cas. No. 15,688]; Coffey v. U. S., 6 Sup. Ct. 437, 116 U. S. 436 [29 L. Ed. 684]; and U. S. v. One Distillery [D. C.] 43 Fed. 846, distinguished."

The Olsen Case is not necessarily in point, as all the acts of the master of the vessel which subjected the vessel to seizure and forfeiture, and on which acts the forfeiture of the vessel was based, were not necessarily those of the owner of the vessel in aiding and abetting the bringing in of the Chinese persons. The owner lost his vessel because of the unlawful acts of the master. Under the indictment found against the owner he was to be tried for aiding and abetting. The forfeiture was not incurred because of those acts of aiding and abetting, although the aiding and abetting must have been a part of the acts of the master. They must have acted in concert.

It is somewhat difficult to reconcile the Olsen Case with the McKee Case and the One Distillery Case. When a statute declares that if certain acts are done, which are made unlawful, the party doing them shall be punished on conviction by fine or imprisonment, or both, and also declares that the instrumentalities used in the commission of such offense shall also be subject to seizure and forfeiture to the United States, it well may be that indictment, conviction, and sentence do not constitute a bar to a proceeding in rem to enforce the forfeiture, inasmuch as the criminal prosecution and punishment and the proceeding in rem to enforce the forfeiture as a part of the punishment are necessarily separate and distinct proceedings, but both are pursued necessarily to enforce the penalty and punishment prescribed for the doing of the unlawful acts, viz. fine or imprisonment, it may be both,

and forfeiture of the instrumentalities used in the commission of the offense. It is all one punishment, although in a sense cumulative.

But when we have a statute, complete in and of itself, which makes the doing of certain prohibited acts, therein specified, a crime, and such statute also prescribes the punishment to be inflicted in case of violation, and such statute makes no reference to other statutes, it is going far to say that we may go to some other prior statute which in general language provides for the forfeiture to the United States of all instrumentalities used in the commission of offenses of that character. If the forfeiture is enforced, it is in the nature of and in fact amounts to the imposition of an added punishment, not found in or provided for in the statute which makes the doing of the prohibited act a crime and which also specifies the punishment to be inflicted in case of a violation. It is settled law that when a person is accused of a crime, indicted, tried, convicted, or acquitted, as the case may be, by a court of competent jurisdiction, and punished, if convicted, or acquitted, he cannot again be indicted, tried, convicted, and punished for the commission of that offense, or again tried.

"Where a criminal charge has been adjudicated upon by a court having jurisdiction to hear and determine it, that adjudication, whether it takes the form of an acquittal or conviction, is final as to the matter so adjudicated upon, and may be pleaded in bar to any subsequent prosecution for the same offense. * * * In this respect the criminal law is in unison with that which prevails in civil proceedings." Hawkins, J., in Queen v. Miles, 24 Q. B. D. 423, 431, adopted and approved by the Supreme Court in United States v. Oppenheimer, 242 U. S. 85, 88, 37 Sup. Ct. 68, 61 L. Ed. 161.

In Coffey v. United States, 116 U. S. 436, 6 Sup. Ct. 437, 29 L. Ed. 684, which was an action on information against certain distilled spirits and apparatus used in the distillation of same, for the forfeiture thereof, the defendant pleaded a prior judgment of acquittal on a criminal information filed against him by the United States for the same acts, founded on the same sections of the Revised Statutes as was the proceeding in rem for forfeiture. The Supreme Court, overruilng and reversing the courts below, held that, although the particular statutes —section 3257, R. S. U. S. (Comp. St. § 5993), and section 3450, R. S. U. S. (Comp. St. § 6352)—contained each a provision for the forfeiture of the apparatus and the imposition of a fine with imprisonment in the one case (section 3257), and for a forfeiture of the goods, etc., and the imposition of a fine or penalty in the other (section 3450), and in the third case under section 3453, R. S. U. S. (Comp. St. § 6355), for a forfeiture of the goods, etc., only, that the trial and acquittal on the criminal charge was conclusive in his favor in the suit for the forfeiture. In the criminal prosecution the jury had found that the acts charged had not been committed, and, the parties being the same, the court said:

"It is true that section 3257, after denouncing the single act of a distiller defrauding or attempting to defraud the United States of the tax on the spirits distilled by him, declares the consequences of the commission of the act to be (1) that certain specific property shall be forfeited; and (2) that the offender shall be fined and imprisoned. It is also true that the proceeding to enforce the forfeiture against the res named must be a proceeding in

rem and a civil action, while that to enforce the fine and imprisonment must be a criminal proceeding, as was held by this court in The Palmyra, 12 Wheat. 1, 14 [6 L. Ed. 531]. Yet, where an issue raised as to the existence of the act or fact denounced has been tried in a criminal proceeding, instituted by the United States, and a judgment of acquittal has been rendered in favor of a particular person, that judgment is conclusive in favor of such person, on the subsequent trial of a suit in rem by the United States, where, as against him, the existence of the same act or fact is the matter in issue, as a cause for the forfeiture of the property prosecuted in such suit in rem. It is urged as a reason for not allowing such effect to the judgment, that the acquittal in the criminal case may have taken place because of the rule requiring guilt to be proved beyond a reasonable doubt, and that, on the same evidence, on the question of preponderance of proof, there might be a verdict for the United States, in the suit in rem. Nevertheless the fact or act has been put in issue and determined against the United States; and all that is imposed by the statute, as a consequence of guilt, is a punishment therefor. There could be no new trial of the criminal prosecution after the acquittal in it, and a subsequent trial of the civil suit amounts to substantially the same thing, with a difference only in the consequences following a judgment adverse to the claimant."

This is not a holding that, if the defendant in the criminal prosecution had been convicted, the property could not have been proceeded against in and by the proceedings in rem. It having been duly adjudicated by a court of competent jurisdiction in the criminal action that defendant did not commit the acts alleged against him, it was held that that question could not again be litigated between the same parties in the action to forfeit the property, as the forfeiture, if incurred, was incurred because of the commission of the acts referred to. Gelston v. Hoyt, 3 Wheat. 246, 4 L. Ed. 381, is to the same effect. In the Coffey Case the court further said:

"The judgment of acquittal in the criminal proceeding ascertained that the facts which were the basis of that proceeding, and are the basis of this one, and which are made by the statute the foundation of any punishment, personal or pecuniary, did not exist. This was ascertained once for all, between the United States and the claimant, in the criminal proceeding, so that the facts cannot be again litigated between them, as the basis of any statutory punishment denounced as a consequence of the existence of the facts."

In Origet v. United States, 125 U. S. 240, 8 Sup. Ct. 846, 31 L. Ed. 743, an information in a suit in rem against certain goods seized as forfeited for a violation of the revenue laws, a verdict was rendered for the condemnation of the goods. This was necessarily a finding that the acts had been committed. The information was filed under section 12 of Act June 22, 1874, c. 391 (18 Stat. 188). That law provides that if any owner or importer, with intent to defraud the revenue, should make or attempt to make any entry, etc., by means of fraudulent or false invoice, etc., he should—

"for each offense be fined in any sum not exceeding five thousand dollars nor less than fifty dollars, or be imprisoned for any time not exceeding two years, or both; and, in addition to such fine, such merchandise shall be forfeited."

It was contended that the only way in which the goods could be condemned was by proceedings under indictment as an incident of the

prosecution of the offender by indictment, and that the forfeiture of the goods, like the fine and the imprisonment prescribed, is a part of the punishment upon a conviction on a criminal prosecution, and that the forfeiture is imposed only as an addition to the fine where that is imposed, and that the merchandise could not be forfeited independently of the imposition of the fine. The Supreme Court said and held:

"But we are of opinion that this is not the proper construction of the section. The fine, or the imprisonment, or both, are to follow conviction on a criminal prosecution of the owner, importer, consignee, agent, or other person, who does the act forbidden by the section, with the intent therein mentioned. The section then goes on to say that, 'in addition to such fine, such merchandise shall be forfeited.' The sole meaning of this is that the person owning the merchandise shall lose it by forfeiture, in addition to such possible loss as may come to him by the imposition, if he is the offender, of the pecuniary fine, on the criminal prosecution against him. But the merchandise is to be forfeited irrespective of any criminal prosecution. The forfeiture accrues to the United States on the commission or omission of the acts specified. No condition is attached to the imposition of the forfeiture. The section does not say that the merchandise shall be forfeited only on the conviction of some offender, whether the owner of the merchandise or one of the other persons named in the section. The person punished for the offense may be an entirely different person from the owner of the merchandise, or any person interested in it. The forfeiture of the goods of the principal can form no part of the personal punishment of his agent."

This, it seems to me, is a holding that fine and imprisonment, or either, is the punishment for the offense, and that the enforcement of a forfeiture of the goods involved, which must be in a separate proceeding in rem, forms no part thereof. If so, then in the instant case, and other like cases, the one who brings into the United States distilled spirits in violation of the act of August 10, 1917, in a wagon, sleigh, or automobile, subjects himself to a criminal prosecution and fine and imprisonment, one or both, and this is the punishment for such offense. The wagon, sleigh, or automobile, or other instrumentalities, used by him in so bringing in the distilled spirits, will be liable to forfeiture to the United States, and such forfeiture may be enforced in a proceeding in rem under other sections of the Revised Statutes. This would not be adding to the "punishment" imposed by section 15, chapter 53, Acts 1917, as such proceeding is no part thereof.

[3] The effect of a judgment of acquittal on a criminal charge of bringing in or importing distilled spirits, contrary to law, is essentially different from the effect of a judgment of conviction on the same charge. In the one case, that of acquittal, as between the same parties, it is established once for all that the acts alleged were not committed by the one charged with the offense. This question cannot again be tried or litigated between the same parties. On acquittal there is no fine, no imprisonment, no penalty, and no forfeiture. There cannot be. In the other case, that of conviction, it is an adjudication once for all, as between the same parties, that the acts alleged were committed, and in such case the consequences prescribed by law must follow. The consequences may be a fine, or imprisonment, or both, and to this may be added, as a consequence, the forfeiture of the instrumentalities used in the commission of the offense, bringing in of the merchandise—in this case distilled spirits—contrary to, or in violation of, law. If the

forfeiture of the merchandise or instrumentalities is a part of the punishment prescribed, it must be found in the statute fixing the punishment, in this case the act of August 10, 1917; but, if not, then authority for the seizure and forfeiture in a proper proceeding in rem may be given by and found in other statutes. So far as punishment for the violation of law is concerned, it must be presumed the one prescribed in the statute is the only one, and exclusive of all others, and a punishment prescribed in other statutes, even a general one, for bringing in merchandise contrary to law, or in violation of law, cannot be resorted to.

But punishment for the offense by fine or imprisonment may not be the only consequence that follows such a violation of law. The distilled spirits may not belong to the one who commits the offense of bringing them into the United States, but they may be forfeited by proper proceedings in rem against the owner or the thing itself. The vehicles used in so bringing in the distilled spirits contrary to law may not belong to the one who uses them in so violating the law, but they may be seized and forfeited in a proceeding in rem. If A. is accused of bringing in distilled spirits contrary to law, and he is tried for the offense and acquitted, this is no bar to a criminal prosecution against B., who did bring such spirits in contrary to law. If the instrumentalities used, as a vehicle, wagon, or automobile, belong to a third person, C., such instrumentalities may be proceeded against by a suit in rem for the forfeiture thereof under the applicable statutes found in other acts of Congress.

In United States v. A Lot of Precious Stones, etc., 134 Fed. 61, 68 C. C. A. 1, criminal indictments were found and presented against Albert Schmidt and Sara Crawford Schmidt, his wife, separately charging each with a violation of section 3082, by having fraudulently imported into the United States certain precious stones, etc. Albert Schmidt was tried on the indictment against him and acquitted. Thereupon the United States attorney moved a nol. pros. of the indictment against Sara Crawford Schmidt and same was nol. prossed accordingly. The dismissal of an indictment does not operate as an acquittal. Dealy v. United States, 152 U. S. 539, 542, 14 Sup. Ct. 680, 38 L. Ed. 545. Prior to the finding of the said indictments an information for the condemnation of said precious stones and jewels had been filed against said Albert Schmidt and Sara A. Crawford, really Sara Crawford Schmidt, founded on the same acts, and after the acquittal of Albert Schmidt, and after the indictment against Sara Crawford Schmidt was nolle prossed, the United States proceeded with the condemnation proceedings under the information against Sara A. Crawford. It was contended that the acquittal of Albert Schmidt and the nolle pros. of the indictment against Sara Crawford Schmidt, named in the information Sara A. Crawford, was a bar to the proceedings against her under and on the information. This contention was overruled. It was held that, notwithstanding the acquittal of Albert Schmidt and the nolle pros. of the indictment against Sara Crawford Schmidt, the proceedings for condemnation against her might continue, and accordingly the judgment of the lower court that the acquittal and nolle pros. barred

further proceedings against her on the information for condemnation was reversed. This decision was rendered by the Circuit Court of Appeals, Sixth Circuit, Lurton, Severens, and Richards, Circuit Judges, and in the course of the opinion the court said:

"If there had been no indictments found against Albert Schmidt and Sara Crawford Schmidt individually, and upon the trial of the information the jury had found that Albert Schmidt was not guilty of the charge, and Sara Crawford Schmidt was, a judgment for the forfeiture of the goods seized and libeled would have followed. Since the information charges her, along with Albert Schmidt, with the fraudulent importation of these goods, and since there has been no adjudication of the question whether she was individually guilty or not, we are of the opinion that that question may still be tried in the forfeiture proceeding."

In United States v. Manufacturing Apparatus, etc. (D. C.) 240 Fed. 235, it was held by Lewis, District Judge, that:

"The criminal prosecution of a stockholder and director of a corporation under Act Aug. 2, 1886, c. 840, § 17, 24 Stat. 212 (Comp. St. 1913, § 6229), for defrauding the United States of the tax on oleomargarine resulting in an acquittal, is not a bar to a subsequent proceeding under said section for the forfeiture of the oleomargarine and the manufacturing apparatus and raw materials for its manufacture owned by the corporation based upon the same alleged offense."

In Ex parte Lange, 18 Wall. 163, 168 (21 L. Ed. 872), it is held:

"If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense."

In the instant cases the question is whether or not, after the conviction of a defendant of the offense of importing distilled spirits into the United States contrary to law (and importation is absolutely prohibited under the act of August 10, 1917), and a fine, or imprisonment, or both, has been imposed as prescribed by that act, proceedings in rem for the forfeiture of both such distilled spirits so imported and the instrumentalities used in so unlawfully bringing in or importing the distilled spirits, or either, can be maintained against the party guilty of the unlawful act, and who has been convicted and fined or imprisoned, or against the property itself so used and belonging to him. In other words, after criminal prosecution and punishment for the offense by fine or imprisonment, is the prosecution of proceedings to condemn and forfeit an effort to secure and enforce an added or double punishment, and, if successful, would such condemnation operate as an added or double punishment for the same offense?

[2] When a statute creates a new offense and fixes the penalty, or provides a specific punishment, only that punishment can be inflicted which the statute prescribes. McBroom v. Schottish, etc., 153 U. S. 318, at page 325, 14 Sup. Ct. 852, 38 L. Ed. 729; Farmers', etc., Bank v. Dearing, 91 U. S. 29, 35, 23 L. Ed. 196; Oates v. National Bank, 100 U. S. 239, 250, 25 L. Ed. 580; Barnet v. National Bank, 98 U. S. 555, 558, 25 L. Ed. 212; Stafford v. Ingersol, 3 Hill (N. Y.) 38; First National Bank of Whitehall v. Lamb, 57 Barb. (N. Y.) 429; De Wolf v. Johnson, 10 Wheat. 367, 390, 6 L. Ed. 343; 10 Cyc. U. S. Rep. 1093. The act of August 10, 1917, is a new statute and creates a new offense, and prescribes or denounces the penalty or punishment

and makes no reference to any forfeiture or to any other statute. In Oates v. National Bank, supra, 100 U. S. at page 250, 25 L. Ed. 580, the court said:

"It denounces no penalty other than a forfeiture of the interest which the note or bill carries, giving to the debtor the right to sue for and recover twice the amount of interest so paid. If we should declare the contract of indorsement void, and, consequently, that no right of action passed to the bank on the note transferred as collateral security, an additional penalty would thus be added beyond those imposed by the law itself. 'On what principle could this court add another to the penalties declared by the law itself?' De Wolf v. Johnson, 10 Wheat. 367 [6 L. Ed. 343]; Farmers' & Mechanics' National Bank v. Dearing, 91 U. S. 29 [23 L. Ed. 196]; Barnet v. National Bank, 98 U. S. 555 [25 L. Ed. 212]."

In De Wolf v. Johnson, supra, the transaction originated on a contract of loan made in Rhode Island by De Wolf to Prentiss, the payment of which was secured by a mortgage on lands in Kentucky. The question arose whether the contract was void under the usury laws of either state. The laws of Rhode Island, where the contract was made, prescribed a penalty and forfeiture of certain amounts in such cases, but the laws of Kentucky made usurious contracts void. The court held that this contract was governed by the laws of Rhode Island, and that no other penalty or forfeiture could be imposed, and that the contract could not be held void under the statute of Kentucky. The court said:

"The law of Rhode Island certainly forbids the contract of loan for a greater interest than 6 per cent., and so far no court would lend its aid to recover such interest. But the law goes no further; it does not forbid the contract of loan, nor preclude the recovery of the principal, under any circumstances. The sanctions of that law are the loss of the interest, and a penalty to the amount of the whole interest, and one-third of the principal, if sued for within a year. On what principle could this court add another to the penalties declared by the law itself?"

The court was not dealing with a case where the law of the same state by some other statute made it a crime and imposed a fine and punishment, one or both, for the act of contracting for usury, but was considering a case where the laws of one state, that where the contract was made, prescribed a certain penalty, and the laws of another, where the property was situated, prescribed another. In Farmers' National, etc., Bank v. Dearing, 91 U. S. 29, 35, 23 L. Ed. 196, the court was considering the forfeiture declared by the thirtieth section of Act June 3, 1864, c. 106, 13 Stat. 99 (Comp. St. §§ 9758, 9759), and the effect, if any, of a state statute on the same subject, and the court held (91 U. S. page 35, 23 L. Ed. 196):

"Where a statute creates a new offense and denounces the penalty, or gives a new right and declares the remedy, the punishment or the remedy can be only that which the statute prescribes"—citing Stafford v. Ingersol, 3 Hill (N. Y.) 38; and First National Bank of Whitehall v. Lamb, 57 Barb. (N. Y.) 429.

But this is not a holding or a declaration that, if there be a general statute of the United States declaring that all property brought into the United States contrary to law, and all instrumentalities used in

bringing such property in, shall be forfeited, and by a new statute of the United States the bringing in of certain property not before excluded is prohibited, and the act of so bringing in is made a crime punishable by fine or imprisonment, that the merchandise or property and such instrumentalities so used may not be forfeited under the provisions of such former general statute. The forfeiture is no part of the punishment for the illegal act as we have seen. Origet v. United States, 125 U. S. 240, 8 Sup. Ct. 846, 31 L. Ed. 743.

The act offended against, that of August 10, 1917, bringing distilled spirits into the United States, is not a customs law or a revenue law, as the merchandise is not dutiable, and the United States has no interest in such distilled spirits, except it be to keep them out of the United States. See Boyd v. United States, 116 U. S. 616, 624, 6 Sup. Ct. 524, 529 (29 L. Ed. 746), where the court said:

"In the case of stolen goods, the owner from whom they were stolen is entitled to their possession; and in the case of excisable or dutiable articles, the government has an interest in them for the payment of the duties thereon, and until such duties are paid has a right to keep them under observation, or to pursue and drag them from concealment."

The right of the United States to seize and forfeit the distilled spirits is because they are brought in in violation of law, and the right, if it exists, to seize and forfeit the instrumentalities used by the wrongdoer in bringing in such merchandise contrary to law must be based on the fact they are used in the commission of an offense against the United States. If the offense has not been committed, then there can be no right of seizure or of forfeiture. In the Boyd Case, supra, 116 U. S. at page 633, 634, 6 Sup. Ct. 534, 29 L. Ed. 746, the court also says:

"We are also clearly of opinion that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal. * * * These are the penalties affixed to the criminal acts; the forfeiture sought by this suit being one of them. * * * The information, though technically a civil proceeding, is in substance and effect a criminal one."

And this is again held in Stone v. United States, 167 U. S. 178, 187, 17 Sup. Ct. 778, 42 L. Ed. 127, and in the Stone Case United States v. McKee, 4 Dill. 128, Fed. Cas. No. 15,688, supra, is again referred to with apparent approval. In the cases of offending against the act of August 10, 1917, no revenue is to be collected, and the offense of bringing in the distilled spirits is made a crime, and the act itself denounces the penalty. Having been indicted and fined or imprisoned, one or both, the defendant has answered to the offense, and the proceeding, in its nature criminal, to take the property, especially the instrumentalities used, is a proceeding not against such property alone, but against the offender, and an attempt to take and forfeit his property, not because the United States has any interest in it, but for the alleged reason he used it as an instrumentality in the commission of the crime, and as to the spirits themselves it is a taking and a forfeiture to the United States because of their being in the United States contrary to law. In the Boyd Case, supra, the court (116 U. S. at page 637, 6 Sup. Ct. 524, 29 L. Ed. 746) holds, in effect, that a proceeding in rem

for the forfeiture of property is not one against the property alone, but against the owner also.

I am of the opinion that a distinction must be made between the right of the United States to seize and forfeit the distilled spirits brought into the United States contrary to the act of August 10, 1917, and its alleged right to seize and forfeit the instrumentalities used in effecting such violation. It is settled that the United States may say that Chinese laborers may not come or be brought into the United States. Such Chinese persons, not citizens, may be seized, if they do come, and deported. The United States has, it seems to me, an equal right to say that distilled spirits shall not come or be brought into the United States. If brought in, they are here contrary to law, and may be seized and disposed of. It cannot be that, if the one who brings them in is indicted and fined or imprisoned, he may retain as his own in the United States such distilled spirits. Such punishment cannot have the effect to legalize the presence of such spirits in the hands of the wrongdoer in the United States. It is not an added punishment to seize and condemn them. But this has no application to the instrumentalities used by a citizen of the United States and owned by him in so bringing in such spirits. These are not in the United States contrary to law. There is no law forbidding their presence in the United States. The general statute referred to provides for their seizure and forfeiture only. If forfeited, it must be by virtue of some statute; and, if taken from the wrongdoer, who is the owner, it must be for the reason he used them in the commission of an offense, and, as such instrumentalities are not seized for the collection of some sum due to the United States, and for the reason it has an interest in them, it would seem the seizure must be in the nature of the enforcement of an added punishment for the offense, as the proceedings in rem to enforce the forfeiture are criminal in their nature as we have seen. Such seizure and forfeiture is clearly in the nature of an added penalty for the commission of the offense.

I am of the opinion, while the authorities are conflicting, that when a defendant has been indicted, convicted, and punished by a court of competent jurisdiction, pursuant to the provisions of section 15, c. 53, Act Aug. 10, 1917 (see, also, section 301, c. 63, Act Oct. 3, 1917, title 3, 40 Stat. 308 [Comp. St. 1918, § 8739b] War Tax on Beverages), for bringing distilled spirits into the United States, he cannot be proceeded against by proceedings in rem for the forfeiture of his vehicles used in bringing in such spirits, inasmuch as the statute is new, denounces the penalty and punishment for the offense to be imposed, and makes no reference to any forfeiture of such property, or to any other or prior statute.

As to the distilled spirits brought in contrary to law, I am of the opinion they are unlawfully in the United States, and may be seized and disposed of by forfeiture or otherwise, and that such seizure and forfeiture is not the imposition of a double or added punishment.

HERCULES POWDER CO. v. NEWTON, Commissioner of Patents.

(District Court, S. D. New York. December 17, 1918.)

1. TRADE-MARKS AND TRADE-NAMES ⟸3(4) — REGISTRATION — DESCRIPTIVE WORDS—"INFALLIBLE."

The word "infallible," as applied to smokeless powder, is descriptive, conveying the idea that the powder will always do its work, and so is not the proper subject-matter for a registered trade-mark.

2. COURTS ⟸96(1)—DISTRICT COURT—WEIGHT OF DECISIONS OF DISTRICT OF COLUMBIA COURT OF APPEALS.

Before District Court will arrive at conclusion with respect to whether name "Infallible," as applied to smokeless powder, is descriptive, and not registerable, at variance with conclusion of Court of Appeals of District of Columbia upon the same matter, it should be clearly convinced that such conclusion was wrong (following Gold v. Newton, 254 Fed. 824, — C. C. A. —).

In Equity. Suit by the Hercules Powder Company against James T. Newton, as Commissioner of Patents. Bill dismissed.

Edwin J. Prindle, of New York City, for plaintiff.

Francis G. Caffey, U. S. Atty., of New York City, and Robert F. Whitehead, of Washington, D. C., for defendant.

MAYER, District Judge. The suit is brought under the provisions of section 4915 of the United States Revised Statutes (Comp. St. 1916, § 9460); the Commissioner of Patents having consented that jurisdiction be entertained by this court.

Plaintiff seeks to require the Commissioner of Patents to register as a trade-mark for smokeless powder, the word "infallible." Registration of this mark was refused by the examiner of trade-marks in the Patent Office and by the Commissioner of Patents, and, on appeal to the Court of Appeals of the District of Columbia, the decision of the Commissioner of Patents was affirmed. Both the Commissioner of Patents and the Court of Appeals of the District of Columbia examined the subject-matter with great care and placed their respective decisions substantially upon the same ground.

[1] One question is whether "infallible," when used in connection with smokeless powder, is descriptive. On this point the Commissioner of Patents said, in part:

"'Infallible' is certainly descriptive of these qualities. It is true this word does not exhaustively describe them; one word can seldom perform this function, but it is a word that will be useful in describing just the qualities that applicant says sporting powder should possess."

The Court of Appeals of the District of Columbia, in the same connection, held:

"The word 'infallible' implies something that never fails and that is certain of operation, incapable of error, and free from uncertainty or liability to failure."

The argument of counsel for the plaintiff is, first, that nothing can be said to be infallible, and, secondly, that the word "infallible," when

used in connection with smokeless powder, cannot be said to be descriptive. This word, when thus used, seems to me to convey the idea that the smokeless powder will invariably do its work, or, putting the thought in another way, that it can be used with certainty for the purpose for which it is desired.

[2] Counsel on both sides have analyzed with care many decisions of the Patent Office and of the courts, dealing with this subject of descriptive words. Counsel for plaintiff has called attention to some decisions of the Patent Office in respect of the word "infallible," which were not called to the attention of the Court of Appeals of the District of Columbia. These prior decisions of the Patent Office must be regarded as disposed of, so far as this case is concerned, by the decision of the District of Columbia Court of Appeals.

It will not be useful to analyze at length the effect of the many decisions which deal with this question of descriptive words. It certainly can be stated that, at best, the question is debatable, and the most favorable position in which the plaintiff can be put is that another court (i. e., this court) might hold differently from the Court of Appeals of the District of Columbia. I am of opinion that that court was right in its conclusion, but, in any event, before this court would arrive at a different conclusion, it would be necessary that this court should be clearly convinced that the conclusion of the Court of Appeals of the District of Columbia was wrong. Indeed, it might well be contended that what I have just stated does not go as far as did our Circuit Court of Appeals recently in Gold et al. v. Newton, 254 Fed. 824, —— C. C. A. ——. In respect of the argument that the word "infallible," in connection with plaintiff's smokeless powder, has acquired a secondary meaning, it is sufficient to refer to Elgin National Watch Co. v. Illinois Watch Case Co., 179 U. S. 665, 21 Sup. Ct. 270, 45 L. Ed. 365.

I quite agree with the contention of counsel for the defendant that what plaintiff asks in the case at bar is, in effect, to modify the statute, so as to make the "ten-year" period, not that next preceding the passage of the act of 1905 (Act Feb. 20, 1905, c. 592, 33 Stat. 724 [Comp. St. 1916, § 9485 et seq.]), but such a period as would cover plaintiff's use of the mark.

For the reasons thus briefly outlined, it follows that the bill must be dismissed.

EGNER v. PARSHELSKY BROS., Inc.

In re FOOTE.

(District Court, E. D. New York. June 13, 1918.)

BANKRUPTCY ⟸303(3)—PREFERENCE—KNOWLEDGE OF INSOLVENCY—EVIDENCE.

A defendant *held*, on conflicting evidence, to have had knowledge that a bankrupt was insolvent at the time it took back property previously sold to him, which rendered the transaction a preference.

In Equity. Suit by Henry Egner, trustee in bankruptcy of George P. Foote, against Parshelsky Bros., Incorporated. Decree for complainant.

Hastings & Gleason, of New York City, for plaintiff.
H. S. and C. G. Bachrach, of Brooklyn, N. Y., for defendant.

GARVIN, District Judge. This is an action in equity, brought by a trustee in bankruptcy to set aside a transfer of shingles and building material by George P. Foote, of whom plaintiff is trustee in bankruptcy, to Parshelsky Bros., a corporation, defendant.

No question of law is involved. The court must decide whether the defendant knew or had reasonable cause to believe that Foote was insolvent at the time that the transfer was made. If this question is determined in favor of the plaintiff, the court must determine from the evidence the value of the goods transferred. The plaintiff produced Isaac Parshelsky, an officer of the defendant, who testified, among other things, that he had taken back the goods with the consent of the bankrupt. James French, an employé of the expressman who took the goods to the railroad station, testified that there were over 400 bundles of shingles and some trim. The evidence indicates that $1 per bundle was the fair market value of the shingles. Parshelsky testified that other articles to the extent of $22 were also taken. The bankrupt, who was to some extent corroborated by his wife, testified that he stated to Parshelsky that he was going into bankruptcy before the petition was filed.

The defense called Isaac Parshelsky, who testified that Foote had never mentioned bankruptcy, and that he supposed he was perfectly solvent when he took back the articles in question; that he took them, indeed, at Foote's request. The defense offered also the testimony of one Blumenthal, an employé of the defendant. This testimony had been taken de bene esse.

I have concluded to give judgment in favor of the plaintiff. It is quite true that the defense offers the testimony of two witnesses who positively contradict the testimony given by plaintiff with respect to knowledge of insolvency. I observed carefully the various witnesses who appeared and their manner of giving their testimony.

Personal observation is sometimes of great assistance in determining whether or not a witness is telling the truth. There are some things that enter into the attitude of a witness as he testifies, and which have a pronounced bearing on the testimony he gives, which do not appear at all in the written transcript of the record of the proceedings.

The witness Foote impressed me as one who was telling the truth, and it is my conclusion that the defendant actually knew of the financial condition of the bankrupt at the time of the transfer.

A decree will be entered against the defendant, ordering and adjudging that the defendant deliver to the plaintiff the shingles and building material obtained from the bankrupt, and that in default of such delivery the defendant be ordered to pay to the plaintiff the value thereof, $422.

ELLEN v. JOHNSON.

(District Court, E. D. New York. May 28, 1918.)

HABEAS CORPUS ⇐16—ACTION OF DRAFT BOARD—REVIEW BY COURTS.

Where a local draft board, upon the facts stated in a registrant's questionnaire, found him subject to service and gave him a classification, which was affirmed by the district board, a court cannot on habeas corpus review its action in refusing to reopen the case.

Habeas Corpus. Petition on behalf of Abraham Ellen for writ directed to Evan M. Johnson, Commander of the National Army at Camp Upton, N. Y. Writ denied.

Russell, Gilroy & Schehr, of New York City, for plaintiff.

Melville J. France, U. S. Atty., of Brooklyn, N. Y., for defendant.

GARVIN, District Judge. An application has been made by Morris Ellen, based upon a verified petition, for a writ of habeas corpus, directed to the United States army officer in charge of the military cantonment at Camp Upton, N. Y., and to each and all of his deputies, requiring him and them to bring and have Abraham Ellen, the son of the applicant, before this court, upon the ground that he is unlawfully deprived of his liberty. The petition presented by the applicant shows that Abraham Ellen registered, and that in the first draft he received a discharge as an alien; that when the second draft came on the registrant duly filled out his questionnaire, and claimed exemption as an alien; that on said questionnaire, without sufficient evidence and irregularly, the local board declared the registrant eligible under class 1. The petition sets forth further, on information and belief, that the report of the local board on the questionnaire shows that the local board had no evidence before it to justify its findings, and that it had the evidence before it to show that the registrant was an alien. The petition further sets forth that the registrant came to this country on March 6, 1916, is a native of Russia, and has never taken out his first papers, and therefore is an alien.

The answering affidavit shows: That the registrant filed his questionnaire with local board and made the following answer to question 8: "Q. 8. Has either of your parents been naturalized in the United States? A. Yes." That the minute of the local board on said claim for deferred classification was as follows: "The local board classifies the registrant as shown on the cover sheet hereof (1–A) because it finds that his parent had been naturalized." That an appeal was taken to the district board of the city, which unanimously classified the registrant in 1–A, because it found that the registrant had failed to establish his claim to exemption on the ground of alienship. That thereafter the registrant filed an affidavit, in which he set forth that his father was not a citizen, and that his father had not declared his intention of becoming a citizen until some time after the registrant had become 21 years of age. He therefore requested that his case be opened, and that he be allowed to establish the claim of alien-

ship, and produce before the board his father and mother, neither of whom, according to his claim, are citizens of the United States. He further presented an affidavit, made by his father, in which applicant under oath stated that he had received his final papers on June 7, 1917, but that the registrant was 23 years of age, and therefore was not a minor at the time of this naturalization. The local board declined to open the case.

No such situation is here presented as justifies interference by the court. The case is not brought within the rule of Angelus v. Sullivan, 246 Fed. 54, at page 67, 158 C. C. A. 280, at page 293:

"The civil courts can afford relief from orders made by such boards in any case where it is shown that their proceedings have been without or in excess of their jurisdiction, or have been so manifestly unfair as to prevent a fair investigation, or that there has been a manifest abuse of the discretion with which they are invested under the act."

It is clear that the local board found as a fact, after taking the proof offered by the registrant, that he was not entitled to the deferred class.

The application for a writ of habeas corpus is denied.

In re FRANKLIN BREWING CO.

(District Court, E. D. New York. June 17, 1918.)

BANKRUPTCY ⟸305 — JUDGMENT ⟸691 — PERSONS BOUND — BONDHOLDERS REPRESENTED BY MORTGAGE TRUSTEE.

Holders of bonds of a corporation secured by trust mortgage are bound by the decree in a suit in the bankruptcy court by trustees in bankruptcy of the corporation against the mortgage trustee adjudging the bonds void, and such court has power to enforce the decree by requiring their surrender.

In Bankruptcy. In the matter of Franklin Brewing Company, bankrupt. On motion by trustees for order directing surrender of bonds of bankrupt. Motion granted.

See, also, 252 Fed. 324.

Samuel Evans Maires, of Brooklyn, N. Y., for petitioners.

Henry F. Cochrane, of Brooklyn, N. Y., for respondents.

GARVIN, District Judge. This is a motion made by the trustees in bankruptcy of the Franklin Brewing Company, bankrupt, for an order directing Henry Doscher, John Doscher, Charles Doscher, Gesine Engel, Mathilda C. Behre, Caroline Candidus, and the People's Trust Company to forthwith surrender up and deliver to the trustees 450 alleged coupon bonds made, issued, transferred, and delivered to the several persons mentioned. These bonds were secured by a trust mortgage made by the bankrupt to the People's Trust Company as trustee for these bondholders. After the adjudication herein the trustees in bankruptcy brought an action against the People's Trust Company, asking that this mortgage be set aside and canceled on the ground that it was illegal, invalid, and void. Where-

upon a decree was made by this court in the said suit in favor of the trustees and against the People's Trust Company, decreeing that the said bonds were illegal, invalid, and void as against the trustees in bankruptcy. This decree has been affirmed by the Circuit Court of Appeals. The holders of the bonds, having been represented by the trustees of the mortgage issued to secure the bonds, are bound by the decree. Beals v. Illinois Railroad Co., 133 U. S. 290, 295, 10 Sup. Ct. 314, 33 L. Ed. 608; Richter v. Jerome, 123 U. S. 233, 246, 8 Sup. Ct. 106, 31 L. Ed. 132; Shaw v. Railroad Co., 100 U. S. 605, 611, 25 L. Ed. 757; Kerrison, Assignee, v. Stewart, 93 U. S. 155, 160, 23 L. Ed. 843.

The decision of the court in the suit setting aside the mortgage contains the following words:

"At the time this mortgage was executed neither the People's Trust Company nor any other person or persons paid to the Franklin Brewing Company any cash money for the mortgage; nor did any person or persons pay any money, furnish any labor, or give property to that corporation for either the mortgage or bonds in question."

Section 55 of the New York Stock Corporation Law (Consol. Laws, c. 59) reads:

"*Consideration for Issue of Stock and Bonds.*—No corporation shall issue either stock or bonds except for money, labor done or property actually received for the use and lawful purposes of such corporation."

These alleged bonds, therefore, are void, and I am of the opinion that this court has the power to enforce the effect of the decision in the action to set aside the mortgage.

Charles Doscher submits an affidavit in which he alleges on information and belief that the bonds may be necessary as evidence in any controversy arising between the legatees of Claus Doscher and the executors thereof. An order, therefore, may be entered, directing Henry Doscher, John Doscher, Charles Doscher, Gesine Engel, Mathilda C. Behre, Caroline Candidus, and the People's Trust Company to forthwith surrender up and deliver to Louis Karasik, Christopher L. Meyerdirks, and Thomas W. Maires, as trustees in bankruptcy of the Franklin Brewing Company, all of the 450 alleged coupon bonds made, issued, and delivered to the said persons, which were secured by the said mortgage of $450,000.

This order will contain a provision requiring the said trustees, upon canceling the said bonds, to retain them in their possession, so that they may be available in any litigation between the legatees of Claus Doscher and the executors thereof, as evidence.

Ex parte TINKOFF.

(District Court, D. Massachusetts. January 2, 1919.)

No. 1662.

1. ARMY AND NAVY ⟸20—SELECTIVE SERVICE ACT—EXEMPTIONS.
Where petitioner was admittedly within the class of persons liable for service under the Selective Service Act, he was within the jurisdiction of the draft boards, and his induction into the army was not void, even though his claim for exemption on account of the dependency of his wife was improperly denied.

2. ARMY AND NAVY ⟸44(2)—OFFENSES—DISCIPLINE—PERSONS SUBJECT.
Where petitioner, admittedly liable for service under the Selective Service Act, was inducted into service, his claim for exemption being improperly denied, he is subject to punishment for violation of army discipline.

At Law. In the matter of the petition of Paysoff Tinkoff for a writ of habeas corpus. Petition dismissed.

The United States Attorney, for the United States.
Defendant, pro se.

MORTON, District Judge. [1] The petitioner was admittedly within the class of persons liable for service under the Selective Service Act (Act May 18, 1917, c. 15, 40 Stat. 76). He was therefore within the jurisdiction of the draft boards. His only complaint is that he was not granted exemption because of the dependency of his wife on him for support. His claim therefor was heard and denied by the draft tribunals. He reported for service and was inducted into the Army in January, 1918. While in the Army he absented himself without leave and is now held by the Army authorities upon that charge.

[2] His induction into the Army was not void—although, if illegal, it might be set aside on proper proceedings. While in the Army the petitioner was bound to obey orders and observe its discipline. Neither his claim that he had been wrongfully held for service, nor his proceedings in the law courts, relieved him of that obligation, nor from the liability to punishment for disregarding it. The case is covered by In re Romano (Dist. Ct. Mass. January 10, 1918) 251 Fed. 762.

Petition dismissed without prejudice to petitioner's right to file another petition.

THE RINDJANI.

ADAM et al. v. GRIEP et al.

(Circuit Court of Appeals, Ninth Circuit. January 6, 1919.)

No. 3128.

TREATIES ⇐11—PROVISIONS—JURISDICTION—CLAIMS OF FOREIGN SEAMEN.

Under Convention between United States and the Netherlands May 23, 1878, art. 11, providing that the consular authorities of each nation shall have charge of controversies between masters and crews of vessels of their respective countries "to the exclusion of all local authorities," a court of admiralty of the United States, while given jurisdiction of suits for wages by Rev. St. § 4530, as amended by Seamen's Act March 4, 1915, § 4 (Comp. St. § 8322), is without jurisdiction of claims of Dutch seamen, who had left a Dutch vessel, for cost of transportation to Holland.

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

Suit in admiralty by Cornelius Griep and others against the Dutch steamship Rindjani; William Adam, master, claimant. Decree for libelants, and claimant and others appeal. Modified.

The libelants and intervening libelants, 17 in number, shipping in Holland on the Dutch steamship Rindjani, filed their libel for wages, alleging that under shipping articles signed at Rotterdam January 12, 1917, they shipped for a voyage to Batavia and return to Holland; that after sailing to Batavia, the master, in breach of the contract and without their consent, proceeded to San Francisco, where they demanded to be paid off and furnished with transportation back to Rotterdam, which demand being refused they demanded payment for one-half their then earned wages since the commencement of the voyage; and that in consequence of the refusal of both demands they as matter of law became entitled to the payment of all of their earned wages. Each asked for an award specifically covering the wages claimed, and prayed for the issuance of a monition, etc., and for a decree for the payment of the alleged wages due, with interest and costs, and that the ship be condemned and sold to pay the same, and that the respective libelants have such other and further relief as they were entitled to receive, including the surrender of passports, "and the issuing of proper certificates of discharge to each of said libelants, and transportation to said Rotterdam, or the equivalent thereof."

The interlocutory decree adjudged both the libelants and intervening libelants entitled to recover the balance of wages due them, as fixed by the shipping articles, "together with wages during the period necessarily employed in returning to the Netherlands, and the cost of transportation thither" —the case being referred to a commissioner to make the necessary computations from the then record and such further proofs as might be taken to enable him to ascertain the respective amounts.

The proctor for the libelants having, by stipulation, waived all claims for wages accruing subsequent to the filing of the respective libels, the commissioner found that 9 of the libelants had been overpaid in the aggregate amount of $62.60, and that the aggregate amount of wages still due 7 of the remaining libelants was $89.45, and that the amount of the cost for transportation of the 17 men from San Francisco to Rotterdam was $159.50 each. The amount of wages claimed by all of the libelants aggregated $1,040.20. The judgment in favor of the libelants was in the aggregate amount of $2,738.35, made up of the award of $2,711.50 representing the equivalent of the cost of their transportation from San Francisco to Rotterdam, and $26.85,

the aggregate amount of the unpaid wages, being the difference between the amount of the wages unpaid and the overpayments.

E. B. McClanahan and S. H. Derby, both of San Francisco, Cal., for appellants.

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

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge (after stating the facts as above). It is undisputed that the court below had jurisdiction over the claims of the libelants respecting their wages by virtue of the last proviso of section 4530 of the Revised Statutes, as amended by the Seamen's Act of March 4, 1915 (38 Stat. pt. 1, p. 1165 [Comp. St. § 8322]), which proviso reads:

"That this section shall apply to seamen on foreign vessels while in harbors of the United States, and the courts of the United States shall be open to such seamen for its enforcement."

It is strenuously contended, however, for the appellants, that as regards the claim for the transportation of the libelants from San Francisco to Rotterdam, embracing $2,711.50 of the total amount of the judgment, the court was, in the first place, without jurisdiction, and that to that extent the judgment should be reversed, and the case remanded to the court below, with directions to dismiss all of the libels in so far as they concern such transportation; and secondly, that, even conceding jurisdiction in the court, the case shows that all of the libelants secured other employment at San Francisco on other vessels shortly after leaving the Rindjani, and were, therefore, not entitled to transportation back to Rotterdam.

The shipping articles in question provide for:

"One voyage (or journey) from Rotterdam to Java, and thence to such other places as the master * * * shall decide, thence to return to a port in the Netherlands."

The case shows that at the time the articles were signed the voyage contemplated by all concerned was from Rotterdam to Batavia and way places, and thence back to the Netherlands. But before the ship arrived at Batavia, certain Dutch ships were torpedoed by German submarines, and upon reaching Batavia the master was instructed to go to San Francisco by way of Singapore, Hongkong, Nagasaki, Yokohama, and Honolulu, and from San Francisco back to Java.

Respecting the question of jurisdiction, it appears that the contract was made in Holland, was to be performed on a Dutch vessel, and that all of the parties to the action are Dutch. Apart from the contention of the appellants that by the Dutch law the construction of the shipping articles is a matter over which the consul general of the Netherlands is given exclusive jurisdiction, it is insisted that by treaty between this country and the Netherlands the decision of the questions arising under the contract was vested in the consul general. If so, it is, of course, needless to inquire into the provisions of the Dutch law.

In so far as the right of the libelants to transportation from San

Francisco to Rotterdam is concerned, it is based on their claim that the voyage to San Francisco constituted a clear breach of the contract of shipment which entitled them to discharge at the latter city. It is practically conceded that the first objection made by any of the libelants to that voyage occurred after the ship left Honolulu for San Francisco, and that after various talks between the captain of the ship and the men it was agreed that the right of the question should be submitted to and determined by the consul general of the Netherlands at San Francisco when the ship should reach that port; and so it was. We extract from the testimony of that officer as follows:

"Q. Will you now tell briefly of the meeting which you had at your office on that Saturday morning between the crew and the master of the Rindjani? * * * A. Well, at that meeting I followed the usual procedure by stating first to the captain and to the members of the crew that I did not represent the owners, neither did I represent the captain nor the members of the crew, but that I acted entirely in an impartial capacity, and if there was a dispute between the members of the crew and the captain, and they both desired to submit it to me, I would be willing to act as judge under the laws of the Netherlands, to sit as judge and if possible adjust their differences, to which they all agreed.

"Q. What was then done or said? * * * A. Well, I told the boys to take plenty of time and state all their grievances and tell me why they desired to break their contract with the captain, and several spoke, sometimes at the same time, and sometimes there were one or two who acted more or less by agreement as the spokesmen, and I inquired whether or not they had any cause for dissatisfaction on account of the food that was being furnished, and on account of the treatment received from the officers; but the boys declared themselves entirely satisfied as to that, and then I also inquired whether or not they were dissatisfied with the wages they received, and they said, 'No,' they were not, they were satisfied with the wages which they obtained, and then I inquired whether or not it was a fact that they desired to have American wages and were dissatisfied with Dutch wages. They said, 'No;' on the contrary, they had been paid a great deal more than had been agreed upon, as presents or a bonus. Then I wanted to know under those circumstances why they wanted to desert the ship, and they said they were afraid, they were afraid of being torpedoed, and I asked them if that was the only cause and they said, 'Yes;' and I remember then saying that it was almost unbelievable that Hollanders, who had been seafaring people for centuries back, would desert their flag while the English and French sailors took their chances on the places infested by submarines, while they were purposely placed on a safe run. But they stuck to their story and simply said they were afraid they would be torpedoed on account of the ship carrying articles which Germany has declared contraband, and under those conditions they did not care what was going to be paid or how it was going to be paid; they wanted to leave the ship.

"Q. What was the final result of that conference? * * * A. Well, at that time the final result was that I told them, as long as they had submitted their differences to the consul, that I could not accept that excuse for breaking their contract, and it was therefore my judgment that they were bound to stand by the ship and their captain.

"Q. Do you know whether, Mr. Torchiana, there was any subsequent action taken by these members of the Rindjani crew? A. Well, I know that afterwards the ship was libeled.

"Q. Do you know whether they left the ship or not? A. Yes— Oh, yes; they left the ship against the decision I gave, and then the captain declared them deserters, and articles of desertion were made up and forwarded to the Netherlands' authority in the home country.

"Q. Were those articles prepared in your office? A. Yes.

"Q. Who forwarded them to the home government? * * * A. They were forwarded through the consular mail to the Netherlands.

"Q. Have you a copy of the notifications of desertion or whatever you call the document? A. I have a memorandum of that, the office memorandum.
"Q. Is it a permanent record of your office? A. Yes."

The convention between the United States and the Netherlands of May 23, 1878 (21 Stat. 662), provided in its article 11 as follows:

"Consuls general, vice consuls general, consuls, vice consuls and consular agents shall have charge of the internal order on board of the merchant vessels of their nation, to the exclusion of all local authorities. They shall take cognizance of all disputes and determine all differences which may have arisen at sea, or which may arise in port, between the captains, officers, and crews, including disputes concerning wages and the execution of contracts reciprocally entered into. The courts or other authorities of either country shall on no account interfere in such disputes unless such differences on board ship be of a nature to disturb the public peace on shore or in port, or unless persons other than the officers and crew are parties thereto.
"The consuls general, vice consuls general, consuls, vice consuls and consular agents shall be at liberty to go, either in person or by proxy, on board vessels of their nation admitted to entry, and to examine the officers and crews, to examine the ships' papers, to receive declarations concerning their voyage, their destination and the incidents of the voyage; also to draw up manifests and lists of freight or other documents, to facilitate the entry and clearance of their vessels, and finally to accompany the said officers or crews before the judicial or administrative authorities of the country to assist them as their interpreters or agents."

In its sixteenth article it provided that the convention should remain in force for five years from the date of the exchange of ratifications (July 31, 1879), and further provided that:

"In case neither of the contracting parties shall have given notice twelve months before the expiration of the said period, of its desire to terminate this convention, it shall remain in force for one year longer, and so on from year to year, until the expiration of a year from the day on which one of the parties shall have given such notice for its termination."

So far as appears, that treaty had not been abrogated, but was in force, at the time the consul general of the Netherlands passed upon the controversy between the present libelants and the captain of the Rindjani, since no provision of the Seamen's Act of March 4, 1915, already referred to, has any bearing on the point now under discussion.

The provisions of article 11 of the convention, above set out, are in effect the same as those of article 10 of the treaty between the United States and the King of Prussia of May 1, 1828 (8 Stat. 382), which was the subject of consideration in The Elwine Kreplin, 9 Blatchf. 438, Fed. Cas. No. 4,426, in which case it was held that that treaty required that the matter then in dispute—a matter of wages in that case—was one for the determination of the consular officer, and that the United States courts had no jurisdiction of it.

That ruling was followed by Judge Deady in the case of The Marie (D. C.) 49 Fed. 286, in the case of The Burchard (D. C.) 42 Fed. 608, in The Welhaven (D. C.) 55 Fed. 80, and in other cases there cited.

Our conclusion is that the court below had no jurisdiction over the question as to the right of the libelants to transportation from San Francisco to Rotterdam, and that it is therefore unnecessary to consider whether, if it had such jurisdiction, the libelants would be en-

titled to the cost thereof in view of their securing other employment on other vessels so soon after leaving the Rindjani.

It results that the case must be and is remanded to the court below, with directions to so modify the judgment as to deny the cost of transportation of any of the libelants or intervening libelants from San Francisco to Rotterdam, for lack of jurisdiction over that subject.

CASTLE v. LEWIS, Sheriff.

TULK v. SAME.

(Circuit Court of Appeals, Eighth Circuit. December 4, 1918.)

Nos. 5073, 5074

1. HABEAS CORPUS ⟸45(3)—FEDERAL COURTS—JURISDICTION.

When a person is in custody under process of a state court for an alleged offense against the laws of the state, and it is claimed that he is held in violation of the Constitution or of a law or treaty of the United States, or for an act done or omitted pursuant to a law of the United States, the federal courts, under Rev. St. §§ 751–753 (Comp. St. §§ 1279–1281), have plenary jurisdiction to inquire into the cause of such confinement by means of habeas corpus and to discharge the petitioner.

2. HABEAS CORPUS ⟸111(1)—FEDERAL COURT—DISCHARGE.

While the federal court or judge has the jurisdiction and power, under Rev. St. §§ 751–753 (Comp. St. §§ 1259–1281), to inquire into the cause of and to discharge one confined under the process of a state court, who claims that he is held under the circumstances above stated, the time and method of the exercise of that power are within the wise judicial discretion of the court or judge, in view of the certainty or uncertainty with which the facts are established, in view of the nature of the case, of whether it involves an alleged violation of the Constitution or a confinement for an act done in pursuance of a law of the United States, of whether it is a case of urgency, where a failure to discharge the prisoner immediately will or may substantially delay the enforcement of the laws of the United States or seriously interfere with the operation of its government or the administration of its affairs, or it is a case which really involves only the question whether the issues presented shall first be tried in the federal or in the state court.

3. HABEAS CORPUS ⟸45(4)—FEDERAL COURTS—JURISDICTION.

If an officer or soldier of the United States is in custody under the process of a state court for an alleged offense against the laws of a state, for an act which he claims was done by him in his official capacity in pursuance of the laws of the United States, such as the shooting of a person he was trying to arrest, and at the close of the hearing under the writ of habeas corpus the facts are admitted or clearly proved, either that his confinement is in violation of the Constitution or of a law or treaty of the United States and that the state court is without jurisdiction to try him for the offense charged against him, or that he had authority from the United States to arrest persons guilty of the offense for whose commission he was trying to make an arrest, that he had reasonable cause to believe and did honestly believe that the person he sought was guilty of the offense for which he was trying to arrest him, that in attempting to make the arrest he acted within the scope of his authority and used no more force than he honestly and reasonably believed was necessary in order to make the arrest, and that the case is one

of urgency, in which the delay of a trial by the state court will seriously interfere with the enforcement of the laws of the United States or the operation of its government, the court or judge may and should immediately discharge the prisoner without waiting for such a trial.

But, if the case does not fall within one of the exceptional classes of cases above enumerated, the general rule and settled practice is for the court or judge to refuse to interfere by writ of habeas corpus with the custody of the state court until after the trial of the prisoner in that court, although it has the power and jurisdiction to discharge earlier.

4. ARREST ⟸63(4)—FELONY—ARREST WITHOUT WARRANT.
While an officer may arrest for a felony without warrant he may not so arrest arbitrarily, and it is indispensable to a justification of arrest of one actually innocent, that the circumstances were such that a person of ordinary ability would have believed that the party was guilty.

5. HABEAS CORPUS ⟸85(1)—EVIDENCE.
Where federal officers shot one of a party in attempting to arrest such persons in Osage county, Okl., for suspected violation of laws relating to intoxicating liquor, evidence *held*, in habeas corpus proceedings in the federal court, to show that none of the party, in the presence of the officers, committed the offense of introducing intoxicating liquor into the county.

6. INDIANS ⟸38(5)—INTRODUCTION OF INTOXICATING LIQUORS.
The prima facie presumption of the unlawful introduction of intoxicating liquor into Indian Territory, etc., declared by Act May 18, 1916, § 1 (Comp. St. § 4144a), may be rebutted by evidence to the contrary.

7. HABEAS CORPUS ⟸113(12)—APPEAL—PRESUMPTION.
It is a prima facie presumption of law that the finding of the trial judge in habeas corpus proceedings, who heard and saw the witnesses, was correct.

8. ARREST ⟸68—FORCE.
Conceding that petitioners were authorized to arrest without warrant for introducing intoxicating liquor into Oklahoma, that authority includes the lawful power to use only such force as an ordinarily prudent and intelligent person, with knowledge and in situation of arresting officer, would have deemed necessary.

9. ARREST ⟸68—FORCE—EXTENT.
Where federal officers desired to arrest several suspected of introducing intoxicating liquor into Oklahoma, *held* that, if persons were known to live in vicinity, etc., officers were not warranted in shooting into automobile in which such persons were riding, and taking the risk of, and actually killing, one of the party.

10. HABEAS CORPUS ⟸111(1)—DISCHARGE—DISCRETION.
In a proceeding under Rev. St. §§ 751–753 (Comp. St. §§ 1279–1281), for habeas corpus to secure release of federal officials, who killed one whom they were attempting to arrest on theory he and his companions were guilty of introducing intoxicating liquor into Osage county, Okl., *held*, that refusal to discharge such officers from custody of state officials, to which they had been committed for violation of state law, was not an abuse of discretion.

Appeal from the District Court of the United States for the Western District of Oklahoma; John H. Cotteral, Judge.

Petitions by D. F. Castle and by Sam W. Tulk for writs of habeas corpus and for a discharge from the custody of Seth M. Lewis, Sheriff of Osage County, Okl. From judgments dismissing and denying the petitions, petitioners appeal. Affirmed.

John A. Fain, U. S. Atty., of Lawton, Okl., and S. M. Rutherford, of Muskogee, Okl., for appellants.

T. J. Leahy and Corbett Cornett, both of Pawhuska, Okl. (C. S. Macdonald, of Pawhuska, Okl., on the brief), for appellee.

Before SANBORN, CARLAND, and STONE, Circuit Judges.

SANBORN, Circuit Judge. These are appeals from judgments of Hon. John H. Cotteral, United States District Judge, that the petitions of D. F. Castle and Sam W. Tulk, for writs of habeas corpus and for a discharge from the custody of Seth M. Lewis, sheriff of Osage county, Okl., be dismissed and denied.

An information was filed in the district court of Osage county by the county attorney of that county, which charged that Castle, Tulk, and William Bryant, on April 25, 1917, shot and murdered Charles Mosier. Castle and Tulk had been arrested and arraigned, had pleaded not guilty, and, in default of bonds of $5,000 each, fixed by the court, had been committed to the county jail in the custody of Lewis, the sheriff of the county. Thereupon Castle and Tulk presented to Judge Cotteral petitions for writs of habeas corpus, in which they alleged that they were on April 25, 1917, officers of the United States, duly authorized under the laws thereof to arrest persons for the offense of introducing whisky into Osage county, Okl., which was Indian country; that on that day Charles Mosier, Henry Mays, Roy Tinker, and Charles Roberts were engaged in transporting whisky in an automobile in the presence and within the knowledge of the petitioners into Osage county, which was Indian country, in violation of the laws of the United States; that the petitioners in the discharge of their official duty endeavored to arrest these violators of the law; that they called upon them to halt and to submit to arrest, but they refused and fled; that while they were fleeing the petitioners fired several shots from their guns at the departing automobile, to disable it, so that they could arrest its occupants; that they did not intend to shoot or injure Mosier; and that whatever acts they did were done in the discharge of their official duties as officers of the United States and by authority of its laws. Upon the filing of these petitions Judge Cotteral issued orders upon the sheriff to show cause why writs of habeas corpus should not be issued, and why Castle and Tulk should not be discharged from his custody. The sheriff answered that he held them under a commitment issued by the district court of Osage county, Okl., which commanded him to confine them in the county jail under the charge of murdering Mosier, until they should be legally discharged therefrom. Upon the presentation of this response the cases went to final hearing, testimony that occupies 107 pages of the printed record was introduced, and the court dismissed the petitions and refused to discharge the petitioners upon the merits of their cases.

[1] When a person is in custody under the process of a state court for an alleged offense against the laws of such state, and it is claimed (a) that he is in custody in violation of the Constitution, or of a law or treaty of the United States, or (b) for an act done or omit-

ted to be done by him in pursuance of a law of the United States, the District Courts of the United States and the judges thereof have plenary jurisdiction to inquire into the cause of such confinement by means of the writ of habeas corpus, and to discharge the petitioner if his detention is in violation of the Constitution or of a law or treaty of the United States, or if he is in custody for an act done or omitted to be done in pursuance of a law of the United States. United States Revised Statutes, §§ 751, 752, 753 (2 United States Compiled Statutes 1916, §§ 1279, 1280, 1281); Ex parte Royall, 117 U. S. 241, 248, 6 Sup. Ct. 734, 29 L. Ed. 868.

[2] It does not follow, however, from the grant of this jurisdiction, that the duty is imposed upon the court or its judges to discharge the petitioner in every case immediately after the hearing, even if the court or the judge is of the opinion that the confinement is unwarranted. The injunction of the statute is to hear each case on the writ of habeas corpus summarily and thereupon "to dispose of the party as law and justice may require." This direction leaves to the wise judicial discretion of the court, or judge, the time and mode in which the granted power shall be used. That discretion should be so exercised "in the light of the relations existing, under our system of government, between the judicial tribunals of the Union and of the states, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution" (117 U. S. 251, 6 Sup. Ct. 740, 29 L. Ed. 868), in the light in each case, of the nature of that case, whether it involves an alleged violation of the Constitution or a confinement for an act done in pursuance of a law of the United States, whether it is a case of urgency where a failure to discharge the petitioner immediately will or may substantially delay the enforcement of the laws of the United States, or seriously interfere with the operation of its government or the administration of its affairs, or a case which really involves only the question whether the issues presented shall be first tried in the federal court or in the state court, and in the light of the clearness and certainty with which the material facts are established, whether they are admitted or proved beyond doubt, or are involved in uncertainty and the subject of conflicting testimony which naturally invokes the verdict of the jury.

[3] If an officer or soldier of the United States is in custody under the process of a state court for an alleged offense against the laws of a state for an act which he claims was done by him in his official capacity, in pursuance of the laws of the United States, such as the shooting of the person he was trying to arrest, and at the close of the hearing under the writ of habeas corpus the facts are admitted or clearly proved (a) that his confinement is in violation of the Constitution or of a law or treaty of the United States, and that the state court is without jurisdiction to try him for the offense charged against him (Ex parte Siebold, 100 U. S. 371, 376, 25 L. Ed. 717; In re Neagle, 135 U. S. 1, 10 Sup. Ct. 658, 34 L. Ed. 55; In re Waite [D. C.] 81 Fed. 359, 362, 371, 372; Campbell v. Waite, 88 Fed. 102,

107, 31 C. C. A. 403; In re Loney, 134 U. S. 372, 10 Sup. Ct. 584, 33 L. Ed. 949; In re Fair [C. C.] 100 Fed. 149), or (b) that he had authority from the United States to arrest persons guilty of the offense for whose commission he was trying to make an arrest, that he had reasonable cause to believe and did honestly believe that the person he shot was guilty of the offense for which he was trying to arrest him, that he acted in attempting to make the arrest within the scope of his authority and used no more force than he honestly and reasonably believed was necessary in order to make the arrest, and that the case is one of urgency in which the delay of a trial by the state court will seriously interfere with the enforcement of the laws of the United States or the operations of its government, the court or judge may and should immediately discharge the petitioner without waiting for such trial (Ohio v. Thomas, 173 U. S. 276, 283, 19 Sup. Ct. 453, 43 L. Ed. 699; United States v. Fuellhart [C. C.] 106 Fed. 911, 914; In re Laing [C. C.] 127 Fed. 213, 217; United States v. Lipsett [D. C.] 156 Fed. 65). The cases, however, which present such facts, are exceptional, and the general rule and settled practice of the courts and judges of the United States, in cases which do not fall within the classes just enumerated, is to so exercise their discretion, in view of the delicate relation of the national and the state courts, as to refuse to interfere by writ of habeas corpus with the custody of the state court, at least until after the trial of the petitioner therein. Ex parte Royall, 117 U. S. 241, 251, 6 Sup. Ct. 734, 29 L. Ed. 868; Drury v. Lewis, 200 U. S. 1, 6, 8, 26 Sup. Ct. 229, 50 L. Ed. 343; In re Lincoln, 202 U. S. 178, 181, 182, 26 Sup. Ct. 602, 50 L. Ed. 984, and cases there cited. The judge below, after hearing the evidence in the cases in hand, was of the opinion that they fell under the general rule, and in the exercise of his discretion he refused to discharge the petitioners before their trial in the state court, and the question now presented is: Was his action erroneous or an abuse of his discretion?

The only ground on which Castle and Tulk alleged in their petitions that they were entitled to a discharge from the custody of the state court was that they were officers of the United States, who had the authority under its laws, and upon whom the duty was imposed thereby, to arrest persons introducing whisky into Osage county in their presence, that Mays, Tinker, and Roberts were such persons, that the petitioners tried to arrest them, that they fled in an automobile, that it was necessary for the petitioners, in order to arrest the occupants of the automobile, to fire their guns at it, that they did so for that purpose, with no intent to shoot or injure its occupants, and that all their acts were done in their official capacity, in pursuance of the laws of the United States.

[4, 5] Conceding, without deciding, that the petitioners were authorized under the laws of the United States to arrest without a warrant persons who upon reasonable grounds they honestly believed were committing in their presence the offense of introducing intoxicating liquors into Osage county, that they tried to arrest Mays, Tinker, and Roberts as such persons, that the latter fled, and that the peti-

tioners fired at the automobile in which they went to stop it, so that the petitioners could make the arrest, the burden was still upon them to prove, by at least a fair preponderance of the testimony, three other facts, in order to entitle them to their discharge: First, that they had reasonable cause to believe and honestly did believe that Mays, Tinker, and Roberts were introducing intoxicating liquor into Osage county in their presence; second, that the petitioners honestly and with reason believed that, in order to arrest them therefor, it was necessary for the petitioners to fire their guns at the departing automobile which held them, and to take the chance of shooting its occupants; and, third, that the confinement the petitioners are suffering and will be likely to endure while their cases proceed to trial and disposition in the state courts will so seriously interfere with the enforcement of the laws of the United States or with the operations of its government that these are cases of emergency or urgency, which justify and require a departure from the general rule and a discharge of the petitioners before their trials in the state court.

Henry Mays was a livery driver, who lived at Pawhuska, in Osage county, with his wife and two children, owned his automobile, and carried passengers for hire. He had lived in Pawhuska for many years. Tinker was a young man 24 years old, who had lived in Pawhuska all his life, and was on April 25, 1917, a soldier. Mosier was a young soldier, who had lived in Pawhuska many years. Roberts was a young soldier. About 2 o'clock in the afternoon of the day of Mosier's death, he hired Mays to take himself, Tinker, and Roberts into the country. After they had been seated in the automobile, Mosier asked Mays to drive them to Charles Johnson's place, which was in Osage county, about nine miles east of Pawhuska. Mays did so. There Mosier and Tinker bought three quarts of whisky, and returned to the car, and Mays, Mosier, Tinker, and Roberts started therein back to Pawhuska. When they were about five miles east of their homes, they passed Lewis, the sheriff, and his car, which was on the road, and Castle, Tulk, and Bryant, who fired their guns at Mays' car and killed Mosier. Mays and the other occupants of his car did not go out of the county that day, and they were not introducing liquor into the county. Some time in the afternoon of that day Lewis had information that intoxicating liquors were expected into Osage county. He testified that he—

"just had information that there was a car of whisky coming in, probably two cars. Q. Didn't have any information as to who it was going to be? A. No, sir; I did not. I didn't know."

He told Castle and Tulk he had this information, and invited them to go in his automobile with him out on the Bartlesville road, which was the main travelled road east from Pawhuska, over which Mays had gone, and over which many automobiles passed daily, and over which intoxicating liquors were usually brought into Osage county. Lewis was, and had been for at least five years, acquainted with Mays, Mosier, and Tinker. Castle testified that he had known Mays for five years, that he had arrested him once for introducing liquor, that he had found liquor in his car, and that Mays had a reputation

of hauling liquor; but Mays testified that he had never been convicted of introducing liquor, and that he had not been hauling it. The officers went out on the Bartlesville road about four or five miles, and then, as Tulk testified:

"We laid in wait—got off into the lane there running north and south, and we laid in wait until we seen the car approaching."

They then took their car out onto the road, and as Mays' car approached they recognized Mays and his car, and as he passed them, and also after he passed them, they fired into the car, and after the car had gone a few rods past Lewis' car a shot struck and killed Mosier. The facts which have been recited thus far are undisputed. Some of the officers testify that as Mays' car approached them one of the occupants broke a bottle over the side of the car which they thought was whisky. The living occupants of Mays' car testified that no bottle was so broken before they passed the officers. Mays' car was running quite fast as it passed the car of Lewis, and Lewis' motor was also running. Mays testified that his brake was out of order, so that he could not have stopped quickly, if he had received notice to do so, but that he received no such notice. The officers testified that they held up their hands and called upon Mays to stop. The living occupants of Mays' car testified that they saw no motion and heard no call to stop, and that all they heard was a command from one of the officers as they passed, to kill them all, that Mosier then cried out, "For Christ's sake get out from here, they are going to kill us all," and Mays speeded up his car, and Mosier was shot.

The officers testified that none of them gave the command to kill; they also testified that they honestly believed that the occupants of Mays' car were introducing liquor into Osage county; and their counsel argue that they had reasonable ground for that belief, because the road on which Mays was driving was the road over which liquor was usually brought into the county, because the possession of intoxicating liquor in that county is prima facie evidence of its unlawful introduction (Act May 18, 1916, c. 125, § 1, 39 Stat. 124 [Compiled Statutes 1916, § 4144a]), and because some of them testified that they saw a bottle they thought contained whisky broken over the side of the car as it approached, and Lewis had information that one or two loads of whisky were coming into Osage county. But the fact is proved, without contradiction, that the occupants of Mays' car were not introducing liquor into Osage county. The alleged breaking of a bottle of liquor over the side of the car before it passed the officers is denied, and it is not established by the preponderance of the testimony. There is no evidence whatever who gave Lewis his information that liquors were to be introduced into the county, and he testified that he had no information that the occupants of Mays' car were expected to introduce it. If, therefore, his information justified the arrest of the occupants of Mays' car and the shooting into it, it would have equally justified the arrest of the occupants of any other car that happened first to come along the road at like speed with that of Mays' car, while these officers were lying

in wait. In Chandler v. Rutherford, 101 Fed. 774, 778, 43 C. C. A. 218, 221, this court, commenting on a similar situation said:

"It will be observed, however, that no offense had been committed in the deputy marshal's presence when he attempted to arrest the plaintiff, and that such knowledge as he had of an offense having been committed was derived wholly from hearsay. * * * When an officer seeks to justify an arrest without a warrant under a statute like the one now under consideration, and the act for which the arrest was made was not committed in his presence, it is manifest that he must show that he acted on information such as would justify a reasonable man in believing that the particular person arrested was guilty of a felony."

Section 5654 of the Revised Laws of Oklahoma of 1910, provides that a peace officer may, without a warrant, arrest a person:

"First. For a public offense committed * * * in his presence. * * * Third. When a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it."

The general rule is that, while an officer may arrest for a felony without a warrant under certain circumstances, he may not so arrest arbitrarily, or on a mere belief or suspicion that the party he arrests is guilty of the felony. It is indispensable to a justification, when the party he arrests or seeks to arrest is actually innocent, not only that the officer honestly believed or strongly suspected that the person he arrested or sought to arrest was guilty of the felony, but also that the facts and circumstances within his knowledge were such that a reasonable person of ordinary ability and intelligence, knowing those facts and circumstances and acting without prejudice or passion, would have believed or strongly suspected that the party arrested, or the party whom the officer sought to arrest, was either guilty of the felony or implicated in it. 5 Corpus Juris, 416, § 461, and notes and authorities there cited. In the case in hand the evidence is undisputed, not only that the occupants of Mays' car did not, in the presence of the officers, commit the offense of introducing liquor into Osage county, for which the petitioners alleged in their petition they were seeking to arrest them, but that they were not guilty of committing an offense at all.

[6, 7] The prima facie presumption of the introduction of the liquor which arose by virtue of the statute, which was enacted to throw the burden of proof upon the trial of cases for the introduction of the liquor upon those in possession of the liquor in the first instance, was met and swept away by the undisputed evidence of all of the witnesses upon the subject that Mosier and Tinker obtained the liquor on that day within the county, and that none of the occupants of the car introduced any from without it. The issue, whether or not, at the time of the attempted arrest and shooting, the officers had any knowledge that there was whisky in the car, is conditioned by conflicting testimony, the preponderance of which is not with the officers. In this state of the evidence the judge below failed to find that the facts and circumstances within the knowledge of the officers at the time of their attempted arrest and shooting were such that a reasonable person of ordinary intelligence and ability, knowing these facts and circumstances, would have been led to believe or

strongly to suspect that any of the occupants of Mays' car were guilty of the offense of introducing whisky into Osage county. There is a prima facie presumption of law that the finding of the judge who heard and saw the witnesses was correct, and a careful reading and consideration of the evidence has failed to satisfy that in making that finding the judge fell into any error of law or made any mistake of fact.

[8, 9] The next question is: Was there any error of law or mistake of fact, in that the judge failed to find under the evidence that the petitioners were acting within the scope of their authority in shooting into Mays' car and taking the chance of killing some of its occupants. Conceding, for the purpose of considering this issue only, that the petitioners were authorized to arrest the occupants of Mays' car without a warrant for the felony of introducing liquor into Osage county, that authority included the lawful power to use such force as they then had reasonable cause to believe, and in the exercise of their sound discretion they did honestly believe, was necessary to make the arrest; but it included the right to use no more, and the use of any greater force was beyond the scope of their authority, unauthorized, and without justification. Here, too, the measure of necessary force is that which an ordinarily prudent and intelligent person, with the knowledge and in the situation of the arresting officer, would have deemed necessary. 5 Corpus Juris, 424, § 59; 1 Bishop's New Criminal Procedure, § 159. The officers testified that as Mays' car approached them they raised their hands and called "Halt!" The living occupants of Mays' car testified that they saw no motion and heard no call to stop. The officers and occupants of Mays' car testified that the former fired the first shot into the side of Mays' car as it passed them; the living occupants of the car testified that as they passed all they heard was a command to kill them all as the shooting commenced. The officers testified no such command was given, but the witnesses agree that the shooting continued for some time after the car passed, and that from eight to twenty shots were fired. Several of these shots struck the automobile; some passed through the back of it above the seat; some passed over it, and struck in the road ahead of it, as it was going up a hill. The officers testified that they fired into the machinery below the body of the car and at the tires, for the purpose of stopping the car, and that they did not intend to injure the occupants.

The officers knew Mays, Mosier, and Tinker; they recognized them, or some of them, as Mays' car approached, and recognized that the car was Mays'; they knew that they lived in Pawhuska, toward which city they were going, and that they had lived there for many years. Mays was a married man, and had two children there. The occupants of Mays' car had no weapons, and had not resisted arrest; they testified they did not know that the officers wanted them to stop or wanted to arrest them until after the shooting. They were not fugitives from justice; they were not violent men; they were not itinerants or strangers. So it is that the evidence as to the sayings and doings of the parties when Mays' car passed the officers

presents a substantial conflict as to what was said and done by the officers, that invokes the consideration of a jury, and the facts that all the occupants of the car, except Roberts, were known by the officers to be settled residents and citizens of Pawhuska, and that they were going towards their homes there, whence the officers themselves came, render it difficult to conclude that a person of ordinary prudence and intelligence, knowing the facts and circumstances which these officers knew, could have had cause to believe, if he were in their situation, or could have honestly believed, that he could not have accomplished the arrest of the occupants of Mays' car in Pawhuska, which was only five miles away, or that it was necessary, in the exercise of sound discretion, in order to make their arrest, to fire into the automobile and take the dangerous chances of injuring or killing some of its occupants. The judge below was unable to reach that conclusion, and no error or mistake in his finding here is discovered.

[10] The single question remains: Was the judge below guilty of an abuse of his discretion in concluding that these were not such cases of urgency as required him to discharge the petitioners before their trial in the usual course of procedure in the state court? The contention that every case wherein an officer of the United States, in custody under an order of a state court for trial for an alleged offense against the laws of the state, claims that the act charged against him was as done or omitted by him while acting in his official capacity in pursuance of a law of the United States, is such a case of urgency as requires a federal court or judge to discharge the officer upon hearing of the writ of habeas corpus before his trial in the state court, is answered by the decision of the Supreme Court in Drury v. Lewis, 200 U. S. 1, 6, 8, 26 Sup. Ct. 229, 50 L. Ed. 343. The time and mode of disposing of such officers is subject to the discretion of the federal courts and judges.

The petitioners were committed to the custody of the sheriff on the charge of murder, and were so held in custody in default of bonds of $5,000 each, fixed by the state court. These facts constitute the only evidence or pleading that these were cases of urgency, that the enforcement of the laws of the United States or the operations of the national government would be injuriously delayed, or seriously or at all disturbed, by reason of their confinement, or the delay of their discharge until after their trials by juries in the regular course of the proceedings of the state court, and under these circumstances this court is unwilling to hold, in view of all the facts and circumstances to which reference has been made, that the judge below was guilty of any abuse of discretion in his refusal to discharge them before such trials.

Let the judgments and orders in these cases, which dismissed the writs of habeas corpus and denied the applications for the discharge of the petitioners from the custody of the sheriff, be affirmed, with costs.

CHICAGO, M. & ST. P. RY. CO. et al. v. DES MOINES UNION RY. CO. et al.

DES MOINES UNION RY. CO. et al. v. CHICAGO, MILWAUKEE & ST. P. RY. CO. et al.

(Circuit Court of Appeals, Eighth Circuit. May 23, 1918. Rehearing Denied October 28, 1918.)

Nos. 4885, 4886.

1. RAILROADS ⟸80—TERMINAL PROPERTY—CONVEYANCE TO TERMINAL COMPANY.
   Articles of incorporation of a terminal railroad company, organized by three railroad companies, each of which owned property and franchises in a city, to take over and operate such property for terminal purposes, construed in connection with a prior contract between the railroad companies for joint use of the property, and with subsequent conveyances of the same to the terminal company in exchange for its bonds, *held* to vest the latter with the entire legal title, leaving the interest of the railroad companies therein only that represented by their stock.
2. RAILROADS ⟸118—POWER TO TRANSFER PROPERTY—CONVEYANCE TO TERMINAL COMPANY.
   The rule that public carriers may not impair their public usefulness by vitally maiming their lines has no application to conveyances by railroad companies of terminal portions of their lines to a terminal company, whereby a more efficient and economical operation of the property is secured.
3. RAILROADS ⟸19—ILLEGAL AMENDMENT OF CHARTER—ESTOPPEL.
   Where an amendment to the articles of incorporation of a terminal company, although not legally adopted, was acquiesced in by the parties in interest all of whom took part in its adoption, and was treated as valid and in force for 17 years, during which time some acquired additional interests from others, the latter are, as between them, estopped to question the validity of the amendment.
4. RAILROADS ⟸139—CONTRACTS WITH TERMINAL COMPANY—CONSTRUCTION.
   Under contracts between three railroad companies and a terminal company organized by them, providing that, after deducting the amount received from other companies for use of the terminal property, the cost of its maintenance and operation should be paid monthly by the three companies, such companies *held* entitled to a surplus accumulated by the terminal company from sums so received from outside companies for rentals and switching charges and not applied on cost of maintenance and operation all of which was charged to and paid by the three companies.

Hook, Circuit Judge, dissenting in part.

Appeal from the District Court of the United States for the Southern District of Iowa.

Suit by the Chicago, Milwaukee & St. Paul Railway Company and others against the Des Moines Union Railway Company and others. From the decree, both parties appeal. Modified.

Burton Hanson, of Chicago, Ill. (J. C. Cook, of Cedar Rapids, Iowa, on the brief), for complainant Chicago, M. & St. P. Ry. Co.

J. L. Minnis, of St. Louis, Mo., for complainant Wabash R. Co.

J. L. Parrish, of Des Moines, Iowa, and F. W. Lehmann, of St. Louis, Mo. (W. E. Miller, of Des Moines, Iowa, on the brief), for defendants.

Before HOOK, SMITH, and STONE, Circuit Judges.

STONE, Circuit Judge. This is a bill by the Chicago, Milwaukee & St. Paul Railway Company and the Wabash Railroad Company against the Des Moines Union Railway Company, Frederick M. Hubbell, Frederick C. Hubbell, and F. M. Hubbell & Son. The complainants are railways passing through the city of Des Moines, requiring the use of terminal and depot facilities. Defendants are a terminal company at Des Moines and the individual owners of five-eighths of its outstanding capital stock. Complainants, except for eight qualifying shares, own the other three-eighths of such stock, the Wabash one-eighth, and the Milwaukee two-eighths. Complainants are now using the facilities of the terminal company under a 30-year contract, dated May 10, 1889, but related back to May 1, 1888, and expiring May 1, 1918. As holders of the stock control in the terminal company, the Hubbells have declared that, if complainants desire to use the terminals after the above date, they can do so only under such contract as may be made therefor. Believing that they have (aside from stock holdings) controlling interests and rights in the terminal property, complainants have brought their bill. The main object of the suit is to have determined the rights of the three companies in respect to the terminal property and operation. A subsidiary, but not unimportant, controversy is present regarding the right to several hundred thousand dollars accumulated from rentals, privileges and switching service by the terminal company, not arising from the use by nor service to the complainants.

The complainants allege that they are the real owners of the terminal property, and that defendant company simply holds the title in trust for them, or that the terminal ownership is subject to an easement in their favor, which gives them the right to use the property in perpetuity for terminal purposes, upon payment of the actual cost of operation, maintenance and taxes. The claim of the defendants is that the defendant company is the sole owner of the entire title to the terminal property, and also that complainants are estopped from questioning such title.

The decree of the court below adjudged that the defendant company had complete title to the terminal property, and that complainants had no interest therein, except as stockholders of the defendant company. But the court held that, growing out of provisions in that company's articles of incorporation, it owed to complainants and their successors a corporate obligation to furnish them terminal service upon equitable terms, and that such obligation was paramount to any obligation to serve other roads. From this latter provision in the decree defendants have prosecuted a cross-appeal. As to the accumulated earnings, the court below held that this fund belonged to the defendant company, and that the complainants had no interest therein, other than as shareholders in the defendant company. Complainants have appealed from the entire decree.

The determination of the main controversy is the definition of the legal effect of certain instruments and acts of the parties or their predecessors in interest. The determination of the right to the ac-

cumulated earnings depends upon the construction of the contract (dated May 10, 1889) under which the parties are now operating.

The Main Controversy.

[1] A brief history is essential to any proper understanding and determination of the case. As to that part of their respective railways entering Des Moines, the Milwaukee is the remote successor of the Des Moines Northwestern Railway Company and the St. Louis, Des Moines & Northern Railway Company, while the Wabash is the remote successor of the Des Moines & St. Louis Railway Company. Prior to 1881 the Wabash, St. Louis & Pacific Railway Company was the owner of a railway line extending from St. Louis northwesterly to Albia, Iowa, about 68 miles southeasterly from Des Moines. J. S. Polk, J. S. Clarkson, F. M. Hubbell, and J. S. Runnells were at the same time interested in a short narrow-gauge line, the Des Moines Northwestern Railway Company, extending northwesterly from Waukee, a town about 15 miles westerly from Des Moines. Desiring to connect these lines at Des Moines, the Wabash and the above individuals entered into a contract December 8, 1880, providing for the organization by these individuals of a new company, the Des Moines & St. Louis Railway Company, and the building by it of a standard-gauge line from Albia to Des Moines, with funds furnished by the Wabash Company. On the same day the Wabash Company entered into contract with the Des Moines Northwestern Railway, with the expressed object of increasing and securing the "through" traffic of that line. This it sought to do by agreeing to furnish funds for the extention of that line northward and westward, and by agreeing to provide a connection from Waukee with the contemplated Des Moines & St. Louis Railway tracks to be laid in Des Moines. In April, 1881, yet another company, the St. Louis, Des Moines & Northern Railway Company, was organized by the above individuals, and soon began constructing a narrow-gauge line from the northwest to Des Moines. A part of this line formed a link between Waukee and Des Moines, over which the Northwestern shortly thereafter secured running rights.

During the year 1881 and thereafter, the acquirement of right of way in Des Moines and the construction work there proceeded; the land being taken in the name of James F. How, James F. How, trustee, G. M. Dodge, St. Louis, Des Moines & Northern Railway Company, or the Des Moines & St. Louis Railway Company; that taken by How, or How, trustee, being paid for by the Wabash.

With the three lines entering or about to enter Des Moines and the land being acquired for terminals, the time and necessity for some terminal arrangement had arrived. The contract of January 2, 1882, was executed by the three railways and by the individuals (Dodge and How) in whose names part of the land had been taken. This contract is the basis of complainants' claims upon the main issue in the case. They contend that titles and rights defined therein remain unchanged

in essentials. Defendants claim later departures radically affected such titles and rights as are to be found in the contract.

This contract, omitting signatures, was as follows:

"This agreement, made at the city of New York, the 2d day of January, 1882, by and between the Des Moines & St. Louis Railway Company, the Des Moines Northwestern Railway Company, and the St. Louis, Des Moines & Northern Railway Company, and the several individual signers hereto, witnesseth:

"First. The companies above named are engaged in the construction of railways converging at the city of Des Moines, and have heretofore agreed upon the purchase, construction and maintenance at their joint expense for terminal facilities in the city of Des Moines to be held and used in common as hereinafter provided.

"Second. In pursuance of said agreement, various purchases have been made of real property in the city of Des Moines in the name of James F. How, individually, James F. How, trustee, and Grenville M. Dodge, and certain additional property has been appropriated by the Des Moines & St. Louis Railway Company, and the construction of buildings and other improvements upon said premises has been begun.

"Third. It is mutually agreed by the parties above named, that the expense incurred by the purchases and improvements above mentioned and such others as may be hereafter made, shall be borne in the proportion of one-half by the Des Moines & St. Louis Railway Company and one-quarter by each of the other two companies above named. It is understood that a depot company may be organized and may take permanent charge of the property upon the terms herein set forth, and that said company may issue and deliver to the companies, parties hereto, its mortgage bonds to the amount of their respective portions of the cost of the said purchases and improvements.

"Fourth. The title to said property shall be and remain in a trustee to be named by agreement by said companies, but subject to the joint use and occupation of all of said railway companies upon the terms herein described.

"Fifth. The individual signers hereto hereby declare said purchases to have been made in their names upon the trusts above referred to, and agree to quitclaim and convey the same to said trustees upon demand and reimbursement.

"Sixth. The Des Moines & St. Louis Company shall at all times be charged with the police control, supervision and maintenance of said property, and the expense thereof shall be apportioned between it and the said other two companies, the apportionment to be determined by the use thereof which they shall respectively make as evidenced by the wheelage; payment of the sum required to be made monthly to the Des Moines & St. Louis Railway Company, within 10 days after rendition of an account stated.

"Seventh. The control of said property by the Des Moines & St. Louis Railway Company shall not extend to a determination of the character and extent of improvements to be now or hereafter put upon the same, but differences between the parties under this head shall be settled by arbitration.

"Eighth. It is understood and agreed that spur tracks shall be built connecting the said terminal grounds with such manufactories and other sources of trade in and about the city of Des Moines as afford sufficient opportunity for profit by so doing, and that all of said tracks shall be adapted for use for both broad and narrow gauge trucks: Provided that in case either of said companies shall deem the construction of any of said tracks as not advantageous to its business, the question of constructing said track, and which of the parties hereto shall pay therefor, shall be determined by arbitration.

"Ninth. Taxes and assessments levied upon said property shall be charged to maintenance account.

"Tenth. In the event that any company, whose railroad does not extend to Des Moines, shall effect an arrangement for running its trains into Des Moines over the railroad of either of the parties hereto, such company shall be entitled to the use of all of said terminal facilities upon the payment of a fair sum for rental and its proportion of the maintenance account, the rental

to inure to the companies hereto in the same proportion as the original outlay, and the sum due from such company for maintenance account to be determined in the same manner as the sums due from the other companies, parties hereto. Railroad companies whose roads extend to Des Moines may be admitted to the use of said facilities by agreement of all the companies parties hereto.

"Eleventh. All differences arising under this agreement shall be referred to arbitration; one of said arbitrators shall be chosen by the Des Moines & St. Louis Railway Company, another by the St. Louis, Des Moines & Northern Railway Company, and the third by the two thus selected. The judgment of any two of the said arbitrators shall be final. If the matters of difference shall be between the Des Moines & St. Louis and the Des Moines Northwestern, then the second arbitrator shall be chosen by the Des Moines Northwestern, and not by the St. Louis, Des Moines & Northern.

"Twelfth. It is mutually understood that the grounds so to be held in common by the companies, parties hereto, are all east of Farnham street in the city of Des Moines, and that no grounds west of Farnham street have been acquired under this agreement."

An analysis of this contract shows a statement of the occasion and object of the contract; provisions for the title, the use and occupation, the maintenance, and the improvement of the property; and for arbitration.

The occasion and object of the contract is stated to be to provide for the common holding and use by the three companies of the property and improvements then or thereafter acquired or constructed for terminal facilities.

As to title, the property was "to be held in common" (paragraph twelfth) through the medium of a trustee to be selected by the companies, in whom the title should "be and remain * * * subject to the joint use and occupation of all of said railway companies upon the terms herein described" (paragraph fourth). If outside railways effected arrangements to enter Des Moines over any of the three lines, they should, beside a portion of the maintenance cost, pay a fair rental "to inure to the companies hereto in the same proportion as the original outlay" (paragraph tenth). The individual "signers hereto" declared the property acquired in their names to have been "upon the trusts above referred to," and agreed "to quitclaim and convey the same to said trustee upon demand and reimbursement" (paragraph fifth). Payment for the property was to be borne by the three companies, in proportions of one-half by the Des Moines & St. Louis and one-fourth by each of the other companies, with a provision that, if a depot company should be organized and should take permanent charge of the property, "said company may issue and deliver to the companies, parties hereto, its mortgage bonds to the amount of their respective portions" of expenditures for the property (paragraph third).

The use and occupation of the property was to be "joint" (paragraph fourth), under the "police control" and "supervision" of Des Moines & St. Louis (paragraph sixth). Industrial spur tracks, which might be built, should be adapted to both standard and narrow gauge (paragraph eighth). There was provision for the use of these terminal facilities by outside companies. If such company did not extend to Des Moines, but should effect an entrance by a running arrangement over any of these three lines, such company should be en-

titled to the use of all the terminal facilities upon payment of a fair rental and its proportion of the maintenance account. Other railways might "be admitted to the use of said facilities by agreement of all the parties hereto" (paragraph tenth).

The maintenance of the property, including taxes and assessments (paragraph ninth), was to be in charge of the Des Moines & St. Louis, the expense to be divided on a wheelage basis and paid monthly to said company on rendition of accounts therefor (paragraph sixth). Any other company entitled to use the terminals under paragraph tenth to bear its wheelage proportion (paragraph tenth).

Regarding future improvements, the contract provided they must, in character and extent, be such as agreed upon by the three companies, or, if a disagreement, such as determined by arbitration (paragraph seventh and eighth); the cost of such to be paid, one-half by the Des Moines & St. Louis, and one-fourth by each of the other companies (paragraph third), except that arbitration might settle which of the companies should pay for industrial spur tracks, the construction of which had been opposed by one of the companies as not advantageous to its business (paragraph eighth).

Obviously, the only purpose of including the individuals, Dodge and How, in the contract, was to control the title taken in their names. They figure in the future of the plan, as outlined by the contract, only for the purpose of conveying their title "to said trustee upon demand."

Also, there is mention of a "depot company." Under the influence of a knowledge of what was afterwards done, there is danger of exaggerating this reference. Clearly it was rather incidental. Its physical location in the contract is significant of the place it occupied in the minds of the parties at the time in connection with the contract. The contract is carefully drawn by skilled draftsmen, who set off in brief, clean-cut, numbered paragraphs the different subjects of the contract. If the "depot company" had bulked large in their contemplation at that time, or if it was to form any essential part of their then plan, it is strange it did not receive some separate and distinct consideration. In fact, it occurs in the paragraph which sets forth the proportions in which the companies are to bear the expense of acquiring and improving the terminal property. Its obvious connection with that idea is that it contains the only suggestion of any method of reimbursement for such outlay. In our judgment, that was the only reason for mentioning, in the contract, the matter of such a company. Even as expressed, while it shows that the subject of such a company had been considered, it also reveals that either the project had not reached the stage of completion and concurrence, or that everything regarding it was purposely left in complete abeyance, in so far as this contract is concerned. The expression is that such a company "*may* be organized, * * * *may* take permanent charge of the property, * * * *may* issue and deliver to the companies * * * its mortgage bonds. * * * "

As to the companies, the contract not only declared some existing property rights, but attempted to define for the future the rights of title and usage of the terminal property. The title contemplated was

a trust. The legal title to be "in a trustee to be named by agreement of said companies." The beneficial estate to be in the three companies in proportion to the parts each contributed to the payment therefor. While this proportional interest is not set forth in so many words, it is necessarily inferred from the combined circumstances that the companies were to pay therefor and for improvements thereto in proportions of one-half, one-fourth, and one-fourth (paragraph third), and that the only possible source of profit then contemplated or provided for (rental from any tenant companies) was to inure to the three companies in the same proportion (paragraph tenth). But there was to be no proportional limitation of usage. There was to be a "joint use and occupation of all of said railway companies" (paragraph fourth). Nothing in the entire contract hampers the complete independent individual occupation and use of all the terminal facilities at all times by each of the companies except the two provisions that the occupation and use shall be "joint" (paragraph fourth), and that the Des Moines & St. Louis shall be charged with the "police control and supervision" thereof (paragraph sixth). It was apparently intended that each company should do its own terminal work with its own men and equipment. The only other precedence given either of the companies was the necessary one of "maintenance," with which the Des Moines & St. Louis was also charged (paragraph fourth). In short, the three companies gave up independence of title and of action in the occupation and use of the property only in so far as was absolutely necessary to what they then considered a safe joint occupation and use.

But whatever may have been the importance of a depot company in the minds of the contracting companies at the time the contract was executed, such (defendant herein) was incorporated under the Iowa statutes on December 10, 1884. However, conveyances to this new company, and acceptance by it, affecting the existing terminal property, although first authorized by resolutions of the four companies January 1, 1885, did not begin until November 7, 1887, nor end until April 28, 1888. The actual management of the property by the terminal company did not commence until May 1, 1888, up to which time the companies occupied and used it in common under the 1882 contract.

What effect upon the title, control, use, and occupation of this terminal property had the formation of this terminal company and these conveyances of the property formerly owned, occupied and used by the railway companies under the 1882 contract? This involves consideration (in the light of attendant acts and circumstances) of the articles of incorporation of the terminal company, the resolutions of the four companies in reference to the conveyances, the conveyances themselves, and an attempted amendment of the articles of incorporation.

The only official action taken by any of the railway companies concerning and prior to the incorporation of the terminal company was a resolution of the board of directors of the Des Moines Northwestern Railway Company on December 9, 1884 (the day preceding the incorporation). This resolution declared "it is desirable that a corporation be

organized for the purpose of taking and holding" the property covered by the 1882 contract. It then chose its representatives "to act for this company in the organization of such corporation, and they are selected to act as two of the directors of said proposed corporation so to be organized for the purpose of carrying out the objects of said contract of January 2, 1882." December 10, 1884, all of the parties to the 1882 contract met for the purpose of incorporating the defendant company, Gen. G. M. Dodge appearing both for himself and for the St. Louis, Des Moines & Northern, two individuals representing the Northwestern, and two the Des Moines & St. Louis. The sole business of the meeting was the passage of resolutions referring to the articles of incorporation. The resolution of adoption declared "that for the purpose of carrying out the objects and purposes of the agreement heretofore, to wit, on the 2d day of January, 1882, made and entered into by and between the Des Moines & St. Louis Railroad Company and others (which is set out in full in the following articles of incorporation)," the articles be adopted as follows:

"Articles of Incorporation of the Des Moines Union Railway Company.

"Whereas, the Des Moines & St. Louis, the Des Moines Northwestern, and the St. Louis, Des Moines & Northern Railway Companies have been engaged in the construction of railways converging at Des Moines, Iowa, and have secured certain franchises, purchased certain realty and made certain improvements thereon—which they have heretofore agreed should be secured, purchased, made and maintained upon certain agreed conditions, at their joint expense—in accordance with a contract made and entered into by and between said companies and Grenville M. Dodge and James F. How, trustee, bearing date January 2, A. D. 1882, and which contract is in words and figures as follows, to wit: [Here the contract was set forth.]

"Whereas, each of said railway companies and said parties has expended large sums of money in purchasing and improving the property aforesaid, and in the construction of suitable buildings for the use of said companies; and

"Whereas, it was provided in the contract aforesaid that a depot company might be organized to take permanent charge of the property, and it was the understanding of the parties that such company might acquire, operate and maintain said property in such manner as best to serve the interest of the parties hereto:

"Now, therefore, for the purposes aforesaid, as well as for those hereinafter expressed, the undersigned hereby associate themselves in a body corporate, and adopt the following:

"Articles of Incorporation.

"Article 1.

"The name of the corporation shall be the Des Moines Union Railway Company, and its principal place of transacting business shall be Des Moines, Iowa.

"Article 2.

"The general nature of the business to be transacted shall be the construction, ownership, and operation of a railway in, around and about the city of Des Moines, Iowa, including the construction, ownership, and use of depots, freight houses, railway shops, repair shops, stockyards and whatever else may be useful and convenient for the operation of railways at the terminal point of Des Moines, Iowa, as well as the transfer of cars from the line or depot of one railway to another, or from the various manufactories, warehouses, storehouses, or elevators to each other or to any of the railways or depots there-

of, now constructed or to be hereafter constructed, in or around said city of Des Moines, and such corporation shall possess all the powers conferred upon corporations for pecuniary profit by chapter 1 of title 9 of the Code, and the amendments thereto. All the powers exercised by this company shall be in accordance with the terms and spirit of the aforesaid contract entered into on the 2d day of January, A. D. 1882, by and between the Des Moines & St. Louis Railroad Company, the Des Moines Northwestern Railway Company, the St. Louis, Des Moines & Northern Railway Company, Jas. F. How, Jas. F. How, trustee, and Grenville M. Dodge. The said company shall have the right to lease or otherwise dispose of the use of any part of its franchises to any other railway company—provided that the assent in writing of the Des Moines & St. Louis Railroad Company, the Des Moines Northwestern Railway Company and the St. Louis, Des Moines & Northern Railway Company shall be necessary before any such lease or disposition can be made to any other than the parties above named.

"Article 3.

"The capital stock of this corporation shall be one million ($1,000,000.00) dollars, which shall be divided into shares of one hundred ($100.00) dollars each, and shall be paid in at such times and in such manner as the board of directors may determine, and the board are authorized to receive in payment therefor the property and franchises in the city of Des Moines, now held by the Des Moines & St. Louis Railroad Company, the Des Moines Northwestern Railway Company, the St. Louis, Des Moines & Northern Railway Company, Jas. F. How, trustee, Jas. F. How, and Grenville M. Dodge.

"Article 4.

"The affairs of the company shall be managed by a board of eight directors, who shall be elected annually, by the stockholders, on the first Thursday of January of each year. The provisional board of directors, who shall hold office until the first Thursday in January, A. D. 1886, shall consist of Jas. F. How, A. L. Hopkins, A. A. Talmage, J. S. Runnells, J. S. Polk, F. M. Hubbell, G. M. Dodge, C. F. Meek.

"Four members of the board shall be nominated by the Wabash, St. Louis & Pacific Railway Company, two members by the Des Moines Northwestern Railway Company and two members by the St. Louis, Des Moines & Northern Railway Company, and no stockholders shall be eligible for membership of the board unless so nominated.

"The fact that a candidate has been duly nominated shall be certified to the stockholders' meeting of this company by the secretary of one of the respective companies aforesaid and such certification shall be conclusive.

"The provisions herein with respect to nomination for the board of directors shall apply to and be enjoyed by any grantee or assignee of either of the railway companies aforesaid. No contract, lease, or other agreement, amounting to a permanent charge upon the property of the corporation, shall be entered into by the board unless the same shall have been first approved by the Des Moines & St. Louis Railroad Company, the Des Moines Northwestern Railway Company and the St. Louis, Des Moines & Northern Railway Company, or their assigns, and shall have been submitted to a meeting of the stockholders, duly called, and shall have been approved by more than three-fourths of all the stockholders; and it shall not be within the power of the board of directors to create any limitation whatsoever upon any of the franchises of the corporation, except the same shall have been submitted to and approved by the stockholders as hereinbefore provided.

"The directors shall elect, from their number, a president, vice president, secretary and treasurer. All vacancies arising from the death or resignation of a member of the board shall be filled by the board.

"Article 5.

"The president, vice president, secretary and treasurer shall possess the powers and discharge the duties of like officers of similar corporations, subject to the limitations imposed by these articles. The officers, hereby con-

stituted, who shall hold their places until the first Thursday in January, 1886, or until their successors are duly chosen, shall be as follows: President, G. M. Dodge. Vice president, Jas. F. How. Secretary and treasurer, F. M. Hubbell.

"Article 6.

"The private property of stockholders shall be exempt from liability for corporate debts and undertakings.

"Article 7.

"The highest amount of indebtedness to which the corporation may at any time subject itself shall be the amount authorized by law.

"Article 8.

"Meetings of the board of directors may be called by the president, or, in case of his absence or disability, by the vice president, and shall be called upon request preferred in writing by two members of the board.

"Article 9.

"These articles may be amended by a vote of more than three-fourths of all the stock in favor thereof, at a meeting of the stockholders thereof, of which a notice containing the proposed amendments shall be mailed to each stockholder at his address, as disclosed by the transfer books of the company. Notice of such proposed meeting shall also be given by publication for three successive weeks in some newspaper of general circulation—published in the city of Des Moines, Iowa.

"Article 10.

"This corporation shall commence on the 5th day of December, A. D. 1884, and continue 50 years, with the right of renewal."

That the creation and entrance of the terminal company into the arrangements of the parties had a marked influence is certain. Here was a creature of the companies, brought into being for the cardinal purpose of taking, by some sort of title, this terminal property, improving, maintaining, and operating it. No title was conveyed in the articles of incorporation. Had nothing further been done the title, control, and operation of the terminal property would have been unaffected. But these articles are valuable as throwing light upon the intention of the parties as to the place that company was to have in their terminal plans. These articles contain provisions in addition to such as would have been necessary in the mere creation of a terminal company—to such as would have been employed by outsiders, whose only purpose was to engage in a terminal business. It is in these exceptional provisions that the particular intention of these parties is to be found. The articles include what may be called a "preamble," which, after reciting the occasion of the 1882 contract, the contract in extenso, and the expenditure of money in pursuance thereof, makes its sole reference to the terminal company as follows:

"Whereas, it was provided in the contract aforesaid that a depot company might be organized to take permanent charge of the property, and it was the understanding of the parties that such company might acquire, operate and maintain said property in such manner as best to serve the interest of the parties hereto"

—declares that "for the purposes aforesaid, as well as for those hereinafter expressed, they associate themselves in a body corporate, and

adopt the following articles of incorporation." The clear statement in this preamble reference is that the parties intend the terminal company "to take permanent charge of the property" and "to acquire, operate, and maintain said property" in such manner as best to serve their interests.

In what we may call the articles proper we find certain provisions which reveal the intention of the railway companies, not only to keep the stock ownership (seemingly contemplated in the authority given the board of directors "to receive in payment therefor the property and franchises in Des Moines, now held" by the railways and individuals, parties to the 1882 contract), but to exercise a control over the property and over the actions of the terminal company beyond such as would spring from stock ownership alone. Our immediate inquiry has no concern with the legality of these exceptional limitations, if attacked in a proper way, but, taking them as they are, what light do they throw upon the intention of the parties?

Such control may be roughly classified into three kinds: (a) The requirement that the board of directors should be nominated by the three companies, treating the Wabash as identical in interest with the Des Moines & St. Louis (A–4); (b) requirements relating to the disposition of the use of any part of its franchises to any other railway company (A–2), to the creation of any limitation upon such franchises (A–4), and to the creation of any permanent charge upon the property (A–4); and (c) a broad requirement that all of the powers of the corporation shall be exercised "in accordance with the terms and spirit" of the 1882 contract (A–2).

The first of these three classes (a) shows the method of controlling the board of directors. Aside from any previous contract, the railways might want a provision perpetuating in them the choice of directors, and the only connection in thought with the 1882 contract suggested by this requirement is in the circumstance that each railway company was to choose directors in proportion to their interest in the property under that contract. If the selection of directors were to depend entirely upon the vote of the stock, there was no assurance that two of the railways might not combine their votes and exclude the third from any voice in the active management. Therefore they sought to assure, not only complete control of the board, but the same representation upon the board as each of them was to have in the property under the existing contract; the idea also doubtless being in their minds that the stock which paid for that property would be similarly divided.

The second requirement (b) shows the method intended to preserve the control of the railway companies over the property and franchises acquired by the terminal company. Without the previous approval of the three railway companies, no disposition of the use of any part of its franchises could be made to any other railway company, nor could any permanent charge be placed upon its property.

Passing from these specific provisions, looking toward the control by the railway companies of the management, franchises and property of the terminal company, we approach the general requirement

(c) that "all the powers" of the terminal company shall be exercised "in accordance with the terms and spirit" of the 1882 contract. What does this mean? Evidently a limitation upon the exercise of the corporate powers. Subject to the limitations above discussed, those powers were such as ordinarily belonged to a corporation organized under the Iowa Code for pecuniary profit to construct, own, and operate a terminal railway, with all of its attendant depots, warehouses, shops, etc. What, then, were the further limitations carried by this reference? How was the free exercise of these powers of the terminal company in constructing, owning, and operating a terminal to be limited by the terms or spirit of the contract? The terms and intent of the contract as to *construction* were that there should be only such improvements and extensions as were agreed upon by all the three railways, or settled by arbitration, and to be paid for (except as to certain industrial spurs) by the three on the basis of their contemplated interests in the property of one-half, one-quarter, and one-quarter. The contract terms and intent as to *ownership* were a trust. The contract terms and intent as to *operation* were that each company should do its own terminal work under the police control and supervision of the Des Moines & St. Louis. Under the contract the cost of *maintenance* (including taxes and assessments) was on a wheelage basis. Under the contract *the use of the facilities by other roads* was to require agreement of all three roads, except that any other road entering Des Moines over the tracks of any of the three railways might use them on payment of rental to the roads and a wheelage part of the maintenance.

It is clear that all of these terms and intentions neither were intended to nor could survive the introduction of the terminal company. It is also clear that some of them were to remain active. It is impossible from the two instruments alone (contract of 1882 and articles of incorporation), read in the light of their history, to draw a line in this particular which is at all points clear and definite. Some things, however, seem distinct. Touching *operation,* it is conceded by all parties to this suit that the plan of the contract that each of the railways should do its own terminal work over tracks in joint use was dangerous and unworkable. Doubtless this was one of the main underlying necessities for a terminal company, which could, with its own engines and men, do all of this terminal work. Each of the companies was to have terminal facilities, but in a different method from that covered by the contract. The idea of a joint usage, in the sense of a right in each of the three railways to make an individual usage of the same property during the same period, had been found unsatisfactory and abandoned for the better plan. The contract plan of operation was to be replaced in its entirety.

As to *ownership*: No title or interest in the property owned or held by all or any of the parties to the contract passed or was affected by the articles of incorporation. It is quite clear, however, in the articles, that the parties intended in the future to turn over that property to the terminal company. What was to be the character of the title or interest they intended to convey? There is no dispute

in this case that as much as the bare legal title was to go. Was the full beneficial interest also to pass? When the parties made the 1882 contract, which provided for a trust, they also revealed therein that a terminal company had been under discussion. In an almost incidental way that matter was mentioned in connection with payment for the property covered by the contract. This mention was that such a company "may issue and deliver to the companies parties hereto its mortgage bonds, to the amount of their respective portions of the costs of said purchases and improvements." Why issue and deliver the bonds, unless they carried value? Why issue and deliver them, except for some value in return? In short, the idea in the contract was compensation or reimbursement. The compensation or reimbursement was to be for money paid out for the legal title and the beneficial interest in the property. The only thing which the parties then had in view to give value to a mortgage and its bonds was this same property. Clearly the parties had considered before and at the time of the contract that the plan first to be tried might give way to that of a terminal company, and that such company might acquire the entire title to the property. Coming to the articles, we find no change in this conception. The preamble recited that—

"It was the understanding of the parties that such company might *acquire*, operate, and maintain said property in such manner as best to serve the interest of the parties hereto."

Nothing is said regarding the use of mortgage bonds, but article 3, dealing with capital stock, authorized the directorate of the new company "to receive in payment therefor the property and franchises in the city of Des Moines now held by" the parties to the contract. What other than the beneficial interest in this property could have constituted in any real sense "payment" for the stock? Article 4 required the consent of all three companies before any "permanent charge" could be placed *by the terminal company* upon the property. Thus the plan, so far as revealed by the articles, seemed to remain as suggested in the contract, with the additional idea of a payment in stock; in short, the complete title to go to the company, with the terms of payment not definitely settled, but suggestions of the value in bonds up to the outlay (in the contract) and of the capital stock of the company (in the articles).

As to *maintenance*: There is but one direct statement, and that is the one from the preamble quoted above. As to where the funds are to be secured therefor, there is no suggestion, unless we can infer that the plan of the contract is to prevail, or that indebtedness may be incurred therefor.

As to the *use by other railways:* There is the provision that the company shall have no right, without the prior written consent of the three railways, "to lease or otherwise dispose of the use of any part of its franchises to any other railway company."

Summarizing, the intention of the parties, as revealed by the articles of incorporation, shows a development of the terminal plan, changing, but not entirely abandoning, that of the 1882 contract. The continuing influence of that contract is evident, though the limits of that

influence are not in all respects clearly defined. As to operation, it is evident that the general agency thereof was to be entirely different from that contemplated by the contract, but there is lack of certainty as to the influence of the contract over the action of this new agency. As to title the intention is clear. As to improvement and maintenance there is indistinctness.

The conduct and acts of the parties during the next few following years gradually clarified, crystallized, and consummated the entire plan. The intention that the entire title to the property should pass to the terminal company had been suggested in the 1882 contract and adhered to in the articles of incorporation of that company. It was to be further emphasized in resolutions of the four companies relating to the transfers of the title. It was to be consummated in those conveyances. The plan as to improvements, maintenance, and operation of the property in the hands of the terminal company, which had been so dimly outlined in the charter requirement that the powers of the terminal company should be exercised "in accordance with the terms and spirit" of the contract, obviously needed further and clearer definition. The 1882 contract was most general in its provisions, and it applied to a situation in which a terminal company had no place. No one could determine what the "terms and spirit" of the 1882 contract meant as applied to the management of the terminal company. Very soon after the terminal company took control of the property, the parties dispelled this uncertainty by a supplemental contract, explaining clearly what they meant in that regard by the "terms and spirit" of the 1882 contract. This was the contract of May 10, 1889, related back to the date the terminal company took control (May 1, 1888), and covering a term of 30 years. It completed in a workable manner the terminal plan. While all-important in the other branch of this case, this last contract is no more than a side light upon the main controversy, which pivots upon the character of title in the property conveyed to the terminal company.

The first step toward a transfer of title was the action by stockholders' meetings of the four companies, all held January 1, 1885. At these meetings the railway companies (each reciting that the terminal company had been "organized as contemplated and provided in the aforesaid contract, to acquire, hold, use, and enjoy the real estate, property rights, and franchises in the city of Des Moines * * * of the aforesaid railway company and signatories of said contract acquired and held thereunder, and to carry out the purposes of the said contract") ratified and accepted the articles; undertook "to discharge all the obligations imposed upon it by said contract in order to make effective the purposes of" the terminal company; and authorized its proper officers—

"upon the issuance to it of the share of the bonds and stock of said Des Moines Union Railway Company, to which it may be entitled under said contract to convey, assign, and transfer to said company all its right, title, and interest of whatever name and character, in and to the real estate, franchises, choses in action, and rights in possession or contingent to all the property in the city of Des Moines east of Farnham street in said city now held, enjoyed, or claimed by either or all of the signatories of said contract

of January 2, 1882, or any agent or trustee thereof, purchased, acquired, or held in pursuance of said contract."

Upon the same day the terminal company, at the first meeting of its board of directors, appointed a committee—

"to confer with the several parties to said contract and agree with them severally upon the terms and price at which they will respectively assign, transfer, and convey said railroad property and franchises to this company, and procure from them, and each of them, such conveyance and transfers as may be necessary to fully invest this company with the title, control, and management of said properties as provided for in said contract of January 2, 1882."

It also directed the issue of not to exceed all of its fully paid capital stock and not to exceed 500 bonds, of $1,000 each, secured by mortgage on "all of said property so to be conveyed to this company or thereafter to be acquired." This stock and these bonds were "to enable this company to pay for the property and to maintain, operate, and improve the same, and purchase other property necessary to carry out its objects, and remove any and all liens or incumbrances thereon, and pay off all just claims against the same." With the provision that, when the above committee "shall have agreed with the said several parties to said contract as to the amount of bonds and stocks of this company necessary to be delivered to them, and each of them, in payment for said railroad property and franchises," and shall have delivered the same "on receipt of the conveyances and assignments of said property so to be made to this company," the remainder of the bonds and stock shall be issued from time to time as needed only for the above purposes. Deeds in compliance with these resolutions were not made until beginning with November 7, 1887, and ending April 28, 1888. Nor did the terminal company take possession and operate that property until May 1, 1888, after the last of these deeds, although two of the three railway companies had at these same January 1, 1885, meetings, voted to at once "transfer the management and operation of its property in Des Moines" to the terminal company, expressly leaving the settlement as contemplated by the other resolution to be arranged later, and although the terminal company at its meeting that day assumed to take immediate charge. It is not shown in the record why there was this delay in executing the deeds, although counsel suggest it lay in the confusion attending the passage through financial difficulties of the Wabash & Pacific, the largest single force in the terminal arrangement.

November 1, 1887, the terminal company, at a stockholders' meeting called "for the purpose of considering the question of amending the articles of incorporation of this company, and issuing bonds of the company for the purpose of raising money to purchase, construct, and improve its railway and property," increased its capital stock to $2,000,000 (without changing the authorization to receive therefor the properties in payment), and authorized the issue of not over $800,000 bonds, "secured by mortgage or deed of trust on the property of this company, and the same or the proceeds thereof to be used in purchasing and paying for its property and improving the same, and build-

ing its railways, depots, roundhouses, and shops, and making other improvements."

Within a week later the directorates of the four companies passed practically identical resolutions in reference to the transfer of the property taken in the names of Dodge and of How. The substance of these resolutions was a request to How and to Dodge "to transfer to" the terminal company the property so held upon receipt of stipulations to deliver to each of them as soon as practicable "first mortgage bonds of that company to the amount of the money advanced for the payment of said property and improvements with interest on same and taxes paid thereon" and the capital stock of the company; the stock to go one-fourth to Dodge and three-fourths to How, the latter to transfer the stock and bonds coming to him to the purchasing committee of the Wabash "in lieu for the money advanced by said company to make the purchase of above property and improvements, and the payment of taxes for this company."

In addition the Des Moines & St. Louis authorized its officers to execute a deed to the terminal company, "conveying to it all its real estate, rights of way, franchise, roadbed, and other property of said company lying and being in the city of Des Moines, east of Farnham street," no matter how acquired; this being done "for the purpose of carrying out the contract of date January 2, 1882."

On the same day, upon receipt of formal notices of the above resolutions passed by the railway companies, the terminal company, at a directors' meeting, accepted the above action of the railway companies, authorized the delivery of the stock and bond warrants, the execution of the mortgage, and issue of bonds.

All of the above resolutions were passed at stock or directorate meetings of the companies. The entire membership of the terminal company was selected by the railway companies and undoubtedly simply registered their will. The resolutions emphasize and confirm the statements made above as to the intention of the railways (revealed in the contract and the articles) that the *entire* title should pass to the terminal company and be paid for by stock and bonds of that company.

In pursuance of the resolutions, How and Dodge delivered deeds. There were three from How, covering different pieces of property. The first two were identical in form. Omitting legal description of the property they were as follows:

"James F. How, Trustee, to Des Moines Union Railway Company.

"Deed.

"Whereas, the property herein described was from time to time purchased with the moneys and funds of the Wabash, St. Louis & Pacific Railway Company, a corporation; and whereas, for its convenience the legal title to said property was conveyed to me in trust; and whereas, said property was acquired and held for the purpose and upon the terms set forth in a certain contract made and entered into on or about the 2d day of January, 1882, between the Des Moines & St. Louis Railway Company, the Des Moines Northwestern Railway Company, and the St. Louis, Des Moines & Northern Railway Company, G. M. Dodge, James F. How, and James F. How, trustee, and which contract was consented to by said Wabash, St. Louis & Pacific Railway Company; and whereas, I have heretofore, at the request of said Wa-

bash, St. Louis & Pacific Railway Company, stated and declared in writing that I held the legal title to the real estate hereinafter described in trust for said Des Moines & St. Louis Railway Company and said Des Moines Northwestern Railway Company; and whereas, the board of directors of said Des Moines & St. Louis Railway Company and the board of directors of said Des Moines Northwestern Railway Company did, on or about the 8th day of November, 1887, pass certain resolutions containing among other things the following, to wit:

" 'Whereas, James F. How has, prior to 1881 and since then, purchased certain property and made expenditures on same as trustee for this company, the money expended for said property being furnished by the Wabash, St. Louis & Pacific Railway Company; and whereas, under an agreement with this company and the Wabash, St. Louis & Pacific Railway Company and others, it was intended that said property standing in the name of James F. How, trustee, should be transferred to the Des Moines Union Railway Company under certain conditions: It is hereby resolved that James F. How is requested by this company to transfer to the Des Moines Union Railway Company the property above referred to' :

"Now, therefore, know all men by these presents: That I, James F. How, trustee, as aforesaid, of the city of St. Louis, state of Missouri, in consideration of the premises, and of the sum of one dollar to me in hand paid by the Des Moines Union Railway Company, the receipt whereof is hereby acknowledged, have granted, bargained, sold, and conveyed, and by these presents I do hereby grant, bargain, sell, and convey, unto the said Des Moines Union Railway Company the several lots or pieces and parcels of ground situated, lying, and being in the city of Des Moines, county of Polk, state of Iowa, particularly described as follows: * * *

"To have and to hold all and singular the several pieces and parcels of real estate aforesaid, with all the appurtenances thereunto belonging, unto the said Des Moines Union Railway Company, a corporation, and its assigns forever. It is expressly understood, however, that I only undertake to convey such title as I may have in said premises, and that I only undertake to warrant and defend against those claiming through and under me."

The third deed substantially differed only in that the conveyance recited it to be by How "as trustee aforesaid." The deed from Dodge was an ordinary quitclaim. A few lots which had been taken in the name of the Northern were quitclaimed by a deed which conveyed the described lots—

"together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging, or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof; and also all the estate, right, title, interest in the above-described property, possession, claim, and demand whatsoever, as well in law as in equity, of the said parties of the first part, of, in, or to the above-described premises, and every part and parcel thereof, with the appurtenances, to have and to hold all and singular the above mentioned and described premises, together with the appurtenances, unto the said parties of the second part and assigns forever."

Other property which stood in the name of the Des Moines & St. Louis was conveyed by general warranty deed. All of these deeds were recorded, so far as this record shows, on April 26, April 27, or May 1, 1888. The mortgage authorized was dated November 1, 1887, acknowledged February 13 and 28, 1888, and recorded May 21, 1888 (three weeks after record of the last of the above deeds on May 1). There was never any deed from the Northwestern, which had no property standing in its name.

It is unprofitable to trace the different later steps connected with and leading up finally to the payment for the property by bonds covering the actual expenditures and stock totaling 4,000 shares ($400,000). With the passage of these deeds and consideration ends the history of the title. All of these transactions result as follows: An intention on the part of all parties that the entire title shall go to the terminal company; payment by that company of the full consideration therefor ultimately agreed upon; deeds designed to convey that full title.

[2] But it is said that, if the railways did so convey all interest in these necessary parts of their roads, such action would be void. The rule invoked is that public carriers will not be permitted to contract away their public usefulness by vitally maiming their lines. Rules of law extend no further than the basic reasons upon which they rest. The usefulness, if not the necessity, of terminal companies is established. That they must, as a general proposition, own their properties in order to raise funds to improve, maintain, and operate them efficiently, is certain. The more efficiently and economically a railway can procure terminal facilities, the better and cheaper its services to the public should be. The conditions and compensation for use of such terminals by the railways are subject to public control, so that the railways cannot be denied or unreasonably restricted in such usage. The public service is protected. It should be bettered by such a terminal arrangement. Therefore the rule invoked by plaintiffs has no application to disposition of terminal portions of a railway to a terminal company.

It is urged that the terminal company has, by its own statements, declared that it had no beneficial interest in the property. The statements intended are contained in reports made by that company to the Executive Council of Iowa for the years 1888, 1889, 1890, 1892, and 1893. In these reports the company stated that it was "simply a representative company, acting as an agency" for the railway companies, "performing all necessary work for them, and charging each at actual cost, its due proportion thereof incurred." These reports were made for purposes of taxation. During all of these years, except 1892 and 1893, the entire income was applied in reduction of the bills of the railway companies, and for those 2 years it should have been so applied under the terms of the 30-year contract, dated May 10, 1889; so that, in fact, it had no income which properly remained as its own. Again, if the use of the term "representative" is to be emphasized, it would be met by the terms "tenant" and "lessee," applied to the railway companies, in a contract dated July 31, 1897. This latter contract was between the terminal company and the complainants, or their predecessors. It applied to and affected the contract of 1889, under which the companies are and have been operating since very shortly after the terminal company began to control the property.

It is contended that complainants retained through the articles of the terminal company an interest in and control over the property. As we have endeavored to show above, no interest was retained in the property through these articles of incorporation. The title was un-

disturbed and unaffected until the deeds transferred it. However vocal the articles of incorporation and the resolutions of the different companies may have been of the intention of the parties, these expressions passed into effective action only in the deeds. But the articles did provide for a direct control over the property by the railway companies. This was through the requirement that the prior consent of the railways was necessary before leasing or disposing of the use of any part of its franchises, or before placing any permanent charge upon the property, and the requirement that the railways, not the stock, should name the entire directorate. This control was purely contractual in its nature, and neither sprang from nor gave rise to any legal estate or interest in the property itself, affecting the full and complete title of the terminal company. When the deeds passed, the terminal company held the complete legal and equitable title to the property, though it had by contract restricted its freedom to lease, dispose of, or incumber it.

[3] The above control was later relinquished. April 8, 1890, there was an attempt to amend the articles. The result of the proposed amendments would have been to take from the railways, as such, all of the control given by the original articles, to substitute therefor a character of veto control by one-eighth of the stock, and to provide that, not all, as formerly, but 4,000 shares, of the capital stock should be paid the railway companies, in addition to the bonds then already issued, as the full purchase price of the property deeded by the railways. The railways contend that they were invalid, because not properly adopted, and that, even if valid, they could not alter the relations between the railways and the terminal company, because such were based upon contractual rights which had become vested, and which the railways had not by formal corporate action consented to be altered.

The claim that the amendments were never properly adopted is well taken, but not open to complainants. The exact rights of any one to any of the capital stock were not determined definitely until the contract of May 10, 1889, and no stock had been issued at all up to the date of the attempted amendments. However, the company had maintained an organization from its incorporation, December 10, 1884. This was not difficult, as the articles themselves provided for the nomination of the entire board by the railway companies, no other party had any interest in this terminal company or property, and it was not active in the control and operation of the property until May 1, 1888. But when the corporation undertook to amend its fundamental law, that could be legally done only by the stockholders. There was no stock issued; there was only a right to stock through the contract of 1889. This contract provided (section 26) for the issuance of the entire authorized capital of $2,000,000 (20,000 shares), 10,000 shares to the St. Louis Company and 5,000 shares to each of the other two companies. It appears from the same section of the contract that each company was to stock-qualify its own terminal company directors. With the three companies entitled to all the stock, and with none of it issued, the eight men (in person or by proxy), who had been selected by these companies as their choice for directors, met in a stockholders'

meeting, claiming to represent one share of stock each. There is a statement in the minutes of that meeting that the railway companies "were also present" in the person of three of these men, who were respectively president or vice president of each of the railways. It is not stated or claimed that such alleged representatives were there holding the proxies of the stock to which their respective companies were entitled, or that as such representatives they participated in any way in the meeting. Nor is it claimed that any of them had any authorization from his company (unless such adhered to his official position) to so be present or to represent it. At such a meeting the amendments were duly passed. Formal requisites of the Iowa law as to publication, etc., of corporate amendments were met.

Articles of incorporation have a dual character; they are at once a grant of authority and a contract. The matter of authority is between the state and the incorporators alone. The matter of contract, while always and primarily between the state and the incorporators, may include third parties, either actual or in prospect. Hawthorne v. Calef, 2 Wall. 10, 17 L. Ed. 776; Curran v. Arkansas, 15 How. 304, 14 L. Ed. 705; Woodruff v. Trapnall, 10 How. 190, 13 L. Ed. 383. The relation between such third parties and the incorporators, or their combined entity, the corporation, is purely contractual. It possesses no different or higher attributes because its terms find expression in an instrument to which the state is also a party. Such contracts are subject to the ordinary rules of law governing contracts. It is, of course, evident that such third parties and the corporation could not alter such contract in any manner that would affect the rights of the other party, the state. Although there are additional reasons why this should be so where the state is a party to this character of contract, yet neither can two of three parties to any contract so alter their contractual relations as to affect the third without its consent. No reason appears why in this, as any kind of tri-party contract, two of the parties may not at will alter or annul any of such contract rights, if such action affects them alone.

With such power to change their rights, the question becomes whether or not the terminal and railway companies have altered or annulled the rights arising from the contract contained in the articles of incorporation. They took no formal corporate action accepting or ratifying these attempted changes in their contractual relations with the terminal company. But all of the individuals who acted at this purported meeting of stockholders of the terminal company were chosen by the three railway companies and certainly were merely their instruments. There can be no question that the controlling, executive officers of the railway companies were fully aware of and approved the action of the meeting; that Hubbell was encouraged to purchase the bonds and stock; that the value of the stock was solely prospective during the existent operating contract; and that this value has largely increased, as the worth of the terminals grew and the contract term diminished. Although the 1889 contract had provided for distribution between them of the entire capital stock of 20,000 shares, they accepted, after the amendments, distribution of 4,000 shares provided

therein. Before the amendments there had been no stock issued, but the corporate organization had been maintained by eight directors chosen by the three railways in accordance with and in the proportions prescribed in the original articles. After the amendments the directors were elected by the outstanding stock, and, in fact, they were not all representative of the railways; no attempt was made by the railways, as such, to exercise the very valuable right of naming, in certain proportions, the directors. The amendments provided that no stock beyond the 4,000 shares should be issued, except by consent of more than seven-eighths of the stock. This provision has been observed. This was a very vital provision, bearing upon the value of the issued stock. It cannot be disputed that the virtual veto of further issue was for the benefit of Hubbell, who then owned one-eighth of the stock (bought less than two months before), and to whom the Wabash purchasing committee at that very time was endeavoring to sell another eighth (later consummated). At that time the terminal company was under contract with the railway companies to apply all of its surplus earning to a reduction of their service bills, thus, during the life of that contract, depriving the stock of all chance of dividends. That contract had then 28 years to run. Yet 3 days before this purported meeting of the terminal stockholders the Wabash purchasing committee offered Hubbell $100,000 of terminal bonds and one-eighth of the stock for $115,000 and accrued bond interest. This sale was consummated after the amendments had been adopted.

The truth seems to be that the purchasing committee of the Wabash was desirous of realizing upon these bonds and stock by sale to Hubbell, who was the dominating influence in the other two railways; that Hubbell was willing to purchase if the control of the railways, as such, given in the articles was removed; the articles were amended, removing Hubbell's objection; the purchase was made. For 17 years thereafter the railways acted in perfect harmony with the articles as amended. During all of that time there was no questioning of their validity. Not until this suit was filed in 1907 was there any such attack. The doctrine of laches comprehends and controls the situation. Neither as shareholders nor as parties contracting with the terminal company can the railway companies thus sleep upon their rights and then in a court of equity enforce such against others who have, to their knowledge, acted upon the belief that such rights did not exist, and have acquired and hold property which has enormously increased in value in the interval. These amendments took away all control by the railway companies, as such, over the action of the terminal company. This would include the rights of approval by them of usage, transfer, or permanent incumbrance of the property, nomination of directors, and all influence of the 1882 contract as embodied in the articles of incorporation. All of these provisions in the articles were for the exclusive benefit of the railways, and they could and did part with them.

Finally, it is urged that it cannot be supposed that these railway companies would bring into being a creature, put into its hands such ownership and control over their property, and endow it with such

powers that it and not they could command the situation. Such a supposition is improbable and here unnecessary. There is nowhere any indication that the railways intended any such result, and yet such, in our judgment, is the result. This unexpected outcome was the product of several circumstances. A very short trial convinced the railways that the 1882 contract plan was not safe nor practical in the use of the terminals. Under that plan as much control as they deemed proper had been vested in that one of them (Des Moines & St. Louis Railway Company) which was most largely interested in the property. The necessity of some neutral outside agency was evident. A close corporation, in which stock and representation on the directorate was assured in proportion to their ownership of the property, naturally suggested itself. The opportunity for reimbursing themselves for outlay in connection with the property was attractive. This could be done through bonds of a terminal company, and yet leave the free use and entire control of the terminals. Such bonds must have value behind them, and there was no other value possible except the property; also, they must acquire the stock of such company and must make payment therefor in value. So they created this agency; they circumscribed its powers with restrictions which made their control of it as complete as legally possible; they contracted among themselves, limiting the transfer of stock by any of them. They thus took every precaution consistent with the objects they had in mind which prudent men could devise to make their control over their creature complete and permanent. They then transferred to it their property and felt secure.

For years so complete was this mastery that no stock of the terminal company was issued, although it had acquired the property, issued its bonds thereon, and had sole control over the operation of the terminals. But financial difficulties enmeshed the Wabash, the then holder of the largest interest (one-half) in the stock and bonds. One avenue of relief was through disposition of a considerable portion of such stock and bonds to an individual (Hubbell), who was then influential in the two other railways. Such a sale would seem in effect a mere rearrangement of the interests of the three companies in the terminal company. But it was a vital condition of that purchase, required by the purchaser, that the complete control of the railways over the terminal company should be lessened, so that the purchaser might protect his interests. This was done. It was the severance of those bonds in which lay the control of the railways, as such, over the terminal company. Thereafter, through successive acts, natural enough, and at the time apparently harmless, this removal of control was more completely confirmed; the ultimate result being the entire emancipation of the terminal company from outside government. In course of time a majority of the outstanding stock had passed legitimately and for value to the Hubbells; also they had disposed of their interests in the railways (Northern and Northwestern) to the Milwaukee, retaining for themselves the terminal company holdings. These last two concurring factors inserted into the situation for the first time an unforeseen diversity of interests between the railways and the terminal company.

Thus the railways themselves had, through a series of acts and circumstances extending over many years, gradually let slip from them that exclusive ownership and control which they had at the beginning so much valued and so carefully guarded. The proprietorship and mastery of the entire terminal property, rights, and franchises are represented by the outstanding stock and bonds of the terminal company. All of such stock and bonds are now held by the complainants, or passed through their ownership or that of their predecessors and were parted with for value. They have not lost their property. They have the stock and bonds, or the value they received for them. They have parted with all control not given by the stock or bonds.

Our determination upon the main contention in this case is that complainants, except as bond and stock holders, have no interest in the property of the terminal company and no voice in the control and management of that company.

Surplus Earnings.

[4] In connection with the management and operation of the terminal properties, sources of income arose aside from the contributions made by the three railways. These sources were switching charges and rental of parts of its property or of privileges in connection therewith. Accumulations of this character now total several hundred thousand dollars. Complainants base claim therefor upon the contract entered into between the terminal company and the railway companies, dated May 10, 1889. The terminal company replies that the contract does not include such moneys. The determination turns, therefore, upon the meaning of that contract. A subsequent contract of July 31, 1897, does not affect this controversy. Those portions of the 1889 contract pertinent to this point are as follows:

"Section 3. Each of said parties of the second part, for itself and its assigns, agrees to pay to said party of the first part a sum of money to be ascertained as follows, to wit:

"(1) There shall be ascertained the amount required to pay 5 per cent. interest upon the mortgage bonds of the party of the first part, one-twelfth of which, less any deduction hereinafter provided for, shall be payable monthly as hereinafter specified.

"(2) At the expiration of each month, or as soon thereafter as practicable, there shall be ascertained the expenses of maintaining and repairing the property of the party of the first part, including the maintenance and repair of tracks, depots, roundhouses, engine houses, etc., during the preceding month. And in like manner there shall be ascertained the taxes, general or special, levied upon or against said property and paid during the preceding month, or to be paid during the next succeeding month, and the insurance, if any, paid during the preceding month, or to be paid during the next succeeding month.

"(3) There shall be likewise ascertained the costs and expenses of every nature connected with the operation of said terminal station, freight and passenger depots, depot grounds, roundhouses, transfers and other properties, which is to include every item of expense or disbursement incurred or made by the party of the first part not hereinbefore mentioned, except the expenses specified in section 9 hereof.

"Section 4. Having so ascertained the monthly aggregate of all the items and sums mentioned in the preceding section, there shall be deducted therefrom the amount, if any, which other railway companies may be under obliga-

tion to pay by virtue of contracts for the use of said property, or parts thereof, for the preceding month, and the remainder shall be paid by the parties of the second part in the proportion that the wheelage of each of said parties bears to the entire wheelage of all said second parties during such preceding month; and it is expressly understood and agreed that in computing wheelage, three narrow-gauge cars shall be taken as the equivalent of two standard-gauge cars, and that the term 'wheelage' as used in this contract means that three narrow-gauge cars are to be accepted as the equivalent of two standard-gauge cars.

"Section 5. If the amount, or any part of the amount, due from any other railroad company or companies for the use of said property or any part thereof, shall not be paid when due, then the sum so due and unpaid shall also, on demand of said first party, be paid to it by said second parties on a wheelage basis as hereinbefore defined."

Section 9, referred to in the above quotation, relates to a different basis of dividing roundhouse expenses and does not alter the meaning of the quotation.

The plaintiffs contend that these "surplus earnings" are made up of items which under the above provisions should have been credited upon their monthly bills. Defendants claim that the only character of credit items intended by these provisions were such as were paid by some other railway by virtue of a contract for the use of the property, and that these items fall without that definition. This latter contention is a strict construction of the exact wording of the contract. It is not in our judgment a fair construction of the spirit of the agreement. This conclusion is based both upon the history of the transaction and upon the meaning to be given this precise language when read in connection with the entire contract.

After the railways had, in April, 1888, transferred the property to the terminal company it was in a position to proceed to carry out its purposes. All of the parties (this for practical purposes at that time meant the three railway companies) evidently realized that something more was needed to definitely define and control the relations of the four companies toward each other. One witness testifies that the moving considerations which led to this agreement were that the 1882 contract had made no provision defining how the interest upon the bonds should be paid, and that the railways thought that roundhouse services should not be paid for on a wheelage basis. Doubtless these two items were in the minds of the parties, but it is quite evident that there was something of greater importance. The very general statement in the articles of incorporation that the terminal company was to exercise all of its powers "in accordance with the terms and spirit of the aforesaid contract entered into on the 2d day of January, A. D. 1882," was too vague to serve as a practical definition of the rights of the parties, or as a guide to the terminal company in the conduct of the business of the railway companies. Besides it was vitally necessary to settle the terminal stock rights of the railways. Therefore the parties wisely determined, as set out in the preamble of the 1889 contract, that—

"for the protection of the parties hereto and their assigns, it is important that the rights, duties, and liabilities of each in regard to the whole subject-matter of said terminal facilities, including their use, care, control, rental, taxes, expenses, renewals, insurance, and repairs, shall be stated and defined."

The contract of 1882 had provided a plan for financing the terminal project. This plan contemplated that the railway companies would provide the terminal properties; that the expenses of control, supervision, maintenance (including taxes) and (generally speaking) improvements should be met by them on a wheelage basis. They expected at that time to procure the service at cost and divide that cost in accordance with actual usage. This idea that the terminal service for which they were taking all these steps would be furnished them at cost passed into the 1889 contract. For several years after that contract became effective the monthly bills rendered by the terminal company and paid by the railway companies set forth specifically these items of rentals and switching charges from outside sources as credits upon the expenses, of which the balance was divided between the three railways on a wheelage basis. February 11, 1891, a directors' meeting of the terminal company ordered—

"that the rents collected for the use of the company's real estate, and the switching charges paid in, be credited on the bills of the different tenant companies occupying this company's terminals, giving to each company its share ascertained by wheelage."

About a year later, January 7, 1892, the same body ordered a discontinuance of this practice. By its terms this discontinuance was intended to be temporary, and was for the purpose of providing a fund "with which to purchase supplies and pay current bills which come in before it receives its monthly revenue from the tenant companies." When the auditor of the Wabash noticed the absence of such credits from the bill for the month preceding the above last order he inquired of the terminal company superintendent, who wrote as follows:

"Replying to yours of the 1st inst., in regard to the allowance for switching, rentals, etc., that should be made on our bills for the months of December and January, I have to say, that at a meeting of the executive committee, held January 7, 1892, it was decided not to distribute these collections for a period of time, until the Des Moines Union Railway Company could accumulate a small fund for working capital. I presume this will continue in effect until January, 1893. You will be furnished each month a statement showing the amount of this rental, *and your proportion of the same* [italics ours], so you can make a charge against the D. M. U. Railway and carry it on your books, as you see fit, for future adjustment."

Also, in the annual report made by the terminal company to the Executive Council of the state of Iowa for taxation purposes for the years 1888, 1889, 1890, 1892, and 1893 was the statement that the terminal company was "simply a representative company, acting as an agency for" the railway companies, "performing all necessary work for them, and charging each at actual cost its due proportion thereof incurred." The report for 1894 differs in some other, but not in this, respect, except that it includes another railway, and says that it "performs certain services for these companies, and collects from them as rental, and for such services, the aggregate amount of its expenses, which expenses are paid by the several railway companies in proportion to the use of the property and services rendered, as provided by contracts existing between this company" and the other companies. Thus the history of this provision of the contract, and of the view

taken of it by the parties themselves before any antagonistic motives or interests had intervened, shows that all revenue of the terminal company was to be credited on the bills of the railway companies. A careful consideration of the entire contract itself leads to the same conclusion.

Therefore the surplus earnings should be returned to the railway companies. For that purpose an accounting should be taken to determine what sum should go to each, calculated upon monthly wheelage basis.

Usage After May 1, 1918.

When the present operating contract is ended, the rights of the parties respecting the use of the terminals by the railways are those which spring from their nature as carriers and their physical and business relation to each other as carriers in and entering a large terminal. These are that the terminal company must furnish its full terminal facilities in so far as reasonably necessary and required by the railways, and they will pay therefor such reasonable sum as may be agreed upon between the terminal company and each of the railways, or, in default of such agreement, as may be fixed by the proper public tribunal.

Conclusion.

The decree should be modified. It should state the complete title to this property in the terminal company, and that the only interest of the railways in the property or the management of the corporation is such as flows from stock ownership, that the surplus earnings belong to the railways, and a master should be appointed under instructions to ascertain the part due each upon a wheelage basis.

It is so ordered.

HOOK, Circuit Judge (dissenting in part). I concur in the award to plaintiffs of what is called the surplus earnings of the terminal company, not only for the particular reason given, but also for a broader one, arising from the other branch of the case.

I am unable to agree to the foregoing opinion upon the main controversy, and will state my reasons in a general way. The railroad companies organized the terminal company, and invested it with the legal title to their property, including integral parts of railroad lines and appurtenant franchises, solely for the more convenient and better performance of their public duties. It is open to question whether the most important of the conveyances could lawfully have been made, except for that specific purpose. That purpose was fundamental, not temporary or casual, and it determined the character of the terminal organization. The terminal company was not incorporated by individuals as an independent enterprise for personal profit, and its stock was not put upon the market as that of a financial venture. The contract of 1882 between the railroad companies foreshadowed the terminal company in express words, and when that company was chartered it took the place of the individual trustee provided for by the contract. That fact is too plain for discussion. The change to a cor-

porate trustee was solely for reasons of convenience. It was one of method or form, but not of underlying, essential substance.

As regards the legal title to the property, the terminal company became the trustee of the railroad companies that organized it and of such others as might thereafter be admitted to joint beneficial ownership. The beneficiaries, present and future, were what are commonly called proprietary or constituent companies. Each of them owed a duty to the others that it would not at any time so deal for itself or with its own proprietary interest as to impair or destroy the joint relation among them or the character of their common organization. Not only did the terminal company hold the legal title as trustee, but in the operation and maintenance of the property it was an agency of the proprietary companies for the performance of their railroad functions. This was accurately expressed in a sworn declaration by one of the individual defendants in 1892 when president of the terminal company. He averred that it was "simply a representative company, acting as an agency at Des Moines for the Wabash Railroad Company and the Des Moines, Northern & Western Railway Company, performing all necessary work for them, and charging each, at actual cost, its due proportion for the expense thereby incurred." The Des Moines, Northern & Western was the successor of two of the original proprietary companies.

In both aspects of its position towards the proprietary companies the terminal company was in a high sense their trustee, and according to salutary principles it was bound to maintain the integrity of that relation. Being itself a corporation, its fiduciary obligations and disabilities rested equally upon its officers, through whom alone it could act. The limitations upon the right of a person in such a capacity to act for his personal benefit with respect to the subject of the trust are familiar. Never are they less than that the dealing must be open, avowedly at arm's length, and without connivance or concealment. The individual defendants, one or the other, or both, were, at all the times material in this case, officers and directors of the terminal company. The conclusion of my Brothers, briefly stated, is that by a series of transactions occurring in a long course of years the original character of the terminal company was gradually changed into that of an independent corporation, and that the control of it was lost by the railroad companies and was acquired by the individual defendants, who were its officers. But they say:

"There is nowhere any indication that the railways intended any such result, and yet such, in our judgment, is the result. This unexpected outcome was the product of several circumstances."

In other words, the proprietary companies were not cognizant of the trend of the circumstances, and the result held to follow, though unexpected, and not intended by them, is enforced, because of a legal presumption of intention of natural consequences of acts, regardless of intention in fact. The circumstances relied on do not appear to me to have the significance attributed to them; but, were it otherwise, the presumption should not be so broadly applied to the case of a trust, the destruction of which is claimed by those subject to the disabilities

of trustees dealing for themselves. The excerpt quoted above touches the quick of this controversy. In my opinion the various transactions thought to produce a result so unexpected and unforeseen should be severally examined in the light of the surroundings at the time they occurred. If in one aspect they were then consistent, or not apparently inconsistent, with the frequent and studied declarations of the object of the terminal organization, and that view was then reasonably entertained by the railroad companies, that view should prevail in a court of equity, rather than a shrewder one tending to a conclusion in favor of participants who were bound in good conscience to the contrary.

An argument is made upon the issue by the terminal company of bonds on the property and the necessity that it should have had the title to enable it to make the mortgage. Of course it had to have title as complete as the giving of the mortgage required, but there is nothing in that inconsistent in any degree with the existence of a trust relation between it and the proprietary companies. The mortgage is still afoot, and in this case no rights are asserted under it. Its effect upon the question before us is not different from that of a joint mortgage by the proprietary companies upon properties severally owned by them, but committed to a common use, or that of an authorized mortgage by an individual trustee named under the contract of 1882. The proprietary companies were fully justified in believing that the changes and amendments in the charter, etc., of the terminal company, now relied on as making for its complete independence, were for the sole purpose of giving it the conventional dress of a corporation that has put forth an issue of bonds. That was why suggestions originating within the terminal company were so readily agreed to by them, and that is why the result so contrary to their vital interests, now held to follow, was unforeseen.

I question whether property and rights of great value are lost in that way, except in circumstances concededly not present here. The very suggestion that a great railroad system, like the Wabash, for example, had unintentionally and unexpectedly lost its proprietary interest and right to use extensive terminals in a large city, to the establishment and upbuilding of which it was a party, and to which it had contributed property acquired for railroad purposes by eminent domain and public grant, is so unusual as to impose upon those who make it a heavy burden of law and fact. Questions like these naturally suggest themselves: Who got the property of the railroad company, and deprived it of its right of entrance into the city? How did they do it? What were their relations to the railroad company? Who represented the railroad company in such an important matter, and what authority did they have?

After the conclusion is reached that the terminal company had by gradual action thrown off its trust character and had become independent, attention is directed to the transactions in its stock. The power asserted by the individual defendants to control the terminal company and thereby to exclude the plaintiffs from the use of the terminals rests upon their possession of five-eighths of the issued capital stock.

There is, however, abundant proof that the stock of that company was intended only to represent the interests of railroad companies actually using the terminal facilities and as a method of apportionment among them. The stock was not intended as a source of personal or individual profit apart from railroad use. Stock ownership and terminal use were inseparable. I know of no public policy or rule of law against such a status of corporate stock or its enforcement as between the parties who established it. If it were formally expressed in the corporate charter, the world would have to take notice. But as between the parties themselves, those participating and having actual knowledge, internal evidence may disclose it. It should always be in mind that in this case there are no innocent purchasers relying upon public records. The contract of 1882 specified the proportional interests of the three original railroad companies, and foreshadowed the organization of the terminal company to take the place of an individual trustee. In 1884 the terminal company was organized for the expressed purpose of carrying out the contract. My Brothers see in the articles of incorporation some evidence of a departure from the trust and the beneficial relations, but it seems to me that the intention to maintain them was asserted and reasserted as definitely and positively as words would permit.

While, as customary, the charter made provision for a capital stock, the connection between the distribution and future ownership of such thereof as might be issued and the railroad use of the property was manifested, not only in that instrument, but afterwards in many ways by both the railroad companies and the terminal company. The limitations of an opinion will not admit of a recital of this evidence in detail. It is in the record, and there is much of it. In 1887, three years after the terminal company was incorporated, when the parties began to convey to it the legal title, the directors of the predecessor of the Wabash Company adopted a resolution directing its president and secretary to execute a deed conveying "all its real estate, rights of way, franchise, roadbed, and other property of said company lying and being in the city of Des Moines, east of Farnham street, whether the same was acquired by grant from the city of Des Moines, or by purchase or condemnation," and, it was added, "this resolution being offered for the purpose of carrying out the contract of date January 2, 1882," etc. One of the individual defendants, as secretary of the directors' meeting, recorded the adoption of the resolution. The Wabash Company was then the real party in interest. The conveyance executed by the officers so authorized, the individual defendant being one of them, was in form a warranty deed, but certainly the resolution of authority fixed the effect of the conveyance for the parties and those who afterwards dealt with knowledge of the facts. Mere executive officials of a railroad company cannot, upon their own initiative, convey away parts of its road and franchises. And, were it necessary to be determined here, it would be an interesting question how far its representatives in a terminal company, organized and holding title like the one here, could do so by consenting to a vital change of its character, or even by a disposal of its stock, without express au-

thority of their principal manifested in the usual corporate way. The 30-year contract of May 10, 1889, between the terminal company and the proprietary companies, was authorized as supplemental to the contract of 1882, and in a preamble it was recited that in pursuance of its charter it acquired and owned a railway. The charter was that of 1884 into which the contract of 1882 was written.

One other matter bearing on this phase of the case may be mentioned. The effort to purchase stock began in 1888. The property of the Wabash Company, including a half interest in the terminal stock not yet issued, was then in a transitional state in a foreclosure proceeding, being held by a purchasing committee. One of the defendants wrote Mr. Ashley, the president of the Wabash Company, and also a member and the secretary of the purchasing committee, saying he had been asked whether half of that stock interest, one-fourth of the whole, could be bought. Mr. Ashley replied favorably, adding:

"But I have always supposed that it would be necessary to confine the sale to such railway companies as would be interested in the station."

Also:

"Was there not an understanding or agreement as to the sale of the stock when the terminal company was formed, and would it not be prejudicial to the interest of the whole to part with the stock to outsiders?"

The defendant replied, agreeing with him and mentioning some railroads in whose interest inquiries had been made. The purchase was made in 1890. It was in 1892 that the other individual defendant made the sworn statement that the terminal company was "simply a representative company, acting as an agency" for the railroad companies. About two months after the first sale, the purchasing committee sold an additional eighth of the stock to the defendant. In a letter during the negotiations Mr. Ashley wrote him:

"It must be understood, of course, that a one-eighth interest in the capital stock shall be sufficient to represent a proprietorship in the company according to the understanding we had when you were here."

The phrase "proprietorship in the company" is not commonly used to describe the stock of an ordinary corporation. Moreover, the defendants, being substantially interested in the proprietary companies, other than the Wabash, had been endeavoring to induce other railroads to come into the terminal company. They were, one or both, also officers of the terminal company. It would naturally be assumed that in dealing with them they were acting in the railroad and terminal interest, as distinguished from that in which they now assert control. The record shows that it was common practice in correspondence to address them personally on subjects of corporate concern. In fact, the three-eighths of the stock bought from the Wabash purchasing committee was transferred to and became the property of the Des Moines Northern & Western Railway Company, into which the two other companies were merged. That was in 1892. The Des Moines Northern & Western then owned seven-eighths of the terminal stock and the Wabash one-eighth. As has already been observed, the terminal company was declared in that year to have been simply a rep-

resentative agency. Early in 1893 a similar declaration was made on behalf of that company. The Des Moines Northern & Western was financially dominated and officially controlled by the individual defendants. In the fall of 1893 their company pledged five-eighths of the terminal stock to them as collateral to some indebtedness. In January, 1894, the pledged stock was by agreement applied as part payment to a small amount, and they have since held it.

The next annual sworn statement on behalf of the terminal company to the Executive Council of the state of Iowa illustrates the transforming effect upon the character of the corporation which a mere transfer of its stock is supposed to have. In February, 1894, it was declared that the terminal company was the owner of the property; that it leased it to the railroad companies, performed services for them, and collected a rental. My Brothers, adopting that theory, say that the ultimate result was the entire emancipation of the terminal company from "outside government." According to the decision, the proprietary companies became outsiders, without right, after the expiration of the operating contract of 1889, to use the terminals, contrary to the will of the holders of five-eighths of the stock, except upon the order of some public administrative board in Iowa, if there be one with jurisdiction. I do not think the stock in the hands of the defendants should be destroyed, or its true value in the scheme or plan of the terminal organization impaired, but that it should be actively operative and profitable only when transferred to and held by railroad companies which use the terminals and contribute in that way to the object of their creation. There are four or five other important railroad systems entering Des Moines, besides those of the plaintiffs.

There is little conflict in the evidence. The difference between my Brothers and myself is not so much about the facts as their significance. They put emphasis upon the corporate cover of the terminal company and perceive a drift to complete self-sufficiency and independency from the very moment of incorporation. But the doctrine of a corporate entity separate and apart from the persons composing the corporation is after all a mere legal fiction, established for convenience and to serve the ends of justice. It does not go beyond that. In equity the shell artificially assumed is not impermeable. The court will look through it and regard the kernel, and whenever justice requires will hold the stockholders as the corporation. That is being constantly done in equity in determining public rights as affected by the corporate association of particular individuals and the rights of the individuals among themselves and with respect to their organization.

But, however the above may be, it seems to me that the less measure of relief granted by the trial court cannot be denied the plaintiffs. It is that they were entitled to a continued use of the terminal properties and that the court would determine the terms and conditions if the parties were unable to agree. That is the matter of defendants' appeal. Whenever a definite right claimed by a railroad company to use specific property of another is of contractual origin, as where it

is a condition of the franchise of the owner or is founded upon conventional agreement, the question of the existence of the right and its extent and limitations is a justiciable one, and the claimant may invoke the aid of a court of equity for its establishment and enforcement. Similarly, when the right is upon reasonable terms and conditions, the court may determine them if the parties do not agree. Both phases of this subject have been so decided in the cases, familiar in this circuit, of the Union Pacific Bridge, at Omaha, and the Wabash right of way and tracks, at St. Louis. If the right of use exists, reasonable terms and conditions are implied, in the absence of recital or stipulation about them. In view of the admitted history of the terminal company, the plaintiffs, merely as minority stockholders, have a right to the use of the terminals and upon reasonable terms. The right is not of that general nature which requires an appeal to some administrative board for the enforcement of the public policy of the state applicable to all railroad companies, but is essentially contractual. It could not reasonably be said that, had the contract of 1889 not been made, two of the original companies holding a majority of the stock might have excluded the third from the use of the terminals and defeated its appeal to the courts. The individual defendants have no greater right or power.

UNITED STATES, for Use of R. HAAS ELECTRIC & MFG. CO. et al., v. TITLE GUARANTY & SURETY CO. et al.

(Circuit Court of Appeals, Seventh Circuit. December 10, 1918.)

No. 2618.

1. UNITED STATES ⊂⊃67(3)—BONDS OF CONTRACTORS FOR PUBLIC WORKS—REMEDIES OF PERSONS FURNISHING LABOR OR MATERIALS—"FINAL SETTLEMENT."

   Where a public building had been completed, accepted, and occupied by the government, and the public works officer in charge had prepared a "final voucher," which, when certified by the contractor, was approved by the proper department officer, such approval constituted the "final settlement" of the contract, within the meaning of Act Aug. 13, 1894, as amended by Act Feb. 24, 1905 (Comp. St. § 6923).

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

2. UNITED STATES ⊂⊃67(3)—BONDS OF CONTRACTORS FOR PUBLIC WORKS—RIGHTS OF PERSONS FURNISHING LABOR OR MATERIALS.

   There may be a final settlement between the government and a contractor for public work, which fixes the rights of creditors who furnished labor or materials under Act Aug. 13, 1894, as amended by Act Feb. 24, 1905 (Comp. St. § 6923), although full payment is not then made, and the balance may be subject to change.

3. UNITED STATES ⊂⊃67(3)—BONDS OF CONTRACTORS FOR PUBLIC WORKS—RIGHTS OF PERSONS FURNISHING LABOR OR MATERIALS.

   Although final payment of a contractor for public work is by the terms of the contract to be determined by the Secretary of the Navy, the "final

settlement," to fix the rights of creditors of the contractor under Act Aug. 13, 1894, as amended by Act Feb. 24, 1905 (Comp. St. § 6923), may be made by some other officer acting for the government.

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Action by the United States for the use of the R. Haas Electric & Manufacturing Company and others, against the Title Guaranty & Surety Company and others. From a judgment of dismissal, plaintiffs bring error. Reversed.

Almon W. Bulkley, of Chicago, Ill., counsel for plaintiffs in error.

Charles Y. Freeman, of Chicago, Ill., counsel for defendants in error.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

EVAN A. EVANS, Circuit Judge. Defendant in error executed its bond to the United States conditioned, among other things, that the contractor "shall promptly make payments to all persons supplying it labor and materials in the prosecution of the work" in constructing the main hospital building of the naval training station at Great Lakes. The R. Haas Electric & Manufacturing Company "and other parties similarly situated," for whose benefit this action was brought, were creditors of the contractor, Noel Construction Company, having furnished labor and material for which they had not been paid.

[1] Plaintiff alleged that more than six months had expired since the "completion and final settlement of the contract," which allegation was denied by defendant, and upon determination of this issue the decision turns.

The action was begun December 5, 1912. The building was "completed" January 16, 1912. Plaintiff asserts that a "final settlement" of the contract occurred on April 6, 1912. On this date the acting chief of the Bureau of Medicine and Surgery of the United States Navy approved what the civil engineer of the United States Navy termed the final voucher. In this letter bearing date March 29, 1912, the engineer wrote as follows:

Re Voucher #31. March 29, 1912.

Sirs: There is forwarded herewith final voucher, less the five per cent. reservation to be withheld for a period of one year, under contract M. & S. No. 1, for the construction of the hospital building at this station. This final voucher covers all additions and deductions under the contract.

It is requested that this voucher be signed in the usual manner, after the certificate "Certified correct and just, payment not received," and then returned to this office, as additional signatures from this office must be attached previous to transmittal to the department.

To this letter the construction company made reply on April 1, 1912, notifying the Public Works Office that the voucher had been executed and returned as requested. This voucher, No. 31, reached the De-

partment of the Navy and was approved on April 6, 1912, by the acting chief of the Bureau of Medicine and Surgery.

The summary of this final voucher was as follows:

Extension of items	$233,409.49
Deductions	222.71
	$233,186.78
Less 5 per cent. reservation to be withheld until January 16, 1913..	11,659.34
	$221,527.44
Less amount previously paid	209,468.52
Amount due	$ 12,058.92

Unless this voucher constitutes a final settlement, it is admitted the action was prematurely brought.

In determining whether a "final settlement" occurred on this date, we cannot overlook the plain purpose of the Act of August 13, 1894, c. 280, 28 Stat. 278, as amended by the Act of February 24, 1905, c. 778, 33 Stat. 811 (Comp. St. § 6923), which was to make more certain the payment of claimants furnishing labor or materials to the government contractors. The title of the original act reads:

"An act for the protection of persons furnishing materials and labor for the construction of public works."

And a part of the amended act reads:

"That hereafter any person * * * entering into a formal contract with the United States for the construction of any public building, * * * shall be required, before commencing such work, to execute the usual penal bond, * * * with the additional obligation that such contractor * * * shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work," etc.

It is apparent, therefore, that the purpose of the act and the object of the bond given in the present case was to secure to the plaintiffs in error and others similarly situated the prompt payment of their claims. Illinois Surety Co. v. John Davis Co., 244 U. S. 376, 37 Sup. Ct. 614, 61 L. Ed. 1206.

Three significant provisions of the act herewith numerically numbered are:

(1) "If no suit should be brought by the United States within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor * * * shall be, and are hereby, authorized to bring suit in the name of the United States * * * for his or their use and benefit, against said contractor and his sureties, and to prosecute the same to final judgment and execution."

(2) "Provided, that where suit is instituted by any of such creditors on the bond of the contractor it shall not be commenced until after the complete performance of said contract and final settlement thereof, and shall be commenced within one year after the performance and final settlement of said contract, and not later."

(3) "And provided further, that where suit is so instituted by a creditor or by creditors, only one action shall be brought, and any creditor may file his claim in such action and be made party thereto within one year from the completion of the work under said contract, and not later."

Claimants' embarrassment, if their present position be untenable, is obvious from a reading of provisions (1), (2), and (3). If no final settlement occurred on April 6, 1912, but did occur as claimed by defendant on December 30, 1912, then no action was maintainable until six months thereafter or until July, 1913. Such an action, however, would have been barred because of the second proviso, (3). For claimants must file their claims within one year of the completion of the work and not later. If suit could not be begun until June, 1913, as defendant contends, and the work was completed, as admitted by the parties, on January 16, 1912, it is apparent that no claims could have been filed within the period specified by the act.

Appreciating the object of the act, courts have given a construction to the term "final settlement" that is in harmony with its purpose. Robinson v. United States, 251 Fed. 461, — C. C. A. —; Illinois Surety Co. v. Peeler, 240 U. S. 214, 36 Sup. Ct. 321, 60 L. Ed. 609; United States v. Robinson, 214 Fed. 38, 130 C. C. A. 432; United States v. Illinois Surety Co., 226 Fed. 653, 141 C. C. A. 409; American Bonding Co. v. United States, 233 Fed. 364, 147 C. C. A. 300.

In the present case the building had been completed and the government had accepted the work and occupied the building prior to the date the final voucher was made out. The voucher was prepared by the public works officer who represented the government in the construction of the building. He termed his statement a "final voucher." Before sending it to the government he secured from the contractor a certificate of its correctness. It was then examined and approved by the acting chief of the bureau in charge of the construction.

Made under these circumstances, when the building was fully completed, accepted, and occupied by the government, at a time when the parties were concerned only in a final settlement of the contract, it is difficult to avoid the conclusion that the date of the approval of this voucher constituted the date from which the six months period ran.

[2] True, there was withheld, as is customary in most contracts of this character, five per cent. of the contract price for a period of one year from the date of the completion of the building. Obviously "final settlement," as that term is used in this statute, did not mean final payment. Illinois Surety Co. v. Peeler, supra. For otherwise the provision in reference to filing claims within one year would necessarily defeat the purpose of the act in all instances excepting only the creditor who first began suit.

It is contended, however, that subsequent to April 6th the government withheld payment of the balance shown by voucher 31 because the building was not completed within the time specified in the contract. There being no necessary connection between final settlement and final payment, this fact is not of much significance. There may be a final settlement between the government and the contractor so as to fix the rights of the creditor under this act notwithstanding the balance may be subject to change.

While there is room for legislative action in the way of an amendment to avoid the defeat of the purpose of the act through inability to give effect to provision (2) heretofore quoted because of the appli

cation of provision (3) also quoted, we find no embarrassment in reaching our conclusion upon the facts in this case. We conclude that in cases where the government has clearly indicated that it has no claim against the surety, a final settlement within the purview of this act has taken place. Robinson v. United States, supra. The approval of the corrected voucher No. 31 in our opinion indicates a determination by government officers that the government was not a claimant to any part of the proceeds of the bond.

[3] Defendant, however, further contends that the approval of voucher No. 31 was not by a government official authorized to bind the government in the respect last indicated, and reference is made to various provisions of the contract to show that the Secretary of the Navy was alone authorized to make the final settlement.

Examination of the contract indicates that the public works officer, the official who prepared the voucher, was the supervisor of construction on the ground; that the commandant determined the amount of the payments as the work progressed, payments being made by the Navy Department based upon these monthly estimates, 10 per cent. being withheld, excepting, however, that before final payment was made a release to the United States executed by the contractor should be filed with the department. We have been unable to find any paragraph in the contract which lodged the exclusive authority to make final settlement with the Secretary of the Navy. Such references to him as appear are not inconsistent with the action of the chief of the bureau in charge of this construction work.

Even though the final payment as between contractor and the government was to be determined by the Secretary of the Navy, the "final settlement" as used in this statute might well be made by some other official acting for the government.

Under all the facts in this case, we conclude that a final settlement occurred April 6, 1912, and the action was therefore not prematurely brought.

The judgment is reversed, and cause remanded, with directions to proceed in accordance with the views expressed in this opinion.

E. I. DU PONT DE NEMOURS & CO. v. BRISCO.*

(Circuit Court of Appeals, Fourth Circuit. December 5, 1918.)

No. 1656.

1. MASTER AND SERVANT ⊂=121(1)—FACTORY ACT—CONSTRUCTION—GUARDING VATS.

Under section 2 of the Factory Act of Virginia, that "all vats * * * shall be properly guarded," the place and manner of the guarding must be such as will at least reasonably safeguard employés while engaged in their habitual work and in their necessary passing to and from it.

2. MASTER AND SERVANT ⊂=289(22)—ACTION FOR INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

Evidence *held* to justify submitting to the jury the question of the contributory negligence of an injured employé in failing to remove an obvious danger at his place of work.

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

*Certiorari denied, 248 U. S. —, 39 Sup. Ct. 257, 63 L. Ed. —.

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 George C. Brisco against E. I. Du Pont de Nemours & Co. Judgment for plaintiff, and defendant brings error. Affirmed.

Charles E. Plummer and J. Gordon Bohannan, both of Petersburg, Va., for plaintiff in error.

John B. Minor and David H. Leake, both of Richmond, Va. (Robert E. Scott, of Richmond, Va., on the brief), for defendant in error.

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

ROSE, District Judge. This is a personal injury case. The defendant in error was plaintiff below, and plaintiff in error defendant. They will be so styled here. The plaintiff worked for defendant. He was hurt in what is called the "save-all" or "catch-all" compartment of its gun cotton plant. Every 30 minutes, from the adjoining tub room, a quantity of hot water and steam was discharged into the "save-all." Not infrequently, so much steam was so liberated that plaintiff had to get out more or less rapidly. On one of these occasions, while trying to do so, his foot slipped and his leg went down into a vat filled with hot water, somewhat impregnated with acid. He was badly scalded, and his injuries are perhaps permanent.

The plaintiff says he was hurt because defendant did not give him a safe place in which to work. There was evidence from which the jury might have found that in this respect he was right. The defendant sets up assumption of risk and contributory negligence. The learned judge below withdrew the former of these defenses from the consideration of the jury, because he thought that the uncontradicted evidence showed that the plaintiff's hurt was a direct consequence of defendant's failure to guard the vat, as is required by a penal statute of Virginia. If the enactment is applicable, the ruling was right. Pocahontas Consolidated Collieries Co. v. Johnston, 244 Fed. 368, 156 C. C. A. 654.

The "save-all" room was 30 feet by 80. Of this, 22 or 23 feet by 74 was occupied by a vat or tank, which was without any permanent covering, except the roof of the building. Along one long and one short side there were platforms—the shorter some 6 feet wide and the larger, although usually referred to in the testimony as the "8-foot platform," was according to the presumably accurate measurements furnished by the defendant, 7 feet in width. The vat was filled to the depth of 2 or 3 feet with the acid-impregnated water, which at intervals was discharged into it from the tub room, and in which cotton had been boiled. Some of the cotton came over with the water. The plaintiff was employed to fish it out with a long-handled wooden rake, and after the water had partially drained out of it, but before it had become dry, to place it into buckets or pails, carry it to the tub room, and put it back into the tubs for reboiling.

In constructing the room, no arrangement was made for safeguarding the employés from such accidents as that which caused the

plaintiff's injury. Indeed, it does not appear that any thought was given to that subject. The 6-foot platform along one end of the room slanted up from one corner of the building, where it was 3 feet or more above the surface of the water, to the other corner, in which it was as much as 6 feet from that surface. The other much longer platform was, as already stated, some 7 or 8 feet wide, and sloped slightly downwards towards the vat. It was about 3 feet above the water. The work of fishing out the cotton does not appear ever to have been done from this platform, nor, so far as the record discloses, was it intended to be used for that purpose. It stood perhaps 6 feet above the bottom of tank, to which the cotton tended to settle, so that a man standing on it would have had to use a rake with a handle 10 or 12 feet long.

Neither of these platforms was guarded in any manner. Transversely over the top of the tank, at intervals of a few feet, were laid 4x6 stringers, with the narrower side up. From time to time, the workmen employed in this room laid planks from one of these stringers to another, usually putting two or three planks side by side. As a rule the platform thus made extended across the center of the tank for nearly its entire length; but, as the planks were not fastened to anything, their position was changed from time to time by the plaintiff, who, for some months before the accident, had been the only person employed in this room, and indeed the only person who spent any appreciable time in it. He stood on this temporary platform, called in the record the "drainage platform," or with one foot on it, and the other on one of the stringers, and with his rake pulled up the cotton and deposited it upon the temporary platform, upon which he was standing. According to some of the defendant's witnesses, plaintiff's predecessors, if not the plaintiff, occasionally stood astraddle over the water, with one foot on one stringer and the other on another. No attempt was ever made to think out or provide a safer method of working. When plaintiff was driven out of the room by the occasional inrush of steam, he had at first to run across one of these 4-inch stringers to the sloping platform, climb up three feet to it, run along it to the 6-foot platform, and then to the exit which opened from the latter. He himself put some planks across two stringers, so that on such occasions he could step from one plank to the other and so reach the sloping platform, and he persuaded one of the carpenters to construct for him some steps which enabled him to get upon that platform more easily and quickly.

There is not a hint in the record that the defendant ever gave a moment's thought to diminishing the risks of the persons who, from time to time, were successively employed in this room. The fact is all the more remarkable because, as the defendant's witnesses testify, it had been the habit, before plaintiff was sent to do the work in this place, to have it done by aged persons or cripples. Doubtless the explanation is to be sought in the pressure under which the responsible heads of these great munition factories were then as now working. The plant was in continuous operation, upon the three-shift system of 8 hours each. Plaintiff was on duty from 7 a. m. to 3 p. m. each day,

but as he could readily enough get out in 8 hours all the cotton which came into the vats in 24, the "save-all" was unoccupied from 3 p. m. to 7 a. m. in each 24-hour period.

As 3 o'clock approached on the day preceding the accident, plaintiff, as he testified, found that the tubs in which he regularly should have put the cotton he then had upon the drainage platform were full. It was not safe to allow the cotton to become dry, as in that condition it might cause explosion or fire. He had accordingly been instructed not to leave it on the platform when he quit work. He testified that, having this in mind, he went to the superintendent or foreman and reported the difficulty to him. He says he was then told that such official would see about it. That there was any such conversation is more or less directly denied by the foreman in question, but as the cotton would not, in fact, in 16 hours dry sufficiently to be at all dangerous, nothing happened, and when he came back at 7 on the morning of the accident the cotton was where he had left it the afternoon before. He testified that he then went to another foreman and reported the situation, and that the latter told him that workmen would be sent to get the cotton off the drainage platform, and instructed plaintiff in the meanwhile to take some more planks and construct with them another temporary platform on the side of the room most remote from the sloping platform. This account is also contradicted with greater or less positiveness. At all event, the plaintiff left the cotton piled up on one section of the drainage platform, and constructed, as he says he was told to do, another temporary platform in the location already mentioned, and from it proceeded with his usual task of raking up the cotton from the bottom of the vat.

At 7:30 a. m. there was one of those discharges of hot water and steam which made it necessary for plaintiff to get out of the room as quickly as he could, and by filling the air with mist the getting out was made somewhat more than usually dangerous. He went from his latest platform to the drainage platform by walking or running along one of the 4-inch stringers. When he reached that platform, his direct course was obstructed by the pile of still wet cotton, and as he went around or through it, his foot slipped, his leg plunged down into the water, and the harm was done.

[1] The defendant argues that it would have done no good to guard the vat, because it says the guards would have been around the outside of the tank, and it was not there that the plaintiff fell, and that it was impracticable to guard the drainage platform upon which the plaintiff slipped, or the stringers which he habitually traversed, and upon which he occasionally worked. Such an argument misconceives the whole purpose of the statute. The enactment (section 2 of the Virginia Factory Act [Laws 1914, c. 16]), declared that "all vats * * * shall be properly guarded." That does not mean necessarily that the guards shall be on the outside of the vat. They should be there if guards at that place are needed to attain the purpose of the Legislature, namely, the protection of the workmen; but the place and manner of the guarding must be such as will at least reasonably safeguard em-

ployés while engaged in their habitual work and in their necessary passing to and from it.

Plaintiff claims that, as the statute requires some things to be done "whenever practical," and omits the quoted words when commanding that vats be guarded, the purpose of the lawmakers was to require such guarding, no matter how difficult it might be.

We are not called upon in this case to express any opinion as to the merits of that contention. Whatever be the answer which may ultimately be given to it, we are persuaded that no employer, who requires or knowingly permits employés habitually to work or pass where there is no protection against falling into open vats, can, upon any construction of the statute, escape from liability, unless he shows at least that the vat could not have been so constructed, and the method of work could not have been so arranged, as to permit the furnishing of such safeguards.

The only evidence offered upon the subject by the defendant is that the temporary platform and the stringers actually used in this vat could not have been readily guarded. Employers may not on such easy terms grant themselves indulgence for sinning against a statute intended for the protection of the lives and limbs of those who work for them.

[2] The defense of contributory negligence rests principally on defendant's contention that plaintiff should have forked the wet cotton from the drainage platform over to the sloping platform. Defendant offered evidence that plaintiff had been told that whenever the drainage platform was full, and there was no room in the tubs for the cotton on it, he should put the cotton on the sloping platform. He denies that he ever had such orders. Defendant replies that, whether he had or not, the sloping platform was there in plain view, and he must have seen for himself how easy it would have been to get the dangerous accumulation of wet cotton off the drainage platform, and with that cotton off the latter platform would have been a safer place than it was, and doubtless the cotton could have been so arranged on the sloping platform that it would not have increased greatly any risk the plaintiff might have been compelled to take in escaping over a portion of it, as he necessarily had to do when he had occasion to leave the room in a hurry.

In view of the contradictory testimony as to the instructions he had received, and the statement of the foreman, made, as plaintiff testifies, less than half an hour before the accident, that workmen would be sent to remove the cotton from the drainage platform, the question of contributory negligence was properly left to the jury under instructions which sufficiently stated the applicable law.

The defendant may not complain of the rejection of some of its offered prayers on this subject. They were either covered by what the court did say, or were properly refused because they attempted to segregate and recite some, but not all, the material facts in evidence.

No error appearing, the judgment below is affirmed.

BERNSTEIN v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. December 5, 1918.)

No. 1652.

CRIMINAL LAW ⊂⊃1003—SENTENCE—FIXING DATE OF EXECUTION OF SENTENCE AFTER DATE ORIGINALLY FIXED.

The time when a sentence of imprisonment shall commence, although specified in the same entry, is properly no part of the sentence, and may be changed by the court at a subsequent term, if for any reason execution of the sentence has been delayed.

Appeal from the District Court of the United States for the Eastern District of Virginia, at Richmond; Edmund Waddill, Jr., Judge.

Criminal prosecution by the United States against Samuel Bernstein. On appeal by defendant from orders denying writ of habeas corpus and petition for release from sentence. Affirmed.

Robert H. Talley, of Richmond, Va., for appellant.

Hiram M. Smith, Asst. U. S. Atty., of Richmond, Va. (Richard H. Mann, U. S. Atty., of Petersburg, Va., on the brief), for the United States.

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

KNAPP, Circuit Judge. On April 11, 1916, the appellant, Bernstein, convicted in the court below of violating certain provisions of Bankruptcy Act of July 1, 1898, c. 541, 30 Stat. 544, was sentenced to pay a fine of $1,000, and to be imprisoned "in the penitentiary at Atlanta, in the state of Georgia, for the period of 18 months from this date." He sued out a writ of error, and was released on bail pending review by this court, which affirmed the judgment in the following December. 238 Fed. 923, 151 C. C. A. 657. In the meantime, and presumably upon conviction of some other offense, he was sent by the United States District Court for the Eastern District of Missouri to a prison or jail in that state for a term which did not expire until nearly 2 years after the date when he was sentenced to Atlanta for 18 months. Upon his discharge from confinement in Missouri, he was taken into custody by the marshal for the Eastern District of Virginia under the prior sentence. He at once demanded to be released on the ground that the time specified in that sentence had long before expired, and he could not be further detained or imprisoned thereunder. At the same time he presented to the court below his petition for a writ of habeas corpus ad subjiciendum, in which he sets forth his contention as follows:

"Your petitioner contends and insists that such judgment and sentence is now inoperative and void because the time therein specified, to wit, 18 months from the date thereof, has now expired, petitioner, after such sentence and until lately, having been confined in prison under sentence of another federal court, to wit, the United States District Court for the Eastern District of Missouri, at St. Louis, the confinement being in the Missouri jail

at St. Charles, and he cannot, therefore, be held for further confinement or imprisonment thereunder, the time of the imprisonment pronounced by such sentence having actually run out and expired on the 11th day of October, 1917, and there being no further imprisonment ordered or set forth in said judgment and sentence, and the court being without authority or power to resentence petitioner, the term at which he was convicted and sentenced having long since expired."

The court below refused the writ prayed for, and thereupon "resentenced" Bernstein to pay a fine of $1,000 and to be imprisoned "in the penitentiary at Atlanta for the period of 18 months." He appeals from the refusal to grant the writ, and from the resentence.

The question raised by appellant is not new and has been frequently answered. It may be assumed, as he contends, that a court is without power, in the absence of statutory authority, to alter or amend a final judgment in either a civil or criminal case after the expiration of the term at which the judgment was rendered, unless during that term there was some reservation of subsequent control. But it has been repeatedly held that the naming of a date when the sentence shall be executed, or the period of imprisonment begin, is not a part of the sentence proper, and therefore such date may be changed after the term expires. In a legal sense, the sentence is the punishment fixed for the offense of which the accused has been convicted, and any order respecting the time of its infliction is but the award of execution or a direction to the clerk for framing the mittimus. Such an order or direction is said to be, not a judicial, but merely a ministerial, act, to which the rule invoked by appellant does not apply. In 12 Cyc. 784, the distinction is thus stated:

"After the term is passed at which the original sentence was imposed, the court has as a general rule no power to modify, amend, or revise it, particularly if the new punishment is in excess of the original sentence. Changes in the sentence, however, which do not alter the punishment, but only change the time and place of its infliction, may be made at a subsequent term."

In 16 Corpus Juris, 1304, it is said:

"As a general rule, the time for imprisonment to commence or to be inflicted is no part of the judgment or sentence proper, and according to the weight of authority, in the absence of a statute requiring it, the time when the imprisonment is to begin or end need not be specified in the sentence; it being sufficient to state merely its duration."

The Supreme Court says, in Holden v. Minnesota, 137 U. S. 483, 495, 11 Sup. Ct. 143, 148 (34 L. Ed. 734):

"The order designating the day of execution is, strictly speaking, no part of the judgment, unless made so by statute."

And again, in Schwab v. Berggren, 143 U. S. 442, 451, 12 Sup. Ct. 525, 528 (36 L. Ed. 218):

"Besides, it is well settled that the time and place of execution are not strictly part of the judgment or sentence, unless made so by statute."

True, these were capital cases, as was Nicholas v. Commonwealth, 91 Va. 813, 22 S. E. 507, where the death penalty was fixed by statute, and the court had no discretion. But as respects the power of a

court, after the expiration of the term at which sentence was imposed, to change the date of its execution, or the date when its execution shall be commenced, we perceive no difference in principle between the case where a specific penalty is fixed by statute, and the case where limits are named within which the court may exercise its discretion; and for the reason that when sentence has once been pronounced in the latter case it becomes the same in legal effect as though that sentence had been prescribed by statute and no other could be imposed. As was said in Hollon v. Hopkins, 21 Kan. 638:

"The time fixed for executing a sentence, or for the commencement of its execution, is not one of its essential elements, and strictly speaking is not a part of the sentence at all. * * * The essential portion of a sentence is the punishment, including the kind of punishment and the amount thereof, without reference to the time when it is to be inflicted."

Directly in point, for the facts are strikingly similar, is State v. Cockerham, decided in 1842, 24 N. C. 204, in which the Supreme Court of North Carolina said:

"The time at which a sentence shall be carried into execution forms no part of the judgment of the court. The judgment is the penalty of the law, as declared by the court, while the direction, with respect to the time of carrying it into effect, is in the nature of an award of execution. In this case the judgment was that the defendant be imprisoned 2 calendar months, and the words, which follow in the record, 'from and after the 1st of November next,' direct the time of executing the judgment. The entry, indeed, would have been more formal, had the judgment and the mandate for carrying it into effect been separate and distinct. But, however informal, it can be understood, in conformity to the law, as consisting of distinct parts, and therefore ought to be so understood. Upon the defendant appearing in court and his identity not being denied, and it being admitted that the sentence of the court had not been executed, it was proper to make the necessary order for carrying the sentence into execution."

It follows from these decisions, with which we are in accord, that the court below had full power to make the order of April 8, 1918, which requires appellant to serve the sentence imposed upon him 2 years before. Although the order so recites, we think it inaccurate to say that he was "resentenced," since the court made no change in the original sentence, but merely changed the previous direction as to the time when imprisonment should begin. When the order is so considered, as properly it should be, the other contentions of appellant are made to disappear.

Affirmed.

JONES et al. v. GENERAL FIREPROOFING CO.

(Circuit Court of Appeals, Sixth Circuit. February 13, 1919.)

No. 3051.

PATENTS ⊂=165—CONSTRUCTION OF CLAIMS—IMPORTING ELEMENTS NOT SPECIFIED.

The rule that an element expressly specified in one claim of a patent should not be read into another in which it is not specified is intended to apply only where such element alone differentiates the two claims.

On motion for rehearing and to reopen. Denied.

For original opinion, see 254 Fed. 97, — C. C. A. —.

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

PER CURIAM. An application for rehearing demonstrates inaccuracy in the opinion filed, and necessitates further discussion.

It was the theory of the opinion that the diagonally edged support is the essence of the invention, and that the language of the claims which we sustained justifies, and the whole case requires, the conclusion that such support should be implied as an element in these claims. It is now pointed out that this diagonal support is expressly specified in certain other claims not in suit, and hence that it should not be read into claims where it is not named. The rule invoked does not go to the extent which requires its application here. We suppose the reason of the rule is that each claim is supposed to have a distinguishing characteristic, and that no construction should be unnecessarily adopted which would cause two claims to be identical. From this reason, it follows that the prohibition is directed, not broadly against importing into one claim a specific limitation expressed in another, but, when stated with precision, is aimed against importing a limitation of that character when, by it alone, the two claims come to be different. If we apply the rule thus stated to the present case, and, for example, to claim 3, and compare it with claim 2, which bears the closest resemblance to claim 3, we must concede that claim 2 expressly calls for the diagonal support by saying "the edge of the support being arranged at an angle to the direction of the feed," while claim 3 includes it only by the implication arising from the call for feeding the sheet lengthwise and expanding the sheet by drawing it away from the plane of the support, thus employing the support with the diagonal edge; but we further observe that claim 2 calls for "means for continuously drawing the sheet over the edge of the support," while claim 3 calls for "means for drawing it away from the plane of the support," and that claim 3 specifies, while claim 2 does not, "means for continuously feeding the sheet lengthwise." These distinctions may not be very substantial; but the draftsman intended them to have distinguishing effect, and we are not inclined to overlook them for the sake of compelling what we think a substantially wrong result. With respect to

this particular question, there is even less objection to importing this same element—the diagonal edge—into claim 9. There is no other claim closely similar to 9 which contains the limitation in express form.

In this connection, two models have been submitted with the rehearing application which are designed to show that a structure can be made fully responding to claim 3 and yet having no diagonal edge support. As to that model which illustrates the progressive operation, it is to be observed, first, that for the missing diagonal support it provides an approximate substitute in the form of two points of support diagonally disposed; and, second, that the claim by its terms fairly contemplates expansion as the sheet is drawn off the support; while in the model the sheet "passes off the same" (the support) mostly unexpanded. We are not satisfied that there was error in our construction of the claim in this respect.

The opinion stated that claim 9 [1] was not rejected on reference to Pitkin; and hence we gave no consideration to the alleged limiting effect of such rejection. This statement was not accurate. Claim 9 was not rejected on reference to Pitkin at the same time that several other claims were, nor was claim 9 amended to distinguish from Pitkin by inserting the "drawing" feature; but at a later time, and when claim 9 had taken the same form as when issued, excepting that it did not contain the word "marginal," it was so rejected, and the word "marginal" was then inserted to avoid the reference. It follows that the phrase "holding a longitudinal marginal portion of the unexpanded sheet in a fixed plane" must be deemed to have been adopted by Curtis in the sense necessary to distinguish his device from Pitkin, and if, when used in this sense, it will also distinguish the patented machines from the defendant's, the claim cannot be so construed as to cover the defendant's device. Pitkin held an entire sheet upon the plane surface, except as the edges were forced away; he, therefore, by inclusion, held a "longitudinal portion" of the sheet. Curtis gripped and held both longitudinal edges of his sheet and began his expansion at the center. However, claim 9 we think clearly intended to refer to and cover the treatment of one-half of the Curtis sheet. It was foreseen that, without departing from the basic principle, one margin only might be held and the other margin proceed into expansion. Other claims refer specifically to the holding of both margins, and we do not doubt that claim 9 was intended to describe the handling of one-half of the sheet shown by the drawings, without including the simultaneous, similar handling of the other half. Hence, it is apparent that in the Curtis device, as in the defendant's, one entire longitudinal margin of the sheet is firmly held while expansion progresses upon the other side; while, in the Pitkin machine, the whole central part is held while both sides are expanded. It is true enough that if we draw an imaginary line through the center of the Pitkin sheet and consider it as

[1] Claim 9: "The machine for expanded previously slitted sheet metal wherein are combined means for feeding the sheet longitudinally and continuously, with means for holding a longitudinal marginal portion of the unexpanded sheet in a fixed plane and means for deflecting the adjacent longitudinal portion of the sheet from said plane and simultaneously expanding it."

two units, as we do in the Curtis sheet, we will find that Pitkin holds one longitudinal margin of each half sheet; but, to do this, we must put a construction upon Pitkin not recognized either by Curtis or by the Patent Office; because, if they had viewed Pitkin in that light and if they also intended—as we think they certainly did—that claim 9 should refer to one-half of the Curtis sheet, the force of Pitkin as a reference would not have been avoided by the amendment inserting the limitation to "marginal." Here, again, we are not inclined to give an overstrict application to rather technical reasoning when the effect is to reach an unsatisfactory result.

The opinion said that claim 5 should also be construed to include the limitation to the diagonal support. This seems to have been an inadvertent reading of claim 6 instead of claim 5. Claim 6 contains this express limitation; claim 5 is the same, verbatim, excepting the limitation. It, therefore, most certainly cannot be read into claim 5; and claim 5 must be classed with 1, 8, and 10, and be considered invalid. Claim 6 was at first sued upon, but later plaintiff omitted it from the list of those upon which he intended to depend. This was done because he adopted a theory of the respective meanings of 5 and 6 which we have not been able to approve, and which seems to have been nothing more than that hypothesis which is not an election.[2] We do not now see that it is important, in any practical way, whether claim 6 is added to 3 and 9 to serve as the basis of the decree. If plaintiff thinks it is, application may be made to the court below to shape the decree so as to include claim 6, and the court below will grant or refuse the application, or grant it upon terms as to a further opportunity for defendant to be heard thereon—all as to that court may seem proper.

There is no occasion to open the case at this stage for further proof regarding defendant's new machine. Whether that infringes may be considered in the court below in any way in which such questions are commonly presented.

Upon what may be considered the main, meritorious question, reargued and presented most exhaustively, we are not convinced that we reached the wrong conclusion. We think the substance of Curtis' invention lay in the diagonal supporting edge over which the longitudinally moving slitted sheet was deflected and expanded at an angle to the plane of the sheet, and that defendant's device is rightly thus described. We also adhere to the view that the sheet is "drawn" over the edge in the fair sense which the whole record requires should be given to that word in the patent.

The application for rehearing and the motion to reopen are denied.

[2] Mr. Justice Holmes in Northern Co. v. Grandview Co., 203 U. S. 106, 108, 27 Sup. Ct. 27, 51 L. Ed. 109.

THOMPSON v. NICHOLS.

(District Court, D. Maine. January 27, 1919.)

No. 786.

1. COURTS ⟸281—FEDERAL COURT—DISTRICT COURT—JURISDICTION.
Under Judicial Code, § 24 (Comp. St. § 991), declaring that the District Court shall have jurisdiction of all suits of a civil nature, at common law or in equity, where the matter in controversy exceeds $3,000, and is between citizens of different states, the District Court is without jurisdiction of purely probate matters, and such court has no jurisdiction to establish or annul a will in any district where the state in which the district is located has intrusted jurisdiction of probate matters to a probate court and has not given such jurisdiction to courts of equity.

2. COURTS ⟸200—MAINE—PROBATE COURTS.
Under Rev. St. Me. 1916, c. 67, §§ 2, 9, chapter 73, §§ 10, 11, and chapter 82, § 6, and in view of history of probate matters, the equity courts for Maine are without jurisdiction of the purely probate matters of approving or annulling a will.

3. COURTS ⟸281—FEDERAL COURTS—JURISDICTION—"SUIT."
A proceeding in a probate court to probate or annul a will is not a "suit," within Judicial Code, § 24 (Comp. St. § 991), giving the District Courts original jurisdiction of all suits of a civil nature at common law or in equity, etc.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Suit.]

4. COURTS ⟸255—FEDERAL COURTS—DISTRICT COURT.
If a federal District Court has jurisdiction over a proceeding to annul a will, admitted to probate in the probate court of a state, such jurisdiction must have been conferred by statute.

5. COURTS ⟸281—JURISDICTION—PROBATE—ANNULMENT.
Where an heir at law, who would be entitled to share in the estate of a decedent, were there no will, sought to enjoin the executor from carrying out the terms of the will that had been probated, and to have the executor declared an administrator de son tort, on the ground that the decision of the probate court denied due process of law, the heir, regardless of whatever language he may use in stating his attack, is seeking a nullification of a decree of the probate court, and a federal court, although there be requisite diversity of citizenship and jurisdictional amount, has no jurisdiction over the proceeding.

6. CONSTITUTIONAL LAW ⟸306—DUE PROCESS OF LAW—DENIAL.
Where a will was duly admitted to probate by the state probate court, and the proceedings were conducted according to the rules and principles established by law for the protection and enforcement of the rights of those interested in the estate, *held*, that an heir at law was not denied due process of law.

In Equity. Bill by Fred S. Thompson against Alexander H. Nichols. On defendant's motion to dismiss. Bill dismissed, and plaintiff's motion to strike from the records defendant's pending motion overruled.

Arthur S. Littlefield, of Rockland, Me., A. E. Hanson, of Malden, Mass., and Eugene C. Upton, of Boston, Mass., for complainant.

Wm. P. Whitehouse, of Augusta, Me., Robert T. Whitehouse, of Portland, Me., and Robert F. Dunton, of Belfast, Me., for defendant.

HALE, District Judge. This case is now before the court on defendant's motion to dismiss plaintiff's bill of complaint for want of

jurisdiction. By the bill, the plaintiff, a citizen of Illinois, proceeds against the defendant, a citizen of Maine, and invokes the jurisdiction of the court, on the ground of such diversity of citizenship. The bill alleges that the petitioner has been deprived of his distributive share as heir at law of the intestate estate of his aunt, Henrietta T. Nickels, late of Searsport, in this district, namely, of a part of that estate exceeding in value $3,000, and that he has been so deprived by reason of a violation of the right to due process of law, secured to him by the Constitution of the United States, and by the Fifth and Fourteenth Amendments thereto; by the failure of evidence, that a certain instrument, alleged to be a copy of her will and executed by her in 1911, continued unrevoked as her will till death, notwithstanding the nonproduction of the original, and the consequent legal presumption of destruction; also by the failure of any evidence that she had destroyed the instrument in the belief that she had executed a later legal will, and in that, if there were such evidence, it would not be competent upon which to base a decree, there being no statutory authority for such procedure in Maine.

After the allegation of the diversity of citizenship, the plaintiff alleges that he is a nephew and heir at law of the intestate, who died in February, 1914, leaving the petitioner as one of the heirs at law, and entitled to one-sixth of the estate, which one-sixth amounts to more than $3,000; that the defendant is administering the estate under a decree of the probate court of Waldo county, Me., purporting to admit to probate an alleged will of the intestate, which was allowed in May, 1914, by the probate court of Waldo county, as the last will of Henrietta T. Nickels, without proof of the necessary jurisdictional facts, without process of law which would justify the decree, and without giving the plaintiff due process of law, as provided by the Constitution of the United States. The bill alleges that this decision of the probate court was sustained on petition brought in the probate court of Waldo county and appealed to the supreme court of probate and to the law court of Maine, and a third time sustained upon a second petition to annul, filed in the probate court of Waldo county, by a decree in that court dismissing the petition, the last decree being unappealed from.

The bill alleges that the original decree of the probate court of Waldo county, dated May 12, 1914, was made without due process of law, in that the decree was based upon the doctrine that, where a prior will is destroyed by the testator in the belief that he has legally made a later will, the revocation of the prior will by destruction is dependent upon, and related to, the valid execution of the later will, and, if no later will was in fact executed, then there is no revocation, and the former will may be admitted to probate by copy; that this doctrine is called the doctrine of dependent relative revocation, and that such doctrine has no recognition in the Law of Maine; and, even if it were so recognized by the law of Maine, there is no evidence that the instrument of November 9, 1911, the execution of which was approved by copy in the probate court, continued in the mind of the said Henrietta T. Nickels, unrevoked, as her will till death, or that she had

destroyed the instrument in the belief that she had theretofore executed a legal will.

Among the prayers of the bill are: That this court will decree that the employment of the doctrine of dependent relative revocation in the courts of probate of Maine is beyond the statutory powers of the probate courts of Maine, and without due process of law; that the defendant has no legal right to the custody of the estate of Henrietta T. Nickels under a decree obtained without due process of law; that, under color of decree made without due process of law, the defendant has no right to withhold from the plaintiff his one-sixth of the property to which he is entitled as an heir at law; that the defendant, its servants and agents, be enjoined from enforcing or carrying out the decree of the probate court of Maine of May 12, 1914, said decree being made without due process of law; that the defendant be adjudged to be administrator de son tort; that the amount of the plaintiffs distributive share in the estate shall be established as a debt upon the estate, or a trust impressed upon it for the plaintiff's benefit; that the plaintiff be adjudged to be entitled to one-sixth of the estate after payment of debts and expense of administration; that, under an order of the court for the sale of assets of the estate, the administrator shall be obliged to sell listed stock first, and retain the Maine Belting Company stock and the unlisted stock for distribution in kind, or that the defendant shall be ordered by this court to go into the probate court of Maine and ask that court to declare the probated document of 1911, by alleged copy, to be null and void and revoked; and that the defendant be ordered to ask for a further appointment as administrator of the estate, by a decree made under due process of law.

The plaintiff's contention is that by this bill he is not seeking to vacate a decree of the probate court or of any state court, but that he is seeking to restrain the action of a void decree, made without due process of law; that the court has jurisdiction under its general equity powers, the controversy being inter partes, between citizens of different states; that the bill shows the unlawful taking of plaintiff's property without due process of law; that the authority of the state cannot be allowed to restrict the federal court of its authority conferred by the Constitution of the United States; and that the plaintiff should be allowed the decree of this court to protect his property, even though, in the protection of such property, a decree of the probate court is disregarded or set aside.

The defendant's motion to dismiss states ten different grounds of dismissal. The first ground of dismissal is that:

"The plaintiff's bill seeks to nullify and prevent the enforcement of a decree of the probate court admitting a will to probate, and to interfere with the custody and administration of the estate of a decedent thereunder, which are purely matters of probate, intrusted by the state, from which the authority to make and prove wills is derived, exclusively to the jurisdiction of the probate court, and as such are not within the jurisdiction of a court of the United States."

[1] If this court has jurisdiction over the matters stated in the bill, it obtains such jurisdiction from section 24 of the Judicial Code

(Act March 3, 1911, c. 231, 36 Stat. 1091 [Comp. St. § 991]), the material and applicable part of which section is:

"The District Courts shall have original jurisdiction as follows: First. Of all suits of a civil nature, at common law or in equity, * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum * * * of $3,000, and * * * is between citizens of different states."

Is the matter before us a suit of a civil nature, at common law or in equity? Or does it present a pure matter of probate, in that it seeks to prevent the enforcement of a decree of the probate court of Maine, admitting a will to probate?

The solution of the question does not require original reasoning, but rather an examination of the leading cases upon a subject which has received much consideration. It is the clear doctrine of the federal courts that matters of pure probate are not within the jurisdiction of courts of the United States, for the reason that the authority to make wills is derived from the state; and the requirement of probate is a regulation to make a will effective. The leading case in this circuit, and one of the most important cases upon the subject in the federal courts, is In re Cilley (C. C.) 58 Fed. 977. In that case Judge Aldrich made a careful and exhaustive examination of the whole question. He began by inquiring what was meant by "suits of a civil nature in law and in equity." He considered whether those words, as understood when the Constitution was framed, embraced proceedings for the probating of wills. He pointed out clearly that, by decisions in England and America, these words in the Judiciary Act and in the Constitution were not used in any colloquial sense, but in the broad, common, well-determined sense by which equity and common law are understood in this country and in England. He cited leading decisions of the federal courts, among others Tarver v. Tarver, 9 Pet. 174, 9 L. Ed. 91, Broderick's Will, 21 Wall. 503, 22 L. Ed. 599 (1874), Fouvergne v. City of New Orleans, 18 How. 470, 15 L. Ed. 399, Ellis v. Davis, 109 U. S. 485, 3 Sup. Ct. 327, 27 L. Ed. 1006 (1883), and other cases, holding that it was the settled law of England at the time of the adoption of our Constitution, as well as at the time of the enactment of various Judicial Codes under the Constitution, that the Court of Chancery will not entertain jurisdiction of questions in relation to probate upon the validity of a will, which the ecclesiastical court was competent to adjudicate; but it would act only in cases where the ecclesiastical court could furnish no adequate remedy;—that jurisdiction to probate wills was withdrawn from the spiritual courts and bestowed upon the probate courts late in the seventeenth century. He cited many decisions of the state courts to show that decisions to establish wills are not classed as suits at common law or in equity, and were not so classed in the early history of the country. He distinguished ordinary probate cases from cases like Gaines v. Fuentes, 92 U. S. 10, 23 L. Ed. 524, which was a suit in form to annul a will and to recall the decree by which it was probated, but was in reality a suit brought againt a devisee by strangers to the estate to annul the will as a muniment of title, and to restrain the enforcement of the decree by which its validity had been established so far as it affected property.

He pointed out that this class of cases was not inconsistent with the repeated declarations of the Supreme Court that federal courts have no jurisdiction over the probate of wills, and that the apparent confusion arises from the fact that cases like Gaines v. Fuentes came either from the territorial courts or from states where, by statute, courts of equity have been clothed with jurisdiction to entertain bills to set aside wills on the ground of fraud. Jurisdiction may be vested in the state courts of equity by statute; and, when so vested, the federal courts sitting in states where such statutes exist will also entertain concurrent jurisdiction in a case between proper parties. No such jurisdiction exists over probate proceedings in a state where courts of equity are not clothed with such statutory power. Ellis v. Davis, 109 U. S. 485, 3 Sup. Ct. 327, 27 L. Ed. 1006 (1883). Judge Aldrich further makes the pertinent suggestion that, from the foundation of the government, the federal courts have disclaimed jurisdiction over probate matters, leaving their exercise to the probate courts created for that purpose, and for kindred special purposes, just as the English courts left such matters to the ecclesiastical courts; and that, when Congress intends to make so radical a change as to confer jurisdiction in such a field upon the federal courts, it will not leave room for any doubtful construction, but will use definite and unmistakable language.

In Wahl v. Franz, 100 Fed. 680, 40 C. C. A. 638, 49 L. R. A. 62 (1900), the Circuit Court of Appeals of the Eighth Circuit reviews Judge Aldrich's opinion in the Cilley Case, and says of it that—

"The opinion * * * is both instructive and strong, and seems to us conclusive, so much so that little can be added thereto."

See, also, Cilley v. Patten (C. C.) 62 Fed. 498, showing that the same doctrine is also applicable to setting aside a will. It is not necessary to review the many cases that have followed the Cilley Cases.

In Farrell v. O'Brien, 199 U. S. 89, 109, 110, 25 Sup. Ct. 727, 732, 50 L. Ed. 101 (1904), the Supreme Court passes conclusively upon the question. In speaking for the court, Chief Justice White considers and quotes at length from the leading cases upon the subject. He analyzes Gaines v. Fuentes, 92 U. S. 10, 20, 21, 23 L. Ed. 524. In commenting upon it, he observes:

"Having decided that the suit was in all essential particulars one inter partes, for equitable relief to cancel an instrument alleged to be void and to restrain the enforcement of a decree alleged to have been obtained by false and insufficient testimony, the court was brought to consider whether the law of Louisiana allowed such equitable relief, and said [92 U. S. 20, 23 L. Ed. 524]:

" 'There are no separate equity courts in Louisiana, and suits for special relief of the nature here sought are not there designated suits of equity. But they are none the less essentially such suits; and if by the law obtaining in the state, customary or statutory, they can be maintained in a state court, whatever designation that court may bear, we think they may be maintained by original process in a federal court, where the parties are, on the one side, citizens of Louisiana, and, on the other, citizens of other states.' "

He then reviewed the Broderick Will Case, 21 Wall. 503, 22 L. Ed. 599, Goodrich v. Ferris, 214 U. S. 80, 29 Sup. Ct. 580, 53 L. Ed. 914, Roller v. Holly, 176 U. S. 398, 20 Sup. Ct. 410, 44 L. Ed. 520, Byers

v. McAuley, 149 U. S. 608, 13 Sup. Ct. 906, 37 L. Ed. 867, Ellis v. Davis, 109 U. S. 485, 3 Sup. Ct. 327, 27 L. Ed. 1006, Hook v. Payne, 14 Wall. 253, 20 L. Ed. 887, and other leading authorities upon the subject. He thus concludes his review of the cases:

"Let us, then, first deduce the principles established by the foregoing authorities as to the power of a court of the United States over the probate or revocation of the probate of a will. An analysis of the cases, in our opinion, clearly establishes the following:

"First. That, as the authority to make wills is derived from the state and the requirement of probate is but a regulation to make a will effective, matters of pure probate, in the strict sense of the words, are not within the jurisdiction of courts of the United States.

"Second. That where a state law, statutory or customary, gives to the citizens of the state, in an action or suit inter partes, the right to question at law the probate of a will or to assail probate in a suit in equity the courts of the United States in administering the rights of citizens of other States or aliens will enforce such remedies."

The most recent federal decision is that of Smith v. Jennings, 238 Fed. 48, 151 C. C. A. 124. Here is found a review of all the old cases, and of the late cases of Garzot v. De Rubio, 209 U. S. 283, 28 Sup. Ct. 548, 52 L. Ed. 794, and Goodrich v. Ferris, 214 U. S. 71, 29 Sup. Ct. 580, 53 L. Ed. 914, supra.

From the above review of cases it is well settled that the federal courts have no jurisdiction in equity, either by virtue of statutes, or general chancery powers, over distinctly probate matters; that they have no jurisdiction to establish or annul a will in any district where the state in which that district is located and the suit is brought has intrusted jurisdiction of probate matters to a probate court, and has not, by statute, given jurisdiction to the courts of equity in such state.

[2] Has the state of Maine intrusted exclusive jurisdiction to establish or to annul a will to its probate courts? Or has it granted jurisdiction in such matters, concurrently or otherwise, to its equity courts?

The jurisdiction of the probate court of the state of Maine is found in chapter 67, § 9, of the Revised Statutes of Maine of 1916:

"Each judge may take the probate of wills, and grant letters testamentary or of administration on the estates of all deceased persons, who, at the time of their death, were inhabitants or residents of his county, or who, not being residents of the state, died leaving estate to be administered in his county, or whose estate is afterwards found therein, also on the estate of any person confined in the state prison under sentence of death or of imprisonment for life, and has jurisdiction of all matters relating to the settlement of such estates."

Chapter 73, §§ 10 and 11, provides as follows:

"Any judge of probate, having jurisdiction of the trust, and the Supreme Judicial Court in any county, on application of the trustee, or of any person interested in the trust estate, after notice to all interested, may authorize or require him to sell any real or personal estate held by him in trust, and to invest the proceeds thereof, with any other trust moneys in his hands, in real estate, or in any other manner most for the interest of all concerned therein, and may give such further directions as the case requires, for managing, investing and disposing of the trust fund, as will best effect the objects of the trust.

"Either of said courts may hear and determine, in equity, all other matters relating to the trusts herein mentioned."

The last two of the above provisions have, in substance, been in effect ever since the separation of Maine from Massachusetts. In Given v. Simpson, 5 Greenl. 303, the jurisdiction of the Supreme Judicial Court of Maine, as a court of equity, in regard to testamentary trusts, was defined and limited by the court. It was held that:

"The language of St. 1821, c. 50, giving to this court equity jurisdiction 'to hear and determine all cases of trust arising under deeds, wills, or in the settlement of estates,' is applicable only to express trusts arising from written contracts of the deceased; that is, to trusts expressly and directly created, not to those implied by law, or growing out of the official character or situation of the executor or administrator."

As to the words "in settlement of estates," the court said:

"This vague language may be satisfied by applying it to contracts not under seal, respecting the settlement of estates, whereby trusts are created; and there is therefore no reason for extending its meaning any further, especially as a system, peculiar in itself, is by law established, for regulating and enforcing the settlement of the estates of persons deceased, by the judges of probate. The exercise of an original equity jurisdiction by this court in these cases would disturb and derange this system, unless expressly confined to those trusts which arise under the contracts in writing of the deceased; that is, to trusts expressly and directly created, not to those implied by law, or growing out of the official situation, or incidental to the official character of an executor or administrator."

Chapter 82 of the Revised Statutes of Maine of 1916, § 6, cl. 10, provides that a court of equity has jurisdiction:

"To determine the construction of wills and whether an executor, not expressly appointed a trustee, becomes such from the provisions of a will; and in cases of doubt, the mode of executing a trust, and the expedience of making changes and investments of property held in trust."

Chapter 67, § 2, provides that:

"The courts of probate shall have jurisdiction in equity, concurrent with the Supreme Judicial Court, of all cases and matters relating to the administration of the estates of deceased persons, to wills, and to trusts which are created by will or other written instrument. Such jurisdiction may be exercised upon bill or petition according to the usual course of proceedings in equity."

It must be observed that the above sections, as well as sections 10 and 11 of chapter 73, have no relation to the establishment or annulment of wills. Section 2 of chapter 67, just cited, is taken from an act passed in 1915, which gives the courts of probate such jurisdiction as the Supreme Judicial Court has in equity matters relating to the estates of deceased persons, to wills, and to kindred subjects. It is not an act giving jurisdiction of probate matters to the equity court; it enlarges in no way the jurisdiction of the equity court; it does enlarge the jurisdiction of the probate court, to the extent of the jurisdiction now possessed by equity courts concerning matters relating to wills and to the settlement of estates. By the Public Laws of 1874, now embodied in the Revision of 1916 as clause 14, the Supreme Judicial Court is given—

"full equity jurisdiction, according to the usage and practice of courts of equity, in all other cases where there is not a plain, adequate and complete remedy at law."

In tracing the usage of equity courts, it will be found that, at the time of the adoption of the Constitution of the United States, the English High Court of Chancery did not exercise jurisdiction over matters of probate, such as the approving or annulling of wills. It did not entertain questions in relation to the probate or validity of a will. Broderick's Will, 21 Wall. 503, 22 L. Ed. 599 (1874); In re Cilley (C. C.) 58 Fed. 977, 982. From an early period of history, in all the states constituting the United States, special tribunals, unknown to the ancient judicial system of England, had been created under different names, such as "Probate Courts," "Surrogate Courts," "Orphans' Courts," with statutory jurisdiction over all matters of probate and the administration of estates. As a result of such legislation, in a few of the states, original chancery jurisdiction over all matters has been held to remain unimpaired in spite of the jurisdiction of probate courts, and is exercised concurrently with the latter; but in the great majority of the states the original chancery jurisdiction is denied, or its exercise is suspended, in all matters specified by statute to be within probate jurisdiction.

In secton 1154 (edition of 1905), Pomeroy has summarily grouped the states into three classes. In the states of the first class the original equitable jurisdiction over probate administrations remains unabridged by statute and is concurrent with that possessed by the probate courts. In the second class the jurisdiction of the probate courts over everything relating to the administration and settlement of a decedent's estate is substantially exclusive; the equitable jurisdiction over the subject is neither concurrent, nor auxiliary, nor corrective. In the third class the equitable jurisdiction is not concurrent; it is simply auxiliary. Pomeroy puts the states of Connecticut, Indiana, Maine, Massachusetts, Michigan, Nebraska, Nevada, New Hampshire, Oregon, and Pennsylvania into the second group, namely, into the class where the jurisdiction of the probate courts is exclusive in everything relating to the settlement of estates and the probate of wills.

In Whitehouse's Equity Practice, § 35, it is stated that Maine unquestionably belongs in Pomeroy's second class; that is, to the class where equity jurisdiction over probate matters is denied absolutely, or suspended in all matters specified by statute as within probate jurisdiction. It is further stated that in Maine courts of chancery will not exercise concurrent jurisdiction with courts of probate, but only supplementary or auxiliary jurisdiction in certain matters of administration involving special equitable features, which would constitute sufficient ground for equitable jurisdiction, as in Hawes v. Williams, 92 Me. 492, 43 Atl. 101, citing Graffam v. Ray, 91 Me. 234, 39 Atl. 569, in which case, in speaking for the court, Mr. Justice Strout said:

"The probate court has exclusive jurisdiction, subject to appeal to the supreme court of probate, of the estates of decedents, and their final settlement and distribution, including the settlement of the accounts of the personal

representative. * * * All these questions would be determined by the probate court, and the executor charged for such amount as in equity and under the rules of law he was liable for. All these matters are within the exclusive jurisdiction of the probate court, and cannot be passed upon by a common-law tribunal. The probate court is invested with ample power in these respects."

In Cousens v. Advent Church, 93 Me. 292, 45 Atl. 43, it was held that the Supreme Court, sitting in equity, could not establish an unprobated will; that such will should be presented for probate to the probate court; that the prior probate of an earlier will did not preclude the probate of a later will; that the probate court, being authorized to admit wills to probate, has authority to revise or revoke its former decree, so as to give effect to the last will. In speaking for the court, Mr. Justice Strout said:

"Wills do not become operative until proved and established in some court having jurisdiction for that purpose—in this state, by allowance by the court of probate, or the appellate supreme court of probate. *No other tribunal can give effect to a will. Until established in that forum it has no life. This court, sitting in equity, cannot establish and execute an unprobated will.* * * * The power of the probate court to revoke a decree granting administration is recognized in R. S. c. 64, § 19, which requires an administrator to give a bond, with the condition, among others, 'to deliver the letters of administration into the probate court, in case any will of the deceased is thereafter proved and allowed.' * * * To grant the prayer of the bill would require this court, sitting in equity, to assume the jurisdiction of the probate court, and establish and execute a will, never presented to a court of probate. This is beyond the province of equity. Wolcott v. Wolcott, 140 Mass. 194 [3 N. E. 214]."

The court cites Bowen v. Johnson, 5 R. I. 119, 73 Am. Dec. 49, in which case the Supreme Court of Rhode Island held that the power to revoke a probate once granted, though nowhere expressly recognized in the statutes of that state, was a just and necessary power to be implied from the statute granting general authority to "take the probate of wills and grant administration on the estate of deceased persons."

Waters v. Stickney, 12 Allen (Mass.) 1, 90 Am. Dec. 122, contains an historical discussion of the powers of the probate court in such matters. Following these authorities, in Merrill Trust Co. v. Hartford, 104 Me. 566, 572, 72 Atl. 745, 129 Am. St. Rep. 415, a purely probate proceeding, and not a suit between parties, it was held that a probate court is the tribunal having the power, upon subsequent petition, to vacate or annul a prior decree of probate of a will, when such prior decree is clearly shown to be without foundation in law or fact. In Patten v. Tallman, 27 Me. 17, 24, 27, the Maine court had before it the construction of a will as a muniment of title. The will came before the court as a will already "proved and allowed in the probate court for the county of Lincoln." In speaking for the court, Mr. Justice Shepley said:

"The original jurisdiction for the probate of wills is by statute vested exclusively in the courts of probate. The courts of common law have no jurisdiction, or right to determine, whether a will has been legally executed or not. If a will be presented to them as a muniment of title, which has not been proved and allowed by a probate court, it cannot be received and proved, nor its validity be admitted. If it has been approved and allowed by a pro-

bate court having jurisdiction, its validity cannot be called in question by the court of common law. The adjudication of the court of probate, not vacated by an appeal, is final and conclusive upon all persons. Whether the court of probate decided any questions necessarily arising and involved in its adjudication correctly or incorrectly can never be made a matter of inquiry and decision in a common-law court, to affect that adjudication. Such have been the settled doctrines for a long time in this and in several of the other United States. Dublin v. Chadbourn, 16 Mass. 433; Laughton v. Atkins, 1 Pick. [Mass.] 535."

From the whole current of judicial authority in Maine, it is clear that the power to revoke or annul a will, once admitted to probate, rests solely with the probate court decreeing its allowance. The Supreme Judicial Court, as the equity court of Maine, has no power to entertain a proceeding for the revocation of a will admitted to probate. It follows, then, from what has been said before, that the District Court of the United States, within the district of Maine, has no such power.

[3, 4] It is now necessary to inquire whether proceedings in the probate court to probate a will have the character of "suits," and have been treated as such.

Such proceedings are, as has been seen, distinctly statute proceedings. They do not arise between parties; they are entirely matters of statute; in fact, the whole subject of wills is a matter of statute. In United States v. Perkins, 163 U. S. 625, 627, 16 Sup. Ct. 1073, 41 L. Ed. 287, in passing upon the inheritance tax under a state law, the Supreme Court had occasion to discuss, historically, the right to dispose of property by will. The court cited 2 Blackstone, 492, where the learned commentator says that by the common law, as it stood in the reign of Henry II, a man's goods were to be divided into three equal parts; one part went to the heirs; another part to his wife; a third part was at his own disposal. Prior to the reign of Henry VIII, the right of a man to make his will was thus limited in matters of personal estate, and did not extend at all to real estate. Until special tribunals were founded by the statutes of the several states constituting this nation, in the manner to which reference has been made, there was no machinery for creating a representative to take care of the property of a person after he died. Nobody had the title to the property of a deceased person, except the heir of the real estate, in the absence of a will devising it; and even this was subject to the right of sale for the payments of debts. But when a representative had once been created by statute, under the machinery of such tribunals as probate courts, such representative became a party upon one side against whom any person having a claim could proceed to establish his claim; and when such claimant did proceed to establish his claim, he did so by a suit. The claimant was one party to such suit; the representative of the estate was the other party; and so the suit was inter partes. Such suit could be brought either in law or equity in the state courts when the parties were citizens of the state; they could also be entertained by the federal court when diversity of citizenship appeared, and when jurisdiction was thus given; but this became true only after the will had become probated, and thus had been given life. Until the machinery set up by the state for

creating a custodian of the estate had done its work, such estate was not ripe either for distribution or attack.

In Hook v. Payne, 14 Wall. 253, 20 L. Ed. 887, discussed in Farrell v. O'Brien, 199 U. S. 89, 25 Sup. Ct. 727, 50 L. Ed. 101, an administrator had been duly appointed in a certain estate; a bill in equity was brought against him by a distributee. The bill did not question the validity of his appointment or his authority to represent the estate; it sought, on the ground of fraud, to annul a certain release which the distributee had given to the administrator relating to other shares; it sought to have a decree against such distributee for the correct amount of his distributive share. The court took jurisdiction as between the parties to the suit, and granted relief; but it refused to deal generally with the estate, and the rights of persons other than the complainant. It refused to interfere in any way with the administrative functions of the administrator, as distinguished from the rights of litigants in the suit inter partes which had been brought. It did not undertake to interfere with probate proceedings. The case is not in conflict with the doctrine of the United States courts that they have no jurisdiction in equity to allow or disallow a will. In Byers v. McAuley, 149 U. S. 608, 13 Sup. Ct. 906, 37 L. Ed. 867, the court distinctly says that it had no original jurisdiction to administer an estate and, by entertaining jurisdiction of a suit against the administrator, could not draw to itself the full possession of the estate, or the power to determine all claims against it. See, also, Ball v. Tompkins (C. C.) 41 Fed. 486.

In Waterman v. Canal Louisiana Bank, 215 U. S. 33, 30 Sup. Ct. 10, 54 L. Ed. 80, a bill was filed by an heir against the executor for the determination of the plaintiff's interest in an alleged lapsed legacy. The will was in no way attacked; the validity of the appointment of an executor was not attacked; no decree of the probate court was attacked. The court cited Byers v. McAuley, 149 U. S. 608, 13 Sup. Ct. 906, 37 L. Ed. 867, Payne v. Hook, 7 Wall. 425, 19 L. Ed. 260, and other cases, holding that a debt may be established by the federal court in an estate as administered by the probate court. The case recognized that in proceedings purely of a probate character there was no jurisdiction of the federal courts. It reaffirms the doctrine of Farrell v. O'Brien, 199 U. S. 89, 25 Sup. Ct. 727, 50 L. Ed. 101, that a court of the United States could not entertain jurisdiction of a bill to set aside the probate of a will in the state of Washington because, by the statutes of that state, the proceeding was one purely in rem, and not a suit inter partes sustainable in a court of equity; that in proceedings of a purely probate character there was no jurisdiction in a federal court. In the Farrell Case, referred to, the bill was brought to annul the probate of a will for lack of lawful procedure, for application of a wrong legal principle, and on the ground that under the laws of the state real estate could not be disposed of by a nuncupative will; and the opinion of the court was distinct and conclusive that the law of the state authorized a proceeding for contest of a will only in the court which had admitted the will to probate; that the authority conferred concerning the contest over the probate of a will was an essential part of the probate procedure, cre-

ated by the laws of the state, and was not an ordinary suit between parties; that the remedy afforded by the laws of the state to secure the probate, or the revocation of the probate, of a will, were proceedings of a probate character, and did not constitute an action, or a suit inter partes; that, although there was diversity of citizenship, the court was without jurisdiction, so far as the bill sought a declaration of the nonexistence of a will and the consequent nullity of the probate.

In Ellis v. Davis, 109 U. S. 485, 3 Sup. Ct. 327, 27 L. Ed. 1006, the Supreme Court held that the original probate of wills is a matter of state legislation and depends upon local law, for it is that law which confers the power of making wills; that no instrument can be effective as a will until it is probated; that no rights and relations to it can be contested between parties until preliminary probate has first been made; that power has not been conferred upon the courts of the United States to probate a will; that, if the administration is incomplete and in fieri, application must be made to the courts of probate which have possession of the subject, and exclusive jurisdiction over it. After a will has once been proved and has obtained life in the world, the United States courts permit suits to be brought to construe it as an existing instrument, and even to charge the estate with the amount of a judgment recovered against it in another suit. Lawrence v. Nelson, 143 U. S. 215, 12 Sup. Ct. 440, 36 L. Ed. 130 (1891). In Christianson v. King County, 239 U. S. 356, 373, 36 Sup. Ct. 114, 121 (60 L. Ed. 327) Mr. Justice Hughes, for the Supreme Court, reviews the proceedings of the probate court of the territory of Washington. He says:

"Despite the informality of the petition, the appointment of the administrator was not void, and, not being void, it is not subject to collateral attack."

He cites many cases.

"It appears that subsequently the probate court, after opportunity had been afforded to discover heirs, entertained a petition of the administrator for final account and distribution. The statutory notice * * * was published, and on the return day the proceeding was duly continued, and, on hearing, the decree was entered settling the account, finding that there were no heirs, and directing distribution of the real property, as described, to the County of King. This proceeding was essentially in rem [citing cases]. It was competent for the court to inquire whether there were heirs, and, if there were such, to determine who were entitled to take according to the order prescribed by the statute; and also, if it was found that there were no heirs, to make the distribution to the county as the statute required. It is apparent that there was no deprivation of property without due process of law. The court, after appropriate notice, did determine that there were no heirs and its decree being the act of a court of competent jurisdiction under a valid statute bound all the world including the plaintiff in error. It cannot be regarded as open to attack in this action. Grignon's Lessee v. Astor [2 How. 319, 11 L. Ed. 283] supra; Florentine v. Barton [2 Wall. 210, 17 L. Ed. 783] supra; Caujolle v. Ferrie, 13 Wall. 465, 474 [20 L. Ed. 507]; Broderick's Will, 21 Wall. 503 [22 L. Ed. 599]; Simmons v. Saul [138 U. S. 439, 11 Sup. Ct. 369, 34 L. Ed. 1054] supra; Goodrich v. Ferris, 214 U. S. 71, 80, 81 [29 Sup. Ct. 580, 53 L. Ed. 914]."

It is urged in behalf of the plaintiff that, in some way, certain cases above cited—and particularly the Waterman Case—sustain the contention that this suit can be maintained under the equity power of the fed-

eral courts in cases arising between citizens of different states; that under general equity grounds of jurisdiction, this controversy, being between citizens of different states, can be passed upon in the federal courts. I cannot sustain such contention. The cases just cited fully sustain the doctrine that the federal courts cannot control property in possession of the state courts under probate proceedings; that, as courts of chancery, they can have no jurisdiction of a purely probate matter; they cannot deal with a will until it has obtained life by going through probate machinery. I need spend no time considering the general chancery powers of the federal courts to assume jurisdiction over probate matters. Such jurisdiction, if it is to be found in the United States courts, must have been conferred upon them by an act of Congress. Loring v. Marsh, Fed. Cas. No. 8,515. If it has been conferred by any statute, it is by the section of the Judicial Code to which I have referred, and which provides that this court shall have original jurisdiction of all suits of a civil nature at common law or in equity, where the amount in controversy exceeds $3,000 and is between citizens of different states. From the decisions of the courts to which I have called attention, it is clear that a probate proceeding is not a suit of a civil nature at common law or in equity; it has never been regarded as such by the courts of this country.

[5, 6] In the case at bar the learned counsel for the plaintiff urges that the bill does not seek to set aside the probate of a will, but that it is a suit which obtains the jurisdiction of this court by diversity of citizenship, and seeks to give the plaintiff due process of law in reference to the custody of a certain estate, and to restrain action on a void decree; that this court has jurisdiction to give due process of law even though, in the course of enforcing its decree, it should be found that there is a decree of the probate court of Maine inconsistent with the decree of the federal court, and with the right of the plaintiff to have due process of law. But it is the duty of this court to put the accent of its decree upon the vitals of a controversy, and not upon the mere form. The bill does seek to enjoin the executor from carrying out the terms of a will that has been probated; it seeks to have the executor declared an administrator de son tort, and to have the plaintiff decreed to be entitled to one-sixth of the estate as next of kin and heir. It thus seeks to have this court decree that there has been no legal probate of a will, that the estate is intestate, and that, though the will has been through the machinery of probate, it is, in fact, void. It seeks the decree of this court that the defendant executor has no legal right to the custody of the estate; it seeks to interfere with the disposition of the property under the will by asking the court to decree what sort of stock shall be sold first. It further asks, as an alternative, that the court will order the executor, armed with a decree of this court, to go into the probate court of Maine, and ask that court to declare its decree, probating a will, to be null and void. The bill seeks to attack the probate of a will, and not merely to construe it after it has been through the probate machinery. It is clear that there can be no difference in law between asking the court to declare a will to be null and void, and asking the court to enjoin an executor, appointed under it, from enforcing its

provisions. It seems clear that the court is prevented from making an illegal decree in reference to one-sixth of the estate, as much as it would be prevented from making an illegal decree upon the whole estate. Whatever language the plaintiff may use in which to state his attack upon the probate court, the fact remains that what he seeks from this court results in a nullification of a decree of the probate court of Maine.

Judge Hough has lately discussed the subject of "due process of law" in an illuminating way. 32 Harvard Law Review, 218. He shows the difficulty of defining law or its due process, observing that "Moses, Blackstone, and Mr. James Coolidge Carter have not permanently succeeded in such definition." Judge Hough's article is valuable, not only in its clear reasoning, but in its extended citations. Among many other references, he cites Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565, in which case Mr. Justice Field defines the term "due process of law," when applied to judicial proceedings, as meaning a course of legal proceedings according to those rules and principles which have been established by our jurisprudence for the protection and enforcement of private rights. He observes that, to give such proceedings any validity, there must be a competent tribunal to pass upon their subject-matter.

In the case at bar, in my opinion, the plaintiff in his bill does not present a case where due process of law has been denied him. He has invoked the law of the land in the course of legal proceedings, which appear to have been conducted according to the rules and principles, established by our jurisprudence, for the protection and enforcement of the rights of citizens of Maine. He has obtained a decree in the probate court of Maine, and in the courts to which appeal was taken. Upon the authorities to which I have called attention, these courts must be held to be competent tribunals to pass upon the subject-matter thus brought before them. In Thompson, Appellant, 116 Me. 473, 102 Atl. 303, Mr. Chief Justice Cornish, in speaking for the Maine court, has said:

"The law of the land has been measured out to the petitioner, and [the Supreme Judicial Court of Maine] have searched in vain for any infringement of his constitutional rights."

Upon examination of the proceedings in the state court, recited in the bill in equity, I am of the opinion that the plaintiff had already received due process of law in the only courts competent to take jurisdiction in the probate of wills.

The bill must be dismissed, for the reason that this court has no power to nullify and prevent the enforcement of a decree of the probate court of Maine admitting a will to probate. Having come to this conclusion, it is unnecessary to consider the further questions raised by the motion.

A decree may be presented dismissing the bill, with costs.

On December 28th, the day of the hearing, a motion was filed by the plaintiff to strike from the records defendant's pending motion, with which motion the court is now dealing. The plaintiff's motion to strike defendant's pending motion from the record is overruled.

MEMORANDUM DECISIONS.

BAILIS v. UNITED STATES. (Circuit Court of Appeals, Second Circuit. December 11, 1918.) No. 114. In Error to the District Court of the United States for the Southern District of New York. Criminal prosecution by the United States against Jacob Bailis. Judgment of conviction, and defendant brings error. Affirmed. K. Henry Rosenberg, of New York City, for plaintiff in error. Francis G. Caffey, U. S. Atty., of New York City (Garrett W. Cotter, Asst. U. S. Atty., of Flushing, of counsel), for the United States. Before ROGERS, HOUGH, and MANTON, Circuit Judges.

PER CURIAM. This case is affirmed without opinion.

THE BRIS. (Circuit Court of Appeals, Second Circuit. November 20, 1918.) No. 141. Appeal from the District Court of the United States for the Southern District of New York. Libel by the Standard Varnish Works against the steamship Bris. From a decree for complainant (253 Fed. 259), libelant appeals. Question certified to the Supreme Court.

ROGERS and MANTON, Circuit Judges. This cause coming on to be heard upon the appeal taken herein by the libelant, and it appearing to the court that a writ of certiorari has been granted by the Supreme Court of the United States to review the decree entered by this court in the case of the International Paper Company against the schooner Gracie D. Chambers and others (253 Fed. 182, — C. C. A. —) and it also appearing to the court by an inspection of the transcript of the record upon the appeal in this cause that questions arise in this cause which were involved in the decision in the last-mentioned cause, and that the District Judge relied upon the authority of the decision of this court in said case of the Gracie D. Chambers in making the decision on which the decree appealed from was entered: Now, therefore, this court hereby certifies to the Supreme Court of the United States the following questions of law concerning which it desires the instructions of the Supreme Court for the proper decision of the appeal herein, under the following facts:

On August 17, 1917, varnish belonging to libelant was shipped by it in the port of New York for Gothenburg, Sweden, upon the steamship Bris, consigned to the Allmanna Svenska Elektriska A. B. Westeras, and the agents for said ship thereupon delivered to libelant a bill of lading, of which a copy is annexed hereto, which formed a contract between libelant and claimant in reference to said goods. Particular reference is made to clause 6, clause 7, and the next to last clause of the bill of lading. The libelant paid in advance the freight mentioned in said bill of lading. At the time of said shipment, shippers were required to obtain export licenses from the British government on cargo of this class, and were also required by United States statute to obtain export licenses from the United States government in connection with such articles as the President should, by proclamation, designate. At the time that said shipment was made the President had designated certain articles as to which licenses must be thus procured when destined for Gothenburg, Sweden, but varnish was not included among them. At the time of shipment, the libelant presented a license which it had procured from the British government. On August 27, 1917, the President made a further proclamation, effective August 30, 1917, whereby shippers of varnish and all other cargo destined for Gothenburg, Sweden, were required to procure licenses before the same could be exported. The libelant thereupon made application for such a license, and the claimant held its vessel in port until October 8th, to see if such licenses could be procured, before beginning the discharge of the cargo. Unless shipments were accompanied by the aforesaid licenses they were not allowed by the men-of-war belonging to the Allies to

proceed to destination. On or about October 8th the United States, acting through the Exports Administrative Board, refused the application for a license to transport the goods mentioned in the libel, and other cargo destined for Gothenburg, and claimant thereupon began to unload the cargo of the Bris and concluded the discharge on October 22, 1917. The claimant continued ready and willing to carry said cargo forward, if a license therefor were obtained by libelant. The libelant took redelivery of the cargo at the port of shipment and made a demand upon the claimant that the claimant should return the freight paid, which demand was refused. The question aforesaid is as follows: (1) Did the bill of lading contract justify the carrier, under the facts stated, in refusing to refund the prepaid freight? Which question, arising from the facts aforesaid, is hereby submitted to the Supreme Court.

CONRAD v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. July 8, 1918.) No. 5108. In Error to the District Court of the United States for the District of Colorado. Boswell F. Reed and Robert W. Steele, Jr., both of Denver, Colo., for plaintiff in error. Harry B. Tedrow, U. S. Atty., of Boulder, Colo., for the United States.

PER CURIAM. Writ of error dismissed, without costs to either party in this court, on motion of plaintiff in error.

FAUER et al. v. UNITED STATES. (Circuit Court of Appeals, Second Circuit. November 13, 1918.) No. 28. In Error to the District Court of the United States for the Southern District of New York. Proceeding by the United States against Philip Fauer and others. From the judgment, defendants bring error. Affirmed. Charles H. Griffiths, of New York City (Raymond H. Sarfaty, of New York City, of counsel), for plaintiffs in error. Francis G. Caffey, U. S. Atty., of New York City (Ben. A. Matthews, Asst. U. S. Atty., of New York City, of counsel), for the United States. Before WARD, HOUGH, and MANTON, Circuit Judges.

PER CURIAM. Judgment affirmed.

FEDERAL TRADE COMMISSION v. NULOMOLINE CO. (Circuit Court of Appeals, Second Circuit. August 16, 1918.) Petition to vacate an interlocutory order of the Federal Trade Commission against the Nulomoline Company. Denied without prejudice. Leo Levy, of New York City (Louis Marshall, Sol. M. Stroock, and Edward F. Spitz, all of New York City, of counsel), for petitioner. Before WARD, ROGERS, and MANTON, Circuit Judges.

PER CURIAM. We regard this application as premature, and therefore it is denied without prejudice, as is also the motion for a stay for the same reason.

FUEL ECONOMY ENGINEERING CO. et al. v. BERRY. (Circuit Court of Appeals, Third Circuit. January 13, 1919.) No. 2372. Appeal from the District Court of the United States for the Eastern District of Pennsylvania; Oliver B. Dickinson, Judge. Suit by William H. Berry against the Fuel Economy Engineering Company and others. From a decree for plaintiff (248 Fed. 736), defendants appeal. Affirmed. Robert M. Barr, of Philadelphia, Pa., for appellants. A. B. Stoughton, of Philadelphia, Pa., and John E. McDonough, of Chester, Pa., for appellee. Before WOOLLEY, Circuit Judge, and THOMPSON, District Judge.

PER CURIAM. By the decree of the District Court, claims 5, 10, 11, and 12 of letters patent No. 726,792, granted William H. Berry, for a feed water regulator, were held valid and infringed. We affirm the decree on the court's opinion. 248 Fed. 736. In order to allay the concern of the appellants that

this court might decide the case on matters outside the issues—matters concerning unfair competition, charged in the bill but abandoned at the trial—which they conceive improperly remained in the case and influenced the decision below, we say that, from our reading of the opinion, the case appears to have been decided solely on the issues of validity and infringement. But, if litigants read the opinion differently, we add that, notwithstanding we adopt the opinion of the trial judge, our affirmance of the decree is based on the issues raised on the patent and on nothing else. The decree below is affirmed.

GEORGE v. UNITED STATES. (Circuit Court of Appeals, Second Circuit. November 13, 1918.) No. 3. In Error to the District Court of the United States for the Southern District of New York. Proceedings by the United States against Anthony George. From the judgment, defendant brings error. Affirmed. Robert M. Moore, of New York City, for plaintiff in error. Francis G. Caffey, U. S. Atty., of New York City (Vincent H. Rothwell, Asst. U. S. Atty., of New York City, of counsel), for the United States. Before WARD, ROGERS and HOUGH, Circuit Judges.

PER CURIAM. Judgment affirmed in open court.

HALLOWELL v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. August 12, 1918.) No. 2489. In Error to the District Court of the United States for the District of Nebraska. Thomas L. Sloan, of Washington, D. C., for plaintiff in error. Charles A. Goss and Howard Saxton, Asst. U. S. Atty., both of Omaha, Neb., for the United States.

PER CURIAM. Writ of error dismissed, without costs to either party in this court, etc., on motion of counsel for plaintiff in error.

HAYDEN v. UNITED STATES. (Circuit Court of Appeals, Second Circuit. November 13, 1918.) No. 50. In Error to the District Court of the United States for the Southern District of New York. Joseph Hayden was convicted of crime, and he brings error. Affirmed. Wesselman & Kraus, of New York City, for plaintiff in error. Francis G. Caffey, U. S. Atty., and John E. Walker, Asst. U. S. Atty., both of New York City, for the United States. Before ROGERS, HOUGH, and MANTON, Circuit Judges.

PER CURIAM. Judgment affirmed.

HELMER v. UNITED STATES. (Circuit Court of Appeals, Fifth Circuit. November 14, 1918. Rehearing Denied February 1, 1919.) No. 3245. In Error to the District Court of the United States for the Western District of Texas; Duval West, Judge. Ed. Helmer was convicted of selling whisky to soldiers, and brings error. Affirmed. Don A. Bliss, of San Antonio, Tex., (J. D. Robinson and C. J. Gray, both of San Antonio, Tex., on the brief), for plaintiff in error. Hugh R. Robertson, U. S. Atty., of San Antonio, Tex. (Claud J. Carter, Asst. U. S. Atty., of San Antonio, Tex., on the brief), for the United States. Before WALKER and BATTS, Circuit Judges, and GRUBB, District Judge.

PER CURIAM. Our examination of the record in this case in the light of the argument of counsel has led us to the conclusion that no reversible error was committed. The judgment is affirmed.

INTERNATIONAL RY. CO. v. CRAWFORD. (Circuit Court of Appeals, Second Circuit. November 13, 1918.) No. 38. In Error to the District Court of the United States for the Western District of New York. Action between the

International Railway Company and Alice Crawford. There was a judgment for the latter, and the former brings error. Affirmed. Cohn, Chormann & Franchot, of Niagara Falls, N. Y. (Edward J. Franchot, of Niagara Falls, N. Y., of counsel), for plaintiff in error. Bartlett & Roberts, of Buffalo, N. Y. (Eugene M. Bartlett, of Buffalo, N. Y., of counsel), for defendant in error. Before WARD, ROGERS, and MANTON, Circuit Judges.

PER CURIAM. Judgment affirmed.

LEHIGH VALLEY RAILROAD CO. v. MONK. (Circuit Court of Appeals, Second Circuit. November 13, 1918.) No. 21. In Error to the District Court of the United States for the Southern District of New York. Action between the Lehigh Valley Railroad Company and Otto Monk. There was a judgment for the latter, and the former brings error. Affirmed. Alexander & Green and Allan McCulloh, all of New York City (William W. Green and Edward W. Walker, both of New York City, of counsel), for plaintiff in error. S. A. Machchinski and John C. Robinson, both of New York City, for defendant in error. Before WARD, ROGERS and MANTON, Circuit Judges.

PER CURIAM. Judgment affirmed.

LONGSON v. BELASCO et al. (Circuit Court of Appeals, Second Circuit. November 13, 1918.) No. 27. Appeal from the District Court of the United States for the Southern District of New York. Suit by Lila Longson against David Belasco and others. From a decree for defendants, complainant appeals. Affirmed. Thomas A. Hill, of New York City, for appellant. A. J. Dittenhoefer, I. M. Dittenhoefer, and Nathan Burkan, all of New York City, for appellees. Before WARD, ROGERS and HOUGH, Circuit Judges.

PER CURIAM. Decree affirmed.

LOWER LAFOURCHE PLANTING & MFG. CO. et al. v. BREAUX. THE APEX. THE LOUISIANA. (Nos. 3279, 3280.) (Circuit Court of Appeals, Fifth Circuit. January 7, 1919.) Appeals from the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge. Suits in admiralty by A. P. Breaux against the barge Apex and the barge Louisiana; the Lower Lafourche Planting & Manufacturing Company, claimant. Decrees for libelant, and claimant appeals. Affirmed. L. P. Caillouet, of Thibodaux, La. (Caillouet & Caillouet, of Thibodaux, La., on the brief), for appellants. John D. Grace, of New Orleans, La. (M. A. Grace, of New Orleans, La., on the brief), for appellee. Before WALKER and BATTS, Circuit Judges, and GRUBB, District Judge.

BATTS, Circuit Judge. Appellant had a right to appeal, and is not to be criticized for the exercise of the right. That the amount actually in dispute may be less than attorney's fees paid or costs incurred may evidence fidelity to right rather than litigious obstinacy. It may be that some of the amounts included in the judgment were erroneously allowed, and we might be compelled to further prolong a litigation that has had little excuse for being, but for the fact that the recovery against appellant is somewhat too small because of the exclusion of interest. The judgments are affirmed.

McIVER v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. May 7, 1918.) No. 5159. In Error to the District Court of the United States for the Western District of Oklahoma. Twyford & Smith, of Oklahoma City, Okl., for plaintiff in error. John A. Fain, U. S. Atty., of Lawton, Okl., for the United States.

PER CURIAM. Cause docketed, and writ of error dismissed, without costs to either party in this court, on motion of defendant in error.

SAFETY CAR HEATING & LIGHTING CO. v. GOULD COUPLER CO. (Circuit Court of Appeals, Second Circuit. November 13, 1918.) No. 34. Appeal from the District Court of the United States for the Western District of New York. Suit by the Safety Car Heating & Lighting Company against the Gould Coupler Company. From a decree for defendant (245 Fed. 755), complainant appeals. Affirmed. Emery, Booth, Janney & Varney and Randolph Parmly, all of New York City (Livingston Gifford, Robert S. Blair, and Delos G. Haynes, all of New York City, of counsel), for appellant. Kenyon & Kenyon and Richard Eyre, all of New York City, for appellee. Before WARD, HOUGH, and MANTON, Circuit Judges.

PER CURIAM. Decree affirmed.

SCHEIER v. UNITED STATES. (Circuit Court of Appeals, Second Circuit. November 13, 1918.) No. 9. In Error to the District Court of the United States for the Southern District of New York. Abraham Scheier was convicted of crime, and he brings error. Affirmed. S. S. Breslin, of New York City (Budd S. Weisser, of New York City, on the brief), for plaintiff in error. Francis G. Caffey, U. S. Atty., of New York City (Laurence H. Axman, of New York City, of counsel), for the United States. Before WARD, ROGERS, and HOUGH, Circuit Judges.

PER CURIAM. Judgment affirmed.

SCIOTO OIL CO. v. UNITED STATES et al. (Circuit Court of Appeals, Eighth Circuit. September 3, 1918.) No. 5081. Appeal from the District Court of the United States for the Western District of Oklahoma. Walter A. Ledbetter, H. L. Stuart, and R. R. Bell, all of Oklahoma City, Okl., for appellant. John A. Fain, U. S. Atty., of Lawton, Okl., and S. P. Freeling, Atty. Gen., of Oklahoma, for the United States.

PER CURIAM. Appeal dismissed, with costs, on motion of appellant.

UNITED STATES v. LENOIR et al. (Circuit Court of Appeals, Eighth Circuit. July 8, 1918.) No. 5175. Appeal from the District Court of the United States for the District of New Mexico. S. Burkhart, U. S. Atty., of Albuquerque, N. M., for the United States. Vaught & Watson, of Deming, N. M., for appellees.

PER CURIAM. Appeal dismissed, without costs to either party in this court, on motion of appellant.

END OF CASES IN VOL. 254

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